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## False Claims Act

### **Supreme Court Upholds False Claims Implied Certification Theory**

BY DANIEL SEIDEN

**T**he Supreme Court's unanimous decision adopting the implied certification theory of liability is a defeat for False Claims Act (FCA) defendants, but the pain is mitigated by the court's support for a "demanding" and "rigorous" materiality requirement that should protect some defendants (*Universal Health Servs. Inc. v. United States ex rel. Escobar*, U.S., No. 15-7, 6/16/16).

The court ruled that an implied certification claim is viable when a defendant makes specific representations about goods or services provided, but fails to disclose noncompliance with material requirements that make those representations misleading. It also said FCA liability for failing to disclose violations of legal requirements doesn't depend upon whether those requirements were expressly designated as conditions of payment.

"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," Justice Clarence Thomas said.

The court, however, reversed and remanded the First Circuit ruling, which also upheld implied certification, as too broad in its view of materiality.

Under a proper materiality standard, the government's decision to expressly identify a provision as a condition of payment is relevant but not automatically dispositive, the court said.

**Liability Expanded; Materiality Strengthened.** This decision is "bad news for federal contractors," Brian D. Miller, a shareholder at Rogers Joseph O'Donnell, told Bloomberg BNA.

The opinion says "you have to go to court to decide whether your claim is a 'false claim,'" he said. "The court highlighted two limitations to liability, materiality and intent, but no bright lines are provided."

He also said the discussion of materiality is confusing, and defendants "will still need to litigate whether supposed regulatory violations are 'material' even when they seem far removed from any condition for payment."

"The court seems content to let the lawyers and courts sort it all out," Miller said. "If the court is trying to stem abuse of the False Claims Act, this opinion

doesn't do it. It will benefit lawyers more than the public interest."

Eric S. Crusius, counsel at Miles & Stockbridge P.C., said the court attempted "to thread the needle and provide a bright line rule as to when the implied certification theory could apply, but instead the decision may have the effect of encouraging greater use of the False Claims Act by private parties against contractors because of its inherent ambiguity."

"Deciphering as to what is 'material' will be subject of vigorous litigation in federal courts around the country," Crusius said.

Roderick L. Thomas, a partner at Wiley Rein LLP, said the decision will reshape FCA litigation in ways that go well beyond implied certification cases. He said he expected the court to adopt some form of implied certification liability, but the court didn't issue as broad a decision as some thought possible.

The court "stressed a couple of limiting principles intended to cabin the potentially expansive scope of liability," he said.

"Those limitations should reverberate to cases beyond the implied certification realm," Roderick Thomas added. "The unanimous court emphasized that the 'demanding' and 'rigorous' requirements of materiality and scienter will be sufficient safeguards against potentially limitless liability.

"Whether that turns out to be the case in the lower courts, however, remains to be seen," he said. "It is, however, a striking blow to case law that has diminished the element of materiality in particular."

**Misleading Omissions.** The court upheld implied certification by stating that the FCA encompasses claims that make fraudulent misrepresentations, which include certain misleading omissions.

"When, as here, a defendant makes representations in submitting a claim but omits its violations of statutory, regulatory, or contractual requirements, those omissions can be a basis for liability if they render the defendant's representations misleading with respect to the goods or services provided," the court said.

The claims in this case, the court added, fell squarely into a rule that half-truths that omit critical qualifying information can be actionable misrepresentations.

Ultimately, the court concluded that implied certification cases can proceed if complaints satisfy at least two conditions: (1) a claim requests payment and 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 make those representations misleading half-truths.

**Express Condition Not Required.** The court also ruled that an implied certification case can be viable even if the government didn't designate an allegedly violated provision as a condition for payment.

Statutory, regulatory and contractual requirements aren't automatically material even if they are labeled conditions of payment, the court said, and a defendant can have knowledge that a provision is material without the government expressly calling it a condition for payment.

In addition, the court addressed Universal Health's concerns about "open-ended liability" under the FCA by stating that strict enforcement of the "rigorous" materiality and scienter requirements will protect defendants.

**Materiality Enforcement.** The court then addressed the First Circuit's flawed materiality standard, stating that materiality pertains to the government's decision to expressly identify a provision as a condition for payment, but that is not automatically dispositive.

Proof of materiality can include, but isn't necessarily limited to, evidence that a defendant knows the government consistently refuses to pay claims based on non-compliance with a certain requirement. However, if the government pays a particular claim despite knowing that certain requirements were violated, the court said, that is very strong evidence that those requirements aren't material.

Therefore, the court rejected the First Circuit's materiality view which provided that any statutory, regulatory or contractual violation is material so long as the defendant knows the government would be entitled to refuse payment if it knew of the violation.

Mark Troy, a partner at Crowell & Moring LLP in Los Angeles, said the court "significantly beefed up the materiality requirement by holding that the determination of whether the representation would likely influence government payment may be made using both objective and subjective standards."

The respondents may have raised a viable claim by alleging that the noncompliance with health facility requirements was so central to the provision of mental

health counseling that Medicaid wouldn't have paid these claims if it knew about the violations.

The courts below will resolve this materiality issue in the first instance, the court said.

Roderick Thomas added that, in a footnote, the court rejected that the notion of materiality is too fact-intensive for courts to dismiss cases on a motion to dismiss or at summary judgment.

The court "emphasized the need to sufficiently plead materiality under Federal Rules 8 and 9(b), thereby giving further teeth to the new materiality standard the court expects to be 'demanding' and 'rigorous.'"

**Staff Licensing Requirements.** The dispute involved a patient who died while getting treated by a mental health clinic that received reimbursement through Medicaid.

A qui tam action alleged that the defendants sought Medicaid payments while failing to comply with staff licensing requirements.

The district court dismissed the claims, but the First Circuit reinstated them, stating that the defendants knowingly misrepresented compliance with a material precondition of payment when it submitted a claim (19 HFRA 251, 4/1/15)

Universal Health Services Inc.'s petition to the Supreme Court asked whether the implied certification theory of liability is viable under the FCA, and if it is, whether a false claim can proceed if a violated rule or statute wasn't expressly identified as a condition for payment.

Donald B. Verrilli, Jr., Solicitor General, and others from the Justice Department, Washington, represented the government. David C. Frederick and others from Kellogg, Huber, Hansen, Todd, Evans & Figel PLLC, Washington; and Thomas M. Greene and others from Greene LLP, Boston, represented the respondent. Roy T. Englert, Jr., of Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP, Washington; and M. Miller Baker of McDermott Will & Emery LLP, Washington, represented the petitioner.

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