

*Universal Health Services v. United States ex rel. Escobar*, No. 15-7

Yesterday, in *Universal Health Services v. United States ex rel. Escobar*, the Supreme Court held that a claim presented to the United States for payment can be false or fraudulent for purposes of the False Claims Act under an “implied certification” theory. The Court sought to allay any “concerns about fair notice and open-ended liability” by emphasizing the strict application of the FCA’s materiality and scienter requirements, clarifying the meaning of these requirements, and rejecting the Government and Second Circuit’s interpretation of implied certification as “extraordinarily expansive.” It remains to be seen whether the Court’s descriptions of the materiality and scienter requirements will provide meaningful protections to government contractors, including healthcare and other companies participating in various government programs, that face potential FCA liability based on implied certification theories of liability.

The False Claims Act imposes liability on anyone who “knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval.” 31 U.S.C. § 3729(a)(1)(A). The FCA also restricts liability to false statements that are “material” to the government’s obligation to make a payment—that is, that have a “natural tendency to influence” the government’s decision to make a payment. Although the FCA imposes liability for the submission of a false or fraudulent claim, the text of the statute does not define either “false” or “fraudulent.” Under the implied certification theory, the government (and FCA relators) has argued that any request for payment by a contractor implicitly certifies compliance with all contractual and regulatory provisions that are material conditions of payment. According to this logic, a government contractor can be liable under the False Claims Act even if the contractor submitted a facially accurate invoice to the federal government.

On appeal, petitioner United Health Services argued that the implied certification theory of falsity unreasonably broadens the scope of the False Claims Act and is inconsistent with both the statutory language and common-law understanding of the words “false” and “fraudulent.” The Court rejected this view, noting that the statutory language does not preclude the theory, and that “common-law fraud has long encompassed certain misrepresentations by omission.” The Court ultimately held that the implied certification “can be a basis for liability,” but only when (1) “the claim does not merely request payment, but also makes specific representations about the goods or services provided”; and (2) “the defendant’s failure to disclose noncompliance with material statutory, regulatory, or contractual requirements makes those representations misleading half-truths.”

Petitioner sought to limit the application of implied certification by arguing that it can provide a basis for liability only if a defendant fails to disclose a violation of a statutory, regulatory, or contractual provision that the agency expressly designated as a condition of payment. The Court likewise rejected this theory, holding that neither the plain language of the FCA nor the common-law meaning of fraud limits claims to misrepresentations about express conditions of payment.

As limitations on the implied certification theory, the Court emphasized the importance of the FCA’s materiality and scienter requirements. The Court looked to common Law and noted that a misrepresentation is not “material” unless it is “likely [to] induce a reasonable person to manifest his assent.” The Court emphasized that “[t]he materiality standard is demanding,” and that the FCA is not an all-purpose anti-fraud statute. Moreover, materiality “cannot be found where noncompliance is minor or insubstantial.” The Court vacated the First Circuit’s judgment and remanded the case for reconsideration on whether plaintiffs had sufficiently met the materiality and scienter requirements.

The Supreme Court’s decision in *Escobar* clarifies the applicable standards without dramatically altering the *status quo*, given that the false certification theory had been adopted in all but one federal circuit court. Federal contractors will have to depend on the Court’s explanations of the rigorous manner in which the materiality and scienter standards must be applied—and hope that those requirements prevent the worst excesses of implied certification.

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