

Supreme Court Applies Escobar to Reinstate Implied Certification Suit Against Bank Based on Compliance With Fed Rules

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by Erik Ruda

On Tuesday, February 21, 2017, the Supreme Court summarily vacated the judgment in *Bishop v. Wells Fargo & Co.* and remanded the case to the Second Circuit in light of the Court's recent decision in *Universal Health Servs. v. United States ex rel. Escobar*, which recognized the implied certification liability theory in FCA suits.

In *Bishop*, the plaintiffs originally brought FCA claims against Wells Fargo, specifically alleging that that Wachovia Bank and World Savings Bank (both of which later merged into Wells Fargo) engaged in improper accounting practices to disguise the fact that the banks were undercapitalized, which itself was a violation of Federal Reserve rules. Plaintiffs' FCA claims were based on the idea that each time the banks borrowed money from the Fed's Term Auction Facility, they were allegedly falsely certifying to the Fed that they were in sound financial condition.

The Second Circuit in *Bishop v. Wells Fargo & Co.*, 823 F.3d 35 (2d Cir. 2016) affirmed a district court ruling dismissing the FCA claims, holding that even if the allegations concerning fraudulent accounting practices were true, the plaintiffs could not tie the fraud to accusations of actionable implied false claims submitted to the government for payment. Because the banking laws did not expressly condition Fed loans on compliance, it was irrelevant whether knowing the true capitalization of the banks would have caused the Fed to change its lending terms.

After the Second Circuit's *Bishop* decision, however, the Supreme Court announced its holding in *Universal Health Servs. v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016), which upheld the theory of implied certification liability under the FCA, where the alleged misrepresentation to the government is "material" to the government's payment decision.

Following *Escobar*, the plaintiffs in *Bishop* asked the Supreme Court to revive their suit, citing the Court's subsequent affirmation of the implied certification theory of FCA liability and arguing that *Escobar* abrogated longstanding Second Circuit precedent which had

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rejected classic “implied certification” liability.

The Court’s summary disposition illustrates the ongoing importance of *Escobar* to the viability FCA suits brought in appellate circuits which previously did not recognize the implied certification theory. Moreover, financial institutions will need to closely monitor subsequent developments in *Bishop* given the implications of implied certification liability rooted in noncompliance with banking regulations.

The Supreme Court’s summary disposition in *Bishop* can be found [Here](#).

Dorsey’s FCA Now blog has previously provided insights and updates on *Escobar* that can be found at the following links:

<https://www.dorseyfca.com/district-court-grants-motion-to-dismiss-relators-claims-in-one-of-the-first-post-escobar-decisions/>

<https://www.dorseyfca.com/implied-certification-escobar-and-the-impact-on-healthcare-providers/>

<https://www.dorseyfca.com/supreme-court-upholds-implied-certification-theory-of-liability-imposes-limitations-on-its-reach/>