False Claims Act: 2019 Developments for Defense and In-House Counsel

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Overview

- **The Supreme Court's *Escobar* Decision**
- **DOJ's Granston Memo**
- **Discovery Directed at the Government**
- **DOJ's 2019 Guidance on Benefits of Self-Disclosure, Cooperation, and Remediation**
- **The 2017 Tax Act (Pub. L. 115-97)**

The Supreme Court's Decision in *Escobar*

- *Universal Health Services, Inc. v. U.S. ex rel. Escobar*, 136 S.Ct 1989 (2016).
  - "Implied certification" theory of liability is viable under certain conditions.
  - FCA's scienter and materiality standards are "rigorous" and "demanding" -- and can be resolved on a motion to dismiss.
  - FCA liability requires proof that the defendant *knew* its noncompliance with a legal requirement was material to the government's decision to pay claims at the time the defendant sought payment.
  - Government's continued payment despite knowledge of noncompliance is "strong evidence" of immateriality.

The Supreme Court's Decision in *Escobar*

- Circuit split over requirements to state claim under "implied certification" theory of liability.
  - "The implied certification theory can be a basis for liability, at least where two conditions are satisfied: first, the claim does not merely request payment, but also makes specific representations about the goods or services provided; and second, the defendant's failure to disclose noncompliance … makes those representations misleading half-truths." *Escobar*, 136 S.Ct. at 2001.
  - Circuit split (and debate among district courts) over whether these two conditions are exclusive, or whether implied certification liability may exist even in the absence of specific representations about the goods/services.
  - DOJ takes position the two conditions are not exclusive.

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