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Seventh Circuit Applies Escobar Standard to Once Again Reject False Claims Act Liability Based on Implied False Certification Theory

On October 24, 2016, the Seventh Circuit applied the standard announced by the Supreme Court in *United Health Services, Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016), for False Claims Act (“FCA”) liability under an implied false certification theory, illustrating in practice the challenges relators may face in meeting *Escobar*’s heightened standard for liability, at least in some circuits. In *United States v. Sanford-Brown*, 840 F.3d 445 (7th Cir. 2016) (“*Sanford-Brown I*”), on remand, the Seventh Circuit once again affirmed summary judgment in favor of defendant Sanford-Brown, Inc.

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Background

Relator Brent Nelson, a former Director of Education at Sanford-Brown College (“SBC”), a for-profit college, filed suit in July 2012 in the United States District Court for the Eastern District of Wisconsin on behalf of the United States against SBC, alleging that SBC had committed violations of a variety of Title IV and other regulatory requirements and had fraudulently collected federal subsidies as a result. The government declined to intervene in the matter in February 2013.

The relator’s allegations focused on SBC’s Program Participation Agreement (“PPA”) with the Secretary of Education. An institution must enter into a PPA in order to receive federal education subsidies, and, as mandated by federal law, the PPA includes certifications of certain existing facts, as well as forward-looking promises that the educational institution will abide by specified Title IV-related statutes and regulations. As it is relevant to the Seventh Circuit’s consideration of the matter on remand, one of the relator’s arguments rested on an implied false certification theory: that SBC’s compliance with the Title IV restrictions and requirements in the PPA were “conditions of payment” of federal funds, so SBC’s violation of the PPA certifications caused SBC to present false or fraudulent claims of payment to the government. The district court had rejected this and relator’s other arguments, and granted summary judgment in favor of SBC.

The first time the Seventh Circuit heard the case, the unanimous panel also rejected relator’s implied false certification theory. The panel characterized good-faith entry into the PPA as “the condition of payment necessary to be eligible for subsidies,” but held that “[a]bsent evidence of fraud before entry, nonperformance after entry into an agreement for government subsidies does not impose liability under the FCA.” *United States v. Sanford-Brown*, 788 F.3d 696, 710 (7th Cir. 2015) (“*Sanford-Brown I*”). Because the relator made no showing that SBC’s initial entry into the PPA was fraudulent, the panel held, there was no liability. The panel then turned to the concept of implied false certification more generally and rejected it in full, concluding that it would be “unreasonable” 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 determining FCA liability. *Id.* at 711.

The Seventh Circuit's Holding on Remand

On remand, the Seventh Circuit once again ruled in favor of SBC, but this time did so applying the standard announced in *Escobar*.

In the Seventh Circuit's view, the Supreme Court's *Escobar* decision held that an implied false certification can be a basis for liability under the FCA, but only where the relator meets two conditions: (1) the claim makes "specific representations about the goods or services provided" and does not simply request payment, and (2) the defendant's failure to disclose noncompliance with *material* regulatory or contractual requirements renders those representations "misleading half-truths." *Sanford-Brown II*, 840 F.3d at 447 (quoting *Universal Health Services*, 136 S. Ct. at 2001). The panel concluded that the relator had not met either of the two *Escobar* conditions. The relator offered no evidence that SBC had made *any* representations in connection with its claims for payment from the government, and certainly had not proffered any evidence that any of those representations had been misleading or false.

The panel went on to conclude that the relator also "failed to establish the independent element of materiality." *Sanford-Brown II*, 840 F.3d at 447. Noting that the materiality standard is a "demanding" one, the court explained that it requires the relator to show that the defendant's noncompliance with the PPA would have likely or actually changed the government's decision to pay a claim. Applying the standard to the relator's case, the court concluded that "the most" he had shown was that SBC's alleged noncompliance would have given the government the *right* to decline payment, which is insufficient to meet the materiality standard articulated in *Escobar*.

Implications of the Court's Decision

Sanford-Brown II is an early indication that the standard announced in *Escobar* may indeed be a difficult one for some relators to meet, at least in certain circuits. While the implied false certification theory remains legally viable in the wake of *Escobar*, the Seventh Circuit's application of the standard suggests that expansive theories of this type will not fare well going forward.

If you have any questions or would like to discuss the foregoing or any related matter, please contact the Ropes & Gray attorney with whom you regularly work, or an attorney in our [False Claims Act](#) practice.