Whistleblower Defense Alert: The Third Circuit Confirms Broad Power of Escobar's Materiality Requirements

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On May 1, 2017, the Third Circuit affirmed the dismissal of a False Claims Act (FCA) case in which the relator had asserted that Genentech concealed information about side effects of its cancer drug, Avastin. *U.S. ex rel. Petratos, v. Genentech Inc., et al*., Case No. 15-3805 (3rd Cir. May 1, 2017). Relying on the Supreme Court's decision in *Universal Health Servs., Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989, 1996 (2016), the Third Circuit concluded that the relator had failed to show that the information allegedly concealed was material to the government's decision to pay claims. The court explained that "a misrepresentation is not 'material to the *Government's payment decision*,' when the relator concedes that the government would have paid the claims with full knowledge of the alleged noncompliance." The court further observed that "where a relator does not plead that knowledge of the violation could influence the government's decision to pay, the misrepresentation likely does not 'hav[e] a natural tendency to influence . . . payment' as required by the statute."

The court rejected the relator's argument that physicians would have prescribed the drug less if they had known about the side effects, and that this would have resulted in fewer claims paid by the government, explaining that this argument "conflates materiality with causation, a separate element of a False Claims Act cause of action." The court further held that *the government* must be the recipient of a misrepresentation in order for there to be FCA liability. This should prove useful for subcontractor defendants in FCA cases.

Most importantly, the Third Circuit rejected DOJ's position that *Escobar* did not impose a heightened materiality standard for FCA cases:

> In holding that Petratos did not sufficiently plead materiality, we now join the many other federal courts that have recognized the heightened materiality standard after *Universal Health Services*. *See, e.g.*, *United States ex rel. Kelly v. Serco, Inc.*, 2017 WL 117154, at *6–7 (9th Cir. Jan. 12, 2017); *Sanford-Brown*, 840 F.3d at 447; *City of*

Chicago v. Purdue Pharma L.P., 2016 WL 5477522, at *15 (N.D. Ill. Sept. 29, 2016); *United States ex rel. Scharff v. Camelot Counseling*, 2016 WL 5416494, at *8 (S.D.N.Y. Sept. 28, 2016); *United States v. N. Adult Daily Health Care Ctr.*, 205 F. Supp. 3d 276, 295–96 (E.D.N.Y. 2016); *Knudsen v. Sprint Commc'ns Co.*, 2016 WL 4548924, at *12–13 (N.D. Cal. Sept. 1, 2016); *cf. Escobar*, 842 F.3d at 111 (finding FCA violations material where those violations were "as central to the bargain as the United States ordering and paying for a shipment of guns, only to later discover that the guns were incapable of firing").

Since the *Escobar* decision, courts have been struggling with its scope and effect. DOJ and relators have been trying to minimize its impact and meaning, while defendants have argued that it represents a sea change in FCA jurisprudence. The Third Circuit's decision in *Petratos* is evidence that defendants may be on the winning side of this battle.