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Tenth Circuit Applies ‘Demanding' Materiality Standard to FCA False-Certification Claim

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Relying on “the demanding materiality standard set out by the Supreme Court” in its 2016 'Escobar' decision, the appellate court affirmed the district court's dismissal and emphasized the high bar that FCA plaintiffs face in pleading false-certification claims.

In *United States ex rel. Sorenson v. Wadsworth Brothers Construction Co.*, the U.S. Court of Appeals for the Tenth Circuit took up the dismissal of a complaint raising a so-called “false-certification” theory of liability under the False Claims Act. Relying on “the demanding materiality standard set out by the Supreme Court” in its 2016 *Escobar* decision, the appellate court affirmed the district court's dismissal and emphasized the high bar that FCA plaintiffs face in pleading false-certification claims.

The False Claims Act (FCA) “imposes significant penalties on those who defraud the Government.” *Universal Health Services v. United States ex rel. Escobar*, 579 U.S. 176, 180 (2016). Specifically, a plaintiff may recover civil penalties and treble damages from anyone who knowingly makes a false or fraudulent claim for payment from the federal government. 31 U.S.C. §3729(a)(1). In *Escobar*, the Supreme Court considered a so-called “implied false certification” theory of liability. Under this theory, “when a defendant submits a claim” for payment to the federal government, that defendant “impliedly certifies compliance with all conditions of payment. But if that claim fails to disclose the defendant's violation of a material statutory, regulatory, or contractual requirement, so the theory goes, the defendant has made a misrepresentation” that opens it up to FCA liability. *Escobar*, 579 U.S. at 180. In *Escobar*, the Supreme Court confirmed “that, at least in certain circumstances, the implied false certification theory can be a basis for liability.” Id. at 181. At the same time, establishing that liability is a tall order: The plaintiff must prove that “the defendant knowingly violated a requirement that the defendant knows *is material to the Government's payment decision.”* Id. (emphasis added). Moreover, the *Escobar* court held, “[t]hose requirements are rigorous.” Id. at 192. “[T]he Government's decision to expressly identify a provision as a condition of payment is relevant, but not automatically dispositive.” Id. at 195. Moreover, “if the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated, that is very

strong evidence that those requirements are not material." Id.

The Tenth Circuit's *Sorenson* opinion involved a false-certification theory of liability like the one in *Escobar*. Plaintiff Kelly Sorenson brought an FCA claim against her former employer, Wadsworth Brothers Construction Company. *United States ex rel. Sorenson v. Wadsworth Bros. Constr. Co.*, 2022 U.S. App. LEXIS 25315, at *1 (10th Cir. Sept. 9, 2022). Sorenson alleged that Wadsworth, a contractor working on a federally funded transportation project, falsely certified its compliance with the "prevailing-wage" requirements under the Davis-Bacon Act. Id. at *8. The case involved the construction of a "deicing pad" at Salt Lake International Airport. As required by the federal grant, the airport required that its contractors certify that its employees were paid in compliance with the Davis-Bacon Act. Id. Wadsworth hired Sorenson as a truck driver on the project and, according to the complaint, almost immediately Sorenson "noticed discrepancies in his pay." Id. at *9. The Tenth Circuit didn't mince words in summarizing the allegations: "Several time sheets contained Sorenson's forged signatures;" Wadsworth represented that it properly paid its employees "despite actually knowing it did not pay Sorenson in accord with applicable Davis-Bacon requirements;" and Wadsworth engaged in this wrongful conduct "[t]o increase its profits." Id. at *9, 11.

The Tenth Circuit's Decision

In spite of these allegations, the Tenth Circuit held that Sorenson's complaint failed to state a claim. The appellate court's decision focused on materiality: The court held that while the conduct Sorenson alleged was certainly wrongful, he could not establish that this wrongful conduct was material to the government's decision to pay Wadsworth. The complaint, the Tenth Circuit noted, was "bereft of critical facts" and "nothing more than a naked assertion that truthful certification of Davis-Bacon compliance is a precondition to payment … ." Id. at *13. While the court acknowledged that the complaint "arguably supports the inference that Wadsworth failed to pay Sorenson [and other employees], then fraudulently certified its compliance with" the Davis-Bacon Act, that wasn't enough: the FCA isn't "simply some 'all-purpose antifraud statute or a vehicle for punishing garden-variety breaches of contract or regulatory violations." Id. at *15 (quotation omitted). The critical missing piece was *any* allegation even suggesting that this fraudulent certification was material to the government's decision to pay. Id. at *15-16. In light of that fact, the appellate court affirmed the dismissal of Sorenson's FCA claim. (Based on the same reasoning, the Tenth Circuit quickly dispensed with Sorenson's other claim for FCA retaliation as well. Id. at *17.)

The *Sorenson* decision also provides a practice tip for attorneys who handles appeals: Make sure that you file timely notices of appeal as to *all* of the district court orders you seek to challenge. In his appeal, Sorenson challenged not just the entry of judgment against him on his substantive claims, but also the lower court's order awarding Wadsworth its attorney fees. Sorenson filed a notice of appeal after the district court entered judgment on his substantive claims, but "he failed to file a *separate* notice of appeal after the district court entered a final order setting the amount of fees." Id. at *2 n.2 (emphasis added). The Tenth

Circuit ordered Sorenson to show cause why that portion of his appeal should not be dismissed for lack of jurisdiction. In his response, “Sorenson conceded this court 'lacks jurisdiction with regard to the issue of attorney's fees,'” and the appellate court dismissed that piece of the appeal. Id. at *2. The case therefore serves as an important reminder that a party must file a second notice of appeal if he or she intends to challenge an order or judgment that issues after the first notice of appeal is filed.

Conclusion

Sorenson highlights the Tenth Circuit's faithful application of the Supreme Court's *Escobar* decision. Plaintiffs seeking to raise a false-certification theory of liability under the FCA must plead enough facts to plausibly allege not only that the defendant's conduct was fraudulent, but also that the fraudulent conduct was in fact material to the government's decision to make payment.

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