



VENABLE

# *Escobar* Turns One: False Claims Act Materiality in 2017

Tuesday, June 27, 2017  
12:00 pm – 1:30 pm ET

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## Agenda

- Introduction
- *Escobar*
- FCA Landscape after *Escobar*
- Questions



## Warren Hamel, Venable LLP

Partner and Chair, Investigations and White Collar Defense Practice

Panelist



Warren Hamel is the chair of Venable's Investigations and White Collar Defense Practice Group. Mr. Hamel represents clients in white collar criminal defense, environmental criminal defense, and civil enforcement matters, conducting internal investigations, general civil litigation, and commercial and contract disputes. He advises clients on compliance and internal control issues, including records and information management and electronic discovery, whistle-blower issues, and a range of Sarbanes-Oxley-related matters. Mr. Hamel served as an Assistant U.S. Attorney in the U.S. Attorney's Office for the District of Maryland from 1990 to 2002. From 1997 through 2001, Mr. Hamel served as Chief of the Environmental Crimes and Enforcement Unit of the U.S. Attorney's Office for the District of Maryland, where he was responsible for investigation and prosecution of a broad variety of criminal cases and litigation of civil enforcement and defense cases under the Clean Water Act, Clean Air Act, RCRA, and a range of other environmental and conservation statutes.

Mr. Hamel also has extensive experience investigating, prosecuting, and defending fraud and corruption cases, including cases involving mail and wire fraud; bank fraud and fraud on federally funded programs; the Foreign Corrupt Practices Act; the Food, Drug and Cosmetic Act; and the False Claims Act. Recent Foreign Corrupt Practices Act, False Claims Act, and other investigations have taken Mr. Hamel to locations in Europe, South and Central America, Africa, and India.



## Rebecca E. Pearson, Venable LLP

Partner, Government Contracts

Panelist



Rebecca Pearson assists clients in government contract litigation; contract award protests before the Government Accountability Office, U.S. Court of Federal Claims, and federal agencies; size and NAICS Code challenges before the Small Business Administration Office of Hearings and Appeals; administrative claims before agency boards of contract appeals; representation before the Department of Justice and federal courts on civil matters involving government contractors, including the Civil False Claims Act; and civil litigation in federal courts involving government prime contractors and subcontractors. Ms. Pearson also counsels clients on matters involving small business issues, joint ventures and teaming issues, and further counsels on defective pricing and cost allowance questions, teaming agreements, and legal and regulatory compliance and ethics.

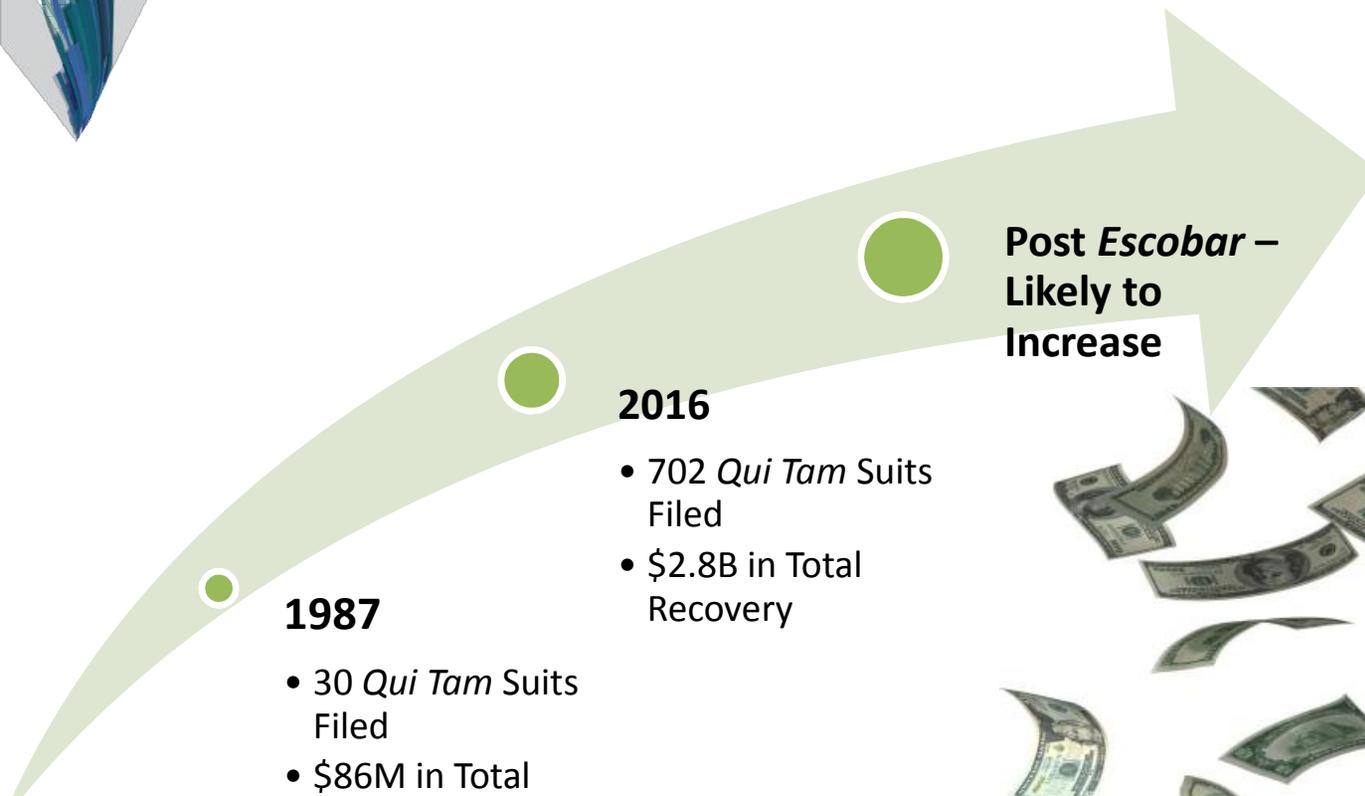
Ms. Pearson is a Board Member of The George Washington University Government Contracts Alumni Board of The George Washington University Law Board. She is also a past President of the National Contracts Management Association and an active Member of the American Bar Association.



# Three Decades of *Qui Tam* Enforcement

**\$53B**

**Total Recovery  
(Since 1988)**



**Post *Escobar* –  
Likely to  
Increase**

**2016**

- 702 *Qui Tam* Suits Filed
- \$2.8B in Total Recovery

**1987**

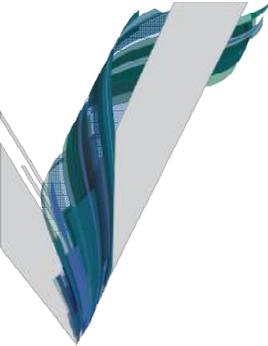
- 30 *Qui Tam* Suits Filed
- \$86M in Total Recovery (*Qui Tam* + DOJ)





## Here's the History: DOJ Recovery from False Claim Act Cases

Fiscal Year	New Matters (referrals, investigations, or <i>qui tam</i> actions)		Settlements and Judgments		Total
	Non- <i>Qui Tam</i>	<i>Qui Tam</i>	Non- <i>Qui Tam</i>	<i>Qui Tam</i>	<i>Qui Tam</i> and Non- <i>Qui Tam</i>
2013	100	754	\$833,491,768	\$3,009,262,541	\$3,842,754,309
2014	96	714	\$2,725,589,226	\$3,056,326,588	\$5,781,915,814
2015	105	632	\$670,783,021	\$2,913,033,047	\$3,583,816,068
2016	143	702	\$1,856,329,432	\$2,800,043,469	\$4,761,357,835



## Continued Enforcement

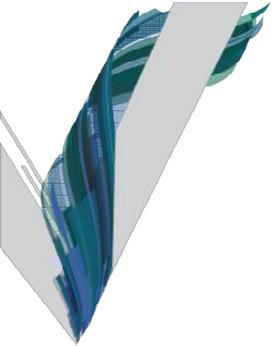


- 2014 – DOJ announces that it will pursue criminal charges in tandem with Civil False Claims Suits
- 2015 – DOJ initiative to increase pursuit of individual wrongdoing
- January 11, 2017 – AG Sessions suggests he would follow the Yates Memo's mandate to pursue individuals
- 2017 – Penalties increase from \$10,781 to \$21,916 (effective for violations occurring after February 2, 2017)



## Predictions for DOJ Recovery Downstream

- Likely to increase:
    - Number of FCA cases and
    - Cost of doing business with the U.S. Government
- ✓ *Universal Health Serv. United States ex rel. Escobar*



***Universal Health Servs. v. United States et al.  
ex rel. Escobar et al., 136 S. Ct. 1989 (June 2016)***



## *Universal Health Servs. v. United States ex rel. Escobar*

- Medicaid patient was diagnosed with bipolar disorder by unlicensed and unsupervised UHS counselors.
- The patient was prescribed medicine for bipolar disorder by a “doctor,” later discovered to be a nurse who was held out as a psychiatrist.
- Rivera soon died from complications related to the medication.
- The patient’s parents (Petitioners) sued UHS, claiming:
  - UHS violated Massachusetts’ Medicaid regulations pertaining to staff licensing, and as a result,
  - UHS did not comply with a condition of payment from the Government.



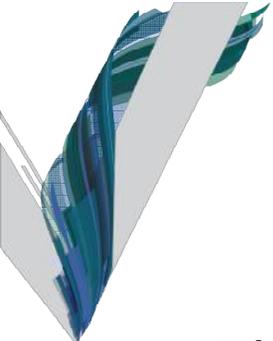
## The *Escobar* Decision

- Justice Thomas, backed by an 8-0 Supreme Court, imposed an “implied [false] certification” theory of liability.
- Liability attaches when a defendant:
  1. Submits a claim for payment that makes specific representations about the goods or services provided,
  2. Knowingly fails to disclose noncompliance with statutory, regulatory, or contractual requirements,
  3. The omission(s) render those representations misleading, and
  4. The misrepresentation is material.
- The determining factor is whether the misrepresentation about compliance is material to the Government’s payment decision.
  - Liability does not depend on whether the requirements were expressly designated as conditions of payment. It is relevant, but not automatically dispositive.



## The Court Narrowed the Test for Materiality

- The Court disagreed with the Government's and First Circuit's expansive view of materiality under the FCA, holding: "statutory, regulatory, and contractual requirements are not automatically material." 136 S.Ct. at 2001-02.
- The Supreme Court test for materiality is:
  1. "It was material to the other party's course of action;" and
  2. "[Has] a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property."

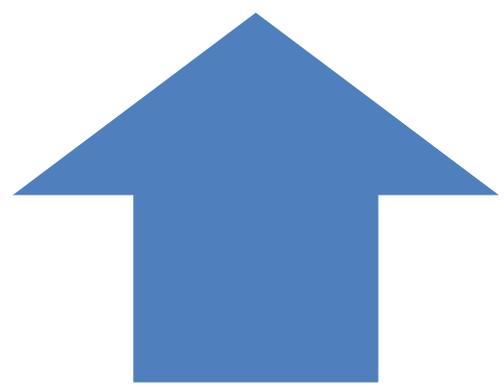


## The Government's Actual Knowledge May Disprove Materiality

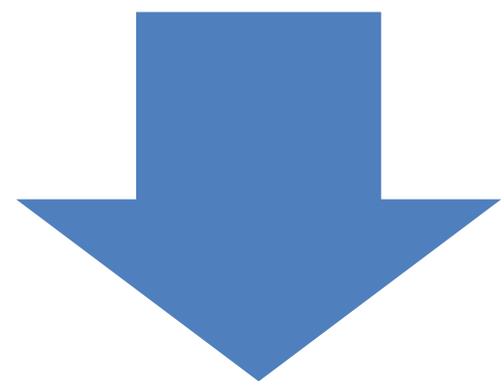
- The Court gave examples of situations where actual knowledge by the Government, plus inaction, demonstrates that the requirement is not material:
  - If the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated.
  - If the Government regularly pays a particular type of claim in full despite actual knowledge that certain requirements were violated, and has signaled no change in position.



*Escobar* affirmed and limited FCA liability for implied certification



Affirmed FCA liability under the implied certification theory



Effectively limited the implied liability theory



## Post –*Escobar* Interpretations of the Court’s Materiality Requirement – Two-Part Test or Flexible?

- ND Alabama Two-Part Test

- *U.S. v. Crumb – Escobar* applied two conditions for liability under implied certification
  1. “[T]he 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”
- *U.S. ex rel. George v. Fresenius Medical Care Holdings*
  - Plaintiff who alleged that his dialysis was cut short failed to allege how incomplete it was and could not demonstrate materiality



## Post –*Escobar* Interpretations of the Court’s Materiality Requirement – Two-Part Test or Holistic?

- Holistic Approach

### 1<sup>st</sup> Circuit

- ***United States ex rel. Escobar v. Universal Health Care Servs. Inc.* (1<sup>st</sup> Cir. 2016) (the decision resulting from the S.Ct. remand)**
  1. Whether regulatory compliance is a condition of payment;
  2. The centrality of the requirement in the regulatory program; and
  3. Whether the Government pays claims despite actual knowledge that certain requirements were violated.

### *Rose v. Stephens Institute*

- Escobar did **not** apply a rigid “two-part test” for falsity.
- “The focus under *Escobar* is not how the condition is designated but instead ‘the effect on the likely or actual behavior of the recipient of the alleged misrepresentation.’”
- Ruled that an incentive compensation ban is material.

# Summary Judgment for Materiality Lives!

Government approval after investigation

*U.S. ex rel. Abbott v. BP Exploration & Production* – Department of Interior’s decision to allow BP to continue drilling after an investigation into whether BP violated the FCA when it submitted plans for an oil platform without all required documents was strong evidence of **lack** of materiality.

Summary Judgment Granted

*United States ex rel. Petratos v. Genentech Inc.* – Relator failed to sufficiently allege that manufacturer made misrepresentations that were material to government’s payment decision.

*U.S. ex rel. Kelly v. Serco, Inc.* – Obligations to comply with time charging regulations were not material to payment.

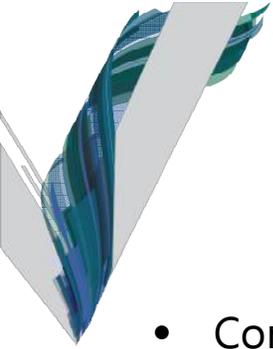
*U.S. v. Sanford Brown Ltd.* – “Enterprise’s purported failure to comply with HEA regulations was insufficient to establish false presentment claim based on theory of implied false certification.” Government entitlement to reject payment is not enough.

Failure to comply with regulations alone insufficient



## Will the Pendulum Swing Away from Summary Judgment?

- Materiality is frequently a fact-intensive standard. As the Government and *qui tam* relators become more adept at pleading materiality, courts may begin to reject summary judgments.
- The following cases denied summary judgment motions:
  - *Rose v. Stephens Institute* (N.D. CA)
  - *United States ex rel. Scutellaro v. Capitol Supply, Inc.* (D.D.C.) (“[W]hile materiality is not always ‘too fact intensive’ to resolve on summary judgment, [Escobar, 136 S. Ct. at 2004 n.6](#), the standard is both ‘rigorous’ and ‘demanding.’”)



## Materiality Factors into Obligations Pursuant to Mandatory Reporting of Fraud, False Claims, and Significant Overpayments

- Contractors must timely disclose, in writing, to the agency, whenever, in connection with the award, performance, or closeout of a Government contract or any subcontract thereunder, it has credible evidence that a contractor's principal, employee, agent, or subcontractor of the contractor has committed—

Reportable Violations	Entity to Whom Disclosed
A violation of federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code	Office of the Inspector General (OIG), with a copy to the Contracting Officer
A violation of the civil False Claims Act	Office of the Inspector General (OIG), with a copy to the Contracting Officer
Significant overpayment	Contracting Officer



# Contractor Best Practices

## Establish Intent to Comply

- Document all decisions
- Demonstrate deliberate, good faith efforts to comply with all regulatory and contractual provisions

## Review Certification Process

- Who will be charged with ensuring that the company is up to date on its certification requirements?
- Do they have the appropriate knowledge to certify?

## Maintain Dialog with Government Customer

- Confirm key communications in writing
- Consider whether to obtain government buy-in for tricky compliance decisions
- Clarify your understanding of contract ambiguities in writing before a dispute



## Contractor Best Practices, Continued

### Develop a Crisis Mitigation Plan

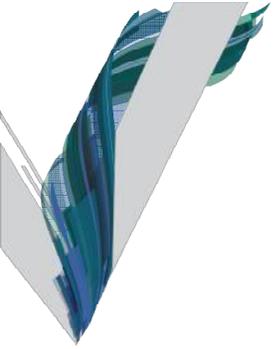
- Document response to non-compliance
- Test compliance post plan

### Proactively Assess Weakness

- Where is your company vulnerable to fraud waste & abuse?
- What are the red flags for fraud in your industry?

### Fraud Awareness Program

- Revisit your fraud awareness program on an annual basis, and if you have not established one, now would be a good time to think about making that investment



# Questions?

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### **Next Month's Government Contracts Webinar:**

#### **Service Contract Act Compliance**

Wednesday, July 19, 2017

12:00 pm – 1:30 pm ET