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## Supreme Court Upholds Implied Certification Theory

On June 16 the Supreme Court of the United States issued a unanimous decision upholding a variation of the “implied certification” theory often used by Relators, especially in healthcare cases, as the basis for a False Claims Act (FCA) claim. Under an implied certification theory, the government, or a Relator, alleges that while the actual claim made to the government was not false on its face, the submitter failed to disclose its noncompliance with some standard or regulation that would have resulted in the claim being denied. For those circuits where the theory was viable, most required that the alleged violation be tied to an express condition of payment, as the FCA is not a general statute to enforce all regulatory violations.

In *Universal Health Servs., Inc. v. United States ex rel. Escobar*, the Relators contended that certain individuals working at a mental health clinic owned and operated by Universal Health who treated their daughter lacked qualifications required under state law. The Relators alleged that whenever Universal Health submitted bills to Medicaid, it impliedly certified that its providers were licensed and qualified. The 17-year old patient, according to the complaint, died as a result of a reaction to medication that had been prescribed to her for bipolar disorder. The Relators alleged that when the facility billed for the services of certain individuals, it failed to note that these individuals did not have the requisite qualifications required under the regulations. Notably, they alleged that the practitioner who diagnosed the patient as bipolar identified herself as a psychologist with a Ph. D., but failed to mention that her degree came from an unaccredited Internet college and was not licensed by Massachusetts.

On appeal, the Court held that the implied certification theory was viable. However, the Court went on to note that the theory was only triggered if the certification related to “material” conditions. According to the Court, the materiality test is demanding, and a misrepresentation cannot be deemed material merely because the government designates compliance with a particular statutory, regulatory, or contractual requirement as a condition of payment. The Court held that materiality turns on various factors with few, if any, being dispositive. For example, violation of a regulation is not automatically “material,” as some regulations are more important than others. Conversely, the Court rejected the view proffered by the Relator and the government that noncompliance would be material if the government would have the

option to deny the claim if it had known of the violation. Finding that the First Circuit had not addressed the materiality standard appropriately, it remanded the case for further consideration.

The Court's opinion is a testament to the fears of many that an eight-person court is unlikely to draw clear lines and more likely to adopt multi-factor weighing tests.

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