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Did the FCA's "Implied Certification" Theory Dodge a Bullet?

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Yesterday's argument before the Supreme Court in *Universal Health Services, Inc. v. U.S. ex rel. Escobar* had the potential to put false claims based on an "implied certification" in the crosshairs. Instead, based on the weight of questioning by a plurality of justices, it appears that some form of implied certification theory may survive. (We previously reported on this case, here.)

Under the implied certification theory, a claim for payment can be false simply because the contractor has not complied with an applicable statute, regulation, or contractual provision. There need not be any affirmative misrepresentation in the claim itself or an express certification of compliance. Although the phrase "implied certification" has evolved as a term of art under the FCA, what it really refers to is the common law concept that a statement can be misleading—and potentially fraudulent—by implication or omission.

Although the nuances in the underlying lower court opinions (*e.g.*, whether the noncompliance concerned a condition of payment versus a condition of participation) were virtually ignored, it soon became apparent that Justices Breyer, Kagan, and Sotomayor may be unwilling to reject the implied certification theory. Justice Sotomayor in particular drew support from the law of contracts by analogizing a breach of performance with falsity. In contrast, Chief Justice Roberts was the lone voice concerned about the burden placed on contractors if the failure to comply with any one of myriad regulations applicable to contractors could trigger FCA liability. Although Justice Breyer posited that a blanket express certification of compliance would obviate any objection that there was no actual falsity, this would still leave contractors with an unrealistic burden precisely because of the sheer volume of regulations.

The Government (as amicus, not having intervened in the case) argued that a request for payment necessarily represents that the contractor is legally entitled to be paid, and that "if the person knows that he has failed to comply with a material term of the contract or a material regulatory requirement, by definition, the government will have no obligation to pay, and the claim of legal entitlement will be false." In other words, the FCA elements of materiality and scienter place reasonable limits on the reach of the implied certification theory. The scope of materiality and scienter, however, was not an express issue before the Court.

In sum, given yesterday's argument, it appears that the Supreme Court may not shoot down the

implied certification theory under all circumstances as the defense bar would prefer. But you never can tell, so stay tuned.

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