The Government Contractor®

THOMSON REUTERS

Information and Analysis on Legal Aspects of Procurement

Vol. 60, No. 4 **January 31, 2018**

Focus

¶ 23

FEATURE COMMENT: The Top FCA Developments Of 2017

For the first time in several years, the U.S. Supreme Court did not render an opinion in a False Claims Act case; nonetheless, 2017 brought with it several important decisions as the lower courts grappled with the 2016 landmark FCA decision in *Universal Health Servs., Inc. v. U.S. ex rel. Escobar*, 136 S. Ct. 1989 (2016).

The past year also saw new leadership among the ranks of the U.S. attorneys and in the front office of the Department of Justice, but the personnel changes do not appear to have altered the statute's role as the Government's primary fraud recovery tool. The $3.7 billion recovered through FCA settlements and judgments in fiscal year 2017 was the fourth largest total in the 30 years since DOJ began tracking recovery statistics. With relators bringing 674 new qui tam matters and DOJ initiating 125 enforcement actions, including more new actions this year concerning procurement fraud than DOJ filed in the past two years combined, 2017 was yet another busy year for "Mr. Lincoln's Law." This Feature Comment highlights the top FCA developments for Government contractors and looks ahead to what is in store for 2018.

Notable Settlements and Individual Accountability—Of the $3.7 billion recovered by DOJ in settlements and judgments from civil fraud cases, nearly $2.5 billion related to the health care industry, and $543 million involved housing and mortgage fraud. Although recovery amounts were comparatively smaller in the areas of procurement fraud and the defense industry, the Government remained aggressive in pursuing and resolving FCA actions against Government contractors.

Most notably, Kuwaiti defense contractor Agility Public Warehousing Co. KSC agreed to pay $95 million to resolve criminal, civil and administrative claims alleging that the company had overcharged the U.S. Government when performing contracts to supply food for the military. The settlement also required Agility to forgo $249 million in administrative claims seeking additional payments under its contracts.

Other notable settlements involving claims submitted to the Department of Defense and the State Department include Pacific Architects and Engineers LLC ($5 million—failure to follow vetting requirements for personnel under a State Department contract), Mercer Transportation Co. Inc. ($4.4 million—bribery of Government officials for transportation contracts at a Marine base), and Triple Canopy Inc. ($2.6 million—unqualified security guards in Iraq).

Another high-dollar FCA settlement involved Bechtel National Inc., Bechtel Corp., URS Corp., and URS Energy and Construction Inc. The companies agreed to pay $125 million to resolve allegations that they violated the FCA by making false statements and claims to the Department of Energy by charging for deficient nuclear quality materials, services and testing at a waste treatment plant. The settlement also resolved allegations that Bechtel improperly used federal contract funds to pay for a lobbying campaign of federal officials for continued funding at the plant. Elsewhere, in the arena of software and technology contracts, the Government reached a $45 million settlement with CA Inc., an information technology management software and services company. CA allegedly made false statements and claims in the negotiation and administration of a General Services Administration contract.

Small business fraud also made its way onto the FCA scene this past year. Among several related settlements highlighted in DOJ's annual recoveries report was a $16 million settlement with ADS Inc. to resolve allegations that the company violated the

FCA by conspiring with purported small businesses to submit false claims for payment in connection with fraudulently obtained contracts. The settlement with ADS ranks as one of the largest recoveries involving alleged fraud in connection with small business contracting eligibility.

Amidst the usual flurry of company settlements, the Government—in accordance with the policy articulated in the Sept. 9, 2015 "Yates Memo"—demonstrated its continued emphasis on individual accountability for corporate wrongdoing. In some cases, individual owners and executives of corporations agreed to joint and several liability for their companies' settlement payments (e.g., the eClinicalWorks settlement for $155 million, the Life Care Centers of America settlement for $145 million, and the Medstar Ambulance Inc. settlement for $12.7 million). In other cases—many of which involved misconduct by physicians—DOJ obtained recoveries directly from the individuals (e.g., Dr. Robert Windsor's $20 million consent judgment, Dr. Meir Daller's $3.8 million settlement, and Dr. Gary Marder's $18 million consent judgment). Although such individual accountability recoveries have tended to come largely from the health care industry, Government contractors should exercise caution, as it is clear that DOJ is uniformly seeking opportunities for both corporate and individual liability.

DOJ to Move to Dismiss More Qui Tam Actions?—This past fall, a public statement from the director of DOJ's Civil Fraud Section left some wondering if DOJ would more actively dismiss meritless qui tam actions under its statutory authority at 31 USCA § 3730(C)(2)(A). Speaking to the Health Care Compliance Association, Michael Granston was quoted as stating that "[w]hile the qui tam provisions were designed to provide relators with a vehicle to proceed without the Government's involvement, clearly meritless cases can serve only to increase the costs for the Government and health care providers alike."

Some commenters construed Granston's statement as signaling a broader policy change in which DOJ would more actively dismiss frivolous cases, but many others, including the undersigned, were skeptical. DOJ has strong financial incentives not to dismiss qui tam actions even if there is only a remote chance that a relator will succeed in obtaining a settlement or a judgment on the Government's behalf, and the potential consequence that fewer potential relators would be willing to file a qui tam action due to the prospect of DOJ dismissing it, as opposed to merely not intervening, certainly looms large. And so it was no surprise that, on Nov. 17, 2017, DOJ walked back Granston's statement, indicating that the director's comments were merely an affirmation of its existing power to dismiss meritless suits under § 3730(C)(2)(A).

Flash forward, though, to just one week ago, when the National Law Journal released an article attaching a memo authored by Granston with guidance on evaluating whether DOJ attorneys should move to dismiss qui tam cases on their dockets. The NLJ's article and various other commenters in the past week have opined that the memo's issuance does suggest something of a change in DOJ policy concerning its authority to dismiss qui tam actions. Although we agree that this could be a signal that DOJ will be more carefully scrutinizing the hundreds of qui tams filed each year, it remains to be seen whether there will be any significant action by DOJ or an impact on the plaintiff's bar in bringing new actions. Certainly defendants may look to see whether their case is one worthy of dismissal as opposed to mere non-intervention, but we are mindful that a rush of defendants arguing their case should be dismissed may dampen any potential impact this change could have.

In short, contractors facing seemingly frivolous qui tam suits should not hold their breath for a motion to dismiss from DOJ. And if there is any uptick in the use of § 3730(C)(2)(A) in 2018, it will likely be driven largely by DOJ's concern about relators establishing unfavorable case law post-*Escobar*. That said, any such increase would still be a welcome development for contractors.

Top FCA Decisions of 2017—This past year saw a number of important decisions on a range of issues from statistical sampling to the reverse FCA, but without a doubt the defining issue of the year was the continued evolution of the case law in the wake of the Supreme Court's implied certification and materiality decision in *Escobar*. Below, we analyze the top decisions from 2017 and take a look ahead to what's in store this year.

1. *U.S. ex rel. Rose et al. v. Stephens Inst.*: Two-Part Test from *Escobar*: a Rose or a Thorn for Contractors?—In *Escobar*, the high court recognized the implied certification theory of liability and held that contractors can face FCA liability where "at least two conditions" are satisfied: (1) the contractor makes "specific representations about the goods or services provided"; and (2) the contractor fails to disclose its noncompliance with material requirements, making the representations "misleading half-truths." Applying that standard, the Supreme Court found that the two conditions were met because United Health Services (UHS) made specific representations when it submitted claims using payment codes corresponding to specific mental health services, and UHS failed to disclose the noncompliance with licensing requirements, making the representations on the claims misleading half-truths.

The Supreme Court concluded that it "need not resolve whether all claims for payment" contain "implicit[] represent[ations]." Since then, lower courts have wrestled with the question of whether both of *Escobar*'s two conditions must be satisfied to establish liability under the implied certification theory—i.e., whether a "specific representation" about the goods or services is a prerequisite to FCA liability. The debate over this issue is illustrated by *Rose*, which is currently on appeal in the U.S. Court of Appeals for the Ninth Circuit.

Rose is the latest in a long line of implied certification cases in which a relator alleges that a for-profit college paid bonuses to recruiters in violation of the incentive compensation ban in Title IV of the Higher Education Act. In *Rose*, the district court denied summary judgment to the college and rejected the college's argument that the "two-part test" is mandatory in all implied certification cases. See *U.S. ex rel. Rose v. Stephens Inst.*, 2016 WL 5076214, at *5 (N.D. Cal. Sept. 20, 2016).

On interlocutory appeal to the Ninth Circuit, the college argued that the Supreme Court used the phrase "at least" to mean that satisfying *Escobar*'s two conditions is the minimum a plaintiff must do to establish implied certification liability. According to the college, the relator's claim failed because the only specific representations that the college made to the Department of Education were about students' eligibility for federal funding; thus, the college's noncompliance with the incentive compensation ban did not render those representations false.

At oral argument before the Ninth Circuit, two of the judges on the panel appeared to favor the position advanced by the relator and DOJ (as amicus curiae) that *Escobar* does not require specific representations about goods or services to establish liability. At the same time, the panel acknowledged that two post-*Escobar* opinions from the Ninth Circuit have held just the opposite. See *U.S. ex rel. Campie v. Gilead Scis.*, 862 F.3d 890 (9th Cir. 2017); 59 GC ¶ 236; *U.S. ex rel. Kelly v. Serco, Inc.*, 846 F.3d 325 (9th Cir. 2017). Indeed, one of the judges suggested that the court might need to resolve the issue en banc.

How the question of the two-part test ultimately gets resolved should be of interest to Government contractors because—unlike *Escobar*, in which the claims included payment codes corresponding to specific mental health services—invoices in the federal procurement space often include far less detail, making it more difficult for a relator to identify specific representations about the goods or services provided. Thus, a decision on the two-part test has the potential to limit or expand the reach of the implied certification theory. No matter which way the Ninth Circuit goes, an opinion in *Rose* will be a worthwhile read for contractors in 2018.

2. *U.S. ex rel. McBride v. Halliburton*, *U.S. ex rel. Campie v. Gilead Scis.* and others: Focus on the Government's Behavior—In *Escobar*, the Court recognized the viability of the implied certification theory of liability, but narrowed its application to "material" misrepresentations, stating that the FCA's materiality requirement is both "rigorous" and "demanding." The Court's decision focused on how a contractor's noncompliance with an underlying legal requirement would affect the Government's "likely or actual behavior," and it laid out several factors that might contribute to a finding of materiality, including evidence that the Government consistently pays (or refuses to pay) claims in the face of noncompliance. As a result, lower courts' recent decisions have consistently focused on the Government's behavior in the face of noncompliance, often concluding that continued payment in the face of noncompliance vitiates materiality.

In several cases among the circuit courts, defendants successfully argued that an alleged violation was not material to the Government's payment decision because the Government took no action despite having notice of—and in some cases, even investigating—the defendant's alleged or actual misconduct. In *Kelly*, the Ninth Circuit affirmed the grant of summary judgment because the Government accepted cost reports despite knowing that the reports did not follow certain guidelines. 846 F.3d 325.

In *U.S. ex rel. Harman v. Trinity Industries*, the Fifth Circuit overturned a $663 million judgment against a guard rail manufacturer after determining that the guard rail defects could not have been material because the Department of Transportation was aware of the defects and yet continued to pay for the rails. 872 F.3d 645 (5th Cir. 2017). *Trinity* is significant in multiple respects, from the sheer size of the single damages to the rare occurrence of overturning a jury verdict, and, perhaps most of all, the fact that the matter made it to trial in the first place, given the Government's awareness of the allegedly fraudulent conduct and continued approval of it even during litigation.

The Government's determination to continue paying even after looking into allegedly fraudulent behavior has also led courts to find a lack of materiality. In *McBride*, the relator alleged that defendant Kellogg Brown and Root (KBR) inflated headcount data that purported to track the number of troops who frequented KBR's recreation centers. 848 F.3d 1027, 1029 (D.C. Cir. 2017); 59 GC ¶ 56. Affirming summary judgment, the D.C. Circuit held that the headcount data could not have been material because the Defense Contract Audit Agency had investigated the relator's allegations, but did not disallow any charged costs.

In *Abbott v. BP Exploration & Prod.*, the relator alleged that British Petroleum (BP) fell out of compliance with engineering regulations, which resulted in the submission of false claims. 851 F.3d 384 (5th Cir. 2017). The qui tam complaint prompted the Department of the Interior to investigate and ultimately conclude that defendant was in compliance and there was no basis to stop drilling. The Fifth Circuit affirmed summary judgment, reasoning that the Government's decision to allow BP to continue drilling was strong evidence that noncompliance with the engineering regulations was not material.

But arguments about the Government's behavior in the face of noncompliance have not always found favor with the courts this past year. In *Campie*, drug manufacturer Gilead Sciences argued in a motion to dismiss that alleged Food and Drug Administration violations could not have been material because the Government continued to provide reimbursements to Gilead despite awareness of manufacturing problems with an HIV drug. The district court agreed and dismissed the complaint. On appeal, while recognizing that the FDA had not withdrawn its approval of the drug, the Ninth Circuit was unwilling to find—at least at the pleadings stage—that the violations were not material:

> [T]o read too much into the FDA's continued approval—and its effect on the Government's payment decision—would be a mistake.... [T]here are many reasons the FDA may choose not to withdraw a drug approval, unrelated to the concern that the Government paid out billions of dollars for nonconforming and adulterated drugs.

862 F.3d at 906. The Ninth Circuit also emphasized that the parties disputed what the Government knew and when, which undermined the defendant's argument that the Government had actual knowledge of FDA violations at the time of reimbursement. Ultimately, the Ninth Circuit decided that there were too many factual questions to resolve on a motion to dismiss, illustrating the challenges of making arguments about the Government's behavior in the absence of a fully-developed record.

Although *Campie* may be distinguishable among this group because it was decided at the pleading stage as opposed to the summary judgment stage, the relator might not have the last word. On Dec. 26, 2017, Gilead filed a petition for writ of certiorari asking the Supreme Court to consider whether an FCA allegation fails if the Government continues to approve and pay for products after learning of alleged regulatory infractions. Contractors will want to keep an eye on this cert petition in 2018 to see if the Court takes the opportunity to address unanswered questions from *Escobar*.

3. *U.S. ex rel. Petratos v. Genentech Inc.* and *U.S. ex rel. Badr v. Triple Canopy, Inc.*: the Significance of DOJ's Intervention Decision—The relevance of the Government's decision whether to intervene in a qui tam case has long been the subject of much debate. Historically, courts have precluded defendants from arguing non-intervention to the jury as bearing on the merits of the case, but could a change be on the horizon? In the wake of *Escobar*, several courts have paid attention to the Government's intervention decision in assessing materiality.

In *Petratos*, a relator brought an action alleging that a drug manufacturer submitted false statements to the FDA when it sought approval of an anti-cancer drug. 855 F.3d 481 (3d Cir. 2017). The Third Circuit affirmed the grant of a motion to dismiss, finding that the complaint failed to meet the materiality standard because the FDA continued to approve the drug after the relator disclosed evidence to the FDA and DOJ when filing his qui tam complaint. And the FDA even approved additional uses for it, while failing to take any adverse action against Genentech Inc. The court then suggested that DOJ's decision not to intervene was a factor that weighed against a finding of materiality: "And in those six years [since relator's disclosures], the Department of Justice has taken no action against Genentech and declined to intervene in this suit." Accordingly, the court found that the heightened materiality standard post-*Escobar* was not met.

The Fourth Circuit also pointed to the Government's intervention decision in its materiality analysis, though in a different direction. In *Badr*, DOJ intervened in a case alleging that the defendant contractor violated the FCA by falsifying marksmanship scores of guards providing security for Government facilities in Iraq, thereby making its claims for payment of those guards false because the personnel were unqualified. 857 F.3d 174 (4th Cir. 2017). The Fourth Circuit applied *Escobar*'s materiality standard when overturning the district court's dismissal. In discussing the evidence that the Government could introduce to show materiality, the panel observed that the "Government did not renew its contract for base security with Triple Canopy Inc. and immediately intervened in the litigation." The court then stated, "Both of these actions are evidence that Triple Canopy's falsehood affected the Government's decision to pay." The court's ruling that DOJ's intervention decision is "evidence" of materiality is striking.

Not surprisingly, DOJ has taken the position that its intervention decision is dispositive evidence of materiality when it does in fact intervene, while simultaneously insisting that its decision to decline to intervene in a case cannot be said to evince a lack of materiality. Even so, these circuit decisions may open the door for defendants in many non-intervened cases to challenge materiality, though one can expect that future decisions will clarify that non-intervention alone is not enough. Until this question is ultimately settled though, defendants will point to cases like *Petratos* to argue that the Government's intervention/declination decision cuts both ways.

4. *U.S. ex rel. Michaels et al. v. Agape Senior Community Inc.*: Fourth Circuit Punts on Stat Sampling while Affirming DOJ's Veto of Proposed Settlement Based on ... Sampling—In a recent and sometimes controversial trend, FCA plaintiffs are increasingly relying on statistical sampling to prove their case-in-chief—e.g., a plaintiff hires an expert to review a subset of claims, proves that a percentage of those claims was false, and then extrapolates that percentage across the universe of claims. In support of this methodology, plaintiffs point to the fact that statistical sampling has been regularly used in other areas of complex litigation such as voting rights and mass torts. FCA defendants have challenged the use of extrapolation at the summary judgment stage on the ground that it is impermissible as a matter of law because sampling sidesteps the individualized claim-by-claim proof required under the FCA.

The Fourth Circuit appeared poised to be the first appellate court to rule on the question of whether statistical sampling is an appropriate methodology for establishing FCA liability and damages when a district court judge, after denying relators' bid to use sampling for just that purpose, certified the question for interlocutory appeal in *Michaels*. But on Valentine's Day 2017, the Fourth Circuit dismissed the interlocutory appeal as "improvidently granted" in light of the panel's view that statistical sampling is an evidentiary issue, rather than a pure question of law. 848 F.3d 330 (4th Cir. 2017).

Although not the clear appellate court guidance that many hoped for, the court's ruling is nonetheless instructive. If statistical sampling is an evidentiary issue, then there may be nothing about the FCA that precludes the use of sampling as a matter of law, but this does not mean that plaintiffs and defendants will stop fighting over the use of the methodology. Rather than resolving the issue of sampling at the summary judgment stage, it will likely be disputed and decided on *Daubert* motions or at trial in a battle of experts.

The Fourth Circuit also joined the Fifth and Sixth circuits in concluding that the U.S. attorney general possesses an absolute veto power over voluntary settlements in qui tam actions. Although that holding in and of itself is not remarkable, the circumstances surrounding the Government's veto in *Michaels* accentuate the frustration of both relators and defendants alike when the Government declines to intervene, but refuses to approve the bargain reached by the litigating parties. Here, not only did the Government decline to intervene, but its basis for vetoing the proposed settlement between the relators and Agape Senior Community Inc. was DOJ's statistical sampling-based damages calculations, the very methodology that the district court rejected as a means of proving damages. In other words, DOJ seemingly found a way to employ statistical sampling in spite of the court's rejection of such a method.

5. *U.S. ex rel. Savage v. Washington Closure Hanford LLC*: Application of the SBA's Presumption of Loss Rule—2017 saw the first decision in a civil FCA case applying the Small Business Administration's "Presumed Loss Rule." See *U.S. ex rel. Savage v. Washington Closure Hanford LLC*, 2017

WL 3667709 (E.D. Wash. Aug. 24, 2017). The rule implements provisions of the Small Business Jobs Act of 2010 and—in cases in which a set-aside contract is obtained by misrepresentation—the rule also creates a presumption that loss to the Government is equal to the total amount expended on the contract. See 15 USCA § 632(w)(1).

Until the *Savage* case, the presumption had only been applied in criminal cases in the sentencing context when determining the loss suffered by the Government. In *Savage*, DOJ intervened in a civil FCA complaint alleging that defendant Washington Closure Hanford (WCH) used pass-through businesses in order to meet certain targets for subcontracting with small businesses. For damages, DOJ sought the full value of the subcontracts that had been awarded to the pass-through companies that did not perform any significant work on the project. WCH moved for partial summary judgment on the permissible scope of the Government's damages, arguing that any damages must be offset by the value received and retained by the Government.

The district court rejected the defendant's argument, holding instead that the value received by the Government through the defendant's performance was irrelevant because the harm was not related to whether or not the Government received the services it bargained for under the contract, but rather the loss of business and experience going to eligible small businesses. *Savage* represents a wake-up call to companies seeking contracts reserved for small businesses, as well as a new tool for the Government in furthering its "full contract value" theory of damages in FCA cases—a scary proposition to say the least.

6. *U.S. ex rel. Petras v. Simparel, Inc.* and *U.S. ex rel. Barrick v. Parker-Migliorini Int'l, LLC*: Courts Refine Definition of "Obligation" in Reverse FCA Cases—So-called "reverse" FCA claims penalize defendants for wrongfully avoiding or decreasing payments that should have been made to the Government. 31 USCA § 3729(a)(1)(G). Liability requires the existence of an "obligation" to pay money to the Government, which the 2009 Fraud Enforcement and Recovery Act (FERA) amendments to the FCA defined as "an established duty, whether or not fixed." 31 USCA § 3729(b)(3). In 2017, several appellate courts attempted to further refine this definition. See *U.S. ex rel. Petras v. Simparel, Inc.*, 857 F.3d 497 (3d Cir. 2017); 59 GC ¶ 176; *U.S. ex rel. Barrick v. Parker-Migliorini Int'l, LLC*, 878 F.3d 1224 (10th Cir. Dec. 28, 2017).

In *Petras,* the Third Circuit held that a contingent obligation that did not exist at the time of the alleged conduct is insufficient to establish a duty to repay under the reverse FCA. The relator alleged that Simparel Inc. knowingly and improperly avoided a contingent obligation to pay accrued dividends to an investor after it had been placed into receivership and was being operated by the SBA.

The district court dismissed the FCA claim because Simparel's obligation to pay the Government that formed the basis of the claim was "too speculative," as it was contingent on either the board's declaration of dividends or the company's liquidation. The Third Circuit agreed, finding that "an established duty" is one that does not include a duty that is "dependent on a future discretionary act," and that "whether or not fixed" in the statutory definition suggests a reference to "whether or not the amount owed" was fixed at the time of the violation, not "whether an obligation to pay was fixed."

Similarly, in *Barrick* the Tenth Circuit concluded that the relator failed to allege that Parker-Migliorini International (PMI) had an "established duty" to pay the Government because the obligation to pay depended on a future discretionary wrongful act by a third party. In this case, the relator argued that PMI's "obligation" to pay the Government arises when the Department of Agriculture is informed that meat is being exported to a country with inspection standards higher than those in the U.S., as this triggers certain costs for the process of inspecting and certifying the product for export. The court disagreed, finding that PMI's obligation to pay was "potential and contingent" because PMI's meat supplier, the party responsible for supplying the destination country to the USDA, would have had to report an accurate and illegal destination country to the USDA for the obligation to arise.

These decisions join others issued in recent years that limit the potential reach of the reverse FCA as amended by FERA. Defendants will likely be able to challenge FCA liability successfully if the duty to repay does not exist at the time of the alleged violation, but is instead contingent on a future discretionary act.

7. *U.S. ex rel. Prather v. AT&T, Inc.* and *U.S. ex rel. Solomon v. Lockheed Martin Corp.*: Defining the Contours of Voluntarily Providing Information as an Original Source—The public disclosure bar provides that courts shall dismiss a qui tam action if substantially the same allegations in the complaint were publicly disclosed, unless the person bringing the action is an "original source."

The primary means by which a relator qualifies as an "original source" is to demonstrate that she "has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions," and she "voluntarily provided the information [on which allegations or transactions in a claim are based] to the Government before filing an action." 31 USCA § 3730(e)(4)(B). Although courts often focus on the knowledge standard in making the original source determination, in 2017 several courts found that relators did not qualify as original sources because they were not able by virtue of their duties to show that they had voluntarily provided their information to the Government.

In *Prather*, the relator, a former prosecutor in the organized crime section of the New York Office of Attorney General, alleged that telecommunication companies fraudulently overcharged the Federal Government for electronic surveillance services. 847 F.3d 1097 (9th Cir. 2017). The relator contended that he had firsthand knowledge of the alleged fraud and that his disclosures to the Federal Communications Commission were voluntary, as they were not a part of his usual job duties. Although the court agreed that it was not the relator's job "to discover and report fraud," the court nonetheless found that the relevant disclosures were not "voluntarily provided" because "the relevant disclosures were made in response to his employer's request, which in turn was triggered by a federal inquiry." While courts have previously held that Government employees whose job duties include reporting fraud could not be original sources, the Ninth Circuit's ruling expands this defense.

Several courts have found that Government employees could not qualify as original sources because their duties encompassed investigating or reporting fraud, but one court this last year found that an employee of the defendant company was not an original source for the same reason. The relator in *Solomon* was the employee monitor for Government subcontractor, Northrop Grumman Systems Corp., which was required to submit surveillance reports directly to the Defense Contract Management Agency. 878 F.3d 139 (5th Cir. 2017). The reports revealed that the two contractors were submitting false cost variance reporting, which led to the contractors receiving fee awards that they would not have obtained otherwise.

The relator argued that "he was not obligated to disclose the results of his audits to the Government because he was not a government employee." The district court disagreed. As the surveillance monitor for Northrop, the court found that the relator had an "affirmative duty" to report to the Government any fraud that he uncovered, and thus did not voluntarily disclose this information to the Government. 2016 WL 7188298 (N.D. Tex. Dec. 12, 2016). The appeals court affirmed on other grounds. Nevertheless, this may be one of the first times when a contractor's own employee—usually the paradigmatic relator—has been excluded because his duties included the reporting of fraud.

8. *U.S. ex rel. Bennett v. Biotronik, Inc.*: Application of the Government-Action Bar—In a case of first impression, the Ninth Circuit was asked to determine the reach of the "Government-action bar"—31 USCA § 3730(e)(3)—which prohibits a relator from bringing a qui tam suit "based upon allegations or transactions which are the subject of a civil suit … in which the Government is already a party."

In *Biotronik, Inc.* the issue regarding the "Government-action bar" involved two qui tam complaints: a different relator's complaint and Bennett's subsequent complaint. 876 F.3d 1011 (9th Cir. 2017); 60 GC ¶ 15. Relator Brian Sant filed a qui tam complaint in 2009 against Biotronik Inc. The Government intervened and entered into a settlement with Biotronik in May 2014 based on certain "covered conduct" included in the allegations. With respect to the Government, the case was dismissed with prejudice as to the "covered conduct" and without prejudice as to any other conduct.

Then, in October 2014, Bennett filed his own qui tam complaint against Biotronik, alleging violations of the FCA based only on the "uncovered conduct," i.e., the conduct included in the allegations in the *Sant* case but not covered by the settlement. The Government declined to intervene in Bennett's suit, and Biotronik moved to dismiss, arguing that Bennett's claims were barred by the Government-action rule in 31 USCA § 3730(e)(3). The U.S. District Court for the Eastern District of California granted Biotronik's motion to dismiss, finding that Bennett's allegations were the same as those advanced in *Sant*, a case in which the Government was already a party.

Bennett appealed to the Ninth Circuit and advanced two arguments as to the Government-action bar. First, Bennett argued that § 3730(e)(3) applies only if the Government is a party to an actively pending suit. The Ninth Circuit disagreed, holding that although the *Sant* litigation had ended, the Government was still a "party" to that suit because "a person remains a party to his suit, even after the suit's conclusion."

Second, Bennett argued that the allegations in his complaint were not the subject of any Government action because the Government's "partial" intervention in *Sant* was limited in scope to the settlement's "covered conduct." The court rejected this argument as well, explaining that when the Government intervenes in an FCA case, it "becomes a 'party' to the suit as a whole," "unsettled claims and all."

The Ninth Circuit's decision in *Bennett* provides important guidance as to the parameters of 31 USCA § 3730(e)(3), given the dearth of case law involving this bar. A defendant facing an FCA complaint that includes allegations raised in a previous FCA case in which the Government intervened, even if not expressly part of the conduct settled and released, may nonetheless be able to avoid litigation of even non-covered conduct.

The Road Ahead—After eight consecutive years of recoveries exceeding $3 billion, there is no reason to expect FCA activity to slow in 2018, notwithstanding recent media coverage regarding DOJ's review of qui tam actions for potential dismissal. In 2017, more than 150 decisions cited *Escobar*, a trend that will only continue in 2018 as relators, defendants and DOJ cite the blockbuster decision in briefs and statements-of-interest. *Escobar* provided some needed clarity by addressing a circuit split, but the opinion spawned additional questions—questions that the lower courts will have to answer in 2018 and beyond.

✦

This Feature Comment was written for The Government Contractor by* Brian Tully McLaughlin, *a partner in the Government Contracts practice group and co-chair of the firm's FCA practice;* Jason M. Crawford, *counsel in the Government Contracts group;* Patrick Brown, *a White Collar associate; and* Nkechi Kanu, *a Government Contracts associate. All authors are resident in the Washington, D.C. office of Crowell & Moring LLP.*