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## False Claims

# Two Supreme Court Cases Could Have Major Impact on the Risk of False Claims Act Liability for Contractors

By MARK B. SWEET AND J. RYAN FRAZEE

**T**he next two Supreme Court terms may well be momentous ones for companies doing business with the government, as the Court appears poised to issue two potentially game-changing decisions involving the False Claims Act (FCA). In one case, *Universal Health Service v. United States ex rel. Escobar*, the Court agreed to consider if (and when) the “implied certification” doctrine is proper. In the other, *State Farm v. United States ex rel. Rigsby*, the Court could also decide whether a contractor can “knowingly” violate a statute through the “collective knowledge” of its employees. Both cases amount to direct challenges to expansive FCA liability, and at a minimum, will clarify what contractors’ liability actually is under two amorphous theories.

The False Claims Act prohibits contractors from knowingly submitting false claims for payment to the government or using false statements or records in support of a claim for payment—essentially committing fraud against the United States. But the government and whistle-blowers have pushed for expansive interpretations of “fraud” that have gotten some traction in the lower courts. For instance, what constitutes a “false claim” has changed over time. When applying the statute, courts have found that, in some instances, a contractor “impliedly certifies” compliance with other laws, regulations, and contract provisions simply by submitting a claim for payment. The claim itself may be completely accurate, but some courts concluded it was still a false claim, and thus the FCA was violated, because the contractor knowingly breached some other law, regulation, or contract provision while requesting payment from the government.

Most circuits recognize the theory of implied certification. Some of these circuits have limited application of implied certification to situations where the contrac-

tor violates a provision or regulation that is a “condition of payment” under the contract or program. A few circuits have rejected or declined to adopt the doctrine.

The government and whistle-blowers have also pushed for an expansion of what it means to “knowingly” submit a false claim. By the plain language of the statute, one may reasonably conclude that someone at the company had to know the claim was false, or at least recklessly disregarded or deliberately ignored some indicator of falsity when the claim was submitted. Under the collective knowledge doctrine, however, courts have found liability by piecing together knowledge from multiple employees that collectively constitute the company’s knowledge of the false claim, even though no individual at the company actually knew all the facts that are necessary to create liability.

Liability under the FCA carries serious consequences. The Act imposes treble damages for violations, plus penalties for each claim submitted. In 2015 alone, the Department of Justice recovered over \$3.5 billion in FCA cases. Moreover, the FCA includes a *qui tam* “whistle-blower” provision that allows for individuals to bring suits on behalf of the government. Generally, over 70 percent of FCA cases generating recoveries of damages are brought by whistle-blowers. Facing such severe penalties, some contractors find it cheaper and safer to settle unmeritorious claims rather than risk a court finding that the contractor, or some combination of employees, committed fraud.

All of this serves as background to two cases that could have a dramatic impact on the risk government contractors face when doing business with the government: *Escobar*, a direct challenge to the implied certification doctrine, and *Rigsby*, a direct challenge to the collective knowledge doctrine. The Court granted cert in the *Escobar* case in early December. Then, shortly after the New Year, the Court asked for the views of the Solicitor General in *Rigsby*, a request that is often a precursor to a grant of certiorari.

*Escobar* centers on a patient who died while receiving treatment from a mental health clinic that received reimbursement through Medicaid. The patient’s family

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brought a *qui tam* suit, in which the government declined to intervene, alleging that the petitioners violated the False Claims Act by submitting invoices to Medicaid while failing to comply with several state regulations regarding the composition and certifications of their staff. The district court dismissed the case because none of the relevant regulations cited by the relators were preconditions for payment—essentially, the government did not require the center to comply with those regulations before paying invoices. The First Circuit reversed, citing different state regulations that, as a condition of payment, required the hospital to have adequate psychiatric staff to meet its clients' needs. The invoices submitted to Medicaid never made any certifications about compliance with those regulations.

The petitioner in *Escobar* has asked the Supreme Court to decide whether the theory of implied certification is viable. If the Supreme Court adopts the theory, the petitioner has asked the Supreme Court to at least limit its scope to situations where the violation affects an express condition of payment.

*Rigsby* involves an alleged fraudulent conspiracy undertaken by an insurance company in the aftermath of Hurricane Katrina. The relators alleged that an insurance company ordered claims adjusters to shift claims from wind damage (which the insurance company would cover) to flood damage (which the government would cover). The evidence at trial showed that at the time the claim was paid out under a federally funded program, the claim adjusters from the insurance company believed in good faith, based on computer models, that flood waters had caused the property damage. A forensic analysis by an outside engineering firm, however, later showed that the damage was caused by wind. A manager at the insurance company who received the forensic analysis refused to pay for the analysis and ordered the engineering firm to redo it, resulting in a new analysis showing that flood waters were the primary source of the damage. The relators alleged that the company concealed the disputed analysis from the government, and the jury later concluded that wind had in fact caused the damage. The Fifth Circuit ruled that the

insurance company had “knowingly” caused a false claim to be submitted because, among other reasons, the claims adjusters knew the claim had been presented to the government and the manager knew it was false.

The petitioner in *Rigsby* has asked the Supreme Court to decide whether a corporation or other organization “knowingly” presents a false claim in violation of the False Claims Act based on the collective knowledge of the company or the ill intent of employees other than those who decided to present the claim to the government. The Supreme Court has invited the Solicitor General of the United States to file a brief weighing in on the dispute. With that brief expected this summer, the Supreme Court could decide later this year whether to hear the case.

Although both circuit courts in these cases ruled in favor of the whistle-blowers, the Supreme Court in recent years has been a more favorable venue for defendants in False Claims Act cases. In 2015, the Supreme Court overruled a circuit court for its expansive interpretation of the statute of limitations in False Claims Act cases. See *Kellogg Brown & Root Servs., Inc. v. U.S. ex rel. Carter*, 135 S. Ct. 1970 (2015). In 2010, the Supreme Court reversed an appellate court for too freely allowing whistle-blowers to file claims based on publicly disclosed information. See *Graham County Soil and Water Conservation District v. U.S. ex rel. Wilson*. And in 2008, the Supreme Court warned against “expand[ing] the FCA well beyond its intended role” and “transform[ing] the FCA into an all-purpose anti-fraud statute.” *Allison Engine Co. v. U.S. ex rel. Sanders*, 553 U.S. 662, 669, 672 (2008).

Both the “implied certification” and “collective knowledge” theories represent the significant legal risks contractors face when working on government contracts. The Supreme Court could rein in these theories and clarify the limits of the civil fraud statute, or empower the government and whistle-blower to bring even more False Claims Act cases for conduct that falls outside of traditional concepts of fraud. The next few Supreme Court terms will be worth watching closely for government contractors.