Government Contracts
& Disputes

March 22, 2016

Supreme Court to Hear False Claims Act "Implied Certification" Appeal

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The U.S. Supreme Court will hear oral argument on April 19, 2016, in United Health Services v. United States ex rel. Escobar, *No. 15-7, a case likely to resolve the current split among federal appellate courts on the so-called "implied certification" theory of liability under the federal False Claims Act (FCA).*

The FCA imposes significant financial penalties for "knowingly present[ing], or caus[ing] to be presented, a false or fraudulent claim for payment or approval."[1] The FCA also prohibits contractors from making false statements "material to a false or fraudulent claim."[2] The FCA has long been the Government's favorite enforcement tool against contractors it believes have committed fraud in connection with a federal contract.

The FCA has been fairly uniformly understood to create liability for a contractor who expressly certifies compliance with certain requirements that are material to payment when in fact the contractor has not complied with such requirements. If, for example, a contractor specifically certified compliance with the Service Contract Act, and the contractor was not in fact compliant with that statute, the contractor potentially could face liability for "express" false certification in connection with its sales to the Government.[3]

The federal appellate courts have divided, however, regarding FCA liability for "implied" false certification—or liability where a contractor is out of compliance with a statute, regulation or contract requirement, but the

[1] 31 U.S.C. § 3729(a)(1)(A).

[2] 31 U.S.C. § 3729(a)(1)(B).

[3] We note that the Fraud Enforcement Recovery Act of 2009 amended the FCA to clarify that subcontractors may be held in violation of the FCA even though their invoices are not submitted directly to the Government. Prime contractors, however, also are at risk in the event that the Government believes they did not act reasonably in invoicing the Government for certain subcontractor costs. To protect themselves from liability resulting from false claims submitted by their subcontractors, prime contractors usually (and should) require certifications from subcontractors commensurate with the certifications required under the prime contract. Based upon the implied certification issue discussed in this article, prime contractors should increase their efforts to require subcontractors to certify the accuracy and completeness of all invoices and the compliance of their performance with subcontract requirements. The Supreme Court's decision on implied certification will further inform best practices in this area.

contractor does *not* expressly certify such compliance. If, hypothetically, a contractor was required to comply with the Service Contract Act but never specifically certified such compliance, and later it was revealed that the contractor knowingly failed to comply with that statute or any of its numerous associated regulations, the government might rely on the "implied certification" theory to impose FCA liability on the contractor merely for submitting an invoice requesting payment at the time of the non-compliance.

The federal contractor community (including many health care providers) has long complained that implied certification creates undue and unjustified liability—with the potential for the government to escalate minor statutory, regulatory or contractual non-compliances into FCA actions. Last year, the U.S. Court of Appeals for the Seventh Circuit agreed and rejected the theory altogether, writing that it would be "unreasonable for us to hold than an institution's continued compliance with the thousands of pages of federal statutes and regulations incorporated by reference into the [government contract in question] are conditions of payment for purposes of liability under the FCA."[4] The Seventh Circuit, however, currently holds the minority view. Several federal appellate courts—including the First, Second, Third, Fourth, Sixth, Ninth, Tenth, Eleventh and D.C. Circuits—have recognized at least some form of implied certification liability under the FCA.

The First and Fourth Circuits appear to have adopted the broadest view of implied certification liability, holding effectively that any knowing, material non-compliance with government regulations or contract requirements potentially gives rise to FCA liability.[5] *Escobar*, a case originating in the First Circuit, involved allegations that a mental health clinic violated the FCA when it sought Medicaid reimbursement despite failing to comply with certain regulations pertaining to staffing and employee supervision. Reversing the district court's dismissal of the complaint,[6] the First Circuit held that "alleged noncompliance with regulations pertaining to supervision ... provided sufficient allegations of falsity to survive a motion to dismiss."[7] Other circuits have limited implied certification liability to circumstances in which the non-compliances in question were clear pre-conditions for payment.

As its Brief forecasts, petitioner Universal Health Services, Inc. first will ask the Supreme Court to rule that the FCA does not permit *any* liability based on an implied certification theory, "under which claims that contain no affirmative misstatements are deemed to be 'false or fraudulent.'"[8] Petitioner's secondary argument contends that any application of implied certification liability must be "limited to circumstances in which a contractor has violated a statutory, regulatory, or contractual provision that is expressly designated as a precondition to payment." Respondents, by contrast, argue that "[k]nowingly billing the government for services that fail to meet material conditions falls squarely within the scope" of the FCA and that "the relevant payment condition need not bear a formal label as long as it is material and the defendant

[4] *United States v. Sanford-Brown, Ltd*., 788 F.3d 696, 711 (7th Cir. 2015), *petition for cert. filed*, No. 15-729 (U.S. Dec. 2, 2015).

[5] *See, e.g., United States ex rel. Badr v. Triple Canopy, Inc*., 775 F.3d 628, 636-37 (4th Cir. 2015), *petition for cert. filed*, No. 14-1440 (U.S. June 5, 2015) ("[W]e hold that the Government pleads a false claim when it alleges that the contractor, with the requisite scienter, made a request for payment under a contract and 'withheld information about its noncompliance with material contractual requirements.'"). The D.C. Circuit also appeared to adopt this view in *United States v. Science Applications Int'l Corp*., 626 F.3d 1257, 1269 (D.C. Cir. 2010) (holding that, to impose FCA liability, the government "must show that the contractor withheld information about its noncompliance with material contractual requirements. The existence of express contractual language specifically linking compliance to eligibility for payment may well constitute dispositive evidence of materiality, but it is not, as SAIC argues, a necessary condition."). However, the D.C. Circuit backed away from this approach last year in *United States ex rel. Davis v. District of Columbia*, 793 F.3d 120, 125 (D.C. Cir. 2015) ("Not all failures to comply with a federal statute or regulation expose a provider to liability under the False Claims Act. ... a defendant may be held liable under the False Claims Act for falsely certifying it complied with a statute or regulation only if ' certification was a prerequisite to the government action sought.'").

[6] The district court had opined that, although, the allegations against the clinic "raise serious questions about the quality of care provided[,] ... the False Claims Act is not the vehicle to explore those questions."

[7] *United States ex rel. Escobar v. Universal Health Servs., Inc*., 780 F. 3d 504, 514 (1st Cir. 2015), *cert. granted*, No. 15-7 (U.S. Dec. 4, 2015).

[8] Petitioner's Brief is available here.

demands payment while knowingly violating it ... Nothing in the FCA's text supports restricting it to violations of expressly designated payment conditions."[9]

Escobar represents an important opportunity for the Supreme Court to bring much-needed uniformity to an extremely high-stakes but heretofore equally unpredictable and inconsistent area of law. Needless to say, the contractor community should be following the case closely. Stay tuned for our coming Alerts following the oral argument scheduled for April 19, 2016, and on the Supreme Court's ultimate decision, which may be issued thereafter at any point during the current 2016 Supreme Court term, which ends on October 2, 2016.

If you have any questions about the content of this alert please contact the Pillsbury attorney with whom you regularly work, or the authors below.

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[9] Respondent's Brief is available here.