



Implied Fraud Under the False Claims Act Hangs in the Balance

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On April 19, 2016, the United States Supreme Court heard oral arguments in a hotly anticipated False Claims Act (FCA) case: *Universal Health Services, Inc. v. United States ex rel. Escobar*. The Court will decide whether the “implied certification” theory is a valid basis for finding contractors and providers liable under the FCA. Under this theory, which has been adopted by First, Second, Third, Fourth, Sixth, Ninth, Tenth, Eleventh, and D.C. Circuits, claims may be considered false or fraudulent on the basis that they include the implicit representation that the provider has complied with all conditions of payment. As a basis for legal falsity under the FCA, the implied certification theory exposes contractors and providers to significant damages and potential exclusion from government programs for failing to comply with a wide array of regulations, many of which are not immediately apparent. The Court’s decision will have significant consequences for contractors, as there likely will be exponential growth in the number of *qui tam* suits filed if the Court upholds “implied certification” as a basis for legal falsity. Alternatively, if the Court rejects this theory, many currently pending FCA complaints are likely to be dismissed.

Observers following the argument generally agreed that predicting what the Court will do in this case is difficult. The argument focused on whether the materiality of the breach should be considered in determining whether to prosecute under the FCA, with counsel for the government arguing that all violations, even the smallest infractions, are “material,” and counsel for the provider arguing that the materiality of the specific contract term is not in issue. Instead, the provider argued that only the tortious conduct of submitting “false” or “fraudulent” claims should result in FCA liability.

Overall, the discussion from the bench was relatively balanced. While Chief Justice Roberts appeared to lean heavily in favor of the contractor’s position, Justice Sotomayor clearly found the government’s position more compelling. However, several other members of the Court, including Justice Breyer, seemed torn in trying to determine the level of severity required for a breach to be deemed “fraudulent.” When Justice Breyer asked how the Court’s opinion should describe the circumstances under which a person submitting a claim has committed fraud, counsel for the contractor referred the Court to the definition in the Restatement (Second) of Torts: A party to a business transaction must exercise reasonable care to disclose matters known to him that (1) may mislead the other party to the transaction, and (2) if he knows that the other party is about to enter into the contract under a mistaken belief as to facts basic to the transaction, and that the other party would reasonably expect a disclosure of those facts.

We will provide an update on the outcome of the case – including whether the Court relies on the traditional legal authorities or on the broader concept of an “implied certification” to define fraudulent conduct – after the Court issues its opinion this summer.

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