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Supreme Court Universal Health Ruling Should Refocus Contractor Compliance/Claim Submission Efforts and Litigation Strategies

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In another unanimous decision affecting government contractors, the Supreme Court on June 16, 2016 ruled that the "implied false certification" theory can be a basis for liability under the False Claims Act. Today, we take a quick look at *Universal Health Services, Inc. v. United States ex rel. Escobar*, 579 U.S. ___ (2016), and discuss its impact on government contractors.

First, the decision snuffed out any remaining hopes of contractors that the implied certification theory would be thrown out. After *Universal Health*, implied certification is the law of the land. But that might not be the biggest takeaway from the decision. Government contractors should be aware of the impacts on their compliance and claims submission systems as well as their litigation strategies.

In *Universal Health*, Justice Thomas explained that misleading "half-truths" can be the basis for FCA liability. At the same time, the Court erected a barrier to liability in the form of a materiality standard that it described as "demanding" and "rigorous." The Court said that materiality cannot be found where the noncompliance is "minor or insubstantial" but did not set a bright line. Instead, the decision focused on explaining the materiality standard.

Compliance and Claims Submissions: Focus on Increased Oversight and Knowledge of Certification Requirements

In *Universal Health*, Justice Thomas postulated that "would-be defendants" could not anticipate and prioritize compliance obligations under a scheme where an expressly designated condition of payment automatically triggers liability. In fact, the Court held that labeling a requirement as a "condition of payment" is relevant but is not dispositive of the materiality standard.

The Court pointed to examples from both ends of the materiality spectrum. On one end, even if the Government failed to specify that the guns it orders must shoot straight, because "a reasonable person would realize the imperative of a functioning firearm," that requirement would be material. On

the other end, if the Government contracts for health services and adds a requirement that contractors use “American-made staplers,” that would not be material in most circumstances. As the Court said, the FCA does not adopt such “an extraordinarily expansive view of liability.”

Contractors should pay attention to the information flow from the Government and should focus their compliance and oversight efforts accordingly. Those efforts should include questions about a solicitation’s certification requirements at the pre-proposal stage of a procurement. Those questions should continue through the performance period to the claims submission phase. Contractors should take advantage of that normal “back and forth” so they thoroughly understand what the Government wants and what it considers important.

Contractors should incorporate that knowledge and information into their compliance programs and infuse and increase their oversight accordingly. Before you submit a claim for payment, make sure you know the certification requirements and know what the Government expects. You should know your product or service and know how it does (or doesn’t) meet those requirements and where the grey areas are.

Litigation Strategy: Focus on Dispositive Motions

In *Universal Health*, the Court rejected the argument that “materiality is too fact intensive for courts to dismiss False Claims Act cases on a motion to dismiss or at summary judgment.” In effect, the Court is inviting motions to dismiss and for summary judgment on materiality, and FCA litigators should accept that invitation. Justice Thomas provided two concrete examples where statutory, regulatory or contractual requirements likely would not be “material.” The following questions should be asked based on those examples:

- If the Government knew that certain requirements were violated, did it pay a claim in full anyway?
- Has the Government routinely paid similar types of claims in full despite knowing that requirements were violated? And has the Government signaled no change in its position?

Contractors and their litigation counsel should first focus on the four corners of the Complaint and then focus discovery on these types of questions about Government actions. The Supreme Court called the materiality standard a “rigorous” one. A rigorous standard would require dismissal if a Complaint did not allege sufficient facts to establish that a requirement was material. The Court also pointed to the plausibility and particularity pleading standards in the federal rules. Contractors should push district courts to enforce these rules and this new standard of materiality. Where facts revealed through discovery show that the materiality standard is not met, contractors should file for summary judgment and should push the district courts to enforce the rules and the new standard.

Most contractors do not have the kind of budgets that allow for protracted litigation. After *Universal Health*, there should be more of a focus on dispositive motions at the initial pleading stages and after discovery, at least for claims based on the implied certification theory. Perhaps that new focus on dispositive motions will be a counterweight to the Government’s current use of expensive FCA litigation to force compliance through an early settlement. We bet that a new focus on materiality in the early stages of litigation coupled with the “government knowledge” defense will help level the playing field for contractors.

Universal Health has been described as a “loss” for contractors. But implied certification already was an accepted theory of FCA liability everywhere except the Seventh Circuit. Going forward, with the very high materiality threshold set by the Supreme Court, contractors facing FCA claims may turn out to be the real winners.

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