Implied Certification Liability under the FCA Could Expose Companies to Unforeseen Liability

The Supreme Court on April 19, 2016, heard oral arguments in *Universal Health Services v. United States ex rel. Escobar*, a case which will impact all government contractors—especially defense companies—as well as any health care company that accepts government funds such as Medicare or Medicaid. At issue in *United Health Services* is whether a False Claims Act claim can be alleged based on an "implied certification" theory of liability. Whereas the quintessential False Claims Act allegation involves goods or services delivered to the government that are not what the contractor represented them to be, under the implied certification theory, companies claiming payment from the government can be held liable for submitting a false claim if the good or service provided does not comply with any condition of payment imposed by statute, regulation, or contract—even if the government received what it paid for and the contractor made no representation regarding ancillary regulations. Because the False Claims Act provides treble damages and statutory penalties of over $5,000 per claim, the Supreme Court's decision in *United Health Services* has the potential to open the door to billions of dollars in litigation and liability.

The False Claims Act ("FCA") was enacted after the Civil War when contractors supplied the government with substandard goods such as rancid food and faulty weapons. The statute is considered largely punitive in nature; and because the government does not have adequate resources to detect and investigate all possible frauds, the FCA includes a *qui tam* provision that allows private individuals to bring FCA suits as whistleblowers—and to share in any eventual recovery. The FCA's recovery-sharing provision has spurred a cottage industry of plaintiffs' firms focused solely on bringing FCA claims against companies that accept government money. If the Supreme Court sanctions the "implied certification" theory of liability in *Universal Health Services*, plaintiffs' firms will have an entirely new avenue through which to allege misconduct.

There is no dispute regarding two types of false claims under the FCA: factually false claims and express certification claims. The former category is the prototypical false claim where goods or services are not what the contractor says they are. This happens, for example, when a defense contractor purports to supply the government with six-inch nails, but instead supplies the government with nails that are five inches long. Under the latter category—express certification claims—a claim for payment is considered false when a contractor specifically certifies compliance with a rule or regulation that it did not in fact follow. For instance, an assisted-living facility serving Medicare patients might expressly promise the government that nurses observe Medicare patients every eight hours, when instead nurses only check patients every 12 hours. In both situations, the claims submitted to the government for payment would be considered "false or fraudulent" under the FCA.

A third category of FCA liability is at issue in *United Health Services*: implied certification claims. Under this theory of liability, a government contractor can be found liable for submitting a false claim if the good or service provided violates some rule or regulation with which the contractor made no representation of compliance. In *United Health Services*, the government contractor—a hospital management company—

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provided services to a patient while purportedly violating Massachusetts statutes regarding staffing, supervision, and licensing requirements. The contractor made no certification to the government that it had necessarily complied with the relevant statutes—and indeed, there is no dispute that the hospital provided some services to the patient. Despite this, the First Circuit found the *qui tam* relator had alleged a viable FCA violation based on statutes neither party had previously cited. This outcome is troubling to companies that do business with the government because rules and regulations are often long, complicated, and difficult to interpret. Implied certification liability under the FCA could thus expose companies to unforeseen liability under obscure regulatory provisions.

Nationwide a deep split exists regarding the implied certification theory of liability. Some circuits—such as the First, Fourth, and D.C. Circuits—recognize liability for implied certification claims, whereas others—including the Second, Sixth, and Seventh Circuits—do not. Moreover, circuits that recognize implied certification liability vary in their application of the rule given that the rule or regulation to which a contractor has supposedly implied certification must also constitute a condition of payment. Some circuits require an explicit indication that a given statute, rule, or regulation is a condition of payment, whereas others have found conditions of payment without any textual basis in the underlying rule. These splits are reflected in the two questions before the court: (1) Is the implied certification theory of liability valid? And if so, (2) must a statute, rule, or regulation specifically state that it is a condition of payment in order to create implied certification liability under the FCA?

At oral argument, an active bench focused largely on principles of contract law, grilling counsel for both sides regarding what sorts of omission should constitute a violation of the FCA. In so doing, the justices drew countless comparisons to breaches of contract, asking counsel to elucidate why conduct constituting breach of a government contract would not also constitute a "false or fraudulent" claim for payment under the FCA. This is a potentially troubling development because lower courts have consistently recognized that the FCA is not the avenue through which to pursue ordinary breaches of contract.[1] Nevertheless, the justices also acknowledged the potential impact of recognizing implied certification liability—billions of dollars in litigation would surely result given the complexity of rules regulating government procurement and health care programs.

The court's decision will play a pivotal role in FCA litigation going forward. If the court recognizes an implied certification theory of liability, government contractors of all types—and defense contractors and health care companies in particular—will need to carefully review their policies, practices, and procedures in connection with any program that receives government funds. Under an implied certification theory of liability, an FCA violation can be alleged if a company violates *any* statute, rule, regulation, or contract provision that is considered a condition of payment. In the context of large-scale programs and nationwide providers, the number of false "claims" under the FCA can multiply quickly, and so too will potential liability.

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[1]See, e.g., *U.S. ex rel. Wilson v. Kellogg Brown & Root, Inc.*, 525 F.3d 370, 373 (4th Cir. 2008) ("If every dispute involving contractual performance were to be transformed into a qui tam FCA suit, the prospect

of litigation in government contracting would literally have no end."); *U.S. ex rel. Hopper v. Anton*, 91 F.3d 1261, 1265 (9th Cir. 1996) ("It appears to the court that the plaintiff is operating under a fundamental misconception as to the reach and scope of the FCA. It is not the case that any breach of contract, or violation of regulations or law, or receipt of money from the government where one is not entitled to receive the money, automatically gives rise to a claim under the FCA." (quoting lower court opinion)).

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