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SCOTUS Ruling May Increase FCA Whistleblower Claims

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The Supreme Court in a recent decision has potentially increased the number of claims available to whistleblowers under the False Claims Act (FCA). The decision in *Universal Health Services, Inc. v. United States ex rel. Escobar* resolved a dispute among lower courts as to whether whistleblowers can pursue claims under the "implied false certification" theory.

What Is the FCA?

The FCA is a statute that makes illegal the submission of fraudulent claims for payment to the government. Whistleblowers who are aware of such fraud can report those actions via a procedure known as a *qui tam* suit. These FCA whistleblowers are often employees of the companies submitting the false claims. If their information leads to a successful settlement or judgment for the government, the whistleblowers may be entitled to between 15 percent and 25 percent of that recovery. Recovery amounts can be quite high, as defendants found liable under the FCA face severe penalties, including three times the amount of the government's damages.

Implied False Certification Theory

Not all fraud against the government takes the form of express misrepresentations and lies. In some instances, a defendant's knowing omission of material information to the government can constitute fraud under the FCA. Under the Implied False Certification theory, a claim for government payment that fails to disclose the defendant's violation of a material statutory, regulatory or contractual requirement can constitute an FCA violation.

In *Universal Health Services*, for example, the whistleblower alleged that the defendant mental health facility submitted claims to the government for Medicaid reimbursements without disclosing that the staff providing the services for which it was seeking reimbursements were not qualified or licensed pursuant to applicable regulations. Justice Clarence Thomas, writing the opinion for a unanimous Court (a rare event these days), held that the Implied False Certification theory can be a basis for liability in certain circumstances.

The Court further defined the Implied False Certification theory by explaining which types of claims knowingly submitted without disclosing statutory, regulatory or contractual violations rise to the level of FCA liability. The non-disclosure to the government must be "material." This means that the information concealed must influence the government's decision whether to make the payment to the defendant.

Significantly, the Court clarified that materiality does *not* require the government to explicitly condition payment on compliance with designated statutes, regulations or contract provisions, a position maintained by some lower courts and vigorously argued by the *Universal Health Services* defendants. Conditions of compliance can be "material" to a government's payment decision even if the government had not previously identified them as such. Justice Thomas provided a helpful

illustration. If the government contracted for the purchase of guns from a defendant manufacturer, and the manufacture knew that the guns it provided did not actually shoot, it would be liable under the FCA, even if the government never spelled out that it would not pay if the guns failed to shoot.

While the Court does not require previously identified conditions of payment to be violated to succeed under the Implied False Certification theory, the Court is clear to call the materiality standard "demanding" and "rigorous." Under this standard, not every failure to disclose a statutory, regulatory or contractual violation will amount to FCA liability, even if knowledge of those violations would have technically provided the government with the option to refuse payment. The Court noted that there could even be circumstances where the government does designate compliance with statutory, regulatory or contractual requirements, and yet a defendant's failure to disclose noncompliance would not be material. For example, no FCA liability would attach if the government regularly pays such claims despite learning of similar non-compliance with the provision in question.

Looking Ahead

In sum, the Supreme Court has held that an Implied False Certification can serve as a valid basis of FCA liability, overturning some decisions of lower courts, like the 5th and 7th Circuit Court of Appeals, that found it could not. The Court further clarified that liability depends on the "materiality" of the information not disclosed to the government. Materiality depends not on whether or not the government previously designated compliance with a specific statutory, regulatory or contractual provision as a condition for payment, but whether the disclosure of the information would have influenced the government's decision to pay the defendant's claim.

It remains to be seen how the lower courts will now apply the Supreme Court's *Universal Health Services* decision to future FCA cases featuring Implied False Certification claims. What does and does not make up a material nondisclosure is likely to be a highly fact-specific inquiry. FCA whistleblowers aware of fraudulent requests for payment from the government, whether under an Implied False Certification theory or otherwise, should consult with attorneys to help assess the strength of those potential FCA claims.