

Supreme Court Preserves Implied Certification Theory In Closely Watched False Claims Act Case

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In the much-anticipated ruling on *Universal Health Services Inc. v. United States ex rel. Escobar*, the United States Supreme Court today [held](#) that False Claims Act liability can be predicated on an implied certification theory of liability. (For the factual background and procedural history of the case, see our earlier [blog post](#) about the court's grant of certiorari.) The court also clarified the materiality threshold that must be satisfied to pursue actionable claims under this theory, finding that materiality can be established with or without express language in the regulations that it is a condition of payment. In upholding the theory of implied certification, the court addressed the situation under which a misleading omission could render a claim false or fraudulent, stating that when a defendant "makes representations in submitting a claim but omits its violations of statutory, regulatory, or contractual requirements, those omissions can be a basis for liability if they render the defendant's representations misleading with respect to the goods or services provided." The court found that the omission of critical qualifying information—that is, information that would cast doubt on a claimant's entitlement to payment—can create an actionable misrepresentation. The court commented that merely submitting request for payment was not sufficient for liability, instead holding that the claim must also make specific representations about the goods or services provided. For example, the court found that when the defendant submitted Medicaid claims using National Provider Identification (NPI) numbers that corresponded to specific job titles, the defendant was representing that its providers met the requirements for these job titles. By failing to disclose that its staff was in violation of state licensing requirements, the defendant's claims constituted actionable misrepresentations. With respect to materiality, the court declined to create any bright-line rule, finding only that a provision labeled an express condition of payment is relevant but not dispositive to the analysis. The court recognized that nothing in the False Claims Act restricts liability solely to violations of an express condition of payment. Conversely, the decision stated that even a violation of an expressly-labeled condition of payment does not automatically satisfy the materiality requirement. Rather, the materiality question will be answered by "looking to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation." For example, materiality can be proven through evidence that a defendant knows the government has a pattern of refusing to pay claims based on noncompliance with the particular statute or regulation at issue. By contrast, evidence that the government routinely pays claims despite full knowledge that certain requirements were violated would be strong support for arguing that those requirements are not material. The court's decision in *Escobar* gives a nod to the Seventh Circuit's concerns about expanding the reach of FCA liability to violations of the countless regulations governing federal health care programs. The court acknowledged the complex maze of regulations faced by billing parties and stressed that the FCA is not intended to punish "garden-variety" or "insignificant" regulatory violations. The decision clarifies the viability of the hotly contested implied certification theory, but it also highlights

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the very fact-intensive analysis that will govern the materiality question. Time will tell how *qui tam* plaintiffs, defendants and the government alike will implement the court's guidance. *This article was co-authored by [Jason Wallace](#).*