Clients&FriendsMemo

The End of the Implied Certification Theory?: The U.S. Supreme Court Grants Certiorari in Case That Could Substantially Limit the False Claims Act

December 11, 2015

On December 4, 2015, the United States Supreme Court granted certiorari in *Universal Health Services, Inc. v. United States ex rel. Escobar*.[1] In *Universal Health Services, Inc.*, the Supreme Court will decide the legal validity of the "implied certification" theory of False Claims Act ("FCA") liability.[2] Under this theory, a relator or the government may allege that whenever a government contractor, or a Medicare or Medicaid provider, submits a claim for payment to the government, that party has also impliedly certified that it has complied with all applicable statutory, regulatory, and contractual requirements. Accordingly, the party has allegedly violated the FCA if it has not actually complied with those requirements on the premise that compliance with the regulations or contract terms is a "condition of payment." Circuits are currently split on this issue: the First, Second, Third, Fourth, Sixth, Ninth, Tenth, Eleventh, and D.C. circuits have found that implied certification is a valid FCA theory,[3] but the Fifth and Seventh circuits have found that it is not.[4] This split has caused uncertainty for companies doing business with the government along with health care providers seeking reimbursement. Likewise, the availability of the implied certification theory has caused deep concern because of its incredibly broad reach and the FCA's imposition of treble damages

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1 *Universal Health Servs., Inc. v. United States ex rel. Escobar*, No. 15-7, 2015 WL 4078340, at *1 (U.S. Dec. 4, 2015).

2 The petition in *United States ex rel. Badr v. Triple Canopy, Inc.*, No. 14-1440 (U.S. June 8, 2015)—a Fourth Circuit decision also questioning the validity of the implied certification theory of liability—remains pending. In *Triple Canopy*, the relator alleged that the government contractor was billing for employees to provide security even though they were not qualified to operate firearms according to Army standards. *See United States ex rel. Badr v. Triple Canopy, Inc.*, 775 F.3d 628 (4th Cir. 2015).

3 *See, e.g., United States ex rel. Hutcheson v. Blackstone Med., Inc.*, 647 F.3d 377, 387 (1st Cir. 2011); *Mikes v. Straus*, 274 F.3d 687, 699 (2d Cir. 2001); *United States ex rel. Wilkins v. United Health Grp., Inc.*, 659 F.3d 295, 306 (3d Cir. 2011); *United States v. Triple Canopy, Inc.*, 775 F.3d 628, 636 (4th Cir. 2015); *United States ex rel. Augustine v. Century Health Servs., Inc.*, 289 F.3d 409, 415 (6th Cir. 2002); *United States ex rel. Ebeid v. Lungwitz*, 616 F.3d 993, 996 (9th Cir. 2010); *United States ex rel. Conner v. Salina Reg'l Health Ctr., Inc.*, 543 F.3d 1211, 1217 (10th Cir. 2008); *United States ex rel. McNutt v. Haleyville Med. Supplies, Inc.*, 423 F.3d 1256, 1259 (11th Cir. 2005); *United States v. Sci. Applications Int'l Corp.*, 626 F.3d 1257, 1269 (D.C. Cir. 2010).

4 *United States v. Sanford-Brown, Ltd.*, 788 F.3d 696, 711 (7th Cir. 2015) ("[W]e decline to join them and instead join the Fifth Circuit.") (citing *United States ex rel. Steury v. Cardinal Health, Inc.*, 625 F.3d 262, 270 (5th Cir. 2010)); *United States ex rel. Marcy v. Rowan Cos.*, 520 F.3d 384, 389 (5th Cir. 2008).

and per claim liability of $5,500 to $11,000.[5] Consequently, companies with potential FCA exposure should follow the *Universal Health Services, Inc.* matter and continue to monitor their FCA compliance.

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Universal Health Services, Inc. operated a mental health clinic in Massachusetts that received federal and state Medicaid funds.[6] After a young woman died of a seizure at the clinic, her parents—the relators—brought a qui tam action against Universal Health Services.[7] The relators claimed that the clinic's staff was both unlicensed and unsupervised, in violation of state regulations, and therefore the clinic's request for Medicaid reimbursements based upon such staff's services violated the FCA.[8] The district court dismissed the relators' claims, finding that compliance with the regulations was not a condition of payment from the government.[9]

The First Circuit reversed, holding that the clinic's payment was indeed conditioned upon the proper supervision of its staff, in compliance with the state regulations.[10] The Court noted that "[a]lthough the record [was] silent as to whether [clinic] explicitly represented that it was in compliance with conditions of payment when it sought" Medicaid funds, "we have not required such 'express certification' in order to state a claim under the FCA."[11]

Universal Health Services then filed a petition with the United States Supreme Court seeking review of the First Circuit's decision. That petition certified two questions for the Supreme Court to review:

> (1) Whether the "implied certification" theory of legal falsity under the FCA—applied by the First Circuit below but recently rejected by the Seventh Circuit—is viable.
>
> (2) If the "implied certification" theory is viable, whether a government contractor's reimbursement claim can be legally "false" under that theory if the provider failed to comply

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5 Treble damages can be substantial. For example, in a recent case arising from a violation of the Stark Law, the Fourth Circuit upheld a judgment of $237,454,195 against a hospital that submitted false claims to Medicare. *United States ex rel. Drakeford v. Tuomey Healthcare System, Inc.*, 792 F.3d 364 (4th Cir. 2015). Due to trebling, an additional $78,626,130 was added to the actual damages of $39,313,065. *Id.* at 389.

6 *United States v. Universal Health Servs., Inc.*, 780 F.3d 504, 509 (1st Cir. 2015).

7 *Id.* at 504.

8 *Id.* at 516–17.

9 *Id.* at 512.

10 *Id.* at 514.

11 *Id.* n.14.

with a statute, regulation, or contractual provision that does not state that it is a condition of payment.[12]

THE SIGNIFICANCE OF SUPREME COURT REVIEW

The Supreme Court's answer to the first question will resolve a split created by the Seventh Circuit, which recently rejected the "so-called doctrine of implied false certification."[13] In *United States v. Sanford-Brown, Ltd.*, the Seventh Circuit held that a party that presents a claim for payment to the government does not impliedly certify that it has complied with the relevant program's "panoply of statutory, regulatory, and contractual requirements."[14] It would be "unreasonable," the Seventh Circuit concluded, "to hold that an institution's continued compliance with the thousands of pages of federal statutes and regulations incorporated by reference into the [federal program] are conditions of payment for purposes of liability under the FCA."[15] Thus, the holding in *Sanford-Brown* directly conflicts with that of the First Circuit in *Universal Health Services, Inc.* as discussed above, and can be read to be inconsistent with the law of the Second, Third, Fourth, Sixth, Ninth, Tenth, Eleventh, and D.C. circuits.

If the Supreme Court resolves this circuit split by affirming the First Circuit and upholding the theory of implied certification, the Court will decide whether an "implied certification" theory is legally viable along with the scope of the theory—specifically, whether a party's compliance with the applicable legal requirements must be an express condition of payment for a party to be liable under the FCA. According to some courts, such as the Second Circuit, "implied false certification is appropriately applied only when the underlying statute or regulation . . . expressly states the provider must comply in order to be paid."[16] According to other circuits, such as the D.C. Circuit, implied false certification applies more broadly, for "nothing in the statute's language specifically requires such a [limited application]," and "adopting one would foreclose FCA liability in situations that Congress intended to fall within the Act's scope."[17]

The Supreme Court's attention to the implied certification theory is also important because as one court has observed, the implied certification theory turns the FCA into a rather "blunt instrument."[18] Indeed, under this theory, a party can be liable under the FCA even where the party did not make an affirmative false statement. As a result, some have argued that companies may face liability for

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12 *Universal Health Servs., Inc. v. United States*, No. 15-7, 2015 WL 4078340, at *1 (U.S. Dec. 4, 2015).

13 *United States v. Sanford-Brown, Ltd.*, 788 F.3d 696, 711 (7th Cir. 2015).

14 *Id.* at 702.

15 *Id.* at 711.

16 *Mikes v. Straus*, 274 F.3d 687, 700 (2d Cir. 2001).

17 *United States v. Sci. Applications Int'l Corp.*, 626 F.3d 1257, 1268 (D.C. Cir. 2010).

18 *Mikes*, 274 F.3d at 699.

minor or technical violations of statutes, regulations, and contractual terms. On the other hand, at least one court has minimized the risk that such technical violations will give rise to FCA liability because this "concern can be effectively addressed through strict enforcement of the Act's materiality and scienter requirements."[19]

While the FCA's scienter and materiality elements may limit the reach of the implied certification theory, as a practical matter, a far greater range of alleged misconduct would fall within the potential ambit of the FCA if the Supreme Court embraces the theory. For that reason, the fact that relators or the government still have to prove all of the elements of the FCA is unlikely to assuage fully the concerns of government contractors and providers and their compliance officers. Judicial review of scienter and materiality does not occur until companies have already expended significant resources not only on compliance, but also on litigation. Companies are ill-served by the uncertainty that results when they must wait to test their FCA compliance in court, as opposed to ensuring their compliance before litigation.

CONCLUSION

Until the Supreme Court renders a decision in *United Health Services Inc.*, implied certification remains a viable theory in the overwhelming majority of federal circuits. Accordingly, companies with potential FCA exposure should—for this reason and to otherwise comply with the law—continue striving to maintain full compliance with all applicable statutory, regulatory, and contractual requirements. While they await a decision from the Supreme Court, companies that rely on the federal government for payment of services or products should remain alert to any potential lapse in compliance that could be characterized as an FCA violation, and not only those that arise under the implied certification theory.

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[19] *Sci. Applications Int'l Corp.*, 626 F.3d at 1270.