



Supreme Court Issues Important Decision Addressing False Claims Act Liability

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Last week, the Supreme Court issued a much-anticipated opinion in Universal Health Services, Inc. v. United States ex rel. Escobar, holding that a failure to comply with regulations can be the basis for False Claims Act (FCA) liability under the so-called implied false certification theory. Specifically, the Court held that a provider who knowingly submits a claim that makes representations about the services provided, but fails to disclose noncompliance with material statutory, regulatory, or contractual requirements may violate the FCA. The Court endeavored to clarify what constitutes “material,” stating that it cannot be minor or insubstantial, but did not provide a bright-line rule as to what makes a requirement “material” to the government’s decision to issue payment. That requirement will be decided by subsequent cases and lower courts attempting to develop standards to assess materiality.

In Escobar, a teenage patient sought treatment at a mental health facility in Massachusetts. The patient ultimately died after an adverse reaction to a medication. The patient’s parents filed a *qui tam* suit against the owner of the facility alleging that a counselor at the facility revealed to the patient’s parents that few of the employees were actually licensed to provide mental health counseling and that employee supervision was limited. Of the five professionals who treated the patient, only one was properly licensed. An individual who had identified herself as a psychologist had earned a degree from an unaccredited internet college, and the state had rejected her application for licensure as a psychologist. The clinic’s director aided multiple staff members in misrepresenting their qualifications, and staff members prescribed medication without proper physician supervision.

The *qui tam* suit relied on the implied false certification theory of liability, asserting that the facility violated the FCA through submission of reimbursement claims that made representations about the services provided, but failed to disclose regulatory violations about licensure and supervision. The district court dismissed the claim, stating that none of the regulations violated had been a condition of payment. The First Circuit reversed, holding that submission of a claim is an implicit communication that a provider is conforming to the relevant program requirements. The appellate court further held that the state regulations clearly set out conditions of payment, as they repeatedly referenced adequate supervision. Under the First Circuit’s holding, violating a condition of payment would be a “material” violation, and thus, a false claim under the implied certification theory.

The Supreme Court agreed that fraudulent misrepresentation of services, including omissions of critical information, can form the basis of FCA liability, if the claim (1) “does not merely request payment, but also makes specific representations about the goods or services provided;” and (2) the failure to disclose this noncompliance makes the representations “misleading half-truths.” In Escobar, the provider submitted Medicaid reimbursement claims using National Provider Identification numbers (NPIs) that corresponded with different job titles. However, several of the staff members providing these services did not meet the regulatory requirements for their job titles. The provider made a claim representing that certain counseling had been provided, but given the underqualified and under-supervised staff providing the counseling, that representation was allegedly misleading.

However, the Supreme Court reversed the First Circuit’s interpretation of what constitutes a “material” statutory, regulatory, or contractual requirement. The First Circuit’s approach meant that

every legal requirement designated as a condition of payment would be “material,” and submitting a non-compliant claim could automatically trigger FCA liability. The Supreme Court disagreed, noting that “[w]hether a provision is labeled a condition of payment [or a condition of participation] is relevant to but not dispositive of the materiality inquiry.” And the Supreme Court further disagreed with the First Circuit’s and the government’s view that the question turns on whether the defendant knows that the government would be entitled to refuse payment if the government were aware of the violation. Instead, the Supreme Court refused to adopt such an expansive reading of FCA liability and emphasized that the materiality is a high and demanding standard.

Implications

The Supreme Court’s decision in Escobar is a bit of a mixed bag. On the one hand, the Court specifically ruled that the implied false certification theory is a valid basis for imposing FCA liability. On the other hand, the Court rejected the government’s expansive view that there is a valid claim under implied false certification theory merely if a provider knows that violation of the particular condition or regulation would be grounds for the government to refuse payment. Instead, the Court focused on whether the defendant knowingly violated a condition that it knows is material to the government’s decision to pay the claim.

The Court attempted to explain its view of materiality in the context of False Claims Act cases, referring to the materiality requirement as “rigorous” and “demanding.” The condition cannot be “minor or insubstantial,” and the government’s labeling of the regulation as a condition of payment versus a condition of participation is not dispositive. However, materiality is inherently subjective, fact intensive, and speculative. And, while the Court brushed aside in a footnote the defendant’s concern that the lack of clarity on materiality would lead lower courts to deny motions to dismiss or for summary judgment, this concern is perhaps worthy of more scrutiny. The Supreme Court emphasized that the FCA is not a means of imposing damages for “insignificant regulatory or contractual violations,” but lower courts will have to sort out whether the alleged regulatory violation was material in order to impose FCA liability. As a result, it is likely that there will be an increase of cases utilizing the implied false certification theory and alleging violations of any of the tens of thousands of pages of federal and state healthcare regulations where “materiality” will be the new battleground. The result may very well be that fewer cases are disposed of at the motion to dismiss or summary judgment stage.

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