AN A.S. PRATT PUBLICATION
JULY 2017
VOL. 3 • NO. 7

PRATT'S GOVERNMENT CONTRACTING LAW REPORT

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VOLUME 3 NUMBER 7 JULY 2017

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Library of Congress Card Number:

ISBN: 978-1-6328-2705-0 (print)

Cite this publication as:

[author name], [article title], [vol. no.] PRATT'S GOVERNMENT CONTRACTING LAW REPORT [page number] (LexisNexis A.S. Pratt);
Michelle E. Litteken, GAO Holds NASA Exceeded Its Discretion in Protest of FSS Task Order, 1 PRATT'S GOVERNMENT CONTRACTING LAW REPORT 30 (LexisNexis A.S. Pratt)

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An A.S. Pratt® Publication

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MATTHEW BENDER

(2017–Pub.4938)

Editor-in-Chief, Editor & Board of Editors

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False Claims Act Materiality Standard Applied to Dismiss Implied Certification Claims

By William H. Voth and Jessica Caterina*

A federal judge in the District of Columbia recently reaffirmed the prior dismissal of "implied certification" False Claims Act claims brought against a materials supplier over body armor durability issues that the company allegedly kept hidden, saying the U.S. Supreme Court's holding in Escobar *was not a sufficient basis to amend the previous findings. The authors of this article explain the decision and its implications.*

The U.S. Supreme Court's June 2016 decision in *Universal Health Services v. U.S. ex rel. Escobar* was widely read as providing new support for the theory of "implied certification" liability in cases brought by government prosecutors and *qui tam* relators under the federal False Claims Act ("FCA"), as it held that a contractor that requests payment without disclosing "violations of statutory, regulatory, or contractual requirements" may be making a false claim against the government.

A federal judge in the District of Columbia, however, recently reaffirmed the prior dismissal of "implied certification" FCA claims brought against a materials supplier over body armor durability issues that the company allegedly kept hidden, saying the Supreme Court's holding in *Escobar* was not a sufficient basis to amend the previous findings.[1] The district court stated that *Escobar* had *not* changed the "strict" requirement that any violations be "material to the Government's payment decision."[2]

BACKGROUND

The government filed suit against Toyobo Co. Ltd. in 2007, accusing the company of violating the FCA by falsely representing information about its vests, which allegedly contained Zylon, a plastic fiber manufactured by Toyobo.

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[1] The cases are *U.S. v. Toyobo Co. Ltd. et al.*, case no. 1:07-cv-01144, and *U.S. ex rel. Westrick v. Second Chance Body Armor Inc. et al.*, case no. 1:04-cv-00280, both in the U.S. District Court for the District of Columbia. The Opinion and Order can be found at https://dlbjbjzgnk95t.cloudfront.net/0908000/908833/https-ecf-dcd-uscourts-gov-doc1-04516000792.pdf.

[2] *Id.* at *9.

The government alleged that Toyobo knew of degradation issues with Zylon but concealed this information from vest manufacturers, who sold the vests to the government while guaranteeing their durability. Toyobo argued that the government contracting agency did not list "durability or degradation resistance" as a specific requirement in the published solicitation for the contract, and thus any alleged misstatements were immaterial to the purchase decisions.

The government replied that various expectations were implied by the contracting process, pointing to various external documents and regulations. In its original dismissal, the district court ruled that such statements did not create FCA liability unless they related to "material" terms of the contract, and that only one of these examples—a guarantee in a reseller catalog provided to the government in 2002—created a genuine issue of fact for trial.[3] The court thus dismissed all claims relating to sales prior to 2002, and limited the issues going forward to only the catalog guarantee.[4]

Following the Supreme Court's holding in *Escobar*, the government sought to revive the dismissed implied certification claims, arguing that *Escobar* allows for the kind of "implied certification" of regulatory compliance claims that were being pursued against Toyobo.

RECONSIDERATION BY THE DISTRICT COURT

District Court Judge Paul L. Friedman granted the government's motion to reconsider the dismissal of the implied certification claims, but found that *Escobar* did not alter the original legal basis for dismissal. Judge Friedman agreed that in theory, *Escobar* could allow FCA claims not based on explicit contractual terms. However, he cited the D.C. Circuit's recent guidance in *United States ex rel. McBride v. Halliburton Co.* that *Escobar* should be read by lower courts as "mak[ing] clear that courts should continue to police expansive implied certification theories 'through strict enforcement of the Act's materiality and scienter requirements.' "[5]

Applying this guidance, Judge Friedman found that the dismissed claims presented nothing material to the contracting or payment decisions of the government, or created a guarantee that the vests would function perfectly during the duration of the contract. He concluded that, because there was no evidence that the degradation issues were material to the parties' decision to enter into the contract, the claims could not be resuscitated under *Escobar*:

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[3] *See United States ex rel. Westrick v. Second Change Body Armor Inc.*, 128 F. Supp. 3d 1 (D.D.C. 2015).

[4] *Id.* at 17.

[5] *Toyobo Co. Ltd.* at *9, quoting *United States ex rel. McBride v. Halliburton Co.*, 848 F.3d 1027, 1031 (D.C. Cir. 2017).

> This record led Judge Roberts [to whom the cases were previously assigned] to find that 'there is no evidence that these extra-contractual considerations were a part of, or otherwise informed, the actual contracting.' *Escobar* again offers no reason to alter that holding, especially because the Supreme Court in *Escobar* directed courts to emphasize the FCA's materiality requirement in their analysis.[6]

Judge Friedman further held that:

> The Supreme Court in *Escobar* did not change the legal principle on which Judge Roberts relied—as articulated in *United States v. Science Applications Int'l Corp*.—that 'noncompliance with material contractual requirements' is a basis for an implied false certification claim under the FCA. 626 F.3d at 1269. Instead, *Escobar* expanded that principle beyond express contract terms[.][7]

CONCLUSION

Judge Friedman's narrow focus on the materiality requirement implies that *Escobar* may not open the door for such theories as wide as many observers initially thought. This case is likely to be one of many pending or newly filed FCA cases in which both sides closely analyze the specific contractual terms at issue and marshal evidence of the parties' intent in order to argue that *Escobar* supports their position on the viability of an implied certification claim.

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[6] *Id.* at *12.

[7] *Id.* at 11.