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PERSPECTIVE

One of government's principal sources of recovery at stake

By Joshua Hill

On Tuesday, the U.S. Supreme Court hears oral argument in *Universal Health Services Inc. v. United States ex rel. Escobar*, a False Claims Act (FCA) case with important implications for the health care industry and other government contractors. In Escobar, the court is considering the viability of the "implied certification" theory of falsity, which subjects persons to FCA liability even where there is no affirmative misstatement or misrepresentation. The theory underpins many FCA cases, particularly in the health care industry.

If the court invalidates the implied certification theory, one of the government's principal sources of financial recovery will be at risk. The stakes are high. In fiscal year 2015, the United States recovered $3.5 billion from FCA cases, including $1.9 billion from companies in the health care industry. It is no surprise then that — despite the lack of headlines — the Escobar case has garnered widespread attention in the health care industry, as reflected by the 26 amicus briefs filed by interested parties.

The FCA has become the primary means by which the government pursues individuals and entities (i.e., "persons") it believes have defrauded government programs. The FCA imposes civil liability on any person who, among other things, "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval." The FCA also includes a qui tam provision that allows private parties to bring suits on behalf of the government. A claim is, generally, a demand for payment. Moreover, the act reaches not only those who directly submit claims, but anyone who "causes" someone else to submit a false claim.

The key element of falsity is at the core of the *Escobar* case. The falsity element of a "false claim" can be satisfied by submissions that are "factually false" or "legally false." First, a paradigmatic example of a factually false claim might involve a contractor who knowingly sells fewer or different goods than called for by the arrangement with the government. After all, the FCA was passed in the wake of Civil War contractors passing off sawdust for gunpowder.

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Legally, on the other hand, false claims are divided between those based on "express certification" and "implied certification." The express certification theory of liability "simply means that the entity seeking payment certifies compliance with a law, rule or regulation as part of the process through which the claim for payment is submitted." *Ebeid ex rel. United States v. Lungwitz*, 616 F. 3d 993, 996 (9th Cir. 2010). For example, a commonly used Medicare claim form requires the signor to certify that the claim "complies with applicable Medicare and/or Medicaid laws, regulations, and program instructions for payment." CMS Form 1500.

A common implied certification theory of FCA liability posits that by merely submitting, for example, a claim for Medicare reimbursement, a person *impliedly certifies* that he or she has complied with all federal health care program rules and regulations that are deemed to be conditions of payment. Thus, the court does not need to look to the actual statements made in connection with the submission of the claim but rather examines whether the person's conduct in hindsight has violated any applicable laws, regulations, or rules. And, if so, the court can find that a false claim has been submitted. The U.S. Courts of Appeal for the 1st, 2nd, 6th, 9th, 10th and 11th Circuits have endorsed, in some variation, the implied certification theory. The 7th Circuit has rejected the implied certification theory. On the basis of this circuit split, the Supreme Court agreed to hear the *Escobar* case.

The primary question presented in *Escobar* is whether the implied certification theory of liability is viable. Universal Health Services, the petitioner, argues that the FCA does not permit liability under an implied certification theory because the statute requires an affirmative misstatement. Moreover, it argues that the implied certification theory "extends liability beyond traditional conceptions of fraud, making the FCA a blunt instrument to penalize noncompliance." Universal Health Services is supported by numerous industry groups, health care providers, and other interested parties.

Escobar, the whistleblower who brought the case, responds that the FCA does not require an express false statement, and besides, the implied certification theory is instrumental to the FCA's purpose to protect the federal treasury against fraud. Not surprisingly, the United States argues in support of Escobar, stating that an implicit representation of compliance is actionable, liability for fraud has not been historically limited to express false statements, and the implied certification theory furthers the purposes for which the FCA was enacted. The United States has been granted leave to participate in oral argument.

The Escobar qui tam suit arose out of tragic circumstances. Universal Health Services owned and operated a mental health services clinic in Massachusetts. The clinic participated in the state Medicaid program. Escobar's teenage daughter received treatment at the clinic over the course of two years. The suit alleges that her treatment was administered by a succession of unqualified, unlicensed, and unsupervised care providers until she suffered a fatal seizure.

The relevant Massachusetts regulations contemplate, in general terms, that staff members of such clinics will be qualified, maintain appropriate licenses, and have adequate supervision. Escobar filed the FCA case, alleging that in submitting claims for reimbursement, Universal Health Services falsely implied that its clinic was in compliance with these state regulations. The district court dismissed the case only to be reversed by the 1st Circuit, which found that the respondents had adequately pled a FCA cause of action based on an implied certification theory. It is difficult to discern how Justice Antonin Scalia's death will impact the outcome of the case. In the last landmark FCA case, *Kellogg Brown & Root Services Inc. v. United States ex rel. Carter*, 135 S. Ct. 1970 (2015), decided last May, the Supreme Court issued a unanimous decision that was seen as favorable, in part, for both qui tam relators and defendants. Tuesday's oral argument might signal the court's appetite for narrowing the reach of the FCA. And the court could very well limit the implied certification theory — without doing away with it — by restricting its use to circumstances in which compliance with laws, regulations, or other provisions that expressly state that compliance is a condition of payment. In all events, barring a 4-4 tie, the ruling could bring clarity and uniformity to the application of the FCA.

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