

Supreme Court Unanimously Backs ‘Implied Certification’ Liability under False Claims Act

By David R. Jimenez, Joseph C. Toris and Jeremy S. Schneider

June 17, 2016

Federal contractors may be subject to liability under the federal False Claims Act for violating regulatory requirements not expressly stated in their contracts, according to U.S. Supreme Court’s decision in *Universal Health Services v. Escobar*, No. 15-7 (June 16, 2016). The Court unanimously adopted the “implied certification” theory of liability under the FCA, under which companies implicitly certify compliance with applicable regulations when they seek payment from the federal government. However, the Court also set a relatively high standard for establishing liability under the Act in clarifying when purported misstatements are “material” to government reimbursement (a necessary element of an FCA claim).

False Claims Act Implied Certification

Under the False Claims Act, a company can be held liable for knowingly presenting a false or fraudulent claim for payment to the U.S. government. The plaintiffs’ bar has been arguing for some time now for the “implied certification” theory of liability, urging that submission of a claim for reimbursement can itself constitute an implied certification that a company is in compliance with applicable federal rules. They argue that this subjects contractors to liability even if they did not affirmatively make any representations regarding compliance and even though they were not required to provide any specific representations as a condition to receiving payment.

Facts of the Case

The False Claims Act contains a *qui tam* provision, which permits a private person (the “relator”) to bring the FCA lawsuit on behalf of the United States if that person has information that the named defendant has violated the Act.

In *Escobar*, the underlying *qui tam* complaint alleged that Yarushka Rivera received counseling services at Arbour Counseling Services, a mental health facility owned and operated by a subsidiary of Universal Health Services, Inc. While being treated, Rivera had an adverse reaction to a medication that an Arbour doctor prescribed her for bipolar disorder. Rivera’s condition deteriorated, and she eventually died of a seizure. Rivera’s parents later discovered that very few Arbour employees “were actually licensed to provide mental health counseling or authorized to prescribe medications or offer counseling services without supervision.”

Rivera’s family, acting as a relator, filed a *qui tam* suit alleging Universal (acting through Arbour) defrauded the Medicaid program by submitting reimbursement claims without disclosing serious violations of Massachusetts Medicaid regulations pertaining to staff qualifications and licensing requirements for these services. Thus, Universal allegedly defrauded Medicaid because it knowingly misrepresented its compliance with mental health facility requirements.

The District Court granted Universal’s motion to dismiss, holding the complaint failed to state a claim under the “implied false certification” theory of liability because none of the regulations violated was a condition of payment. The U.S. Court of Appeals for the First Circuit reversed, holding that “every submission of a claim implicitly represents compliance with relevant regulations.” The First Circuit further held the regulations provided per se evidence that compliance was a material condition of payment because the regulations expressly required facilities to adequately supervise staff.

Adopting Implied Certification

The Supreme Court unanimously adopted the “implied certification” theory of liability under the FCA, substantially increasing the potential liability of federal contractors in and outside of the healthcare

Meet the Authors



[David R. Jimenez](#)

Principal
Hartford 860-522-0404
[Email](#)



[Joseph C. Toris](#)

Of Counsel
Berkeley Heights 908-795-5220
[Email](#)



[Jeremy S. Schneider](#)

Associate
Washington, D.C. Region 703-483-8300
[Email](#)

context under the FCA.

The defense bar had argued that principles of fairness require the government to clarify which conditions are essential under a federal contract. Indeed, a broad interpretation of *Escobar* could mean that every time a company submits a request for payment from the federal government, it is committing fraud if it is simply out of compliance with ancillary regulations that are not specific conditions for payment.

That said, the Court tempered its decision by criticizing the government's overly broad view of the definition of "materiality" under the FCA. In the opinion, Justice Clarence Thomas held that "[d]efendants can be liable for violating requirements even if they were not expressly designated as conditions of payment," but, "[c]onversely, even when a requirement is expressly designated a condition of payment, not every violation of such a requirement gives rise to liability."

The statute defines materiality as something "having a natural tendency to influence, or be capable of influencing" government payment decisions. That definition is a far cry, the Court said, from the government's and the First Circuit's standard: "that any statutory, regulatory or contractual violation is material so long as the defendant knows that the government would be entitled to refuse payment were it aware of the violation." Ultimately, for that reason, the Court vacated the First Circuit's decision, remanding it to "apply the approach set out in this opinion" as to materiality. That approach, the Court said, is a "rigorous," multi-faceted analysis where the government's past practices in paying claims despite knowledge of non-compliance, as well as the "Government's decision to expressly identify a provision as a condition of payment [are] relevant, but not automatically dispositive."

Far-Reaching Implications

What does this decision mean for healthcare providers and federal contractors subject to the FCA? While *Escobar* fully adopts the "implied certification" theory, it underscores the importance of maintaining compliance with all federal rules and regulations governing any business.

One way to reduce False Claims Act liability is to implement a comprehensive compliance program. The government and plaintiffs often use a company's weak or non-existent compliance program to support the argument that the defendant acted with deliberate ignorance or reckless disregard of the allegedly unlawful conduct. Companies can use a comprehensive and well-implemented compliance program to demonstrate that even if unlawful conduct occurred, it was carried out by rogue actors, without company knowledge or acquiescence.

Jackson Lewis attorneys are available to answer inquiries regarding this case and other questions about developing a compliance program, the False Claims Act, and other laws relating to whistleblower activity. Jackson Lewis' Corporate Governance and Internal Investigations Practice includes former senior in-house corporate counsel, distinguished trial lawyers, and former government attorneys who offer a team approach to organizational compliance challenges. Our team regularly represents publicly traded and privately held organizations in a variety of matters involving corporate compliance, internal investigations, and whistleblower litigation.

©2016 Jackson Lewis P.C. This material is provided for informational purposes only. It is not intended to constitute legal advice nor does it create a client-lawyer relationship between Jackson Lewis and any recipient. Recipients should consult with counsel before taking any actions based on the information contained within this material. This material may be considered attorney advertising in some jurisdictions. Prior results do not guarantee a similar outcome.

Focused on labor and employment law since 1958, Jackson Lewis P.C.'s 950+ attorneys located in major cities nationwide consistently identify and respond to new ways workplace law intersects business. We help employers develop proactive strategies, strong policies and business-oriented solutions to cultivate high-functioning workforces that are engaged, stable and diverse, and share our clients' goals to emphasize inclusivity and respect for the contribution of every employee. For more information, visit <https://www.jacksonlewis.com>.