Ten months after the U.S. Supreme Court issued a blockbuster False Claims Act decision in *Universal Health Services, Inc. v. United States ex rel. Escobar*, the Court’s clarified interpretation of the False Claims Act (FCA) is proving to be more favorable to defendants than to whistleblowers.

In June 2016, the Court resolved a split among lower courts as to whether the ubiquitous “implied certification” theory could form a basis of liability under the FCA. In a unanimous opinion, the Court held that this theory was viable and thereby established a new avenue for FCA whistleblowers to assert *qui tam* claims. Despite being touted as a broad theory of FCA liability, however, courts have increasingly relied on *Escobar* to dismiss claims that fail to meet the liability standards set forth in the opinion.

**Background on Implied Certification Theory**

Broadly, the FCA prohibits the submission to the federal government of false claims for payment. Common examples of false claims include such affirmative conduct as a defense contractor overcharging the U.S. armed forces for weapons, or a hospital billing Medicare for services not performed. By contrast, under the implied certification theory of FCA liability, an entity or person defrauds the government within the meaning of the FCA when that entity submits a claim for government payment and fails to disclose the entity’s violation of a material statutory, regulatory or contractual requirement. Prior to *Escobar*, some federal courts had accepted this theory as viable, while others had squarely rejected it.

In *Escobar*, the Supreme Court adopted the implied certification theory as an actionable theory for FCA claims. The Court also made clear that the government need not explicitly condition payment on compliance with a particular legal or contractual requirement. The Court further emphasized, however, that not every legal or contractual violation would subject a federal contractor to FCA liability. Rather, the underlying violation must be material to the federal government’s decision to pay the contractor for the particular goods or services at issue.

Significantly, the Court noted that an entity’s failure to disclose noncompliance might not be material even where a government contract explicitly conditions payment on the contractor’s compliance with certain legal or contractual requirements. If the government regularly paid certain claims in the past despite learning of noncompliance with the requirement in question, that past conduct is a strong indicator that the government does not actually view the matter as material. In such case, there would be no FCA liability even under the implied certification theory.

**The Rigorous Interpretation of *Escobar’s* Materiality Requirement**

In the wake of *Escobar*, courts have often taken a fact-specific approach when determining whether an alleged violation of law or contract is material under the implied certification theory. As a result, some decisions have suggested a decidedly pro-whistleblower interpretation of *Escobar*, while others
have evidenced hostility to claims that courts view as too attenuated to establish FCA liability.

One early pro-whistleblower decision came in early August 2016, when the U.S. District Court for the Eastern District of California held in *Handal v. Center for Employment Training* that the submission of a claim for payment after a federal grant has been approved is an “implicit reaffirmation of compliance,” such that subsequent material violations could expose a company to FCA liability.

A few months later, the U.S. Court of Appeals for the Eighth Circuit held that a college’s purported falsification of student records was material to the federal government’s provision of funding. In reaching this decision in *Miller v. Weston Educational Inc.*, the Eighth Circuit found FCA liability even though the requirement that the college maintain “proper and efficient” administration of aid funds was not explicitly set forth in the parties’ agreement as a condition for payment, as the Eight Circuit concluded that the requirement was nevertheless material.

And in a striking decision in September 2016, the U.S. District Court for the District of Columbia granted the government a default judgment against a company accused of falsely underwriting residential mortgage loans, where the government later ended up making insurance payments.

These holdings seemed to fulfill the prophesy that *Escobar* would trigger judicial expansion of FCA liability. However many courts that have addressed the implied certification theory in the wake of *Escobar* have set strict bounds on implied certification liability. For example, although there is a split in the case law interpreting *Escobar*, most courts have held that *Escobar* established a two-part test for falsity of a claim:

1. a contractor must make specific representations items or services provided, and
2. the contractor’s failure to disclose certain noncompliance must make those specific representations illegal.

These courts have also held that the failure to clearly plead how both elements of the test have been satisfied is fatal to an FCA claim.

Even where the elements of the falsity test are met and properly pled, the materiality analysis has resulted in the dismissal of many claims where the *qui tam* relator cannot show that compliance with a particular condition was necessary for the government to pay a given claim. For example, federal district courts in Alabama and California have noted that a complaint must allege that the government would not have paid a claim if it knew of a violation, but also must explain why the government would not have paid the claim. In other words, the complaint must justify its contention that a given violation of a law, regulation, or contractual provision is actually material; it cannot baldly claim that materiality is the case. In August 2016, the U.S. District Court for the Northern District of Georgia held that alleged misrepresentations by a contractor did not involve matters “so central” to the contract in question that they could have been material to the government’s decision to pay the contractors.

A common refrain among courts rejecting FCA claims based on an implied certification theory is that the *qui tam* relator and/or the government have not shown that the government consistently rejected claims for payment on the basis of a particular regulatory or contractual violation, or that the violation involved something central to the contractual relationship. While not a requirement to demonstrate materiality, numerous federal district courts, including those in Alaska, the Northern District of California, the Southern District of New York, the District of Columbia, and South Carolina, among others, have cited that notion as clear evidence that the government finds compliance with the requirements material.

**Courts Will Continue to Interpret Escobar**
As more courts interpret Escobar, the decisions increasingly suggest a concern that a broad interpretation of implied certification would cast too wide a net, punishing contractors who provide crucial goods and services to the government for technical contractual violations in the process of doing so. This concern has manifested itself in the judicial dismissal of many claims that rely on the Escobar theory of liability. At the same time, the adoption of the implied certification theory does give a basis for claims that were uncertain in many federal districts prior to June 2016.

As the parameters of the implied certification theory solidify further in the coming months and years, the government, qui tam relators, and contractors - and attorneys on both sides of the bar – will have a better understanding of what constitutes conduct leading to FCA liability. But it is clear by now that the implied certification theory is not boundless, and that courts will impose strictures of falsity and materiality to limit its scope.