Does the False Claims Act Permit Suits for ‘Implied False Certification’?

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On April 19, the U.S. Supreme Court will hear oral argument in a high-stakes False Claims Act case that will undoubtedly have a broad impact on government contractors and the health care industry. At issue in *Universal Health Services Inc. v. United States ex rel. Escobar* is the definition of when a government contractor has filed a false claim for payment from the government under the False Claims Act.

‘Implied False Certification’

Since the Civil War era, the False Claims Act has played a central role in combatting fraud against the government. It imposes liability on government contractors that knowingly present false or fraudulent claims for payment. The statute’s *qui tam* provision authorizes private individuals, or “relators,” to file suits against contractors if relators notice potential false claims that the government isn’t pursuing.

The issue in *Universal Health Services* concerns what it takes to prove that a contractor “knowingly” presented a “false or fraudulent” claim. Under the “implied false certification” theory, a government contractor or health care provider impliedly certifies that it has complied with all applicable statutory, regulatory and contractual requirements—even when those requirements are not express conditions of payment—each time the company submits a claim for payment to the government. If the contractor’s performance breached any applicable regulations or contract terms, then its claim for payment is “false” under that theory. The contractor could thus be held liable even if it has never explicitly vouched that it complied with all applicable legal requirements.

Nearly all of the federal courts of appeals have adopted this theory in some form. But a recent decision from the U.S. Court of Appeals for the Seventh Circuit categorically rejected the approach, creating a circuit split that has prompted uncertainty for government contractors and health care providers seeking reimbursement from the federal government. The Supreme Court will likely resolve that split when it decides *Universal Health Services*.

The Case

The issue in *Universal Health Services* arises from a tragic story. The petitioner, United Health Services, receives federal Medicaid funds to operate a mental health clinic in Massachusetts. It provided treatment to the relators’ daughter, who died after having an adverse reaction to medication that clinic staff had prescribed to her. An internal investigation revealed that the staff who had treated the young woman were unlicensed and

unsupervised, in violation of Massachusetts regulations. Regulatory authorities imposed a $1,000 fine and a plan of correction to rectify the clinic's supervision practices.

The parents, however, filed a *qui tam* suit under the False Claims Act. Even though there weren't any explicitly false statements in the clinic's claims to the government, the relators argued that the clinic had violated the False Claims Act by failing to comply with the applicable regulations. Although the district court dismissed the case, the U.S. Court of Appeals for the First Circuit reversed, holding that the relators' suit was proper under the implied false certification theory.

Although all of the parties agree that Universal Health Services failed to comply with the applicable regulatory requirements for licensure and supervision, they disagree about whether the clinic's claims to the government for reimbursement legally constitute fraud under the False Claims Act. According to the relators (whom the federal government supports), a claim is "false" when a contractor requests payment for services that failed to comply with the applicable regulations. Likewise, the relators argue, a claim is "fraudulent" when the claim omits material facts about the contractor's departure from the applicable law. Universal Health Services, on the other hand, argues that a claim cannot be "false" unless it explicitly states something that is not true. For example, if the contractor actually provided the services for which it seeks payment and the claim does not contain any affirmative misstatements about those services, then the claim cannot be actionable under the False Claims Act.

Universal Health Services draws support from numerous *amici*, many from the health care industry. They argue that it is unfair to impose False Claims Act liability for each departure from the complex regulatory schemes that govern the health care industry. Indeed, implied certification claims are often based on vague and highly technical regulatory and statutory standards. False Claims Act liability for a pharmacy, for example, could hinge on Medicaid and Medicare Part D requirements that treatments be "medically necessary" or "reasonably necessary." These capacious requirements can often make it difficult for companies to gauge compliance before litigation.

The Potential Impact of the Decision

Ultimately, there's a lot at stake for government contractors, for the healthcare industry and for the *qui tam* plaintiff's bar. Even though the potential damages award in *Universal Health Services* is relatively low, many False Claims Act cases seek hundreds of millions of dollars. The statute imposes treble damages and mandatory statutory penalties for each false claim. *Qui tam* suits can be particularly lucrative for a successful relator, who has a statutory guarantee of recovering between 15 to 30 percent of the proceeds of the judgment or settlement. Over the past three years, in fact, relators have recovered nearly $1.5 billion in False Claims Act cases. Contractors and relators therefore have a lot to gain—and lose—depending on the outcome of this case.

If the court embraces the implied certification theory, it could significantly expand contractors' potential exposure to False Claims Act liability. Indeed, under that theory, a contractor could be liable even where it did not make an affirmative false statement on a claim and even for minor, technical violations of statutes, regulations and contract terms. Nevertheless, if the court does adopt the implied certification theory, there are still other statutory backstops that may limit the act's application. For example, the statute authorizes

the government to intervene and take over *qui tam* suits that the government finds meritorious. And in practice, most False Claims Act cases are voluntarily dismissed if the government chooses not to intervene. The act also includes "knowledge" and "materiality" requirements that will likely receive greater attention in the courts if the Supreme Court adopts the implied certification theory.

Conversely, if the court rejects the implied certification theory, it could greatly reduce the number of False Claims Act suits filed. Moreover, government contractors and health care providers would be able to more accurately assess potential False Claims Act liability by focusing on the explicit certifications in payment claims.

To be sure, government contractors will not be immune from scrutiny if the implied certification theory is rejected. A range of regulatory procedures and administrative mechanisms will still be available to enforce compliance with government funding programs. These remedies include rejecting or adjusting an invoice for payment, administrative remedies and penalties, breach of contract actions, suits under other fraud statutes such as the Anti-Kickback Statute and criminal prosecution. The government can also demand additional information, exercise inspection rights or order corrective measures. Finally, a contractor could face debarment—a ban on future government contracts. Thus, regardless of the outcome of this case, companies should continue striving to comply fully with all applicable statutory, regulatory and contractual requirements.

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