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SUPREME COURT ACCEPTS IMPLIED CERTIFICATION – WITH A TWIST

The U.S. Supreme Court issued its decision today in *Universal Health Services, Inc. v. United States ex rel. Escobar*, and it will have an enormous effect on False Claims Act ("FCA") cases throughout the nation.

In *Escobar*, the FCA case was based upon the theory that counseling was provided by practitioners who were not properly licensed according to state regulations. However, the counseling was actually provided, and the licensing regulations did not specifically state they were conditions of payment. This is an "implied certification" theory as the actual claims were not false but the submission of the claims impliedly certified compliance with statutes and regulations.

The Defendant argued that the "implied certification" theory could not apply unless the statute or regulation violated explicitly stated compliance was a condition of payment.

The United States government, on the other hand, argued that implied certification was sufficient to make the falsity material. Additionally, the government argued, any claim submitted in violation of a statute or regulation that was an express condition of payment, no matter how trivial, would be a *per se* violation of the FCA.

The Court rejected both arguments.

It started with the language of the FCA, which imposes liability for a "material" false statement. It first ruled that implied false certification could form the basis for an FCA case if (a) the claim both requests payment and makes specific representations about the goods or services provided; and (b) failure to disclose statutory, regulatory or contractual violations are "actionable half-truths," knowing failures to fully disclose relevant information.

The Court then addressed the "condition of payment" question.

The Court first rejected the argument that an implied certification case requires an explicit condition of payment. Rather, the violation must be "material," as determined from a fact-based analysis. If, for example, a provider knows or should know the violation would be material to the government's payment decision, it is irrelevant whether the statute, regulation or contract explicitly identifies it as a condition of payment. If the provider knows that the government refused to pay similar claims for such violations, submission of such claims could create FCA liability.

The Court then rejected the government's argument that any explicitly identified condition of payment could form the basis for an FCA lawsuit, no matter how trivial. The language of the statute, regulation or contract is not relevant to the determination, the Court ruled. The only relevant issue to materiality is the government's actual payment decision. If, for example, the government routinely pays claims submitted in violation of a regulation that is explicitly identified as a condition of payment, that violation would not be material to the payment decision and could not be the basis for an FCA claim.

The Court, by rejecting both arguments, refused to consider the existence or non-existence of condition of payment language as the touchstone for an FCA implied certification case. Instead, it ruled that materiality was a factual analysis determined by the provider's knowledge and the government's previous behavior in the face of such violations.

HEALTH CARE TAKEAWAY

The *Escobar* decision is a significant event in False Claims Act law. No longer can providers rely upon the distinction between "conditions of payment" and "conditions of participation" in assessing potential risks. Instead, they must look to the possible violation itself, the likelihood that it will be relevant to the government's payment decisions and the government's previous behavior in response to such violations.

If you have any questions, please contact David B. Honig at dhonig@hallrender.com or (317) 977-1447 or your regular Hall Render attorney.