

U.S. Supreme Court Reviews the FCA Implied Certification Theory

By Phong Tran | May 4, 2016

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On April 19, 2016, the U.S. Supreme Court heard oral arguments in *Universal Health Services, Inc. v. United States ex rel. Escobar*. The case will decide the fate of the “implied certification” theory of False Claims Act (“**FCA**”) liability.

Normally, a defendant violates the FCA by submitting a false claim for payment to the United States. Under the implied certification theory, however, a defendant may violate the FCA if it submits a proper claim for payment but nevertheless fails to comply with all governing statutory, regulatory, or contractual requirements that are conditions of payment. In these circumstances, the defendant is said to have “impliedly certified” compliance with those requirements merely by submitting the claim for payment.

For years, most courts refused to adopt the theory, concluding that it expanded the FCA beyond its statutory terms. But the First Circuit in *Universal Health* concluded that it could apply in certain circumstances. In that case, the parents of a patient who died from a seizure at a mental health clinic sued the owner-operator of the clinic, Universal Health Services, Inc. The parents alleged that the clinic was unlicensed and out of compliance with state regulations requiring supervision. The parents claimed that the clinic “impliedly certified” compliance with these requirements as a condition of payment every time it submitted a claim for Medicaid reimbursement. As a result, the parents alleged, the clinic had been defrauding Medicaid for years.

The district court dismissed the case. On appeal, the First Circuit reversed. The appellate court rejected distinctions between implied and express certification theories, and instead held that the principal inquiry is “whether the defendant, in submitting a claim for reimbursement, knowingly misrepresented compliance with a material precondition of payment.” The court held that preconditions of payment need not be “expressly designated.” Rather, it is a “fact-intensive and context-specific inquiry.” Because the clinic failed to comply with regulations that “explicitly condition” government payment on compliance, the relators “have provided sufficient allegations of falsity to survive a motion to dismiss.”

Universal Health appealed to the Supreme Court, which agreed to resolve two issues: (1) whether the implied-certification theory is viable; and (2) if so, whether liability should be limited to situations where the violation affects an “express” condition of payment.

At oral argument, the Court appeared to accept implied certification as a viable theory, but struggled with how to determine FCA liability when certain regulations are violated. Chief Justice Roberts, in particular, expressed concern that a broad interpretation could expose companies to the heightened risk that whistleblowers could “come in after the fact” and turn noncompliance with obscure regulations into allegations of fraud.

Regardless of the position the Court takes, the decision in *Universal Health* will affect healthcare providers and other contractors who do business with the government. A decision in *Universal Health* is expected by late June 2016.