

Supreme Court Rejects Government's Expansive View of FCA Liability but Endorses Implied Certification Theory (with Limits)

By **Stuart M. Gerson, George B. Breen, Robert E. Wanerman, and Jonah D. Retzinger**

June 2016

On June 16, 2016, the Supreme Court of the United States rendered a unanimous decision in the highly anticipated False Claims Act (“FCA”) case of *Universal Health Services, Inc. v. United States ex rel. Escobar*.¹ In its decision, the Court endorsed expanding the scope of potential liability under the federal False Claims Act (“FCA”) in certain circumstances but expressly rejected the position of the government and a lower court that every undisclosed violation of a statute, regulation, or contractual term is a basis for multiple damages and civil penalties under the FCA. The Court’s decision is significant for health care providers and suppliers that submit claims to federally funded health care programs, including Medicare and Medicaid, because the FCA remains one of the federal government’s primary enforcement tools. The Court concluded that an implied false certification of compliance—a statement in the claim or an omission from a claim that renders the claim misleading—can be actionable under the FCA. The Court also rejected the holding of several courts that FCA liability reaches only those issues where a claimant has expressly certified that it has complied with a specific term.

Background of the Litigation and the First Circuit’s Decision

The *Universal Health* case arose after a Medicaid beneficiary received mental health services and medication at a facility in Massachusetts and subsequently died. The patient’s family was told afterward that many of the practitioners who saw the beneficiary either lacked the appropriate credentials to treat her or were not properly licensed under state law. The patient’s family ultimately filed a *qui tam* action, alleging that, because the facility had submitted Medicaid reimbursement claims using codes that implied that the services were performed by qualified and licensed staff, the claims were false claims under the FCA. The district court dismissed the action on the ground

¹ 579 U.S. ___, No. 15-7 (June 16, 2016), available at http://www.supremecourt.gov/opinions/15pdf/15-7_a074.pdf.

that the facility had not violated a condition for payment in the relevant regulations. The U.S. Court of Appeals for the First Circuit reversed this part of the decision, ruling that any time a provider submits a claim, it impliedly certifies its compliance with all program requirements, whether or not expressly stated in the claim.

The Supreme Court's Ruling and Its Impact on Health Care Providers and Suppliers

The Supreme Court held that FCA liability can be based on an implied false certification when either the ordinary inference from a representation in the claim, or an omission in the claim, makes the representations in the claim misleading with respect to the goods or services provided. In the Court's view, half-truths in a claim for reimbursement from a government program such as Medicare or Medicaid is just as actionable as an outright lie if the failure to disclose noncompliance with a statute, regulation, or contract term makes those representations misleading half-truths.

Nevertheless, the Court did not agree with the expansive view proffered by the First Circuit or with the government that all breaches or violations result in FCA liability. The Court reiterated that the FCA is not an all-purpose anti-fraud statute, and that not every omission, regulatory violation, or contract breach can result in the fines and multiple damages called for in the FCA. Instead, the Court confirmed that FCA liability is still limited to situations where the noncompliance is material to inducing the government to pay a claim, and that the requirement of materiality is "demanding."

What is a material element of a claim is still a case-by-case determination; indeed, the Court noted that just because the government designates a term as a condition of payment does not automatically make that term material. While the Court did not establish a bright line between permissible conduct and FCA violations, there are some factors that providers and suppliers to government programs should consider:

- If the government knew of an undisclosed fact, would it likely not pay the claim?
- Has the government suffered any demonstrable loss?
- Has the government consistently denied payment of claims (or paid claims) when it knows that the provider or supplier is not in compliance with a particular statutory, regulatory, or contract term?
- If the claims are reviewed by an agency's contracting officer or other official, was the deliverable work approved?

Conclusion

Although the Court has resolved the question of whether or not an implied false certification can result in a violation of the FCA, it remains to be seen in future cases and in the actions of enforcement agencies how elastic the concept of materiality will

be. Health care entities should continue to resist vigorously efforts by the government and *qui tam* relators to use the FCA as a weapon against what are in reality nothing more than minor and immaterial regulatory missteps. *Universal Health* demonstrates that defenses against this overreach remain alive and well.

* * *

*This Client Alert was authored by **Stuart M. Gerson, George B. Breen, Robert E. Wanerman, and Jonah D. Retzinger.** For additional information about the issues discussed in this Client Alert, please contact one of the authors or the Epstein Becker Green attorney who regularly handles your legal matters.*

This document has been provided for informational purposes only and is not intended and should not be construed to constitute legal advice. Please consult your attorneys in connection with any fact-specific situation under federal law and the applicable state or local laws that may impose additional obligations on you and your company.

About Epstein Becker Green

Epstein Becker & Green, P.C., is a national law firm with a primary focus on health care and life sciences; employment, labor, and workforce management; and litigation and business disputes. Founded in 1973 as an industry-focused firm, Epstein Becker Green has decades of experience serving clients in health care, financial services, retail, hospitality, and technology, among other industries, representing entities from startups to Fortune 100 companies. Operating in offices throughout the U.S. and supporting clients in the U.S. and abroad, the firm's attorneys are committed to uncompromising client service and legal excellence. For more information, visit www.ebglaw.com.

IRS Circular 230 Disclosure

To ensure compliance with requirements imposed by the IRS, we inform you that any tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of: (i) avoiding any tax penalty, or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein.

If you would like to be added to our mailing list or need to update your contact information, please contact Lisa C. Blackburn at lblackburn@ebglaw.com or 202-861-1887.

BALTIMORE

Helaine I. Fingold
Joshua J. Freemire
Thomas E. Hutchinson*
John S. Linehan

BOSTON

Emily E. Bajcsi
Barry A. Guryan

CHICAGO

Bradley S. Davidsen
Amy K. Dow
Mark A. Mosby
Kevin J. Ryan

HOUSTON

Mark S. Armstrong

LOS ANGELES

Adam C. Abrahms
Ted A. Gehring
Paul A. Gomez
J. Susan Graham

NEW YORK

Jeffrey H. Becker
Lindsay M. Borgeson
Michelle Capezza
Karen L. Cavalli
Aime Dempsey
Kenneth W. DiGia
Charles C. Dunham, IV
Jerold I. Ehrlich
Gregory H. Epstein
Hanna Fox
James S. Frank
Arthur J. Fried
John F. Gleason
Robert D. Goldstein
Robert S. Groban, Jr.
Gretchen Harders
Carly Eisenberg Hoinacki
Jennifer M. Horowitz
Kenneth J. Kelly
Joseph J. Kempf, Jr.
Basil H. Kim
Stephanie G. Lerman
Leonard Lipsky
Purvi Badiani Maniar
Wendy G. Marcari
Shilpa Prem
Jackie Selby
Victoria M. Sloan
Steven M. Swirsky
Benjamin T. Tso
David E. Weiss
Alison M. Wolf

NEWARK

John D. Barry
Christina Burke
Joan A. Disler
James P. Flynn
Diana M. Fratto
Gary W. Herschman
Laurajane B. Kastner
Daniel R. Levy
Theodora McCormick
Maxine Neuhauser
Anjana D. Patel
Victoria Vaskov Sheridan
Scheherazade A. Wasty
Jack Wenik
Sheila A. Woolson

PRINCETON

Anthony Argiropoulos
Thomas Kane
Andrew Kaplan
Jeffrey G. Kramer

SAN DIEGO

Kim Tyrrell-Knott

STAMFORD

Ted Kennedy, Jr.
David S. Poppick

WASHINGTON, DC

Alan J. Arville
Robert F. Atlas*
Kirsten M. Backstrom
Clifford E. Barnes
James A. Boiani
George B. Breen
Lee Calligaro
Tanya V. Cramer
Anjali N.C. Downs
Jason E. Christ
Steven B. Epstein
John W. Eriksen
Daniel C. Fundakowski
Brandon C. Ge
Stuart M. Gerson
Daniel G. Gottlieb
M. Brian Hall, IV
Philo D. Hall
Douglas A. Hastings
Jonathan K. Hoerner
Robert J. Hudock
William G. Kopit
Amy F. Lerman
Wenxi Li*
Katherine R. Lofft
Mark E. Lutes
Joseph E. Lynch
Teresa A. Mason
David E. Matyas
Colin G. McCulloch
Frank C. Morris, Jr.
Leslie V. Norwalk

René Y. Quashie
Jonah D. Retzinger
Serra J. Schlanger
Bonnie I. Scott
Erica F. Sibley
Lynn Shapiro Snyder
Adam C. Solander
James S. Tam
David B. Tatge
Daly D.E. Temchine
Bradley Merrill Thompson
Carrie Valiant
Patricia M. Wagner
Robert E. Wanerman
Meghan F. Weinberg
Constance A. Wilkinson
Kathleen M. Williams
Lesley R. Yeung

**Not Admitted to the Practice of Law*