

Report on MEDICARE COMPLIANCE

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Door Is Open to More FCA Cases With High Court Ruling on Implied Certification

In a highly anticipated decision, the U.S. Supreme Court paved the way for more False Claims Act lawsuits that are based on regulatory violations. The high court's June 16 ruling in *Universal Health Services v. United States ex rel. Escobar* supports the theory of implied certification as a basis for a false claims case, which means the mere submission of a claim for payment carries with it the assurance that providers have complied with all conditions of payment, even if they haven't expressly certified compliance. But false claims cases won't necessarily be easy to make under the standard set forth in the Supreme Court decision.

According to the nation's highest court, liability can attach "when the defendant submits a claim for payment that makes specific representations about the goods or services provided, but knowingly fails to disclose the defendant's noncompliance with a statutory, regulatory, or contractual requirement."

Washington, D.C., attorney Jesse Witten says he can't decide "whether to celebrate or mourn this decision." *The reason:* while the Supreme Court accepted the implied certification theory, it also held that for a claim to be false, the falsity must be "material," and the judges adopted a stringent test for materiality. The "materiality" part of the decision will help lawyers defend some of their cases, while the court's failure to reject the implied certification theory will hurt other defenses, says Witten, who is with Drinker Biddle.

The unanimous decision came down in an appeal of a ruling from the U.S. Court of Appeals for the First Circuit, which held that Universal Health Services had violated Massachusetts Medicaid regulations on licensing and certification of mental health workers that "clearly impose conditions of payment" even though the conditions were not expressly stated. Julio Escobar had sued Universal Health Services under the False Claims Act over treatment his teenage daughter, Yarushka, received at Arbour Counseling Services, a satellite mental health facility in Lawrence, Mass., owned by a subsidiary of Universal Health Services. "In May 2009, Yarushka had an adverse reaction to a medication that a purported doctor at Arbour prescribed after diagnosing her with bipolar disorder. Her condition worsened; she suffered a seizure that required hospitalization. In October 2009, she

suffered another seizure and died. She was 17 years old," the decision states. It turned out that "of the five professionals who had treated Yarushka, only one was properly licensed."

Arbour billed Mass. Medicaid using payment codes that identified the therapy and counseling services provided. "By using payment and other codes that conveyed [information about the services and the staff qualifications to perform such services] without disclosing Arbour's many violations of basic staff and licensing requirements for mental health facilities, Universal Health's claims constituted misrepresentations," the court said. Any reasonable person, it explained, would assume that persons providing treatment at a mental health facility were qualified to perform these services.

In its decision, the Supreme Court set out two mandatory conditions under which the implied certification theory can be a basis for liability:

(1) "The claim does not merely request payment, but also makes specific representations about the goods or services provided"; and

(2) The defendant's failure to disclose noncompliance with material statutory, regulatory, or contractual requirements makes those representations misleading half-truths."

The U.S. courts of appeal for various circuits, which have been divided on the application of the theory, often analyze false claims cases on the basis of whether the underlying statute or regulation is a "condition of payment" or a "condition of participation." Most circuit courts have ruled that, if the underlying statute or regulation is a "condition of participation," no false claims liability attaches. Only if the court finds that the statute or regulation is a condition of payment may the False Claims Act case go forward.

'Condition of Payment' Restriction Was Rejected

But the Supreme Court rejected the "condition of payment" restriction. "We first hold that, at least in certain circumstances, the implied false certification theory can be a basis for liability. Specifically, liability can attach when the defendant submits a claim for payment that makes specific representations about the goods or

services provided, but knowingly fails to disclose the defendant's noncompliance with a statutory, regulatory, or contractual requirement. In these circumstances, liability may attach if the omission renders those representations misleading," the ruling states. "We further hold that False Claims Act liability for failing to disclose violations of legal requirements does not turn upon whether those requirements were expressly designated as conditions of payment. But we also conclude that not every undisclosed violation of an express condition of payment automatically triggers liability. Whether a provision is labeled a condition of payment is relevant to but not dispositive of the materiality inquiry.... What matters is not the label the Government attaches to a requirement, but whether the defendant knowingly violated a requirement that the defendant knows is material to the Government's payment decision."

FCA's Materiality Rule Is 'Rigorous, Demanding'

The Supreme Court characterizes the materiality requirement of the False Claims Act as "rigorous" and "demanding." The act defines "material" as "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property (31 U.S.C. §3729(b)(4))....A misrepresentation about compliance with a statutory, regulatory, or contractual requirement must be material to the Government's payment decision in order to be actionable under the False Claims Act. A misrepresentation cannot be deemed material merely because the Government designates compliance with a particular statutory, regulatory, or contractual requirement as a condition of payment. Nor is it sufficient for a finding of materiality that the Government would have the option to decline to pay if it knew of the defendant's noncompliance."

The Supreme Court rejected an expansive reading of the False Claims Act that said any statutory, regulatory, or contractual violation is material if the party knows that the government would be entitled to refuse payment if it knew of the violations. When evaluating materiality

under the False Claims Act, the court said, "the Government's decision to expressly identify a provision as a condition of payment is relevant, but not automatically dispositive. Likewise, proof of materiality can include, but is not necessarily limited to, evidence that the defendant knows that the Government consistently refuses to pay claims in the mine run of cases based on noncompliance with the particular statutory, regulatory, or contractual requirement. Conversely, if the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated, that is very strong evidence that those requirements are not material. Or, if the Government regularly pays a particular type of claim in full despite actual knowledge that certain requirements were violated, and has signaled no change in position, that is strong evidence that the requirements are not material."

Because the First Circuit had applied a different interpretation of the FCA requirements, the Supreme Court remanded the case back to the First Circuit to determine whether Escobar had sufficiently pleaded a FCA violation based on the high court's guidelines.

The Supreme Court's opinion, written by Justice Clarence Thomas, was an exercise of "common sense," Witten says. "It did not get hung up on all the False Claims Act jargon and legalistic formulas that the lower courts had adopted over the years. From that standpoint, I think it is welcome even though it does not answer all the questions or provide any black and white lines to follow." According to the high court, if the government regularly pays claims even though it knows some requirements have been violated, that is "very strong evidence that those requirements are not material." As a result, Witten says "we can expect now to see a great deal of discovery regarding government payment practices in the context of particular regulatory violations."

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