Supreme Court to rule on implied certification liability under the False Claims Act

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Earlier this month, the United States Supreme Court announced that it will hear oral arguments in Universal Health Services, Inc. v. United States ex rel. Escobar, No. 15-7, during the current term. The case is significant, as it will decide the validity of the "implied certification" theory of liability under the False Claims Act (FCA), which has been rejected by at least one circuit court and approved to varying degrees by several others. This theory, which has greatly expanded the scope of FCA liability, has been utilized with increasing frequency by the government and private relators in recent years.

The FCA imposes liability for knowingly presenting or causing to be presented a false or fraudulent claim for payment to the federal government or for making a false record or statement material to a false or fraudulent claim for payment. Because the statute does not define "false or fraudulent," federal courts have adopted varying theories of falsity, including the "implied certification" theory. Under this theory, a federal contractor may be subject to FCA liability when it submits a claim for payment to the government while it is in violation of a contractual provision, statute, or regulation. The contractor is subject to FCA liability even though it never communicated to the government that it was in compliance with the applicable contract provision, statute, or regulation. Courts adopting the implied certification theory have held that such a contractor implied that it was in compliance when it submitted the claim for payment to the government.

The circuits that have adopted the implied certification theory differ as to whether the underlying condition of payment must be expressly identified as such, or whether the contractual provision, statute, or regulation may be a condition of payment even if it does not state that payment from the government is conditioned on compliance. The Second and Sixth Circuits require an express condition of payment, while the Fourth and District of Columbia Circuits permit implied conditions of payment. In Universal Health Services, the First Circuit joined the Fourth and D.C. Circuits, permitting an FCA claim to proceed based on the petitioner's alleged noncompliance with state Medicaid regulations in the absence of an express condition of payment.

The split among the various circuits has resulted in ambiguity for contractors providing services to the federal government across multiple jurisdictions. Further, as the petitioner in Universal Health Services argued in its petition for certiorari, the circuits that have adopted implied certification based upon implied conditions of payment have not articulated a clear standard for determining when a contractual provision, statute, or regulation is a condition of payment. The Supreme Court will first decide whether implied certification is a valid theory of falsity under the FCA. If it answers that question in the affirmative, it will then decide whether implied conditions of payment may give rise to FCA liability or whether conditions of payment must be expressly identified as such in the applicable contractual provision, statute, or regulation.

Oral arguments in Universal Health Services are likely to take place in March or April 2016, and a decision should be issued by the close of the Supreme Court's term in June. We will publish a separate bulletin analyzing the Court's decision.

Authors