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Analysis

Escobar 5 Years Later: How FCA Earthquake Is Reverberating



By [Jeff Overley](#) and [Daniel Wilson](#)

Law360 (June 16, 2021, 8:34 PM EDT) -- Five years ago Wednesday, the U.S. Supreme Court addressed a billing dispute tied to one patient's treatment at a Massachusetts clinic and in the process rattled the nation's entire False Claims Act docket with new doctrine. Here, Law360 explores the landmark case's aftermath and finds a litigation landscape that hasn't come close to stabilizing.

THE RULING

The high court on June 16, 2016, [handed down its 8-0 opinion](#) in [Universal Health Services v. Escobar](#), which involved the death of a teenage girl whose Medicaid-funded counseling allegedly came from unqualified clinic staff and thereby defrauded taxpayers.

Observers have described Escobar as perhaps the biggest ruling in the 35-year modern history of the FCA, which the Supreme Court has [interpreted on numerous occasions](#).

One piece of the ruling was a win for plaintiffs — usually ex-employee whistleblowers, the [U.S. Department of Justice](#) or both — that said compliance lapses can constitute fraud even without explicit certifications of compliance because corporations sometimes make "implied certifications."

Another piece was mostly a win for defendants — usually health care providers, drugmakers, medical device manufacturers, defense contractors or banks — that outlined numerous considerations for gauging whether misrepresentations are "material" and therefore punishable under the FCA.

For Escobar's fifth anniversary, Law360 sought fresh perspective from attorneys for whistleblowers — often called "relators" in FCA parlance — as well as defendants. Conversations explored how Escobar fits into a pattern of periodic setbacks for FCA plaintiffs, how the opinion is dividing circuit courts, and whether the Supreme Court or Congress will eventually clarify its meaning.

Comments have been edited for length and clarity.

THE HIGH-LEVEL IMPACT

In interviews this month, Law360 requested experts' thoughts on Escobar's overall impact. The responses from plaintiffs attorneys and defense lawyers in some ways seemed like polar opposites. But they were also nuanced, and attorneys for both sides acknowledged that the aftermath of Escobar hasn't always played out entirely to their liking.

Edward Baker, Constantine Cannon LLP: Escobar hasn't effected any sort of sea change in how the False Claims Act operates and achieves its main congressional goals. What it has done, though, is make life both simpler and more

“*Escobar hasn't*”

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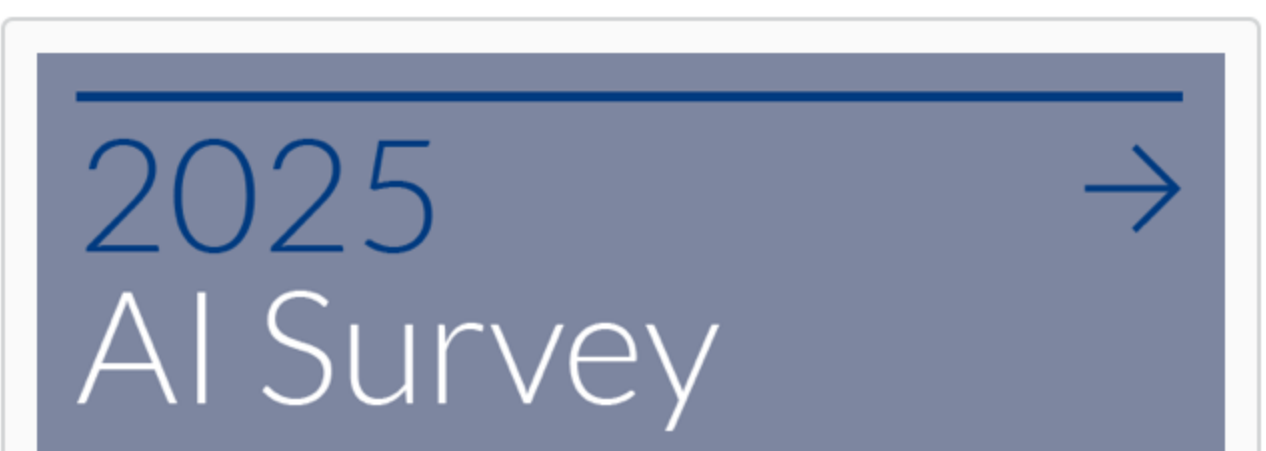
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complicated for relators counsel.

It's clear to everyone that the implied certification of falsity is legitimate and a viable FCA theory. But it's kind of complicated our lives and opened up new battle lines.

The court made clear that, in thinking about materiality, you have to think about a holistic, multifactor analysis. So you have to look at more factors than you used to. And it has opened up new lines of discovery.

Gregory Luce, Skadden Arps Slate Meagher & Flom LLP:

Some circuits understand that Escobar was the sea change that a unanimous Supreme Court adopted. And most of the district courts, in my experience, have actually kind of gotten it. But we have some courts that are resistant.

The [Rose v. Stephens Institute] [decision](#) out of the Ninth Circuit spends most of the panel's time saying that there has been no significant change in the law. And there have been other judges that have reached that same conclusion.

It's difficult to reconcile that. The Supreme Court argument focused in part on whether the materiality requirement could be a basis for granting motions to dismiss or summary judgment to the defense. And the Supreme Court dealt with that by saying materiality is a rigorous and demanding requirement.

So the courts have struggled with not just the substance of Escobar but also the procedural standards. That procedural posture is a significant consideration as you look at cases among the circuits.

Victor Walton, Vorys Sater Seymour and Pease LLP: Escobar put the brakes on a statute that was spiraling out of control, grounding liability in situations where the government could actually be said to have been defrauded. It told courts to look at reality, and not imagine what the government would have done about minor technical violations and to focus on the government's actual actions.

It took the [Allison Engine v. Sanders ruling, in which the high court in 2008 found that the FCA is not an "all-purpose antifraud statute"] further, holding that the FCA is not a "vehicle for punishing garden-variety breaches of contract or regulatory violations."

But there are still all kinds of unanswered questions about Escobar. While Escobar reiterated the rigorous nature of the FCA's materiality element, today courts vary as to what [level of specificity] is required to satisfy Escobar at the pleading stage. My defense colleagues may [think] that Escobar is a game changer. I just think it remains to be seen, but it has made a difference.

CIRCUIT SPLIT OVER TWO-PART TEST

One issue that has divided lower courts is whether Escobar introduced a mandatory test when it found that "the implied certification theory can be a basis for liability, at least where two conditions are satisfied." Those conditions include whether there are "specific representations" about goods or services provided and whether undisclosed noncompliance makes those representations "misleading half-truths."

The Fourth Circuit has [deemed the two-part test optional](#). By contrast, the Ninth Circuit concluded in Rose v. Stephens Institute that whistleblowers "must satisfy Escobar's two conditions," although it reached that conclusion reluctantly, saying it was bound by earlier panel decisions that called the test mandatory in seemingly passing references.

The Eleventh Circuit has also said [the two-part test is required](#). But it did so by alluding to Escobar's language — "at least where two conditions are satisfied" — and paraphrasing it as "where at least two conditions are satisfied."

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Constantine Cannon

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Skadden

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A similar reordering of those words has appeared in a number of court filings, arguably changing Escobar's meaning. And a number of district courts have ruled that the test is compulsory without directly discussing the "at least" language.

Eric Havian, Constantine Cannon: That's my favorite one actually — the split in the circuits on this issue — because the courts have almost willfully not read the language that the Supreme Court actually wrote.

The Supreme Court should take a case and say, "Look, we meant what we said. This is an illustration, but these are not necessary conditions."

The better decisions have recognized that, but you do have cases that have gone off and seized on this language and misquoted it. It's an area that's absolutely ripe for clarification by the Supreme Court. And it's mystifying how such a simple concept could be lost on relatively sophisticated courts of appeals.

THE 'HOLISTIC APPROACH' DEBATE

After the Supreme Court decided Escobar, the case returned to the First Circuit, which **issued an influential opinion** that said Escobar "makes clear that courts are to conduct a holistic approach to determining materiality in connection with a payment decision, with no one factor being necessarily dispositive."

A number of courts have embraced that interpretation. But some judges have focused more on Escobar's assertions that "the materiality standard is demanding" and that it is "strong evidence" that compliance lapses were not material if the government keeps paying despite knowledge of noncompliance.

As one example, a D.C. federal judge in 2019 chucked an FCA case against **IBM** after finding that the **Internal Revenue Service** was "on notice of IBM's alleged fraud" involving software but kept paying the company.

"In fact, it agreed to pay even more money to IBM. The claimed falsity therefore cannot be material," **the judge wrote** in a ruling that **drew the DOJ's ire** and is on appeal at the D.C. Circuit.

Luce, Skadden: I have seen that "holistic approach" used by courts and relators. It's their touchstone. I don't actually know what it means.

What I think the Supreme Court said was that materiality is a rigorous and demanding element of pleading and proof, not that it's holistic.

And that rigorous and demanding requirement is a pleading requirement, much like the need to demonstrate fraud with particularity. It isn't about "holistic." It's about whether you can toe the line and establish evidence that suggests the alleged falsity would have affected the decision to pay.

Michael K. Loucks, Skadden: I agree with that 100%. And I think at some point in the next several years, there's going to be another False Claims Act case in front of the Supreme Court. And [the justices] are going to reemphasize the importance of materiality and get rid of these views that it's "holistic," or that it's not really any different than before. The fact of the matter is the Escobar opinion changed jurisprudence, and some people are slow to accept that.

Craig Margolis, Arnold & Porter: From a defense practitioner's perspective, [the holistic approach] is not what we think the Supreme Court had in mind in the decision. So there continues to be what I'll call some resistance in terms of applying that "rigorous" materiality standard, as Justice [Clarence] Thomas, I think, correctly called it. We certainly have some courts that will quote those words, but then in terms of the actual application, we don't see a whole lot of difference to pre-Escobar jurisprudence.

Baker, Constantine Cannon: It seems obvious from the Escobar decision that no one factor is dispositive. So it's shocking to me when defense counsel argue otherwise — that there's a magic bullet.

There may be instances where courts want to get rid of a case for whatever reason, and they don't take the time to write a full-throated opinion that goes through the factors identified in Escobar. That could just be judicial — call it laziness, call it streamlining, whatever. But I think Escobar is pretty clear that a holistic analysis is required.

Shayne Stevenson, Hagens Berman Sobol Shapiro LLP: I think that the standard that adheres to the statute is one that asks, like so many areas of law, for an objective standard of reasonableness — is it reasonable for a court to conclude, particularly at a motion to dismiss stage before discovery, that a certain misrepresentation is reasonably likely to be material to the government?

From my perspective, Escobar doesn't create a super-heightened pleading standard, and it would be a mistake to treat Escobar as if it is the equivalent of the [Private Securities Litigation Reform Act, which covers pleadings in securities lawsuits] and demands this exacting standard on scienter and materiality for every case.

ESCOBAR'S INFLUENCE ON GRANSTON MEMO DECISIONS

When he led the DOJ's civil fraud division, Deputy Assistant U.S. Attorney General Michael Granston in early 2018 issued a memo reminding DOJ attorneys that they have broad authority to seek dismissal of whistleblower cases.

The **so-called Granston memo** laid out scenarios in which it might make sense to use that authority, such as if DOJ attorneys believe a case lacks merit, would create bad precedent or would burden the government. The authority has subsequently been invoked more times in the subsequent three years than in the three decades prior.

Granston specifically said **in a March 2019 speech** that a heavy discovery burden on the government — as defendants increasingly probe what agencies knew and when for materiality purposes — would not necessarily make a case ripe for dismissal.

But practical evidence shows that Escobar has had at least some influence on the department's FCA dismissal decisions, attorneys said.

Stevenson, Hagens Berman: The defense bar has weaponized Escobar to assail the government with discovery demands purporting to inquire into the government's state of mind in order to exhaust government resources and patience with FCA filings.

This, in turn, has in part led to an increase in measures to dismiss nonintervened cases [those not joined by the DOJ] that should be entitled to proceed — as we all know, billions of dollars have been recovered by relators who litigate cases perceived to be unworthy at one point or another.

Justin Chiarodo, Blank Rome LLP: One good legacy of Escobar is that it does put some limits on these [FCA] cases, and I do think [the memo] is a response to that, in trying to control the quality of decisions.

There's obviously always a fever pitch for whistleblowers to bring these cases forward. And having the Justice Department weigh in to look at cases that might dull the power of the statute, to manage quality, is I think a big, maybe unintended byproduct of Escobar. But I do draw a line between Escobar and that policy.

THE HIGH COURT'S REFUSAL TO REVISIT ESCOBAR

Although many attorneys predict the high court will clarify Escobar, it has thus far shown little interest in doing so. The justices have turned away numerous petitions that have asked a wide array of questions, including **whether the two-part test is mandatory**, whether Escobar **heightened the FCA's materiality standard**, and whether whistleblowers **should be expected to plead information** about the government's past payment practices.

Margolis, Arnold & Porter: Escobar remains, five years later, still a bit of a mess. The courts continue to be divergent in their interpretations of Escobar, particularly the materiality side. We continue to hope that the big court will step in at some point in the not-too-distant future and provide some needed clarity and structure around that materiality requirement.

Jesse Witten, Faegre Drinker Biddle & Reath LLP: I think the toughest [materiality] issue is a procedural issue, which is, when can the decision be made? Can a court make the

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SHAYNE STEVENSON
Hagens Berman

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CRAIG MARGOLIS
Arnold & Porter

decision at the motion to dismiss stage?

The Supreme Court in Escobar said that [judges] could make the decision, in principle, at the motion to dismiss stage. But at [that] stage, you have to take the allegations as true. And it makes all the difference, because if it gets past the motion to dismiss, then you're talking about a lot of expensive discovery for everyone.

AFTERMATH ECHOES PAST SETBACKS FOR FCA PLAINTIFFS

FCA cases and recoveries **have grown dramatically** during the past 15 years, and during that time, courts have periodically erected new hurdles for plaintiffs.

One such hurdle was the "public disclosure bar," which Congress **amended in 2010** so that whistleblowers could more easily qualify as "original sources" authorized to bring FCA cases. Another hurdle has been Rule 9(b) of the Federal Rules of Civil Procedure, which requires that fraud cases be pled with "particularity" and was for many years **a common topic of petitions** for Supreme Court review.

That history of setbacks is repeating itself in Escobar's aftermath, some observers say.

Havian, Constantine Cannon: Escobar is simply the latest in a series of tools and doctrines that courts have used to get rid of nonintervened cases that they don't want on their dockets.

It was originally the public disclosure bar; Congress amended the bar because the case law had gotten so bad. Judges would just use the public disclosure bar to get rid of nonintervened cases they didn't want. And then it was Rule 9(b), where courts demanded absurd levels of particularity — like you had to identify specific invoices — and eventually circuit courts kind of trimmed back these radical applications of Rule 9(b).

And now the latest is Escobar, and maybe it'll require another Supreme Court clarification.

The case is Universal Health Services Inc. v. U.S. et al. ex rel. Escobar et al., case number 15-7, in the [Supreme Court of the United States](#).

--Editing by Alanna Weissman.

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