Supreme Court Recognizes Implied Certification Claims, With Limits

On June 16, 2016, the Supreme Court issued an opinion in *Universal Health Services v. United States ex rel. Escobar,* a case in which the court evaluated the viability of the "implied certification" theory of liability under the False Claims Act. As described in a **previous client alert**, the *Universal Health Services* case had the potential to drastically impact the liability of government contractors, especially defense and health care companies, under the False Claims Act.

In an unanimous opinion authored by Justice Thomas, the Supreme Court recognized the validity of implied certification claims, but imposed very strict standards for proving such a claim. Short of rejecting implied certification claims altogether, the court's opinion provides a good outcome for government contractors. Future False Claims Act defendants can make strong and compelling arguments against implied certification allegations using the rubric and language of the *Universal Health Services* opinion.

At issue in *Universal Health Services* was the viability of "implied certification claims" under the False Claims Act. Under this theory of liability, a government contractor could be held liable for submitting false claims to the government if the good or service underlying the claim violated some relevant statute, rule, or regulation—even if the claim for payment made no representation regarding compliance with other statutes, rules, or regulations. For instance, a hospital serving Medicare patients might submit a claim for payment after a patient visits a doctor. Some obscure Medicare regulation might require that doctors attending to Medicare patients wear white coats. If the doctor did not wear a white coat during the visit and the hospital makes no representation to the government regarding whether the doctor wore a white coat, has the hospital submitted a false claim? This is the sort of liability at issue in *Universal Health Services*. Prior to the court's opinion, a deep circuit split existed regarding the viability of implied certification claims generally and how to prove such a claim. The court's opinion settles the split and provides useful language for defense attorneys.

According to the court, a false implied certification claim is made to the government when "the defendant knowingly violated a requirement that the defendant knows is material to the Government's payment decision." Slip op. at 2.[1] There are two important takeaways in this holding: first, to be liable, a defendant must knowingly violate a rule, regulation, or statute; and second, the defendant must also know that the rule, regulation, or statute is material to the government's decision to pay the claim.

The first consideration—that a provision or rule must be knowingly violated—is noncontroversial. The False Claims Act has a longstanding scienter requirement whereby the relevant violation must have been "knowing" or committed "knowingly." 31 U.S.C. § 3729(b)(1)(A). *Accord* slip op. at 3. The second aspect of the court's holding—that the rule violated must be "material" to the government's payment decision and that materiality must be known by the defendant—opens a new line of defense using the False Claims Act's hitherto neglected "materiality" requirement. 31 U.S.C. § 3729(b)(4). Materiality under the False Claims Act has frequently been either overlooked or conflated with other aspects of the Act. This will change in the wake of *Universal Health Services.*

410 17th Street, Suite 2200
Denver, Colorado 80202

The Supreme Court's opinion explicitly states that it intends to "clarify how th[e] materiality requirement should be enforced," slip op. at 14, and in so doing, provides a promising avenue by which to defend baseless False Claims Act allegations.[2] A misrepresentation is material if it would have the tendency to impact the government's payment decision. Slip op. at 14. Determining whether a rule or regulation is material requires an examination of fact-intensive considerations. Moreover, it must be shown that a defendant knew the government viewed a particular rule or regulation as material to payment.

Under the court's interpretation, materiality is not coextensive with the government's conditions of payment. That is, a rule, regulation, or statute is not necessarily material to the government's decision to pay a claim simply because compliance is a condition of payment. *See* slip op. at 15. Instead, courts must now examine factual evidence—including the government's past conduct—to determine whether a given rule, regulation, or statute is material for implied certification purposes. As the court wrote:

In sum, when evaluating materiality under the False Claims Act, the Government's decision to expressly identify a provision as a condition of payment is relevant, but not automatically dispositive. Likewise, proof of materiality can include, but is not necessarily limited to, evidence that the defendant knows that the Government consistently refuses to pay claims in the mine run of cases based on noncompliance with the particular statutory, regulatory, or contractual requirement. Conversely, if the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated, that is very strong evidence that those requirements are not material. Or, if the Government regularly pays a particular type of claim in full despite actual knowledge that certain requirements were violated, and has signaled no change in position, that is strong evidence that the requirements are not material.

Slip op. at 16. Thus, while the court has opted to recognize implied certification claims of liability under the False Claims Act, the court has directed litigants to focus on facts and conduct when determining whether an implied certification was material to payment. This fact-intensive inquiry can provide defendants with a fruitful avenue of defense, especially in complex government programs in which the government processes and pays large volumes of claims. Conversely, companies must remain mindful of government payment policies and should seek clarification whenever possible. The *Universal Health Services* opinion creates a new avenue of attack for litigants who allege False Claims Act violations, but the Supreme Court has set the standard of proof sufficiently high so as to mitigate the risk of baseless liability.

Richard B. Benenson
Shareholder
rbenenson@bhfs.com
303.223.1203

Joshua A. Weiss
Associate
jweiss@bhfs.com
303-223-1268

[1] *Put another way elsewhere, the court held that "the implied certification theory can be a basis of liability, at least where two conditions are satisfied: first, the claim does not merely request payment, but also makes specific representations about the goods or services provided; and second, the defendant's failure to disclose noncompliance with material statutory, regulatory, or contractual requirements makes those representations misleading half-truths." Slip op. at 11.*

[2] *In addition to emphasizing the fact-intensive nature of establishing materiality, the Supreme Court provided useful language to underscore the importance of this element. See, e.g., slip op. at 14 ("[The scienter and materiality] requirements are rigorous.") & 15 ("The materiality standard is demanding.").*