



## ***Universal Health v. Escobar: Supreme Court Affirms But Limits Implied-Certification Liability under False Claims Act***

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The U.S. Supreme Court in *Universal Health Services v. U.S. ex rel. Escobar*, 2016 WL 3317565 (June 16, 2016) unanimously endorsed the so-called “implied certification” theory of False Claims Act liability, under which a contractor can be liable for violations of government regulations even if the contractor never explicitly certified compliance with those regulations. But the Court also limited the application of implied-certification liability by emphasizing that only “material” violations can support liability and by imposing a “demanding” materiality standard. The decision will likely increase the volume of *qui tam* case filings, and could make motions to dismiss harder for defendants to win, but the decision should also give defendants more arguments to use in ultimately prevailing at summary judgment or at trial.

### ***Escobar concerned violations of staffing and licensure requirements.***

Plaintiffs/relators in *Escobar* were the parents of a teenage girl who died while defendant was providing her mental-health treatment that was paid by a Massachusetts Medicaid program. Relators claimed the treatment violated several Massachusetts state regulations governing the licensure and supervision of mental-health providers. A regulatory investigation confirmed the violations, and imposed a small fine (\$1,000) and minor, non-monetary restrictions. Relators alleged that defendant’s claims for payment (i.e., billing submissions) for their daughter’s treatment were false because, although the claims did not expressly certify compliance with the licensure and supervisions requirements, merely seeking payment impliedly certified defendant’s compliance with all regulations.

### ***District Court: no claim is stated because the regulations are not conditions for payment.***

The district court dismissed the complaint. The court noted that the First Circuit recognized implied-certification claims under the False Claims Act, but the district court concluded that the theory only applied to regulations that were “conditions for payment” under the regulatory scheme. Submitting a payment claim did not impliedly certify compliance with regulations that were merely “conditions for participation” in the government program.

In dismissing the complaint, the district court concluded that none of the licensure and supervision regulations that defendant violated were conditions for payment and, as a result, defendant’s payment claim did not impliedly certify compliance with those regulations. Although the court said regulations need not explicitly say they are conditions for payment, the court’s analysis largely relied on its conclusion that none of the regulations described themselves as conditions for payment.

### ***First Circuit: regulations are conditions for payment because they are designated as such.***

The First Circuit reversed the dismissal and found that relators had adequately alleged false claims. The court reaffirmed its recognition of implied-certification liability under the FCA, and found the relators properly alleged violations of regulations that were conditions of payment. The First Circuit relied on its conclusion (which differed from the district court’s) that the regulations at issue were explicitly described as conditions of payment.



The Supreme Court granted certiorari on two questions: (1) whether FCA defendants seeking payment from the government can be deemed to have impliedly certified compliance with any regulations; and (2) if so, whether the implied certification should be limited to regulations that are expressly designated as conditions of payment.

**Supreme Court: implied-certification liability is permitted, but is limited by materiality.**

The Supreme Court began by endorsing implied-certification liability under some circumstances. The Court held that implied certification can apply where a defendant seeking payment “makes specific representations about the goods or services provided” but fails to disclose violations of “material” requirements regarding the goods or services. *Escobar*, at \* 9. The Court found implied certification was present here because, by using payment codes for specific services and professionals, the defendant falsely implied that the services were performed by properly licensed and supervised professionals. *Id.*

The question then becomes what requirements are “material” so as to support liability, and the Court imposed significant limitations on materiality. While the Court rejected defendant’s argument that only regulations that are expressly designated as conditions of payment could be material (*Id.*), the Court also held that regulations are not material simply because they are designated as conditions for payment. *Id.* at Further, a regulation is not material simply because a violation gives the government the **option** to withhold payment. *Id.* at 12. Rather, the Court held that the issue is whether defendant should have known that the government **was likely** to withhold payment if it knew of the undisclosed regulatory violation. *Id.* The Court said evidence of how the government typically responds to such violations would be critical: if payment for this type of violation is typically refused, the violation is likely material; if payment is typically made, the violation is likely immaterial. *Id.*

The Court vacated the First Circuit’s decision and remanded to re-evaluate the allegations of materiality. *Id.* at \* 13.

**Impact: more cases filed and survive motions to dismiss, but more defendants ultimately prevail.**

After *Escobar*, implied-certification is now the law of the land, overturning cases in the 7th and 2nd Circuits that had rejected or limited the doctrine. And the Court’s focus on a fact-intensive materiality inquiry (e.g., whether the government typically pays despite knowledge of regulatory violations) could make it harder for defendants to defeat implied-certification claims on motions to dismiss. But the Court also noted in a footnote that plaintiffs must allege facts showing materiality with “plausibility and particularity” under Rules 8 and 9(b) (*Id.* at \* 12, n.6), so motions to dismiss certainly remain viable. And by stressing materiality as the lynchpin to any valid certification case, whether implied or express, the Court has shown *qui tam* defendants how to prevail on summary judgment or at trial. Indeed, defendants now may be entitled to broader discovery from government payors regarding whether claims are typically paid despite government knowledge of certain regulatory violations. Thus, the decision is something of a mixed bag, but on balance is probably a win for FCA defendants.

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