

Supreme Court Holds Implied Certifications Create False Claims Act Liability

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In a unanimous opinion released on June 16, 2016, the United States **Supreme Court** adopted the “*implied false certification*” theory of liability under the **False Claims Act**. The Court’s opinion in ***Universal Health Services, Inc. v. United States ex rel. Escobar*** is a mixed blessing for providers.

On the downside, the decision resolves a split among federal appellate courts and expands the reach of the False Claims Act for healthcare providers and other persons who submit claims to the federal government for payment. The decision has broad implications for providers in Illinois, Indiana, and Wisconsin because the U.S. Court of Appeals for the Seventh Circuit had previously rejected the “implied false certification” doctrine.

The Supreme Court’s opinion is not all bad news, however. It cautions that the False Claims Act is not an all-purpose anti-fraud statute or a vehicle for punishing garden-variety breaches of contract or regulatory violations. The Court lays out strict standards for imposing liability under the doctrine.

The False Claims Act

The False Claims Act (FCA) is the primary vehicle for the federal government to recoup losses suffered through fraud. The FCA imposes civil liability on any person who knowingly presents, or causes to be presented, to the United States or its representatives a false or fraudulent claim for payment or approval. The U.S. Attorney General may bring actions under the FCA directly in the name of the United States, or a private person, known as a “relator,” may bring a *qui tam* action in the name of the government. If the relator’s lawsuit results in the recovery of money for the government, the relator shares in the award. The FCA subjects defendants to treble damages plus civil damages of up to \$10,000 per claim, making liability essentially punitive in nature.

The Implied False Certification Doctrine

The FCA does not expressly define what makes a claim “false or fraudulent.” Clearly, a contractor submits a “false or fraudulent claim” when it seeks payment for goods and services it did not provide or when it includes in a request for payment an express representation that is untrue. The FCA doctrine of implied false certification goes one step further and treats a bill submitted to the

government as an implicit assurance that that the bill is a lawful claim for payment. Under the doctrine, a claimant impliedly certifies compliance with relevant statutes, regulations, or contract requirements that are material conditions of payment. When a claimant has not complied with those statutes, regulations, or contract requirements, its failure to disclose its noncompliance makes the claim “false or fraudulent.”

Because government contractors — especially healthcare providers — must comply with thousands of pages of federal statutes and regulations, some federal courts of appeal were reluctant to adopt the implied false certification doctrine out of fear that it would transform the FCA into an instrument for enforcing compliance with all applicable laws and regulations, even technical ones.

Factual and Procedural Background of the *Escobar* Case

Universal Health Services, Inc. v. United States ex rel. Escobar is an FCA case filed by the parents of a teenage beneficiary of Massachusetts’ Medicaid program. For five years, the teenager received counseling services at a mental health facility owned and operated by a subsidiary of United Health Services. A purported doctor at the facility prescribed a drug to the teenager after diagnosing her with bipolar disorder. She had an adverse reaction to the medication and her condition worsened. After suffering two seizures, she died at age seventeen.

Following their daughter’s death, the plaintiffs discovered that of the five professionals who treated her, only one was properly licensed. The practitioner who diagnosed the teenager identified herself as a psychologist, but Massachusetts had rejected her license application. In addition, the practitioner who prescribed medication was held out as a psychiatrist, but she was actually a nurse who lacked authority to prescribe drugs. When submitting reimbursement claims, the facility used payment codes and National Provider Identification (NPI) numbers that corresponded to services performed by properly licensed personnel. Some of the facility personnel had even registered for and obtained NPI numbers despite lacking the requisite qualifications and licenses.

In their *qui tam* suit, the parents alleged that Universal Health had violated the FCA under an implied false certification theory of liability. They asserted that the facility operated by Universal Health’s subsidiary submitted reimbursement claims that made representations about the specific services provided by specific types of professionals, but failed to disclose serious violations of state Medicaid regulations pertaining to staff qualifications and licensing requirements for these services. The Massachusetts Medicaid program, unaware of these deficiencies, paid the claims. The parents alleged that Universal Health defrauded the program, which would not have reimbursed the claims had it known that it was billed for mental health services that were performed by unlicensed and unsupervised staff.

The federal district court dismissed the lawsuit, but the U.S. Court of Appeals for the First Circuit reversed. The Supreme Court granted certiorari to resolve the disagreement between the various courts of appeal over the validity and scope of the implied false certification theory of liability.

The Supreme Court’s Adoption of the Implied False Certification Doctrine

The Supreme Court held that the implied false certification theory can provide a basis for FCA liability. When a contractor submits a claim for payment but fails to disclose its violations of statutory, regulatory, or contractual requirements, those omissions might violate the FCA. The Court, however, placed two important conditions on when an omission can create FCA liability. First, the claim cannot merely request payment, but must also make specific representations about the goods or services

provided. Second, the contractor's failure to disclose noncompliance with material statutory, regulatory, or contractual representations must make the representations misleading half-truths.

In allowing the relators' *qui tam* lawsuit to proceed against Universal Health, the Supreme Court explained that both conditions were met. The claims submitted to the Massachusetts Medicaid program included specific representations about staff qualifications by virtue of including payment codes that corresponded to specific counseling services and NPI numbers corresponding to specific job titles. Those representations were misleading in context. Anyone informed that the practitioners had provided a teenage patient with counseling services would probably — but wrongly — conclude that the provider had complied with core Massachusetts Medicaid requirements about training, experience, and qualifications.

A Statute, Regulation, or Contract Does Not Have to Expressly Designate Conditions of Payment

The *Escobar* case also involved a second issue: whether a defendant can face FCA liability if the contractual, statutory, or regulatory provision alleged to have been violated does not expressly state that compliance is a condition of payment. Universal Health argued that because the Massachusetts Medicaid statutes and regulations did not expressly condition payment of claims on compliance with their requirements, its failure to disclose a noncompliance could not trigger FCA liability. The Supreme Court, however, rejected that argument.

The Supreme Court held that although the FCA does not restrict liability to contractual, statutory, or regulatory provisions that expressly designate a condition of payment, not every undisclosed violation of an express condition of payment automatically triggers liability. To trigger liability, the provision must be one that is *material*. Whether a provision is labeled a condition of payment is relevant to, but not dispositive of, materiality. The Court explained that if a label were all that was necessary, then the government would respond by designating every legal requirement an express condition of payment. Since billing parties are often subject to thousands of complex statutory and regulatory provisions, facing FCA liability for violating any single one of them would not help contractors anticipate and prioritize their compliance obligations. Thus, the Court held, imposing a standard of materiality best provides contractors with fair notice and restricts open-ended liability.

The Supreme Court's opinion includes a lengthy clarification of how lower courts should enforce the materiality requirement, which closely tracks how courts in common law fraud cases determine whether a misrepresentation exposes a person to liability. Materiality looks to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation. A matter is important if a reasonable person would attach importance to it in determining a course of action, or if the person making the representation knows or has reason to know that the recipient of the representation attaches importance to the information in determining a course of action, even though a reasonable person would not.

Under this standard of materiality, it is not enough for *qui tam* relators to allege that a contractor knows that the government would be entitled to refuse payment were it aware of the violation. Instead, relators must allege and prove facts that demonstrate the significance to the government of the particular provisions alleged to have been violated. That proof can include, but is not necessarily limited to, evidence that the government consistently refuses to pay claims based on noncompliance with the particular provision. Conversely, if the government pays a particular claim in full despite its actual knowledge that those requirements were violated, or if the government regularly pays a particular type of claim in full despite actual knowledge that certain requirements were violated, that

constitutes strong evidence that the requirements are not material.

What the *Escobar* Case Means for Healthcare Providers

The Supreme Court's decision in *Escobar* broadens the reach of the False Claims Act by allowing *qui tam* relator claims based on violations of contractual, statutory, or regulatory provisions, even when they are not express conditions of payment. That statement alone, however, does not fairly capture what the decision means for healthcare providers and other government contractors. Those who submit claims for payment to the government are exposed to liability under an implied false certification theory only when their failure to disclose a violation occurs in tandem with an express representation such that the representation is rendered a half-truth, and when the violation is of a material term of a contract, statute, or regulation. Technical violations will not suffice.

Although the Supreme Court rejected bright-line rules that would have offered providers much greater protection from FCA lawsuits, its decision in the *Escobar* case does not open the floodgates to liability or allow the FCA to be used as a blunt instrument to enforce compliance with all laws. The decision may, however, make it more difficult for healthcare providers to secure dismissal of FCA lawsuits at their outset. The standards created by the Supreme Court to limit the reach of the FCA will require lower courts to undertake a rigorous, fact-intensive inquiry into all of the circumstances surrounding the omission of information about a violation, and how the government ordinarily treats those violations when it knows about them. Often, courts do not have this kind of information until the parties to a *qui tam* lawsuit have conducted extensive discovery. Healthcare providers can therefore expect that FCA litigation may become more protracted and costly in the wake of the *Escobar* case, but that their chances of ultimately prevailing are not significantly reduced.

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National Law Review, Volume VI, Number 245

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