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Commentary: The Supreme Court's New Whistleblower Decision Is Huge

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As someone famously said, "We live in a material world." After the Universal Health Services, Inc. v. United States ex rel. Escobar decision, this is particularly true in at least two ways.

In the whistleblower world, there is a pecking order of "haves" and "have nots. In one camp are the paid whistleblowers. In the other are the unpaid whistleblowers. In the paid whistleblower ranks, there are four or five different categories of potential claimants (e.g., SEC whistleblowers, IRS whistleblowers, and even Texas Parks and Wildlife whistleblowers), but the 800-pound gorilla is the False Claims Act/qui tam plaintiff. This is the statute where the huge awards are paid, some exceeding $100,000,000.

Significantly, in Escobar, the Supreme Court gave its stamp of approval to the doctrine of implied false certification, a potentially game-changing FCA theory of recovery. In so doing, the court emphasized materiality as the ultimate litmus test for application of the implied certification FCA cause of action.

A. Business Opposition

A number of prominent pro-business lobbying groups (e.g., the U.S. Chamber of Commerce, the Washington Legal Foundation, etc.) had urged the court to either entirely disavow the implied certification cause of action, or, at best, adopt a restricted view of the concept, predicting a litigation feeding frenzy by rapacious whistleblower plaintiffs, targeting well-meaning government contractors hamstrung by their contracts with a regulation-choking federal government.

In a dramatic illustration of the recent unpredictability of the court, the unanimous decision embracing—with certain limitations, implied certifications—was authored by none other than Clarence Thomas, normally considered a staunch pro-business ally on the court

B. Facts of the Case

The underlying allegations here read more like a low-budget, made-for TV horror film, with the unfortunate claimant the victim of a rogue medical clinic:

• Of the small clinic's total employees, it was asserted that 23 lacked the required licenses to provide mental health services. Nevertheless, they counseled patients and prescribed drugs without supervision.

• Although plaintiff was treated by five clinic professionals, only one was properly licensed.

• Rather than monitoring the staff for license violations, the clinic's director actively misrepresented the staff's qualifications.

• The practitioner who prescribed medicine to the plaintiff, (who the clinic actually represented was a psychiatrist), was in fact a nurse who lacked authority to prescribe medications absent supervision.

• The practitioner who diagnosed the plaintiff as bipolar identified herself as a psychologist with a Ph.D., but failed to mention that her degree came from an unaccredited Internet college and that Massachusetts had rejected her application to be licensed as a psychologist.

On the clinic's business side, however, there was no lack of diligence, inasmuch as the clinic was more than proactive in submitting the treatment claims to Medicare and making sure those claims got paid.

Sadly, the Medicare patient died as a result of an adverse drug reaction, prescribed by one of the clinic's unlicensed practitioners. The FCA lawsuit was thereafter filed.

The clinic's argument that the FCA didn't apply might strike some as disingenuous: it alleged that since the services that Medicare ultimately paid for were unquestionably provided (albeit by medical practitioners who had not obtained the necessary licenses and certifications), there was actually no failure to provide some type of treatment. Consequently, the clinic argued, the only way FCA fraud would be present is if the contract itself required competent licensed practitioners.

C. A Split Among the Circuits

Prior to Escobar, the circuit courts were basically split into three camps on the issue of implied certifications. The expansive view holds that any knowing and material violation or breach of a statute, regulation, or contract can be viewed as a precondition to payment and give rise to contractor liability. This approach had been generally adopted by the First, Fourth, and D.C. Circuits.

The more restricted view, generally accepted in the Second, Third, Sixth, Ninth, Tenth, and Eleventh Circuits, was that only if the contract contains express preconditions to payment, will government contractors be liable for knowing and material violations or breaches of a statute, regulation, or contract.

Expressly rejecting the entire implied certification theory was the Seventh Circuit.

Practitioners in the Fifth Circuit were in a unique state of limbo, since there was no clear indication as to which interpretation applied. This ambiguity actually led the Seventh Circuit to conclude, somewhat erroneously, that the Fifth Circuit had aligned with their position.

D. Court's Decision

Whistleblower advocates were pleased that the court rejected all three interpretations, constructing its own somewhat simple test for application of the concept: "the claim does not merely request payment, but also makes specific representations about the goods and services provided," and (2) the defendant failed to disclose noncompliance with a provision that is "material" to the government's payment decision.

The defense bar claimed a consolation prize here by virtue of the court's insistence that a materiality analysis is required, at least as far as whether the implied certification cause of action is appropriate in any given FCA claim.

E. Other Key Determinations:

• Assuming the contractor has misrepresented its compliance with some applicable rule or regulation, there is no automatic presumption that a violation is present simply because the contract in question makes it a condition of performance.

• An available defense is evidence that the government knew of the violation and paid regardless.

• Another available defense is evidence that the government paid regardless of the violation in other similar situations.

• There is no recovery where the violation involves insignificant regulatory or contractual violations.

• Significantly, at least for plaintiffs, the Court approved the common law contract and fraud concepts of liability for misleading half-truths.

F. Takeaways

Given the court's oft-stated reluctance to allow the FCA as a substitute for generic fraud and contract claims (primarily because of the existence of the FCA's punitive damage provisions), it is somewhat surprising that the Escobar Court adopted identical generic fraud and contract concepts in FCA cases, such as the recognition that half-truths often trigger an actionable duty to disclose relevant facts.

The court emphasized that a defense to a materiality showing might be evidence that a governmental agency allowed a non-compliant practice. This could create a discovery and evidentiary rabbit hole, and might be more difficult to apply it than it seems, given the fact that agencies often allow certain types of noncompliance for essential goods, under unique circumstances. This also raises the question of whether a government bureaucrat had actually approved noncompliance with key requirements, and, if so, whether that individual had the authority to waive those regulatory requirements. Further, given the pressures on a bureaucrat's career, it might be difficult to find one who would admit that he waived certain key requirements that his agency would likely be otherwise insistent on.

If business interest groups such as the U.S. Chamber of Commerce and the Washington Legal Foundation want to maintain their batting average at the Supreme Court, they probably need to be more selective in the corporate litigants they decide to advocate on behalf of. Here most of the clinic employees in question seemed to have less medical training than the average tanning salon employee. Not exactly the best lineup for a game-changing Medicare fraud case.

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