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CLIENT ALERT

Ninth Circuit holds firm on implied certification after *Escobar*: "misleading half-truths" or nothing

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For all the talk about *Escobar*, we sometimes forget that the Supreme Court declined to answer the biggest question presented in that case: "whether *all* claims for payment implicitly represent that the billing party is legally entitled to payment." *Univ. Health Servs. v. U.S. ex rel. Escobar*, 136 S. Ct. 1989, 2000 (2016) (emphasis added). The Court did not have to address such "pure" implied-false-certification scenarios because the claims in *Escobar* did "more than merely demand payment." *Id.* Thus, *Escobar's* holding was limited: the Court found only that implied certification can be a basis for liability "*at least*" where two conditions are satisfied: (a) the defendant makes specific representations about the goods or services provided, and (b) its failure to disclose noncompliance with material statutory, regulatory or contractual requirements makes those representations "misleading half-truths." *Id.* at 2001. The Court described this half-truth theory of liability as a defendant making "representations that state the truth only as far as it goes, while omitting critical qualifying information." *Id.* at 2000.

Prior to *Escobar*, some circuits had gone further. In the Ninth Circuit, for example, the mere submission of claims for payment would expose a defendant to liability if it violated "a law, rule or regulation that is implicated in submitting [that] claim for payment." *Ebeid ex rel. United States v. Lungwitz*, 615 F.3d 993, 998 (9th Cir. 2010). After *Escobar*, it was unclear whether that broader theory of liability had survived.

The Ninth Circuit has, for a third time now, interpreted *Escobar* to *require* that plaintiffs in implied-certification cases satisfy the "misleading half-truths" theory—*i.e.*, that that is the *only* viable implied-certification theory left after *Escobar*. *See U.S. ex rel. Rose v. Stephens Inst.*, -- F.3d --, No. 17-15111, 2018 WL 4038194 (9th Cir. Aug. 24, 2018). The defendant, Stephens Institute, operates an art university in San Francisco and receives federal funding in the form of federal financial aid to its students. To qualify for that funding, the defendant signed a program participation agreement with the Department of Education, which required a pledge that it would abide by an incentive-compensation ban that precluded schools from rewarding admissions officers for enrolling higher numbers of students. Relators, who are former admission

representatives at the Stephens Institute, claimed that the incentive-compensation ban was violated from 2006 through 2010. Although the district court denied summary judgment before *Escobar* was decided, it allowed Stephens Institute to take an interlocutory appeal.

Among the questions certified for interlocutory appeal was whether the "two conditions" identified by the Supreme Court in *Escobar* always had to be satisfied for implied false certification liability under the FCA, or whether the broader theory under *Ebeid* had survived *Escobar.* Although the Ninth Circuit panel in *Rose* might have ruled differently if it were a matter of first impression, the panel held that two other post-*Escobar* Ninth Circuit decisions required that relators satisfy *Escobar*'s two implied certification conditions. *See Rose*, 2018 WL 4038194 at *4 ("Were we analyzing *Escobar* anew, we doubt that the Supreme Court's decision would require us to overrule *Ebeid*. . . . But our post-*Escobar* cases—without discussing whether *Ebeid* has been fatally undermined—appear to *require Escobar*'s two conditions nonetheless. We are bound by three-judge panel opinions of this court."). Taking those precedents as given, the panel affirmed the district court's denial of summary judgment to Stephens Institute and remanded the case.[1]

One of those post-*Escobar* cases is *Gilead Sciences*, which is before the Supreme Court on a certiorari petition, and about which we have previously written.[2] We await the Solicitor General's views, though we note that the Department of Justice filed an amicus brief in *Rose* in support of the relators' position that the two conditions are not mandatory.

In the meantime, the Ninth Circuit seems firmly entrenched: misleading half-truths are the only way to state a viable implied-certification case under the FCA. The language in the *Rose* panel's opinion may elicit a motion for rehearing en banc—which we will follow closely.

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[1] This application of *Escobar* drew a dissent, but all three judges seemed to agree that the half-truth theory of implied-certification liability was the only one to survive *Escobar* (as interpreted by previous Ninth Circuit panels).
[2] https://nicholsliu.com/wp-content/uploads/2018/04/Client-Alert-One-Step-Closer-to-Building-on-Escobar.pdf