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False Claims Act

BNA INSIGHTS: The False Claims Act: Fraud Without a Word

By Brian D. Miller

Last month, the U.S. Supreme Court heard oral arguments in one of the most important False Claims Act (FCA) cases of this century. At stake is stability for government contractors. Unfortunately, some clear direction to determine the difference between a breach of contract and an FCA violation seems unlikely.

For a federal contractor, FCA liability could mean millions of dollars in litigation and settlements and then a referral for a potential debarment/exclusion[1] from federal programs — in some cases, for what they didn't say. At least, that is what the petitioner, Universal Health Services, Inc., argues is contrary to the clear language of the FCA, which requires a ''false'' claim. Petitioner argues that a bare submission of a request for payment is not false.

It is a request that contains no falsehood or untruths and contains only the information prescribed by the government — no other. And yet, the U.S. Court of Appeals for the First Circuit in this case, implied a certification and imposed liability without a word — false or otherwise from the petitioner.

How did we get here?

It all starts with the ''Lincoln Law,'' the False Claims Act, which was enacted in 1863 during the Civil War to go after unscrupulous contractors who provided sawdust instead of ammunition, shoes made of cardboard, lame horses and guns that couldn't shoot.

The unusual part of the law is it allows private citizens to file suit on behalf of the federal government, under the theory of ''it takes a rogue to catch a rogue.'' The idea is that the government gets more enforcement this way. These citizens, called ''relators'' and acting as ''private attorneys general,'' would then receive as a reward a share of the recovery.

Relators are important, because a relator may notice noncompliance that the government does not notice, or seemingly does not care about, and bring suit under the False Claims Act. The government may then intervene and take over the lawsuit, but, even if the government does not, the relator may proceed to bring the case to trial.

In 1986, Congress trebled the damages recoverable under the False Claims Act and added civil penalties. This made the reward to the relator substantial. The 1986 amendments also eased the burden of proving a False Claims Act case. Subsequent amendments in 2009 and 2010 eased the burden even more. As a result, more False Claims Act cases are now brought and recoveries

[1] Often, a referral for suspension/debarment of the contractor follows a False Claims Act case. This will cut off the government contractor from any federal business, and often is the death knell for the company.

Brian D. Miller is a Shareholder in Rogers Joseph O'Donnell, PC and a member of the firm's Government Contracts, White Collar Criminal Defense and Complex Commercial Litigation practice groups.

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for the United States are sizable — and so are the rewards for a successful relator.

This often puts companies that do business with the federal government in a tough spot. If they are not careful, they may become a defendant in a False Claims Act suit filed by a relator, who may be one of their employees or, more likely, a former employee. If the False Claims Act suit is successful, the company would be liable to pay triple damages and civil damages of up to $1,100 for every single time a request for payment was made. For example, one company paid $7 million in just civil penalties — not counting the actual and treble damages. They are still litigating the amount of damages.[2]

Government contractors must be ever vigilant to avoid violating the FCA. As regulation keeps increasing, companies are finding it nearly impossible to keep tabs on whether every single aspect of every regulation is punctiliously complied with. It's possible that some may be so microscopic as to prescribe where staplers are purchased — in the U.S. or elsewhere — to use Chief Justice John G. Roberts' example. Not surprisingly, many contractors focus on the most important requirements in a contract: Getting a good product to the government at a good price. Without more, such as an effective compliance program, this could land them in a world of hurt under the FCA.

Now, remember that a relator is someone who may bring a False Claims Act suit on behalf of the government. If a relator finds a problem with a contractor's compliance with a term of the contract or compliance with a regulation — whether or not the government noticed — the relator may bring an FCA suit. If the relator is right about the contractor's noncompliance, then the contractor may have impliedly certified full compliance by submitting a claim for payment. When the government pays that claim, the claim becomes a ''false claim'' under the FCA.

The Case Before the Court

All of these issues come together in the case now before the U.S. Supreme Court, *United States ex rel. Escobar v. Universal Health Services, Inc.*[3] Briefly, in this case, the petitioner operated a mental health clinic in Lawrence, Mass.,[4] that provided psychological counseling services to the daughter of the relators. The daughter suffered a fatal adverse reaction to medication. The Massachusetts Department of Public Health (DPH) imposed a fine of $1,000 and required improved documentation of the clinic's supervision of nonpsychiatrists. The Massachusetts Medicaid agency (MassHealth) took no action. The Medicaid reimbursement claims were filled out accurately describing the services at the proper charges.

The relators (parents of the daughter who suffered a fatal reaction to medication) filed an FCA claim based on the DPH's finding of a regulatory violation in failing to adequately supervise those providing psychiatric services.[5] Neither the Commonwealth of Massachusetts nor the federal government intervened in the relator's FCA lawsuit.

The Supreme Court heard oral arguments in this case on April 19. The arguments from all sides were relatively straightforward. The petitioner (the health care provider) argued that ''a claim'' under the FCA cannot be a ''false claim'' if it does not state anything untrue. The petitioner's claim for payment from the MassHealth Medicaid program had an accurate description and the correct charge, as required by the form MassHealth designed. This argument is rooted in the text of the FCA, which appears to require an affirmative misstatement for liability. The petitioner also argued that there is no duty under the FCA requiring a claimant to disclose a regulatory violation.

Depending on how the Supreme Court rules, it may be that every requirement is important. A failure to comply with just one tiny aspect could result in a judgment of millions of dollars. A contractor doesn't even have to say it has complied with every small aspect of the contract and regulations. It's implied now with the ''implied certification doctrine.''

Every time a contractor submits a bill, the contractor is saying that it has complied with every aspect of the contract and regulations. Any slip may be deemed a violation of the False Claims Act, resulting in a multimillion-dollar judgment and/or settlement. [6]

By making a request for payment — even just an invoice stating an amount and nothing more — a contractor is deemed to be saying, ''I am eligible for payment because I performed everything under the contract.'' This is not an explicit statement, but an implied statement under the ''implied certification'' theory.

The relator's argument was that an express false statement is not required under the FCA, because the submission of the claim is a representation that the claimant has fulfilled all of the obligations under the contract and deserves to be paid.

By not adequately supervising those providing care, the petitioner is submitting a false claim under the FCA. In other words, submission of the claim is an implied statement or ''certification'' that the workers were adequately supervised.

The U.S. supported the relator's argument by arguing that so long as the claimant knows that it failed to comply with a term of the contract or regulation when it submitted the claim for reimbursement and knows that the government considers this term to be material, the claim is false. The material omission with knowledge

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[2] *See U.S. v. United Technologies Corp., No. 13-4057, Slip Op. at 2 (6th Cir. April 6, 2015)(''The first appeal established that Pratt violated the False Claims Act and that it owed the government $7 million in statutory penalties due to the false cost estimates it provided to the government in 1983.'')*.

[3] 780 F.3d 504 (1st Cir. 2015), cert. granted 136 S. Ct. 582 (2015).

[4] The petitioners operated health care facilities in Malden, Mass., and Lawrence, Mass.. See Brief for Petitioners at 9. Both provided mental health services, and the Lawrence clinic is the ''satellite'' office of the Malden facility, which is the ''parent'' facility. See Petition for a Writ of Certiorari at 6.

[5] The MassHealth regulations contemplate even ''unlicensed counsellors'' providing services under supervision from a qualified professional staff member, such as a psychiatrist, psychologist, social worker, or psychiatric nurse. 130 Mass. Code Regs. § 429.424.

[6] The phrase ''implied certification'' appears to have been used for the first time in *Ab-Tech Construction, Inc. v. United States*, 31 Fed. Cl. 429, 434 (1994), aff'd., 57 F.3d 1084 (Fed. Cir. 1995) (unpublished table decision); *see* Brandon J. Murrill, *Contractor Fraud Against The Federal Government: Selected Federal Civil Remedies*, 78 Cong. Res. Service 10 (Apr. 1, 2014).

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makes it false, which in this case would be the alleged lack of supervision.

Oral Argument: Trying to Distinguish Important Noncompliance Leading to FCA Liability From Unimportant Noncompliance Not Leading to FCA Liability

From the start, the Supreme Court in *Escobar* never expressed any inclination to follow the plain meaning of the FCA's text. The Supreme Court never came to terms with the first element in a False Claims Act case: falsity.

Justice Stephen Breyer began by skipping over this element and moving directly to the ''materiality'' element. Others assumed falsity by the nature of the claim. The nature of the claim was for medical treatment, which is assumed to be under a doctor's care. As Justice Elena Kagan said, ''[A] doctor's care is a doctor's care.'' Tr. at 18.[7]

The argument is that, if Medicaid did not receive a doctor's care, then it is false. The problem is that it is not that simple. It's not just a doctor but others, such as psychologists, social workers and nurses, who are authorized to give care under the Massachusetts regulations. And they did actually provide the care in this case.

One of the biggest problems in trying to find the important conditions of the contract or regulation is that the contract or regulatory scheme is sometimes a morass of conflicting, confusing and contradictory conditions.

One of the most confusing parts of this case is the MassHealth requirements. Which regulation was violated? Does it make a difference that this particular regulation is enforced by a different state agency? If so, how can it be a condition for payment for Medicaid? In a moment of candor about which regulation applied, Justice Sonia Sotomayor said: ''[T]his confuses me to no end.'' Tr. at 22. That's because it is confusing. Petitioner's counsel seemed exasperated when he called it a ''morass.'' Tr. at 55.

Justice Sotomayor went on to say what she thinks is the right solution: ''I don't know why the lower court relied on the Section 423 [qualifications of the Administrator, Director of Clinical Services, Medical Director, and Psychiatrist], this — the director's qualifications and responsibilities when there's a direct regulation that says that the health service will only pay for services rendered by a staff member who's qualified.'' Tr. at 22.

The trouble is that the staff members do not have to be doctors to be ''qualified'' to render services — in this case, counseling.[9] The MassHealth regulations contemplate even ''unlicensed counsellors'' providing services under supervision from a qualified professional staff member, such as a psychiatrist, psychologist, social worker or psychiatric nurse. 130 Mass. Code Regs. § 429.424. And, of course, Section 424 is not a condition for payment — only participation. That's probably why the lower court stretched for Section 423.

Even the First Circuit conceded: ''There is at least some ambiguity as to whether the MassHealth regulation in question, 130 Mass. Code Regs. § 429.422, independently requires each satellite clinic to employ its own psychiatrist.'' *U.S. ex rel. Escobar*, 780 F.3d at 516 n. 15. The First Circuit further admitted: ''On this reading of the definition of 'mental health center,' a satellite that does not employ a psychiatrist is not out of compliance with the staffing regulation so long as the parent has a psychiatrist on staff.'' *Id.* As required, the parent facility in Malden did have a board-certified psychiatrist on staff. As the First Circuit seems to concede, the petitioner has arguably complied with the Medicaid regulations.

The Implied Certification Theory

Under the False Claims Act, falsity must be established. In other words, the government or a relator must find a ''false'' statement or claim. Here, there is just a bare but accurate request for payment. So how does this become a ''false'' request or claim for payment?

To prove the existence of a false claim, the Supreme Court seemed to be happy to rely upon the implied certification theory. The Deputy Solicitor General summed it up well:

> [A] person who submits a claim is not simply asking for money; he is representing that he has a legal entitlement to be paid. And you can say, if a person asserts that he is legally entitled to be paid, and he knows that he has no such legal entitlement, the claim is false. Tr. at 36.

The missing premise is that the person knows that he is not entitled to be paid, because he is in breach of a material term of the contract. The Deputy Solicitor General went on to explain:

> And so a person who knew himself to be in breach of a nonmaterial term and requested payment anyway wouldn't be making a false claim. He would be claiming a legal entitlement to be paid; he would be entitled to be paid because the breach wouldn't excuse the government's payment obligation. But if the term that was being breached was material, the claim of legal entitlement would be false. Tr. at 36-37.

The natural follow-up question is: What is material and nonmaterial? Chief Justice Roberts put a fine point on it, when he asked:

> So the contract is to provide all these health services, and by the way, you've got to buy, you know, staplers made in the United States, not — not abroad. And they do everything, but they don't buy staplers made in the United States.
>
> I would say the government . . . [i]s going to withhold $100, right? Tr. at 40.

The answer is jarring. We do not usually look to where a stapler is purchased to determine if the government got what it paid for in a delicate, complex and

[7] A transcript of the argument before the Supreme Court, as well as the parties' briefs and other materials, is available at http://www.scotusblog.com/case-files/cases/universal-health-services-v-united-states-ex-rel-escobar/.

[9] See authorities attached as an appendix to Petitioner's Brief. Specifically, 105 Mass. Code Regs. Section 140.530 and 130 Mass. Code Regs. Section 429.422-424 require a multidisciplinary staff including psychologists, nurses, social workers, therapists and counselors.

critical surgery. OK, we may have trouble distinguishing exactly what is important, but, under almost any analysis, where staplers are purchased is not important. The Deputy Solicitor General answered:

> . . . [I]f under the terms of the agreement and the — the law of contracts, the government would be legally entitled to withhold payment or a portion or the payment in that circumstance, then ***that would be a false claim***. (Emphasis added.). Tr. at 40.

Even more shocking is that there doesn't seem to be any term of the contract or regulations that is not material, so that even the most insignificant requirement could become a false claim. Chief Justice Roberts gave the logical response: ''[A]nd [if] a relator can sue for that, then I don't understand the difference between material and immaterial.'' Tr. at 41.

Later, the Deputy Solicitor General added: ''I don't know if there are any terms that are wholly immaterial, because if there were, presumably they wouldn't be in the — the agreement or the — the regulations.'' Tr. at 45. This does not help contractors trying to determine whether they are in compliance with all of the material terms of the contract and regulations.[10] What he threw in may help: ''But there are certainly terms that would be immaterial to particular claims.'' Tr. at 45. However, this raises more questions than it answers. In an effort to explain, he added a hypothetical:

> So, for example, if the government had a rule that said at all times, a hospital that is receiving Medicaid reimbursement has to have the following equipment in its operating room. It might well be the case that a violation of that requirement would disentitle the claimant to payment for — for surgical services performed, but would not disentitle the claimant to payment for services that had nothing to do with use of the operating room. Tr. at 45.

The Deputy Solicitor General is making a little wiggle room here. In his hypothetical, not using the precise equipment prescribed by the contract or regulation may disqualify the claimant for that surgery, but not for an unrelated service, such as treatment for a broken arm where the noncompliant equipment plays no role in the services. What he appears to be saying is that compliance with a regulation may be material for one service and not material for another. It all depends. So much for bright lines.

A Lawyer's Game?

To recap: This case came before the Supreme Court as an appeal from a ruling on a motion to dismiss, so we don't know all of the facts. There are no disputes that the services were, in fact, rendered and that these services are covered. The dispute is whether they were adequately supervised and whether a board-certified psychiatrist had to be on site at the satellite office where the services were rendered or whether the board-certified psychiatrist could be at the parent facility.

Massachusetts Medicaid regulations did not address this question, but a regulation from a different Massachusetts agency, the DPH, did have a regulation stating that a satellite facility must have a board-certified psychiatrist present. The Medicaid regulations do not incorporate or reference the DPH regulations. Nevertheless, the First Circuit has made the connection between the two sets of regulations and concluded that it was a condition for payment.

The issue the petitioner raises is: What exactly is false about its request for payment? As counsel for the petitioner states at the end of the argument: All that was submitted was a request for payment. The government controls what it will require in a request for payment. There is no allegation of a false statement in the request for payment. The only allegation is that every jot and tittle of every MassHealth regulation is incorporated.

Unfortunately, without bright lines, such as an express condition for payment, government contractors are left with little to go by. This results in many judgment calls that will inevitably be second-guessed by relators, who will file suit under the FCA and expose the contractor to liability, potential debarment and, possibly, closure. Lawyers will then have to step in and continue to second-guess the contractor arguing for or against materiality and whether scienter was present. While calling it a lawyer's game may be a little harsh, it is truly a lawyer's world and will benefit lawyers.

Conclusion: Implied Certification Limited Only by Scienter and Materiality

A majority of the justices expressed sympathy for the implied certification theory so that the First Circuit opinion will probably stand. The Supreme Court did not seem at all interested in the distinction between conditions for payment compared to conditions for participation in the program. This distinction has been employed usefully by the Second and Sixth Circuits and other courts to put some limits on the implied certification theory.[11] Tr. at 30-31.

Predicting how the Supreme Court will come out is risky business. In this case, I think four or five justices will likely accept the implied certification theory. Justices Sotomayor, Kagan, Ginsburg,[12] Breyer[13] and Ken-

[10] Contractors cannot even raise their prices to cover the risk, as Chief Justice Roberts' question brought out. See Tr. at 32. (''[If a contractor is] going to get in trouble [for every single thing under the] False Claims Act. . . . So our bid is going to be a little bit higher to cover that potential risk.'' The response from relator's counsel was that, in the health care area, rates are set by the government, so contractors cannot raise their prices.).

[11] *Mikes v. Straus*, 274 F.3d 687, 702 (2nd Cir. 2001) (The *Mikes* decision required an express condition for payment: ''Since § 1320c-5(a) does not expressly condition payment on compliance with its terms, defendants' certifications on the HCFA-1500 forms are not legally false. Consequently, defendants did not submit impliedly false claims by requesting reimbursement for spirometry tests that allegedly were not performed according to the recognized standards of health care.''); *Chesbrough v. VPA, P.C.*, 655 F.3d 461, 468 (6th Cir. 2011) (Likewise requiring an express condition for payment: ''Medicare does not require compliance with an industry standard as a *prerequisite* to payment. Thus, requesting payment for tests that allegedly did not comply with a particular standard of care does not amount to a 'fraudulent scheme' actionable under the FCA.'') (Emphasis added).

[12] Justice Ginsburg seemed to correct the petitioner's counsel's statement that ''false'' does just mean ''false.'' Under her view, it also means ''deceptive, misleading.'' Tr. at 4. In other words, a bill may be misleading because the bill may imply that certain conditions were complied with, which is essen-

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nedy[14] made comments that indicate that they accepted the theory under the False Claims Act. Four justices is enough to allow the First Circuit opinion to stand on this issue.

Although I do not think a majority of the court will do so, the court could adopt a ''worthless services'' theory that the services provided by allegedly unsupervised and unqualified staff were so worthless that the claim for payment is a lie (much like the Civil War examples of cardboard shoes and misfiring guns that Justices Kagan and Sotomayor used, *see e.g.*, Tr. at 12, 15, and 16.) Justice Kagan set it forth clearly:

> Let's say there's a contract . . . it says I commit to providing a doctor's care . . . And then it turns out that the medical care that was provided was not by a doctor. It was by a nurse or . . . and then the person who enters into the contract makes a statement, demands payment and says the care was provided.
>
> Now, some care was provided; it is true. But medical care, a doctor's care was not provided. Now, by withholding that fact and by just saying the care was provided, have I not committed fraud under the common law? Tr. at 8.[15]

Instead, I believe the court will adopt the relator's counsel's suggestion: ''[T]he two elements of materiality and knowledge are going to solve the vast bulk of the problems.'' Tr. at 33.[16] These two elements have already proved useful to the D.C. Circuit in deciding implied certification cases. See *U.S. ex rel. Purcell v. MWI Corp.*, 807 F.3d 281, 284 (D.C. Cir. 2015) (''[T]he FCA's objective knowledge standard . . . did not permit a jury to find that MWI 'knowingly' made a false claim . . . .'');[17] *U.S. ex rel. Davis v. District of Columbia*, 793 F.3d 120, 125 (D.C. Cir. 2015) (''Davis has not met his burden to show that the District was in knowing violation . . . .'').

Although the scienter requirement may be as little as reckless disregard for the truth and falsity of the claim, the Supreme Court will adopt the Deputy Solicitor General's language that knowledge ''applies *both* to knowledge of the breach, and knowledge that it is material to the government.'' Tr. at 43 (emphasis added).

What this means is that only a court (summary judgment) or a jury can decide. So, more litigation is the answer. This is not good news for companies doing business with the government. Every jot and tittle of often complex and contradictory regulatory schemes may be the basis of a False Claims Act case. There will be no bright lines. It's still a ''lawyer's game'' because lawyers will be arguing for or against scienter and materiality — in court. And after years of litigation, the contractor may be faced with a multimillion-dollar judgment/settlement and then potential suspension or debarment. The only industry this helps is the legal industry.

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tially the implied certification theory. Justice Kennedy seemed to agree: ''There is a failure to make an additional [statement] or qualifying matter in order to make that statement not false.'' Tr. at 9.

[13] Justice Breyer accepted implied certification and was looking for a limit in materiality. Justice Kennedy seemed to agree: ''It — it seems to me we just can't think about fraud unless we have materiality in some sense. And it could be a very strict standard of materiality.'' Tr. at 14.

[14] Justice Kennedy asked questions that implied that the submission of an invoice would be false if it failed to disclose noncompliance. *See* Tr at 8.

[15] Justice Sotomayor even seemed to become a bit annoyed with the petitioner's counsel when she asked: ''Do you think that anybody, except yourself, would ever think that it wasn't a fraud to provide guns that don't shoot if that's what the — the government contracted for?'' Tr. at 13.

[16] This is the approach taken by the D.C. Circuit in *U.S. v. SAIC*, 626 F.3d 1257, 1270 (D.C. Cir. 2010) (''. . . this very real concern [that the implied certification theory is prone to abuse] can be effectively addressed through strict enforcement of the Act's materiality and scienter requirements.'').

[17] The court adds: ''Under the FCA's knowledge element, then, the court's focus is on the objective reasonableness of the defendant's interpretation of an ambiguous term and whether there is any evidence that the agency warned the defendant away from that interpretation.'' *U.S. ex rel. Purcell*, 807 F.3d at 290.