Dear Health Law Section Members:

The U.S. Supreme Court recently issued an opinion regarding the "Implied False Certification" Theory of False Claims Act Liability which the Section wanted to bring to the attention of all of its members as soon as possible.

Special thanks go **to Anu Sagi-Nakkana** who prepared the following summary for our members in a short period of time.

Thank you,
Malinda R. Lugo

Supreme Court Upholds "Implied False Certification" Theory of False Claims Act Liability, But Imposes Some Limitations on its Reach

On June 16, 2016, the Supreme Court in *Universal Health Services, Inc. v. United States ex. rel. Escobar*[i] ruled that, the theory of "implied false certification" can give rise to liability under the False Claims Act ("FCA")[ii] when certain conditions are met. The unanimous opinion, written by Justice Thomas, held that FCA liability can attach when the defendant makes specific representations about the goods or services provided but knowingly fails to disclose the defendant's noncompliance with statutory, regulatory or contractual requirements connected to those goods or services. The relevant legal requirement need not be expressly designated by the Government as a condition of payment, but the plaintiff must show that the alleged misrepresentation was actually material to the Government's decision to pay (not, as the Government argued, simply that the misrepresentation would have entitled the Government to refuse payment). The Court emphasized the "demanding" nature of this materiality inquiry.

Background

In *Escobar*, the relators' teenage daughter, Yarshuka Rivera, was a beneficiary of the Massachusetts Medicaid program and had been receiving mental health treatment at Arbour Counseling Services ("Arbour"), a facility owned by Universal Health Services ("UHS"). Ms. Rivera died in 2009 at the age of 17 after having an adverse reaction to a medication that a purported doctor at Arbour prescribed after diagnosing her with bipolar disorder. Following an investigation, the Massachusetts Department of Health found that Arbour violated a series of Massachusetts regulations in the course of treating Ms. Rivera by failing both to employ staff members with appropriate qualifications and also to provide appropriate medical supervision. In 2011, Ms. Rivera's parents filed a *qui tam* lawsuit pursuant to the FCA based on an "implied false certification" theory of liability. The complaint asserted that UHS's claims for payment arising from Ms. Rivera's treatment were false because defendant knew that it had failed to comply with the Massachusetts regulations relating to licensure and supervision.

The district court dismissed the case for failure to state a claim under the implied false certification theory of liability because none of the regulations UHS allegedly violated was an express condition of Government payment.[iii] The United States Court of Appeals for the First Circuit reversed in relevant part and remanded, finding that "every time a billing party submits a claim, it 'implicitly communicate[s] that it conformed to the relevant program requirements, such that it was entitled to payment."[iv] Noncompliance with any program requirement would amount to a material misrepresentation, the First Circuit held, so long as the defendant knows that the Government would be entitled to refuse payment were it aware of the violation.[v]

The Supreme Court's Decision

In the first part of its decision, the Court held that the implied certification theory can be a basis for liability so long as two conditions are met: (1) "the claim does not merely request payment, but also makes specific representations about the goods or services provided," and (2) the defendant's "failure to disclose noncompliance with material statutory, regulatory, or contractual requirements makes those representations misleading half-truths."[vi] The *Escobar*

Court next addressed UHS's argument that the implied certification theory should be limited to misrepresentations of legal requirements that were expressly designated as conditions of payment. Rejecting this view, the Court found that the FCA does not include such a restriction on liability, holding that "[w]hether a provision is labeled a condition of payment is relevant to but not dispositive of the materiality inquiry."[vii]

The Court likewise declined to adopt the government's and First Circuit's "extraordinarily expansive view" of materiality – "that any statutory, regulatory, or contraction violation is material so long as the defendant knows that the Government would be entitled to refuse payment were it aware of the violation."[viii] Instead, the Court developed its own mechanism to limit undue exposure under the FCA: "strict enforcement of the [FCA's] materiality and scienter requirements."[ix] Stating that the "materiality standard is demanding" and that the FCA is not a "vehicle for punishing garden-variety breaches of contract or regulatory violations," the Court held that a misrepresentation does not become "material" simply because the government expressly labeled the legal requirement as a "condition of payment" or because the government could choose to withhold payment if it knew about the noncompliance.

In this case, the Medicaid claims submitted by UHS allegedly made representations about the specific counseling services provided but "failed to disclose serious violations of regulations pertaining to staff qualifications and licensing requirements for those services."[x] Therefore, the claims were "clearly misleading in context" because they used specific billing codes and identifiers concerning the "types of treatment" and "specific job titles," implying that the clinic's personnel had the requisite training and qualifications for their jobs.[xi] The Court held that such claim submissions "fall squarely within the rule that half-truths – representations that state the truth only so far as it goes, while omitting critical qualifying information – can be actionable misrepresentations."[xii]

The Court remanded the case to allow the lower courts to determine whether the alleged misrepresentations were material under the standard the Court announced.[xiii]

Reported by: Anu Sagi-Nakkana, Esq.

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[i] *Universal Health Services, Inc. v. United States ex rel. Escobar*, 579 U.S. __, No. 15-7 (June 16, 2016). A copy of the opinion is available online at: http://www.supremecourt.gov/opinions/15pdf/15-7_a074.pdf
[ii] 31 U.S.C. §§ 3729-3733.
[iii] 2014 WL 1271757, *1, *6-*12 (D. Mass., Mar. 26, 2014).
[iv] 780 F.3d 504, 514, n. 14 (2015).
[v] *Id*. at 514.
[vi] *Id*. at 11.
[vii] *Id*. at 12.
[viii] *Id*. at 17.
[ix] *Id*. at 14.
[x] *Id*. at 6.
[xi] *Id*. at 10-11.
[xii] *Id*. at 9-10.
[xiii] *Id*. at 18.