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MATERIALITY UNDER THE FALSE CLAIMS ACT

False Claims Act

The False Claims Act ("FCA") makes liable anyone who "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval."[1] The terms "knowing" and "knowingly" mean that a person, with respect to information (1) has actual knowledge of the information; (2) acts in deliberate ignorance of the truth or falsity of the information; or (3) acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required.[2] Anyone who violates the law "is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, . . . plus 3 times the amount of damages."

The basic elements the Government must prove are: (1) the existence of a claim; (2) falsity; (3) knowledge; and (4) materiality (meaning the false statement is material to the Government's decision to pay the claim). Falsity, knowledge, and materiality must be analyzed in light of the case law.

1) Falsity

i. Escobar

"False or fraudulent" is not defined in the FCA, but case law explains that claims can be "factually false" or "legally false." The following chart distinguishes between the two concepts.

Factually False	Legally False
– services were not provided – services were not provided as described, or – worthless services	– *Express* false certification – falsely certifying compliance with a particular statute, regulation or contractual term, where compliance is a prerequisite to payment – *Implied* false certification – the act of submitting a claim for reimbursement itself implies compliance with governing federal rules that are a precondition to payment

Even if claims are not "factually false," the Government can argue that the claims are "legally false" under the theory of implied false certification.

[1] 31 U.S.C. 3729.
[2] *Id.*

Specifically, the Government may attempt to meet the falsity element under the theory of *implied false certification*, in which the act of submitting a claim for reimbursement (or application for provider relief funds ("PRF") under the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act")) implies compliance with governing rules. In *Universal Health Servs., Inc. v. United States, ex rel. Escobar*, 136 S. Ct. 1989 (2016), seventeen-year-old Yarushka Rivera died after suffering a seizure caused by a reaction to medication prescribed by a psychologist at Arbour Counseling Services ("Arbour"). Arbour, which was operated by Universal Health Services, allegedly allowed people who were not properly licensed to provide counseling services without supervision and to prescribe medications.[3] Despite allegedly failing to comply with regulations like employing properly licensed staff, Arbour billed Medicaid using payment codes for specific services and indicated that the services were provided by properly licensed individuals.[4] Yarushka's parents sued Universal Health Services under the FCA, arguing that Arbour employees were not properly licensed and were minimally supervised.[5] The case was initially dismissed, but Yarushka's parents successfully appealed to the U.S. Supreme Court.

The Court allowed the theory of implied false certification and found that Universal Health Services' bills were misleading because they failed to disclose that it had not complied with basic laws like staff and licensing requirements.[6] Specifically, the Court held that submitting claims that contain fraudulent misrepresentations can form the basis for a false claim under the FCA if two conditions are satisfied: (1) the claim is not merely a request for payment, but makes specific representations about the goods and services provided; and (2) the defendant fails to disclose noncompliance with material statutory, regulatory, or contractual requirements, making those representations misleading half-truths.[7] The Court held that by submitting claims for specific counseling services using National Provider Identification numbers that related to specific job titles, Universal Health Services implicitly certified that it had complied with licensing and supervision requirements, when in fact it had not.[8] As such, because of Universal's failure to disclose its noncompliance, the request for payment contained a fraudulent misrepresentation to the Government, rendering it, therefore, a false claim.[9]

2) Knowledge

The FCA defines "knowledge" to mean actual knowledge of the falsity of the information; acting in deliberate ignorance of the truth or falsity of the information; or acting with reckless disregard of the truth or falsity of the information.[10] A person acts in "reckless disregard of the truth or falsity of the information" when that person has serious doubts about the truth or falsity of the information, or by failing to make simple inquiries to verify its truth or falsity.

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[3] *Escobar*, 136 S. Ct. at 1997.
[4] *Id.*
[5] *Id.* at 1993.
[6] *Id.* at 2000-01.
[7] *Id.* at 2001.
[8] *Id.*
[9] *Id.*
[10] 31 U.S.C. § 3729.

3) Materiality

Under the FCA, "the term 'material' means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property."[11] In determining materiality, relevant factors include: (1) "the Government's decision to expressly identify a provision as a condition of payment"; (2) whether "the Government consistently refuses to pay claims in the mine run of cases based on noncompliance with the particular statutory, regulatory, or contractual requirement" or if, with actual knowledge of the non-compliance, it consistently pays such claims and there is no indication that its practice will change; and (3) whether the "noncompliance is minor or insubstantial" or if it goes "to the very essence of the bargain."[12]

While these three prongs to "materially" under *Escobar* give an overall guide, the analysis is fundamentally fact and circumstances specific. For example, in *United States ex rel. Janssen v. Lawrence Memorial Hospital*[13], the Tenth Circuit affirmed a district court's determination that alleged falsification of patient arrival times was not "material" using the *Escobar* analysis. In *Janssen*, what seemed to undercut the Government's argument was that Medicare continued to pay claims even after being made aware of the alleged falsification – in fact, even after the litigation commenced. Also determinative was the Court's finding that Medicare did not "expressly require accurate reporting as a condition of payment."[14] The Court made it clear that when applying materiality, a "rigorous" and "demanding" analysis is required.[15]

In light of this "rigorous" materiality standard, the PRF's lack of clear regulatory requirements could become problematic for the Government in pressing FCA claims. This is especially true in light of *Azar v. Allina Health Services*, where the U.S. Supreme Court held that departures from sub-regulatory guidance that either establish or change a substantive legal standard should not be the basis of enforcement unless that guidance was the product of notice and comment rulemaking. This is not to say that the sub-regulatory guidance can be ignored – but for purposes of FCA claims, its "authority" is suspect.

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[11] 31 U.S.C. § 3729(b)(4); *United States ex rel. Longhi v. Lithium Power Techs., Inc.*, 575 F.3d 458, 468 (5th Cir. 2009).
[12] *Escobar*, 136 S.Ct. at 2003.
[13] *United States ex rel. Janssen v. Lawrence Mem'l Hosp.*, 949 F.3d 533 (10th Cir. Feb. 7, 2020).
[14] *Id* at 544.
[15] *Id* at 540 (citing *Escobar*, 136 S.Ct. at 2002-03).