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NEWSLETTER

New Supreme Court Case Could Be a False Claims Act Game-Changer

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Government Contracts Issue Update

The Supreme Court of the United States agreed this week to hear a new case that tests the viability and scope of one of the most controversial theories of liability under the False Claims Act: implied certification. The case, *Universal Health Service v. United States ex rel. Escobar*, could have profound effects on how aggressive the government and *qui tam* relators can be in stretching breaches of contract into false claims, and conversely how much pressure a contractor faces when deciding whether to settle or litigate such a case.

The theory of implied certification is that a party can violate the False Claims Act for more than just making a false statement on the face of an invoice or in the express language of a certification. Implied certification means that a party can be liable for seeking payment from the government while knowingly violating a contractual provision or administrative regulation, even in the absence of an express certification of compliance with that standard. The idea is that by seeking payment from the government, the contractor is impliedly certifying that it is complying with all relevant laws and contractual provisions.

For example, under the theory of implied certification, a minority-owned small business was liable under the False Claims Act for submitting progress payment vouchers on a construction project—all of which were accurate and true on their face—because the company knowingly failed to comply with the requirements of the Section 8(a) small business program during performance. *See Ab-Tech Const., Inc. v. United States,* 31 Fed. Cl. 429, 434 (Fed. Cl. 1994). Similarly, a

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company providing photography services to the Air Force was liable under the False Claims Act for submitting invoices—all of which were for a fixed price under the contract—because the company knowingly failed to dispose of equipment in accordance with federal environmental guidelines and standards. *See Shaw v. AAA Eng'g & Drafting, Inc.,* 213 F.3d 519, 533 (10th Cir. 2000).

Most, though not all, circuits recognize the theory of implied certification. The Seventh Circuit has rejected the theory, and the Fifth Circuit has declined to adopt the theory on several occasions without ruling definitively. Of the circuits that do recognize the theory, some have limited the use of implied certification to situations where the contractor violates a provision or regulation that is a "condition of payment" under the contract or program.

In *Escobar*, the defendant operated a mental health clinic that received reimbursement through Medicaid, and the *qui tam* relators had a family member die while receiving treatment at the clinic. *See Escobar,* 780 F.3d 504 (1st Cir. 2015). The First Circuit held that the *qui tam* relators plausibly alleged that the clinic failed to supervise its staff and employ adequate psychiatric staff in violation of state health regulations that were conditions of payment under Medicaid. In other words, even though the clinic never expressly certified compliance with those state health regulations in its requests for reimbursement to Medicaid, the court held that the clinic could nonetheless be liable under the False Claims Act for impliedly certifying that it was adhering to the regulations governing mental health services in that state.

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

The Supreme Court has taken up several False Claims Act cases in recent years, often deciding in favor of defendants and curtailing expansive interpretations of the statute. Earlier this year, the Supreme Court ruled that a *qui tam* relator could not stretch the False Claims Act statute of limitations under a statute giving the government more time to prosecute criminal fraud cases in wartime. *See Kellogg Brown & Root Servs., Inc. v. United States ex rel. Carter,* 135 S. Ct. 1970 (2015). Before that, the Supreme Court warned against "expand [ing] the FCA well beyond its intended role" and "transform[ing] the FCA into an all-purpose antifraud statute." *Allison Engine Co. v. United States ex rel. Sanders,* 553 U.S. 662, 669, 672 (2008).

For those doing business with the government, the advent of implied certification has created the risk that the government will treat any known—or even knowable—breach of contract as fraud. For those participating in government programs or receiving federal grants, the advent of implied certification has created the risk that the government will treat any known or knowable failure to comply with technical regulations as fraud. In either case, the implication is that whenever a contractor or program participant is aware of noncompliance—no matter how insignificant—there is a risk of treble damages for all of the funds received from the government.

That heightened exposure has changed the calculus for many companies facing a government investigation or a *qui tam* suit. What may be worth litigating for single damages is simply too risky when damages are trebled. As a result, many companies choose to settle cases where the government or a relator has an aggressive interpretation of the False Claims Act rather than challenge the theory in court.

A Supreme Court decision striking down the theory of implied certification, or at least clarifying that the relevant contractual provision or regulation must be an express condition of payment, could rein in the Department of Justice and relators' bar and restore a common sense definition of "civil fraud" to the False Claims Act.

Escobar will be briefed in the next few months, with a decision expected later this year.