

---

*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.

Any questions should be directed to [Marcia G. Madsen](#) (+1 202 263 3274), [Cameron S. Hamrick](#) (+1 202 263

3381) or [Roger V. Abbott](#) (+1 202 263 3427) in our Washington office.