



False Claims Act: Supreme Court Upholds Implied False Certification Theory of Liability, Emphasizing “Rigorous Materiality Requirement” (*Universal Health Services, Inc. v. United States ex rel. Escobar*)

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In *Universal Health Services, Inc. v. United States ex rel. Escobar*, the United States Supreme Court unanimously held that the implied false certification theory can be the basis for liability under the False Claims Act, 31 U.S.C. §3729 *et seq.*, which imposes significant penalties on anyone who “knowingly presents . . . a false or fraudulent claim for payment or approval” to the federal government.

In particular, the Court held that the implied false certification theory may trigger False Claims Act liability where the claim for payment makes specific representations about the goods and services provided, but the defendant knowingly fails to disclose its noncompliance with a statutory, regulatory, or contractual requirement. Liability may arise if the omission renders those representations misleading and such misrepresentation is material to the government’s payment decision. The Court

stressed how the analysis does not hinge on whether the government expressly labels satisfaction of the legal requirements which were violated as a condition to payment. Instead, for liability to attach a defendant must knowingly violate a requirement that the defendant knows is material to the government’s payment decision.

Relevant Case Background. In 2011 respondents filed a *qui tam* suit in federal court in Massachusetts against Universal Health alleging that it had violated the False Claims Act under an implied false certification theory of liability. Universal Health’s mental health facility counseled, and prescribed drugs to treat, Respondents’ teenage daughter’s behavioral problems. In May of 2009 Respondents’ daughter had an adverse reaction to a medication a purported doctor at the facility had prescribed after diagnosing her with a bipolar disorder and she ultimately died.

The practitioner who diagnosed Respondents’ daughter identified herself as a psychologist with a Ph.D. even though she received her degree from an internet school and Massachusetts had rejected her application to be licensed as a psychologist. In addition, the

practitioner who prescribed the medicine, and who was held out as a psychiatrist, was in fact a nurse who could not prescribe medications without supervision. Massachusetts investigated the incident and concluded that the facility had violated over a dozen Massachusetts Medicaid regulations. Respondents alleged that Universal Health submitted Medicaid reimbursement claims that made representations about mental health services provided by professionals without disclosing the significant violations of regulations pertaining to staff qualifications and licensing requirements for the services.

Although the First Circuit had adopted the implied false certification theory of liability, the District Court dismissed the claim under that theory because none of the regulations the facility violated

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The Court of Appeals for the First Circuit reversed explaining how each time a party submits a claim, it “implicitly communicates that it conformed with the relevant program requirements, such that it was entitled to payment.” In the First Circuit Court of Appeals’ view a statutory, regulatory, or contractual requirement can be a condition of payment either by expressly identifying itself as such or by implication and that the regulations themselves “constitute dispositive evidence of materiality.”



The United States Supreme Court granted certiorari to resolve disagreement among the Circuit Courts of Appeals over the validity and scope of the implied false certification theory of liability. The Seventh Circuit had rejected the theory of implied false certification, while the Second Circuit accepted the theory, but limited it to failures to disclose violations of expressly designated conditions of payment, and the DC Circuit held that the conditions need not be expressly designated as such.

Implied False Certification Theory Upheld. In holding that omitting

violations of statutory, regulatory or contractual requirements can be the basis for liability under the False Claims Act, the Supreme Court specifically declined to resolve whether all claims for payment implicitly constitute a representation that the billing party is legally entitled to payment. Instead, the Court concluded that the claims for payment by the mental health facility fell “squarely within the rule that half-truths – representations that state the truth only so far as it goes, while omitting critical qualifying information – can be actionable misrepresentations.”

The facility’s submission of claims for payment with specific pay codes corresponding to specific counseling services constituted a representation that it provided those types of treatment. Moreover, the facility submitted reimbursement claims using National Provider Identification numbers corresponding to specific job titles. The Supreme Court reasoned that the submissions reflecting that a social worker provided counseling services would probably lead anyone to conclude that the facility had complied with Massachusetts Medicaid requirements that the social worker had specialized training and

possessed the minimum regulatory qualifications for the job. However, they did not and that constituted a misrepresentation under the Act.

Accordingly, the Court held that the implied false certification theory can be the basis for liability, at least where: (1) the claim makes specific representations about the goods and services provided and is not merely a request payment, and (2) the failure to disclose noncompliance with material statutory, regulatory or contractual requirements makes those representations misleading half-truths.

Clarification of How Materiality Is Determined. In addition, the Court refused to limit liability under the implied false certification theory for failures to disclose violations of contractual, statutory or regulatory requirements only to situations where the government expressly designated those requirements as conditions to payment. The Court held that, while relevant, not every undisclosed violation of an express condition of payment automatically triggers liability. Instead, the misrepresentation about compliance with a statutory, regulatory or

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contractual requirement must be material to the government's payment decision in order for liability to arise under the Act.

The Court emphasized, "The materiality standard is demanding." A misrepresentation cannot be deemed material merely because the government identifies compliance with a particular, statutory, regulatory or contractual requirement as a condition of payment. Moreover, the government's option to decline to pay if it knew of the defendant's noncompliance is not in itself enough for a finding of materiality. Evidence that the defendant knows the government consistently refuses to pay claims for noncompliance with the particular statutory, regulatory, or contractual requirement would be proof of materiality. On the other hand, evidence that the government regularly pays a particular claim in full despite actual knowledge that certain requirements were not met, without signaling a change in that position, would be proof that the requirements are immaterial.

Ramifications. The *Universal Health Services* decision represents an expansion of potential liability under the False

Claims Act. The implied false certification theory is now firmly established in the law, and liability may attach even where noncompliance does not involve expressly designated conditions of payment.

Somewhat tempering such expansion, the Court described

the materiality requirement as "rigorous" and "demanding". Concerns about fair notice and open-ended liability, according to the Court, are to be addressed with strict enforcement of the Act's materiality and knowledge requirements. The Court specifically rejected the defendant's contention that materiality is too fact specific for False Claims Act cases to be dismissed on a motion to dismiss or by summary judgment. The Court characterized the materiality standard it described as "a familiar and rigorous one" requiring plaintiffs to plead their claims with plausibility and particularity under the Rules of Civil Procedure by pleading facts to support allegations of materiality. In particular, the Court stressed, "We emphasize, however, that the False Claims Act is not a means of

imposing treble damages and other penalties for insignificant regulatory or contractual violations."

Despite the Court's assurances, it remains to be seen whether a

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False Claims Act case can readily be dismissed on a motion to dismiss or for summary judgment. Future

False Claims Act litigation will undoubtedly focus on the materiality and scienter requirements under the statute – that is, whether the omitted violations are material to the government's payment decision, and whether defendant knew, deliberately ignored, or recklessly disregarded the violations and how the requirements at issue are material to the government's payment decision.

Since liability under the False Claims Act is punitive in nature, those contracting with the government, or seeking reimbursement of funds under federal benefits programs, must appreciate the increased breadth of potential exposure and the corresponding value of a robust compliance program.

The full text of the Supreme Court's Opinion can be found at http://www.supremecourt.gov/opinions/15pdf/15-7_a074.pdf