

Health Law Alert: U.S. Supreme Court Clarifies Basis for Liability Under the False Claims Act

June 16, 2016

In a unanimous decision issued on June 16 in *Universal Health Services, Inc. v. United States ex rel. Escobar*, 579 U.S. ____ (2016), the United States Supreme Court held that plaintiffs may rely on the so-called "implied false certification theory" as a basis for liability under the federal False Claims Act. Under that theory, when a defendant submits a claim to the government, that defendant impliedly certifies compliance with all conditions of payment, and the failure to disclose noncompliance with a material statutory, regulatory, or contractual requirement renders the claim false for purpose of liability under the FCA.

The *Escobar* Case: Relevant Facts and Procedural Background

Yarushka Rivera, a teenaged beneficiary of Massachusetts's Medicaid program, received counseling and other mental health services for five years at Arbor Counseling Services, a facility owned by Universal Health. During that period of time, Yarushka was treated by five medical professionals at Arbor. Yarushka had an adverse reaction to medication prescribed for her by a purported doctor at Arbor for treatment of bipolar disorder. Her condition worsened, she suffered a seizure requiring hospitalization, and died.

Following Yarushka's death, a counselor at Arbor told her parents that few of Arbor's staff were licensed to provide counseling and that supervision at the facility was poor. The parents also learned that, of the five professionals who had treated their daughter, only one was properly licensed. They also found out that the person who had prescribed the medication, although held out as a psychiatrist, was, in fact, a nurse who was not authorized to prescribe medicine without supervision.

The parents filed a complaint in federal district court in Massachusetts alleging that Universal had violated the FCA by submitting claims for Medicaid reimbursement that asserted that certain services had been provided but without disclosing pervasive violations of regulatory requirements relating to staff qualifications and licensing. The district court dismissed the complaint on the basis that none of the violations alleged was a condition of payment.

The First Circuit reversed, holding that, in submitting a claim, Universal impliedly represented that it had satisfied all requirements necessary to be entitled to payment. The First Circuit further found that compliance with a statutory, regulatory, or contractual requirement can be a condition of payment if



expressly designated as such or by implication.

Universal appealed the First Circuit's decision to the Supreme Court.

Fraudulent Omissions May Be a Basis for FCA Liability

Although the FCA imposes liability on "any person who . . . knowingly presents, or causes to be presented, a false or fraudulent claim," the statute does not define what constitutes a "false" or "fraudulent" claim. Absent such a definition, the Supreme Court looked to the common law of fraud, pursuant to which a party may be found to have made a fraudulent statement as a result of having omitted information that is necessary to prevent the statement from being misleading. The court noted that, in submitting its claim to Medicaid, Universal had done more than just demand payment, it made certain representations regarding the services provided. In making those statements, Universal failed to disclose information regarding noncompliance with material statutory, regulatory, or licensing requirements and that failure made its representations "misleading half-truths."

In Order to Give Rise to Liability, Omitted Information Must Be Material

Under the FCA, omitted information will be a basis for liability only to the extent that the information is material. The court further found that whether compliance is identified as a condition of payment is relevant, but not dispositive of materiality. According to the court, the relevant inquiry for purposes of determining materiality is the effect on the likely or actual behavior of the recipient of the allegedly false statement. Thus, a misrepresentation is material if a reasonable person would be induced to act on the statement or if the party making the statement either knew or had reason to know that the recipient of the statement attached special importance to the omitted information such that the recipient would be induced to act.

The court described the materiality requirement as "demanding." It observed that the requirement would not be satisfied merely because the government designated compliance as a condition of payment or if the government would have the option of declining payment if it knew of the noncompliance or if the noncompliance is minor or insubstantial. In this regard, the court stated the proof of materiality may lie in the actual consequences of noncompliance. If the government routinely pays a particular claim notwithstanding actual knowledge that the claimant violated certain requirements, this would be strong evidence that compliance (or the failure to disclose noncompliance) is not material. If, on the other hand, the claimant is aware that the government consistently refuses to pay claims based on noncompliance with a particular regulatory requirement, this would be strong evidence that compliance with the requirement (or the failure to disclose noncompliance) is material.

What Will the Future Hold?



The *Escobar* decision harmonizes the law among the circuits with respect to the applicability of the implied false certification theory under the FCA. The decision expands the scope of what constitutes a false or fraudulent claim under the FCA to include the failure to disclose noncompliance with statutory, regulatory, or contractual requirements, to the extent that such noncompliance is material to deciding whether to pay the claim. The decision abandons whether regulatory compliance is a "condition of payment" as dispositive on the issue of materiality in favor of a potentially much more factually intensive inquiry. Because materiality will turn on specific facts, this may make it more difficult for defendants to get FCA claims dismissed on a dispositive motion, but it also may make it more difficult for plaintiff to prove that a particular requirement is material.