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ALERT

High Court Hears Arguments on the Implied Certification Theory Under the False Claims Act

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This morning the Supreme Court of the United States heard arguments in *Universal Health Services v. United States ex rel. Escobar*, a case that will determine the scope of so-called "implied certifications" under the False Claims Act (FCA). The Court wrestled with the question of when the failure to disclose non-compliance with a contractual or regulatory obligation rises to the level of fraud under the FCA. Four of the eight justices on the Court engaged in active questioning, and three seemed inclined to adopt a broad understanding of the FCA in which submitting a claim for payment creates an implicit representation that all key contract terms and legal obligations were followed.

At issue in *United Health Services* is what it takes for a claim for payment to be considered "false." Most courts recognize two kinds of falsity under the FCA. First, there is "factual falsity," which involves charging the government for goods or services that were never provided. For example, charging the government for 10 computers when only five were provided would fall in this category. Second, there is "legal falsity," which involves an express false certification of compliance with a particular law or contract requirement. Submitting an invoice that also includes a false certification that no conflicts of interest exist would be an express false certification that renders the claim for payment false. More controversially, some courts have also recognized false "implied certifications." Under this interpretation of the FCA, a contractor is impliedly certifying that it is complying with relevant laws and contractual provisions simply by submitting a claim for payment. For example, under this theory, a small business could

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violate the FCA for knowingly violating Section 8(a) small business rules while also submitting claims for payment under a Section 8(a) contract even if it never certified that it was meeting the Section 8(a) rules.

This broad and controversial third understanding of FCA liability has created a circuit split, which led to the Supreme Court granting certiorari in *United Health Services*. In *United Health Services*, the *qui tam* relators filed a complaint alleging that a mental health clinic in Massachusetts was operating and submitting claims for payment under Medicaid with staff who were not qualified and who were not supervised in accordance with Massachusetts regulations. Relators were parents of a teenager who died as a result of a medication she was given at the clinic. The clinic had never certified to the federal government that it was complying with these regulations, so there was no specific misstatement in connection with the Medicaid payments. Nonetheless, the First Circuit found that the relators had stated a claim under the False Claims Act and that, by submitting claims for payment, the defendant had "implicitly communicated that it had conformed to the relevant program requirements, such that it was entitled to payment."

Oral argument did not give a clear picture into how the Supreme Court will resolve the issue. Questioning was dominated by Justices Roberts, Sotomayor, Kagan, and Breyer, who all took an active interest in the issues and appeared to have strong opinions coming into oral argument. Justice Roberts was the most skeptical of an implied certification theory, grilling counsel for the relators and the United States on the absurdity of reading a representation of compliance with potentially thousands of pages of regulations into every claim for payment. Justice Roberts also seemed to think that the breadth of explicit certifications was appropriately controlled by agencies and contracting officials, who can add certifications to contracts or claims for payment if they think FCA liability should attach. On the other side, Justices Sotomayor, Kagan, and Breyer appeared quite comfortable assuming that a claim for payment implies compliance with at least some obligations of the contractor. Justice Kagan said that classic Civil War era false claims—such as spoiled food or bad bullets—were consonant with an implied certification theory whereby a claim for payment implies basic fulfillment of a contractor's obligations.

The three Justices who appeared comfortable with an implied certification theory were primarily concerned with how to define the line between regulatory or statutory violations that should and should not fall within the FCA. Lower courts that have recognized implied certification under the FCA have attempted to place a limit on the theory by saying only violations of "conditions of payment" create implied certifications, while violations of "conditions of participation" in government programs do not. There has been disagreement among the circuit courts, however, regarding whether those "conditions of payment" need to be expressly identified by law or contract or whether violating any material element of a contractor's obligations is a violation of a "condition of payment."

Justices Sotomayor, Kagan, and Breyer eschewed these categories and focused primarily on identifying those obligations that are "material" enough that failing to disclose their violation renders the claim fraudulent. They indicated that this concept, drawn from contract law and common law fraud, was a useful standard for determining when the government has lost the benefit of its bargain such that the contractor's claim for payment becomes fraudulent. Justice Breyer struggled to find the right verbal formulation, at times discussing "essential" elements of the government's agreement or requirements that are "basic to the transaction."

However, despite advocating for a broad and flexible understanding of implied certification, Justice Breyer said explicitly that he did not want to upset expectations in government contracting, indicating that he recognized the difficulties of this approach.

With regard to the specific facts in *United Health Services*, Justices Sotomayor, Kagan, and Breyer seemed to think that the defendant's failure to have a qualified medical professional provide care in accordance with Massachusetts regulations was a "material" violation, and thus the relators had stated a claim under the FCA.

However the Court rules, the case has enormous ramifications for anyone doing business with the federal government, from defense contractors to health care contractors and providers. Hopefully, at the very least, its opinion will create a unified approach that will free contractors from the uncertainty of multiple standards in different federal circuits. The Court's opinion could also greatly expand—or scale back—the behavior that violates the FCA. If it upholds "implied certification" and defines the theory broadly, the specter of triple damages could lurk behind many contract compliance disputes. A broad understanding of implied certification could also lead to a wave of spurious *qui tam* litigation based on mere breaches of contract or regulatory infractions, raising defense costs and creating increased pressure to settle weak claims. The Court's decision is expected by June 2016.