WILMERHALE

Supreme Court To Address Permissibility and Scope of Implied Certification Liability Under the False Claims Act

DECEMBER 7, 2015

On Friday, December 4, the Supreme Court agreed to hear a case raising the questions of whether implied certification liability is permissible under the False Claims Act and, if so, under what circumstances. Because many of the courts of appeals have accepted implied certification liability for years, implied certification has become a common basis for FCA claims concerning many kinds of government programs. A decision by the Supreme Court to reject implied certification liability or to restrict the circumstances in which it is permissible could markedly reduce the number of FCA claims brought by both relators and the government.

The case is *Universal Health Services v. United States ex rel. Escobar*, No. 15-7. It comes from the First Circuit, and the precise questions presented are: (1) "[w]hether the 'implied certification' theory of legal falsity under the FCA—applied by the First Circuit below but recently rejected by the Seventh Circuit—is viable"; and (2) if so, "whether a government contractor's reimbursement claim can be legally 'false' under [the implied certification] theory if the provider failed to comply with a statute, regulation, or contractual provision that does not state that it is a condition of payment, as held by the First, Fourth, and D.C. Circuit; or whether liability for a legally 'false' reimbursement claim requires that the statute, regulation, or contractual provision expressly state that it is a condition of payment, as held by the Second and Sixth Circuits."[1]

Background

The relators are the parents of a woman who died of a seizure after being treated by allegedly unlicensed and unsupervised staff at a provider of mental health services. The premise of their claims is that because the provider allegedly failed to hire and supervise its staff properly, in violation of state regulations, its submission of reimbursement claims to the state Medicaid agency violated both the FCA and its state equivalent.

The district court dismissed the case. Drawing a distinction between conditions of *payment* and conditions of *participation*, the court held that only noncompliance with statutory or regulatory conditions of *payment* could render a contractor's claims for payment actionably false. The conditions at issue in this case, the district court determined, were conditions of the defendant's participation in the relevant program, not conditions of its receiving payments.

The First Circuit reversed, holding that "any payment/participation distinction is not relevant here," because "the provisions at issue in this case clearly impose conditions of payment." *United States ex rel. Escobar v. Universal Health Services*, 780 F.3d 504, 513 (1st Cir. 2015). In a footnote, the court observed that "[a]lthough the record is silent as to whether [the mental health center] explicitly represented that it was in compliance with conditions of payment when it sought reimbursement from" the state Medicaid agency, the First Circuit has "not required such 'express certification' in order to state a claim under the FCA." *Id*. at 514 n.14.

Implications

Many Circuits have accepted implied certification liability for years, and implied certification claims have become common in FCA litigation.[2] The Seventh Circuit's recent rejection of implied certification liability in *United States v. Sanford-Brown, Ltd.*, 788 F.3d 696 (7th Cir. 2015), created a clear Circuit split and so opened the door to what could be a major curtailment of FCA claims. If the Court reverses the First Circuit on the first question and rejects implied certification liability altogether, that could well cut back substantially on the number of FCA claims brought by both relators and the government.

Many of the courts of appeals that have endorsed implied certification liability have restricted its availability to circumstances in which the implied certification concerns a condition of payment as distinct from a condition of participation.[3] But they have disagreed over when the payment/participation distinction is significant and whether the certification relied upon must involve a regulatory or contractual provision that expressly identifies itself as a condition of payment.[4] If the Supreme Court accepts implied certification liability, but limits it to provisions that are expressly identified as conditions of payment, that would have a substantial narrowing effect on the scope of potential False Claims Act liability.

Additional Cases Pending Supreme Court Review

In the next month, the Supreme Court will consider whether to review two other cases raising important questions under the False Claims Act.[5]

AT&T v. United States ex rel. Heath, No. 15-363, raises the question "[w]hether a relator asserting a claim under the False Claims Act can satisfy Federal Rule of Civil Procedure 9(b)'s particular pleading requirement without setting forth specific facts regarding at least one allegedly false or fraudulent claim submitted to the government." AT&T alleges an entrenched and acknowledged split between the D.C., First, Third, Fifth, Seventh, Ninth, and Tenth Circuits—which hold that a relator need not plead the details of individual false claims in order to survive dismissal under Rule 9(b)—and the Fourth, Sixth, Eighth, and Eleventh Circuits, which in some cases have required relators to plead such specifics. The Court will vote on whether to take the case at its conference on December 11.

State Farm Fire and Casualty Company v. United States ex rel. Rigsby, No. 15-513, presents two questions: (1) "[w]hat standard governs the decision whether to dismiss a relator's claim for violation of the FCA's seal requirement, 31 U.S.C. § 3730(b)(2)?"; and (2) "[w]hether and under what

standard a corporation or other organization may be deemed to have 'knowingly' presented a false claim, or used or made a false record, in violation of section 3729(a) of the FCA based on the purported collective knowledge or imputed ill intent of employees other than the employee who made the decision to present the claim or record found to be false." The Court will take up the petition at its January 8, 2016 conference.

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[1] The certiorari stage briefs are available here.

[2] *See*, e.g., *United States v. Triple Canopy, Inc.*, 775 F.3d 628, 636 (4th Cir. 2015); *United States ex rel. Wilkins v. United Health Grp., Inc.*, 659 F.3d 295, 306 (3d Cir. 2011); *United States ex rel. Hutcheson v. Blackstone Med., Inc.*, 647 F.3d 377, 387 (1st Cir. 2011); *United States v. Sci. Applications Int'l Corp.*, 626 F.3d 1257, 1269 (D.C. Cir. 2010); *United States ex rel. Ebeid v. Lungwitz*, 616 F.3d 993, 996 (9th Cir. 2010); *United States ex rel. Conner v. Salina Reg'l Health Ctr., Inc.*, 543 F.3d 1211, 1217-18 (10th Cir. 2008); *United States ex rel. McNutt v. Haleyville Med. Supplies, Inc.*, 423 F.3d 1256, 1259 (11th Cir. 2005); *United States ex rel. Augustine v. Century Health Services, Inc.*, 289 F.3d 409, 415 (6th Cir. 2002); *Mikes v. Straus*, 274 F.3d 687, 699 (2d Cir. 2001).

[3] *See*, e.g., *United States ex rel. Hobbs v. MedQuest Associates*, 711 F.3d 707, 710 (6th Cir. 2013); *Hutcheson*, 647 F.3d at386-88; *Sci. Applications Int'l Corp.*, 626 F.3d at 1269-70.

[4] Compare, e.g., *Mikes v. Strauss*, 274 F.3d 687, 702 (2d Cir. 2001) (condition of payment must be express), and *Universal Health Services*, 780 F.3d at 513 & n.11 (condition of payment need not be express).

[5] The petition for certiorari in *Triple Canopy, Inc. v. United States ex rel. Badr*, No. 14-1440—seeking review of a Fourth Circuit decision—raises questions related to those in *Universal Health*: "(1) Whether a contractor's knowing failure to comply with a contractual, statutory, or regulatory provision, without payment being conditioned on that provision, results in a false claim … under the 'implied certification' theory of liability"; and "(2) whether 'implied certification' is a valid theory of liability." The Court appears to be holding the *Triple Canopy* petition for a decision in *Universal Health Services*.

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