HEALTH CAPITAL Topics
Volume 9
Issue 7
July 2016
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"*Implied False Certification*" Theory Under False Claims Act Upheld by Supreme Court

On June 16, 2016, in *Universal Health Services, Inc. v. United States ex rel. Escobar* (*Escobar*), the *Supreme Court of the United States* (SCOTUS) held unanimously that the "*implied false certification*" theory, in certain circumstances, may serve as a basis for liability under the *False Claims Act* (FCA).[1] Under the *implied false certification* theory, a defendant implicitly certifies compliance with all conditions of payment upon submission of a claim to the government.[2] In the opinion authored by Associate Justice Clarence Thomas, SCOTUS held that the implied false certification theory is applicable when two conditions are satisfied:

> (1) "*the claim does not merely request payment, but also makes specific representations about the goods or services provided*" [emphasis added]; and,
>
> (2) "*the defendant's failure to disclose noncompliance with material statutory, regulatory, or contractual requirements makes those representations misleading half-truths.*"[3] [Emphasis added]

Notably, SCOTUS held that the misrepresentation "*must be material to the Government's payment decision in order to be actionable*" [emphasis added],[4] leaving many legal observers unsure as to the definition of "*material*" under this decision.[5] This *Health Capital Topics* article will discuss the rationale of the Court in *Escobar*, as well as, the implications of the implied false certification theory and judicial decisions in future FCA actions.

The implied false certification theory involves claims that are fraudulent not because of an affirmative misrepresentation, but rather, "*if that claim fails to disclose the defendant's violation of a material statutory, regulatory, or contractual requirement…the defendant has made a misrepresentation that renders the claim 'false or fraudulent' under [Section] 3729(a)(1)(A)*" of the FCA.[6] Plaintiffs in the past have pursued FCA cases based on either "*factual falsity*" or "*legal falsity*."[7] *Factually false* claims provide a claim for federal reimbursement regarding goods or services that are never provided, and *legally false* claims are predicated upon a misrepresentation under which the party submitting the claim has been found to have "*implied*" that it complied with underlying legal requirements.[8]

In *Escobar*, the relators argued that *United Health Services* (UHS) made *legally false* claims and should be found liable under the implied false certification theory.[9] As discussed in the January 2016 issue of *Health Capital Topics*, *Escobar* involved a *qui tam* action brought by the parents (relators) of a teenage girl who was treated by several unlicensed providers at a mental health center owned and operated by UHS in Lawrence, Massachusetts.[10] The relators' daughter had an adverse reaction to a medication that was prescribed to her for bipolar disorder.[11] Following a series of seizures, the relators' daughter died.[12] Following her death, the relators discovered that only one of the five professionals who treated their daughter was properly licensed.[13] Instead of ensuring supervision of the unlicensed staff, the medical center misrepresented the staff's qualifications and submitted claims for reimbursement for services provided that the staff members were not licensed or qualified to do.[14] Consequently, the relators brought a *qui tam* action against UHS, alleging that the entity violated the FCA under an "*implied false certification theory of liability*" by not providing adequate licensed staff to provide mental health services.[15] The U.S. Court of Appeals for the First Circuit applied the implied false certification theory, ruling in favor of the relators, and stated that UHS violated regulations that "*clearly impose conditions of payment.*"[16] The Court noted that UHS "*implicitly communicated that it had conformed to the relevant program requirements, such that it was entitled to payment.*"[17] The First Circuit opined:

> "*…a healthcare provider's noncompliance with conditions of payment is sufficient to establish the falsity of a claim for reimbursement, we need not address here whether the [FCA] embraces a distinction between conditions of payment and conditions of participation.*"[18]

SCOTUS granted *certiorari* to answer: (1) whether the implied false certification theory under the FCA can provide a basis for liability; and, if so, (2) whether it could only apply if "*[the provider] fails to disclose the violation of a contractual, statutory, or regulatory provision that the Government expressly designated a condition of payment.*"[19] In answering the first question, SCOTUS held that the implied false certification theory can provide a basis for liability "*at least where two conditions are satisfied*."[20] First, the claim must specifically represent the goods or services provided, and not purely request payment.[21] Second, if the defendant

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fails to disclose "*noncompliance with material statutory, regulatory, or contractual requirements*," then those representations are deemed "*misleading half-truths*."[22] In answering the second question, SCOTUS held that the FCA does not limit liability to misrepresentations relating to express conditions of payment; however, SCOTUS also noted that "*…not every undisclosed violation of an express condition of payment automatically triggers liability.*"[23] SCOTUS elaborated by stating, "*[w]hat matters is not the label that the Government attaches to a requirement, but whether the defendant knowingly violated a requirement that the defendant knows is material to the Government's payment decision.*"[24] [Emphasis added]

SCOTUS highlighted that misrepresentations must be material to the Government's decision to pay because the FCA is not an "*all-purpose antifraud statute…or a vehicle for punishing garden-variety breaches of contract or regulatory violations*."[25] SCOTUS narrowed the First Circuit's definition of materiality, i.e., "*…that any statutory, regulatory, or contractual violation is material so long as the defendant knows that the Government would be entitled to refuse payment were it aware of the violation*."[26] [Emphasis added] SCOTUS specifically noted that an FCA violation based on the implied false certification theory does not exist "*…merely because the Government designates compliance with a particular statutory, regulatory, or contractual requirement as a condition of payment*", or upon a finding that "*…the Government would have the option to decline to pay if it knew of the defendant's noncompliance*."[27] Rather, SCOTUS held that "*…materiality 'look[s] to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation[,]*" such as in tort law, where materiality can exist in a matter "*… '[if] a reasonable man would attach importance to [it] in determining his choice of action in the transaction'…"*[28] Based on this difference, SCOTUS vacated the judgment of the First Circuit, and remanded the case to the lower courts for reconsideration.[29]

While SCOTUS confirmed that the implied certification theory may serve as a basis for liability under the FCA,[30] thus resolving the circuit split, many legal experts noted that *Escobar* left open the question of what satisfies the standard for materiality under the FCA in the healthcare industry. Due to the lack of a more definitive, bright-line ruling, many legal experts believe that lower courts will have to provide additional guidance regarding *Escobar* and the definition of "*material*" before the full impact of the decision will be felt and understood by those who may be subject to the FCA, such as healthcare providers.[31] With the uncertainty surrounding what constitutes a violation of the FCA, coupled with the recent rise in the maximum amount of fines per claim under this law,[32] healthcare providers may find it beneficial to follow any continuing development of the implied certification theory under the FCA among the lower courts applying the updated framework following *Escobar*, as well as continue to monitor compliance with applicable regulatory thresholds.

1 "Universal Health Services, Inc. v. United States ex rel. Escobar" 579 U.S. ___ (2016), p. 1.
2 *Ibid*, p. 1.
3 *Ibid*, p. 11.
4 *Ibid*, p. 14.
5 "U.S. Supreme Court Adopts a Limited Liability Certification Theory of FCA Liability, and Establishes a Robust New Materiality Requirement" By Colin E. Wrabley, et al., ReedSmith, June 17, 2016, https://www.reedsmith.com/US-Supreme-Court-Adopts-a-Limited-Implied-Certification-Theory-of-FCA-Liability-and-Establishes-a-Robust-New-Materiality-Requirement-06-17-2016/ (Accessed 7/13/2016).
6 "Universal Health Services, Inc. v. United States ex rel. Escobar" 579 U.S. ___ (2016), p. 1.
7 "SCOTUS to Weigh in on Definition of '*False*' Under FCA" Health Capital Topics, Health Capital Consultants, Vol. 9, No. 1 (January 2016); "Supreme Court Validates 'Implied Certification' Liability Under False Claims Act" By C. Joël Van Over, et al., Pillsbury Winthrop Shaw Pittman LLP, June 23, 2016, http://www.pillsburylaw.com/siteFiles/Publications/AlertJune2016GovConSupremeCourtValidatesImpliedCertificationLiabilityUnderFalseClaimsAct.pdf (Accessed 7/11/2016).
8 HCC, January 2016; Over, et al., June 23, 2016; Wrabley, et al., June 17, 2016.
9 579 U.S. ___ (2016), p. 1, 5-6.
10 *Ibid*, p. 4; HCC, January 2016.
11 579 U.S. ___ (2016), p. 4.
12 *Ibid*.
13 *Ibid*.
14 *Ibid*, p. 5.
15 *Ibid.*; HCC, January 2016.
16 "United States ex rel. Escobar v. United Health Services, Inc." 780 F.3d 504, 513, 517 (1st Cir., 2015); HCC, January 2016.
17 780 F.3d 504, 514 (1st Cir., 2015).
18 *Ibid*, 517 (1st Cir., 2015).
19 579 U.S. ___ (2016), p. 8, 11-12; HCC, January 2016.
20 579 U.S. ___ (2016), p. 11.
21 *Ibid*.
22 *Ibid*.
23 *Ibid*, p. 11-12.
24 *Ibid*, Syllabus, p. 3.
25 *Ibid*, p. 15.
26 *Ibid*, p. 17; 780 F.3d 504, 514 (1st Cir., 2015).
27 579 U.S. ___ (2016), p. 15-16.
28 *Ibid*, p. 14-15.
29 *Ibid*, p. 18.
30 *Ibid*, p. 11.
31 Over, et al., June 23, 2016; "Supreme Court Adopts Implied Certification Theory 'in certain circumstances'" By Rebekah N. Plowman, Jones Day, June 17, 2016, http://www.jonesday.com/files/Publication/7aff603d-d8f8-432f-a241-39742452bd3c/Presentation/PublicationAttachment/e87bf29b-1937-4617-b241-64434bb7a0ed/AHLA%20Weekly%20June%2017.pdf (Accessed 7/11/2016); "UHS v. U.S. ex rel. Escobar: Supreme Court Refines 'Implied Certification' Theory of False Claims Act Liability" By Kirk Ogrosky, et al., Arnold & Porter, June 17, 2016, http://www.arnoldporter.com/en/perspectives/publications/2016/06/uhs-v--us-ex-rel-escobar (Accessed 7/11/2016).
32 "Civil Monetary Penalties Inflation Adjustment" Federal Register, Vol. 81, No. 126 (June 30, 2016) p.42491, p. 42494. This topic will be further discussed in a forthcoming Health Capital Topics article.

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