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False Claims Act

Fraud Fighters Fear 'Deathblow' as Supreme Court Ruling Turns 2

Contractors must have been dismayed on June 16 two years ago when the Supreme Court gave the government and whistleblowers a shiny new fraud-fighting tool by green-lighting the implied certification theory of fraud under the False Claims Act.

Plaintiffs could now assert that contractors were liable if they concealed noncompliance with critical—material—contract requirements when seeking payment from the government.

But Justice Clarence Thomas's opinion did something else. It provided a road map that some defendants could use to take down false claims actions by arguing that no materiality existed, and thus no fraud occurred, if the government continued to make payments despite knowledge of misconduct.

''While *Universal Health Servs., Inc. v. United States ex rel. Escobar* was hailed by some as a victory for whistleblowers, the exacting materiality standard it articulated has been the death knell for many implied certification cases,'' said Blanca Young, Munger, Tolles & Olson LLP, San Francisco.

Defendants and plaintiffs alike want Supreme Court input on this materiality issue that has the potential to devastate some false claims cases, and the court has signaled interest in taking a case out of the U.S. Court of Appeals for the Ninth Circuit and providing clarification.

A second brewing *Universal Health v. Escobar* controversy is whether a valid case must only successfully allege materiality, or must it also identify specific misrepresentations a defendant made about its products or services to the government—a question the Ninth Circuit will probably answer this year.

A circuit split exists on this issue, a recent Supreme Court petition argued.

Big Verdicts Wiped Out If the government pays a particular claim in full despite its actual knowledge that certain requirements were violated, ''that is very strong evidence that those requirements are not material,'' Thomas wrote in *Universal Health*.

Reliance on this language has led to big victories for defendants in the past year:

■ The U.S. District Court for the Middle District of Florida tossed a $348 million jury verdict against a nursing home chain because the government continued to pay Medicare claims despite knowledge of alleged of recordkeeping deficiencies.

■ The U.S. Court of Appeals for the Fifth Circuit threw out a $663 million jury verdict because the Federal Highway Transit Administration always approved of and paid for Trinity Industries Inc.'s allegedly inferior highway guardrails.

This Fifth Circuit ruling, *United States ex rel. Harman v. Trinity Indus. Inc.*, is one of the biggest implied certification developments from the past year ''because it demonstrated the strength of the materiality standard: even jury verdicts worth hundreds of millions of dollars will be wiped out on appeal if the whistleblower or government fails to establish at trial that the alleged statutory, regulatory, or contractual violations were material to the government's decision to pay,'' said Robert Rhoad and Matthew Turetzky, false claims defense attorneys with Sheppard Mullin Richter & Hampton LLP.

It was an open question two years ago as to whether the Supreme Court's decision benefited the government or defendants, but the Fifth Circuit's decision shows lower courts are treating the materiality element as rigorously as the Supreme Court had intended, they added.

Deathblow in the Making? Gilead Sciences Inc. contends the Ninth Circuit should have followed the Fifth Circuit's rationale, but instead misinterpreted *Universal Health* when it revived whistleblowers' claims that Gilead made misrepresentations to the Food and Drug Administration about HIV drug ingredients.

The whistleblowers may have sufficiently alleged materiality because questions remain as to what the FDA knew about the drugs and when, the Ninth Circuit said.

Gilead's petition to the Supreme Court says the agency's continued payments in the face of misconduct allegations should be fatal to the case, and allowing the case to go forward could lead to a ''supercharged'' whistleblower suit industry imposing enormous costs on defendants.

The Supreme Court asked the government to provide a brief as to its views on Gilead's case, which indicates at least some interest in resolving questions about continued payments.

''It is surprising to me that the Supreme Court has expressed such interest in a relatively esoteric issue so quickly'' after the 2016 decision, Mike Bothwell of Bothwell Law Group PC, Roswell, Ga., told Bloomberg Government.

''The court might want to clean up some of the loose language or it might want to provide more of a deathblow to the entire area of litigation,'' he said.

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No Place for 'Bright Lines' The Supreme Court may opt to not get involved in implied certification cases again so lower courts can continue to work on this matter, or it could take the *Gilead* case from the Ninth Circuit and decide that continued payments are an important factor to consider but not an automatic case disqualifier.

Sen. Charles Grassley (R-Iowa), who worked on the 1986 amendments to the False Claims Act, used a Senate floor speech this past winter to critique the continued-government-payments defense in false claims cases.

There are many situations in which the government could have doubts about a contractor but no actual knowledge of fraud, and the government sometimes must keep paying despite those doubts to ensure the public receives services, he said.

Grassley has these cases in his sights, and could push for a legislative fix at some point, Bothwell said. ''There is a lot of mischief being made with this and it will likely end with a legislative solution,'' Bothwell said.

''Context is critical, and because government procurement involves a myriad of fact patterns and regulatory paradigms, it is impossible to draw bright lines delineating strict rules which will be outcome determinative for every situation, said Reuben A. Guttman, senior founding partner of Guttman, Buschner & Brooks PLLC in Washington.

''Right now there are just too few decisions for the court to intercede with new law,'' he added.

Two Steps Another controversy Thomas may have created involves the question of what are the minimum requirements for a valid implied certification case. A complaint must allege materiality, but must it also identify a defendant's specific representations about what it provided the government?

The Ninth Circuit in *United States ex rel. Rose v. Stephens Inst.* will probably provide an answer this year as to whether a valid case must always contain both conditions.

Thomas's opinion says the implied certification theory ''can be a basis for liability, at least where two conditions are satisfied: first, the claim does not merely request payment, but also makes specific representations about the goods or services provided; and second, the defendant's failure to disclose noncompliance with material statutory, regulatory, or contractual requirements makes those representations misleading half-truths.''

Last year, a Supreme Court petition in a now-settled case stated that a circuit split exists and must be addressed.

The petition said the Ninth Circuit had already decided, along with the U.S. Court of Appeals for the Third Circuit, that claims can't survive without the identification of specific misrepresentations, and that a case against a security contractor the Fourth Circuit revived wouldn't last in those other two circuits.

To raise a valid case, the petition said, It should be more difficult for a plaintiff than just coupling simple breach of contract allegations with mere request for payment.

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