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For relators, the roses aren't necessarily redder: The Ninth Circuit's fresh cut on *Escobar* for FCA cases

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The Ninth Circuit Court of Appeals in the recently issued case of *United States ex. rel. Rose v. Stephens Institute*[1] (*Rose*) held that the two-step test of *Universal Health Services, Inc. v. United States ex rel. Escobar*[2] (*Escobar*) is mandatory in implied false certification cases brought under the False Claims Act (FCA).

In *Escobar*, the Supreme Court held that implied certification cases under the FCA can proceed where the defendant makes a claim with specific representations and the defendant's failure to comply with a material requirement makes those representations false or misleading:

> [W]e hold that the implied certification theory can be a basis for liability, at least where two conditions are satisfied: first, the claim does not merely request payment, but also makes specific representations about the goods or services provided; and second, the defendant's failure to disclose noncompliance with material statutory, regulatory, or contractual requirements makes those representations misleading half-truths.

However, the question left open in the wake of *Escobar* was whether proving these two conditions was necessary or merely sufficient to prevail in an implied certification FCA case, an issue on which lower courts have split since *Escobar*, as previously discussed in this blog.[3]

In *Rose*, the Ninth Circuit appears to have joined those courts which have held that the *Escobar* test is a necessary condition which the government or a qui tam relator must meet to prevail in an implied certification case.

This is good news for defendants in the Ninth Circuit because the plaintiff must meet a more exacting standard (i.e., show that the defendant made an affirmative statement that is proven to be false or misleading by the defendant's failure to comply with a material requirement) in order to proceed on an implied certification case.

In *Rose*, the relators were former admissions representatives for the Academy of Art University in San Francisco. The relators alleged violations of Title IV of the Higher Education Act in that the Academy's incentive compensation plan improperly violated the Department of Education incentive compensation ban.

The relators claimed compliance statements made to the Department constituted FCA violations. The Academy brought a motion for summary judgment in the district court, which was denied.

Following the denial, the Supreme Court issued *Escobar*. The Academy filed a motion for reconsideration, which was likewise denied.

An interlocutory appeal to the Ninth Circuit followed, which included the question of whether *Escobar's* two-part test was mandatory in all implied certification cases.

The three-judge panel in *Rose* held that the *Escobar* test was indeed mandatory in such actions and thus upheld the central premise of *Escobar* that an implied false certification theory must comply with at least the two-step test, though the panel noted if the issue came before the court en banc, the full Ninth Circuit might find that the *Escobar* standards are not necessary in all cases.

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Thus, the *Rose* opinion suggests that, if confronted with the issue on a later date, the Ninth Circuit may allow plaintiffs to proceed on an implied certification case without needing to prove the specific two parts of the *Escobar* test as they may be able to rely on other or broader elements such as those set forth in prior Ninth Circuit decisions interpreting the implied certification theory of FCA liability.

However, for the time being, the *Rose* decision bodes well for defendants and reinforces the point that, although *Escobar* brought much-needed clarity to implied certification theory cases under the FCA, the issue remains jurisdiction-specific for the time being, which should be a consideration and a reality in any defense strategy.

NOTES

[1] 901 F.3d 1124

[2] 136 S. Ct. 1989

[3] https://bit.ly/2zAQds4

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