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Justices Grapple with Limits of False Claims Act Liability in Implied Certification Cases

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Last week the ***Supreme Court*** heard oral argument in a ***False Claims Act ("FCA")*** case in which the Court is considering the validity of the so-called implied false certification theory. This theory attaches FCA liability when a person submits a claim for payment notwithstanding a violation of an underlying law or regulation, but without a factually false claim form. Because of the massive volume of Medicare and Medicaid regulations that a provider could potentially violate, the case is significant. More than two dozen stakeholders weighed in with amici briefs. Here we discuss some of the important questions raised in the oral argument.

Universal Health Services v. United States ex rel. Escobar involves a Massachusetts mental health clinic operated by a subsidiary of Universal Health Services. The relators allege that at the time of their daughter' death due to a seizure while in the clinic's care 2009, the social workers at the clinic were not properly supervised and licensed as required by a Massachusetts Medicaid regulation. The issue in *Escobar*, and in other implied certification cases, is whether claims for payment are "false or fraudulent" under the FCA, even if the claim itself is factually accurate, because there were underlying violations of an applicable law or regulation.

When relators' daughter died, they filed several administrative complaints, which led to state investigations and finding of regulatory violations. Importantly, no agency sought to recover any overpayments. Suit was then brought by relators under the qui tam provisions of the FCA. The federal and state governments did not intervene, and the relators proceeded on their own. The District Court dismissed the complaint, finding that the complaint alleged no state regulatory violation that was a "condition of payment." The Court of Appeals for the First Circuit reversed, allowing the case to proceed, on the basis of a state regulation that suggested that the violations in question were conditions of payment. That regulation was not raised by the relators in their complaint or before the district court below. Specifically, the First Circuit held that the legal question was whether the provider had knowingly misrepresented compliance with a material precondition of payment, whether or not that condition was expressly stated.

At oral argument before the Supreme Court (audio available here; transcript available here) the vast majority of questions from the Justices focused on the different common law standards of materiality (also defined in the "false statements" section of the FCA) and the FCA's knowledge requirement. Surprisingly, in response to prodding by Chief Justice Roberts, the parties apparently agreed that a

contractor/provider must have “knowledge” of the regulatory requirement and “knowledge” that noncompliance is material to the government’s decision to pay.

The breadth of potential liability in implied certification cases was made clear in the response from the government (which filed an *amicus* brief and participated in oral argument) to a hypothetical question raised by the Chief Justice of a contract requirement to buy American-made staples. The government responded affirmatively that this provision could be material and thus FCA liability could attach for filing claims for services using foreign-made staples. Based on this response, the government seems to want as much discretion as possible to determine, even after the fact, that virtually all rules might be conditions of payment.

The potential breadth of this standard was also apparent from the Justices’ questions regarding whether it would be sufficient notice to providers if the government adds a statement or certification that compliance with all applicable laws and regulations are a material condition of payment. Such a standard would give providers little meaningful notice because there may be hundreds of pages of regulations and sub-regulatory guidance, much of which is often not meant to constitute payment rules. For example, in *Escobar*, there were numerous state findings of regulatory violations, but no attempt to recoup overpayments.

The Court’s decision in *Escobar* could have a broad impact on providers. While predictions of the outcome from oral argument are always uncertain at best, the concern for providers is that the Court may write a standard that would not provide prior notice based on the statutes or regulations at issue. The problem with liability standards that hinge on materiality and knowledge determinations is that fairness should dictate that providers be given notice of objective standards to which they will be held at the outset. Instead, the Court could impose a facts-and-circumstances test with liability *not* likely determined at the early stages of litigation through motions to dismiss, meaning providers would be exposed to wide open discovery and very expensive litigation.

The briefs of the parties and a number of the *amici* briefs filed on both sides are available from SCOTUSblog.

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