

MEDICAL DEFENSE AND HEALTH LAW

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This article summarizes a recent United States Supreme Court case dealing with the implied certification theory of liability under the False Claims Act. While the case arose in the healthcare field, it is significant for all suppliers who submit claims for payment to the United States government. Under this new decision, the United States Supreme Court unanimously held that implied certification was a valid theory of recovery under the FCA. However, in order to keep the FCA from becoming a mere regulatory enforcement tool, the Court imposed a requirement of “materiality” of the condition (i.e., would the government have refused to pay the claim had it known of the underlying regulatory violation) before liability can attach.

The Supreme Court Weighs in on Implied Certification Theory of FCA Liability

ABOUT THE AUTHOR



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On June 16, 2016, the United States Supreme Court issued its long-awaited opinion addressing the implied certification theory of recovery under the False Claims Act (“FCA”). In *Universal Health Services, Inc. v. United States ex rel. Escobar*, 579 U.S. ____ (2016), the Court first addressed the circuit split as to whether the implied certification theory was even a viable avenue of liability under the FCA. After concluding that the FCA does, in fact, allow for “implied” fraud claims to be brought by relators and the Government, the Court next rejected the notion that implied certification claims can be based simply upon misrepresentations of express conditions of payment. In doing so, the Court denounced the litmus test in use by most circuits, *i.e.*, the conditions-of-payment requirement, and instead replaced that standard with a more rigorous materiality standard. The result of the Supreme Court’s unanimous opinion is a likely uptick in the number of FCA cases filed against Government contractors. Further, whereas many FCA claims were previously disposed of on motions to dismiss, it is now likely that a larger number of FCA claims will survive until at least the summary judgment stage where materiality can be more fully briefed and argued.

The FCA was originally enacted in 1863 as a method of stopping rampant fraud committed by Government suppliers during the Civil War. The Act has been amended many times over the years. It currently provides for treble damages plus civil penalties of up to \$10,000 per false claim against suppliers who knowingly present, or cause to be presented, false claims for

payment to the Government. 31 U.S.C. § 3729(a). Since the 1990s, the FCA has gained increasing popularity among the plaintiff’s bar due in large part to the lucrative relators’ fees and attorneys’ fees available. That trend will most certainly continue in light of 2015 statistics for FCA litigation reported by the Department of Justice. Fiscal year 2015 marked the first time ever that relator awards in cases where the federal government declined to intervene exceeded relator awards in cases where the federal government chose to intervene (approximately \$335 million in non-intervention cases compared to approximately \$263 million in intervention cases). Thus, a whistleblower’s ability to recover greater sums, even without the DOJ intervening, will likely encourage increased *qui tam* activity. The *Escobar* opinion will undoubtedly receive considerable attention and interpretation in much of that litigation.

In *United States ex rel. Escobar v. Universal Health Services*, the relators, parents of an adolescent who received mental health services at a facility of the defendant, brought a *qui tam* suit in federal court, alleging that Universal Health had violated the False Claims Act under an implied false certification theory of liability. More specifically, the parents alleged that the defendant submitted reimbursement claims to the Massachusetts’ Medicaid program for counseling and other services while failing to disclose violations of underlying regulations regarding licensing status, other qualifications, and supervision requirements of certain caregivers. Relators contended that, while not expressly false, the

claims were impliedly false because the provider failed to disclose the underlying regulatory violations when submitting claims for reimbursement to Medicaid.

The district court dismissed the action, holding that the relator had failed to state a claim because the alleged regulatory violations were not an express condition of payment. The First Circuit reversed, holding that every submission of a claim implicitly represents compliance with relevant regulations and that any undisclosed violation of a precondition of payment renders a claim false within the meaning of the FCA. The Supreme Court reversed and remanded the action for analysis consistent with its requirements for a viable implied certification claim under the FCA.

In *Escobar*, the Supreme Court held that the implied certification theory can be a basis for liability where at least two conditions are met: (i) the claim for payment must make specific representations about the goods or services provided, and (ii) the party's failure to disclose noncompliance with material statutory, regulatory, or contractual requirements makes those representations misleading half-truths. The Court declined to consider whether all requests for payment imply that the billing party was entitled to payment, because it found the claims at issue in *Escobar* were more than just demands for payment. Rather, at issue in *Escobar* were claims that were submitted with payment codes and provider identification numbers. These codes and numbers represented that specific types of counseling services were performed by

providers of certain professional qualifications. The Court found that these representations were misleading because the claims did not disclose that the health care provider had not met state regulations relating to licensing and staffing requirements.

The Court then proceeded to discuss in a broader context the proper standard for determining whether noncompliance with a particular requirement was actionable. The Court adopted a materiality standard which is narrower than the condition-of-payment standard used by the First Circuit. The Supreme Court explained that the materiality standard, whether derived from the FCA's statutory definition of materiality or common law, looks to whether knowledge of the noncompliance would have actually affected the Government's payment decision, not just whether it could have done so.

Applying this standard, the Court rejected the premise that a requirement must be expressly designated as a condition of payment. The Court noted that such a designation may be relevant to the materiality determination but is not "automatically dispositive." The Court further explained that materiality must be determined by the facts surrounding the payment decision. So, evidence that a defendant knows that the government consistently rejected claims when it was aware of noncompliance with the particular requirement would support a finding of materiality, whereas evidence that the government paid a claim (or similar claims) in full despite knowledge of the noncompliance

would be strong evidence that the requirements were not material.

So, while the Supreme Court has clarified that the implied certification theory may serve as a basis for FCA liability, it made clear that this theory may not be expansively asserted and that the allegations must satisfy the FCA's materiality requirement. The Court specifically rejected the often asserted principle "that any statutory regulatory or contractual violation is material so long as the defendant knows that the government would be entitled to refuse payment were it aware of the violation." The Court found that the "False Claims Act does not adopt such an extraordinarily expansive view of liability." The Court also reaffirmed the "demanding"

nature of the materiality standard and the need to plead the effect of the alleged nonconformance or violation on the government's decision to pay, thereby injecting a true fraud analysis into what had become a regulatory enforcement tool. As a result, to support liability under an implied false certification theory going forward, the government and relators will need to plead specific and particularized facts satisfying the Court's "rigorous" and "demanding" new materiality standard.

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