KRIEG DEVAULT

Insights

The Supreme Court Endorses "Implied Certification"

July 4, 2016

Hospitals which have discovered violations in their submissions for payment under Medicare and Medicaid may now pause before reporting the mistake and determine if the violation was “material” to the government’s conditions for payment. If the mistake was not material, then the False Claims Act (“FCA”) would not apply to those submissions and the onerous penalty payments of the FCA would be inapplicable as well.

The Supreme Court’s unanimous decision in Universal Health Services, Inc. v. United States ex rel. Escobar, is one of the most significant False Claims Act, 31 U.S.C. § 3729 *et seq.* decisions in recent years. The main issue in this case surrounds the theory of liability known as “implied certification.” The Defendant, Universal Health Services, appealed to the high court in order to challenge the “implied certification” theory under the FCA.

Friend of the Court briefs were filed by many large stakeholders in the medical community, including the American Medical Association, the American Hospital Association, and Pharmaceutical Research and Manufacturers of America, to name a few. Many industries unrelated to healthcare, but containing members who contract heavily in the public sector, also filed Amicus Curiae briefs. This list includes military contractors and other industry groups, such as The Association of Private Sector Colleges and Universities and the Chamber of Commerce.

Justice Clarence Thomas authored the decision, and held that “the implied false certification theory can, at least in some circumstances, provide a basis for liability.”

As background, the underlying suit was filed by the parents of Yarushka Rivera, who died after receiving counseling and medication prescriptions from Arbour Counseling Services for several years. Arbour was owned and operated by Universal Health Services. The relators alleged that improper billing occurred at Arbour, and that the treatment Yarushka received was unlicensed and improperly supervised by counselors and nurses. Thus, Arbour ran afoul of numerous regulatory requirements tied to the Medicaid Program.

The Court’s ruling provided a fairly simple answer to the technical question of whether the “implied false certification” of compliance with governmental requirements can constitute a violation of the False Claims Act, which attaches sizeable penalties to “false or fraudulent claims” but does not clearly define all of the terms. This question has caused numerous splits in the separate federal court circuits. In the end a unanimous decision remanded the case for further consideration.

There were three main holdings in Justice Thomas’s opinion:

First, the Court adopted the “implied certification” theory but clarified its application. Two conditions must be satisfied before the failure to disclose noncompliance to the government can create liability (i)“the claim does not merely request payment, but also makes specific representations about the goods or services provided”,

and (ii)“the defendants’ failure to disclose [the] noncompliance with material statutory, regulatory, or contractual requirements makes those representations misleading half-truths.”

Basically, the Court stated that merely “requesting” payment without more “specific” conditions surrounding the goods or services provided is not enough to establish implied certification liability.

Second, the Court rejected a theory adopted by some lower courts which had previously limited FCA liability. This theory, the “express condition of payment,” limited liability for contractors and allowed for determinations of exactly when the FCA was implicated. The Court stated that “even when a requirement is expressly designated a condition of payment, not every violation of such a requirement gives rise to liability.”

Finally, the Court added a new materiality requirement for relators prosecuting claims under the FCA. Any misrepresentation in regards to compliance with the terms and conditions for payment must be material to the government’s decision to pay, since the FCA is not an “all-purpose antifraud statute.” 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.” Flowing from this requirement is the Court’s tacit admission that “minor or insubstantial” noncompliance that is not material should not be the basis for such enormous financial liability

In many ways, the Court adopted a common sense approach towards “implied certification.” When a defendant omits its violations of statutory, regulatory, or contractual requirements, those omissions can be a basis for liability if they render the defendant’s representations misleading.