

Supreme Court Expands Scope of False Claims Act Under The “Implied False Certification” Theory.

At the end of the term, in *Universal Health Services v. United States et al. ex rel. Escobar et al.*, the Supreme Court issued a unanimous decision expanding the scope of potential liability under the False Claims Act, 31 U.S.C. § 3729 *et seq.* The Court resolved a dispute among the Courts of Appeals over the parameters and applicability of the implied false certification theory of liability. Under the Court's decision, a defendant can be liable where a failure to disclose noncompliance with a statutory, regulatory, or contractual requirement renders representations made by the defendant misleading. The decision does not provide for unlimited liability for failing to disclose any violation. Under the False Claims Act, as the Supreme Court was careful to note, an actionable violation must be material to the government's decision to pay.

Background

The federal False Claims Act dates back to the Civil War era. Originally enacted to hold accountable suppliers who defrauded the Union Army, the False Claims Act serves as a powerful weapon for the government to protect the public fisc. A defendant who violates the False Claims Act is subject to treble damages, plus civil penalties of up to \$11,000 for each false claim.

Several types of conduct give rise to liability under the False Claims Act. The most common involve knowingly submitting a false claim to the government, causing another to submit a false claim to the government, or making a false record or statement to get a false claim paid by the government. Private individuals, commonly called whistleblowers, can file a *qui tam* action on behalf of the United States and share in a percentage of any money recovered. During the fiscal year 2015, whistleblowers filed 638 *qui tam* actions and the Department of Justice recovered over \$3.5 billion in settlements and judgments. Since January 2009, the government has recovered more than \$26 billion.

Recent Action

The implied false certification theory applies where a defendant does not explicitly state that it has complied with a particular statutory, regulatory, or contractual provision, but such compliance is implied. For example, a defense contractor submitting a claim for reimbursement from the government may not explicitly certify in its claim that it is complying with Defense Department regulations, but such compliance may be implied. Prior to the Supreme Court's decision in *Universal Health Services*, the federal Courts of Appeals disagreed on whether and in what situations implied false certifications were actionable under the False Claims Act.

Federal courts in New York allowed a limited application of the implied false certification theory. Under the rule outlined in the Second Circuit decision in *Mikes v. Straus*, a defendant could be liable only where it did not disclose a failure to comply with a statutory, regulatory, or contractual provision that was an express condition of payment. Other courts refused to allow any liability for implied false certifications, permitting recovery only where there was an express or affirmative lie by the defendant. Still other courts allowed liability in situations where the failure to comply with a provision did not violate an express condition of payment.

GOVERNMENT and INTERNAL INVESTIGATIONS

PRACTICE LEADERS

Brian M. Feldman
bfeldman@hselaw.com
Carol E. Heckman
checkman@hselaw.com

PARTNERS

Peter H. Abdella
pabdella@hselaw.com

Jerauld E. Brydges
jbrydges@hselaw.com

Theresa A. Conroy
tconroy@hselaw.com

Edwin M. Larkin
elarkin@hselaw.com

Donald S. Mazzullo
dmazzullo@hselaw.com

Julie Green Sewruk
jsewruk@hselaw.com

Erika N.D. Stanat
estanat@hselaw.com

Jeffrey A. Wadsworth
jwadsworth@hselaw.com

Mark R. Wilson
mwilson@hselaw.com

Richard T. Yarmel
ryarmel@hselaw.com

**GOVERNMENT and
INTERNAL
INVESTIGATIONS**

COUNSEL

Leslie E. DesMarteau
ldesmarteau@hselaw.com

Joseph E. Simpson
jsimpson@hselaw.com

**SENIOR ANTITRUST
COUNSEL**

David A. Wier
dwier@hselaw.com

ASSOCIATES

David T. Archer
darcher@hselaw.com

John P. Bringewatt
jbringewatt@hselaw.com

Candace M. Curran Espinosa
ccurran@hselaw.com

John M. Jennings
jjennings@hselaw.com

Kyra Tichacek Keller
kkeller@hselaw.com

Maura C. McGuire
mmcguire@hselaw.com

Jessica A. Myers
jmyers@hselaw.com

Michael J. Rooney
mrooney@hselaw.com

Laura K. Schwalbe
lschwalbe@hselaw.com

Edward H. Townsend
etownsend@hselaw.com

The Supreme Court resolved the dispute, holding that a defendant who makes representations in submitting a claim to the government but does not state that it has violated a statutory, regulatory, or contractual requirement may be liable where two conditions are met: (1) the claim both requests payment and makes specific representations about the goods or services provided; and (2) the failure to disclose noncompliance with a material statutory, regulatory, or contractual requirement makes the specific representations misleading. Failure to disclose is material if it would affect the government's decision to pay the claim, a fact-intensive analysis that will vary by case. Overruling the Second Circuit's *Mikes* decision, the Court held that False Claims Act liability could apply, regardless of whether or not the underlying requirement was an express condition of payment.

An illustration provided by the Court helps elucidate the ruling. A 2001 case from Vermont involved a professor who applied for a teaching position, submitting a resume outlining his recent jobs and stating he had then retired for a period of years. He did not disclose that he spent his "retirement" in prison following a multi-million dollar bank fraud. His failure to disclose this fact made his earlier representation about retirement misleading.

Implications

The decision in *Universal Health Care* expands the scope of permissible False Claims actions in New York federal courts. Now, a defendant may be liable for implied false certification in a situation where it fails to disclose violation of a statutory, regulatory, or contractual provision even where such provision is not an express condition of payment. Yet, as the Supreme Court reiterated, the other False Claims Act elements—most importantly, both materiality and scienter (*i.e.*, knowledge of wrongdoing) — must also be met before a defendant may be held liable under the Act.

The Supreme Court's opinion governs only the federal False Claims Act and not analogous state statutes. However, because New York courts typically adopt federal jurisprudence in construing New York's analogous False Claims Act, courts in New York are quite likely to cite *Universal Health Care* to define and expand the scope of New York's False Claims Act, as well.

Conclusion

In issuing this decision, the Supreme Court expanded the scenarios under which a defendant can be liable under the False Claims Act. If you would like our assistance with a False Claims Act question, or if you have any questions about this LEGALcurrents, please contact a member of our Government and Internal Investigations practice group at (585) 232-6500 or (716) 853-1616. ■



Harter Secret & Emery LLP
ATTORNEYS AND COUNSELORS

ROCHESTER

1600 Bausch & Lomb Place
Rochester, NY 14604-2711
585.232.6500

BUFFALO

Twelve Fountain Plaza, Suite 400
Buffalo, NY 14202-2293
716.853.1616

ALBANY

111 Washington Ave., Suite 303
Albany, NY 12210-2209
518.434.4377

CORNING

8 Denison Parkway East, Suite 403
Corning, New York 14830-2638
607.936.1042

NEW YORK

733 Third Avenue
New York, New York 10017
646.790.5884