PUBLICATION

Health Care, Defense and Other Government Contractors Will Face False Claims Act on Implied False Certification Theory

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In light of the June 16, 2016, opinion of the United States Supreme Court in *Universal Health Services, Inc. v. United States ex. rel. Escobar*, government contractors can face liability in certain instances under the federal False Claims Act (FCA) for making an "implied false certification." Because neither of the courts below used this new interpretation of the FCA, the Court sent the case back for reconsideration on whether an FCA violation had been pled sufficiently. In *Universal Health Services*, failing to disclose that the staff of the mental health facility providing services to a Medicaid beneficiary did not meet statutory and regulatory requirements for proper licensing and supervision constituted misleading, implied certification.

Three points need to be emphasized:

- Liability with treble damage and civil monetary penalty exposure can attach whenever the provider/contractor submits claims for payment but "knowingly" fails to disclose "noncompliance with a statutory, regulatory or contractual requirement," if the omission is materially misleading.
- The requirements need not be "expressly designated conditions for payment."
- There must be proof of "materiality" of the misrepresentation to the government through evidence of the provider/contractor's knowledge that the requirement is "material to payment decisions" and not just "minor or insubstantial."

That knowledge can be actual or established by deliberate ignorance or reckless disregard of the omission's importance. On the other hand, specifying a requirement as a condition of payment does not by itself establish materiality. If the "government pays a particular claim in full despite its knowledge that certain requirements were violated or regularly does so without change," materiality may be lacking.