

## In Wake of Escobar, False Claims Act Cases Return to Circuit Courts

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On Monday, the U.S. Supreme Court issued [summary dispositions](#) vacating the judgments in three cases brought under the False Claims Act (“FCA”). The Court remanded the cases back to their respective circuit courts for reconsideration in light of the Court’s decision in *Universal Health Services, Inc. v. United States ex rel. Escobar*, 579 U. S. \_\_\_\_ (2016). The Court held that liability under the False Claims Act can arise under the “implied false certification” theory. Under this theory, prior to *Escobar*, some circuits held that a claim could be “false” if the defendant submitted an accurate claim but violated an underlying “condition of payment” that arose from a statute, regulation, or contract. In *Escobar*, the Court found that FCA liability can be premised on a theory of implied false certification, provided that: (1) “the claim does not merely request payment, but also makes specific representations about the goods or services provided,” and (2) the defendant’s “failure to disclose noncompliance with material statutory, regulatory, or contractual requirements makes those representations misleading half-truths.”

The following cases have been remanded:

- ***Triple Canopy, Inc. v. United States ex rel. Badr*, U.S., No. 14-1440.** The Court vacated a Fourth Circuit decision holding Triple Canopy, Inc. liable under the FCA for providing unqualified guards at a U.S. base. The case against Triple Canopy was premised on allegations that the company had falsified marksmanship scores for guards that it hired at Al Asad Air Base in Iraq, and for which it was reimbursed by the federal government. The government argued that the untrue marksmanship scores should be considered false claims because the guards were unqualified for their duties, therefore making reimbursement related to their services fraudulent. Triple Canopy argued that the government’s reimbursement was not specifically conditioned on the marksmanship scores, and that it therefore cannot be the basis for FCA liability.
- ***United States ex rel. Nelson v. Sanford-Brown Ltd.*, U.S., No. 15-729.** In *Sanford-Brown*, a former employee of a for-profit college alleged that the company defrauded the federal government by receiving federal subsidies while in violation of the Higher Education Act and its program participation agreement (PPA) with the Department of Education. Under federal law, the PPA conditions federal subsidies on continued compliance with statutory, regulatory and contractual requirements. The relator claimed that the college’s recruiting and retention

practices violated its conditions of participation, and that any subsidies were therefore the result of false claims. The Supreme Court vacated the Seventh Circuit ruling that granted the college's motion for summary judgment. The circuit had found that "it would be unreasonable for us to hold that an institution's continued compliance with the thousands of pages of federal statutes and regulations incorporated by reference into the PPA are conditions of payment for purposes of liability under the FCA..."

- ***Weston Educ., Inc. v. United States ex rel. Miller, U.S., No. 15-404***. In another case involving an educational institution, a for-profit college was alleged to have violated the FCA as a result of inflating its grades and attendance records to avoid repaying federal loans. Former employees of the college alleged that the school's grade inflation and record manipulation violated its PPA, and as a result, exposed it to liability under the FCA. The Supreme Court vacated the Eighth Circuit's decision which dismissed the case after finding that the false record-keeping was not material to its claims for federal subsidies.

While the decision in *Escobar* upheld the theory of implied false certification as a basis for FCA liability, the Court also adopted a heightened materiality standard that may impact the outcome of the above cases on remand. In its decision, the Court described a "rigorous" and "demanding" materiality standard, underscoring that the FCA cannot become an "all-purpose antifraud statute" or a "vehicle for punishing garden-variety breaches of contract or regulatory violations."

[Laurence Freedman](#) noted that:

The heightened materiality standard is new, and the remands will be the first occasions for the courts to apply it. Under this standard, it is the government or relator's burden to demonstrate the violation was actually material and, we would expect, this will require government evidence to prevail on the theory, not just legal arguments.

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