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Amici Enter Supreme Court Fray About Reach of FCA

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A wide variety of groups have staked out positions in advance of the oral argument scheduled in the Supreme Court for April 19 in *Universal Health Servs., Inc. v. United States*, U.S., No. 15-7, *argument scheduled* 4/19/16.

The submission of more than 25 amicus briefs indicates the importance of the appeal, which could dramatically change the landscape of False Claims Act (FCA) cases.

The Supreme Court will decide whether ''implied certification'' can give rise to FCA liability, and, if so, whether a reimbursement claim is legally false if the provider fails to comply with a statute, regulation or contractual provision that does not expressly state it is a condition of payment. This article summarizes the parties' positions and highlights some of the conflicting arguments offered by amici.

Petitioner Universal Health Services appeals from its loss in the First Circuit. The company contends that the implied certification theory is unenforceable because it presumes that even though the government got what it paid for, the company nonetheless remains liable because it ''failed to abide by some regulatory, statutory or contractual term.''

The company asserts that the implied theory cannot be ''squared with the text of 31 U.S.C. § 3729 (a)(1)(A)''—which imposes liability on any person who knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval. The company argues there can be no affirmative misstatement (therefore, no false claim) and no fraudulent claim unless the contractor has a duty to disclose noncompliance with some statutory/regulatory provision and/or contractual provision.

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An array of entities and associations support Universal Health Services through amicus briefs expressing their concern with the excessive reach of the implied certification theory.

For instance, the American Health Care Association describes how an adverse FCA judgment ''can result in the functional equivalent of the death penalty for a busi-

ness,'' as most providers depend on their participation in federal healthcare programs and an adverse judgment may lead to their exclusion from such participation. Other amici remind the court that the *Escobar* decision will impact more than just healthcare providers.

In their joint amicus brief, the Chamber of Commerce, the National Defense Industrial Association, the Professional Services Council and the International Stability Operations Association contend that implied certification liability will have ''far reaching consequences'' for ''the myriad businesses, non-profit organizations, and even municipalities that perform work for the federal government, or receive funds through a vast range of federal programs, from defense contracting, Medicare, school lunches, and disaster relief services, to software licensing, cigarette manufacturing, crude oil purchasing, student loans, and residential mortgage issuance.''

The Generic Pharmaceutical Association argues in its amicus brief that parties not even engaging in business with the government may be affected by *Escobar*. Because the FCA applies to anyone who ''causes'' a false claim to be submitted, ''anyone who makes a product that is later resold to the government, or reimbursed by the government, becomes a potential target.''

Additionally, as set forth in the Catholic Charities' amicus brief, companies doing business with state governments may face increased liability since the majority of states have statutes similar to the FCA and regularly look for guidance to federal case law interpreting the federal FCA.

The amicus brief filed on behalf of the American Medical Association and other entities includes statistics warning against continued growth of qui tam actions. In the mid-1980s, relators filed a few dozen actions per year, but 632 qui tam lawsuits were filed in 2015.

As the Coalition for Government Procurement noted in its amicus brief, this potential liability may cause some contractors to leave the government market, which will result in less competition and higher prices in government procurement. However, as noted below, amicus briefs filed in support of the respondents reject the notion that growth of qui tam litigation is out of control.

The brief of respondents Julio Escobar and Carmen Carrea focuses heavily on the facts of the underlying case, asserting that Universal Health Services hired ''unlicensed, unqualified, and unsupervised 'counselors' '' to provide mental health services ''in clear violation of several express requirements of the Massachusetts Medicaid program.''

The respondents' daughter passed away in 2009 from a seizure after receiving psychiatric treatment from the company's personnel. The parents assert that one of the company's personnel had prescribed medicine to their daughter without disclosing that suddenly stopping the medication could lead to seizures. In their legal argument, they claimed, inter alia, that the plain language of the statute permits implied certification.

Reviewing various dictionaries, the respondents explain that '' 'false' in the context of a 'claim' means 'not well founded.' '' Rather, an invoice seeking payment ''even though the goods or services failed to comply with material requirements is 'not well founded' and therefore 'false.' ''

In the case at bar, the services provided were unsuitable ''compared to services provided by properly licensed and supervised professionals,'' and the respondents reject the company's argument that the government ''got what it paid for.'' (Respondents also reject the notion that the government ''getting what it paid for'' forecloses FCA liability.

Citing legislative history from the 1986 FCA amendments in which the Senate Judiciary Committee ''expressly noted that a false or fraudulent claim 'may take many forms, the most common being a claim for goods or services not provided, or provided in violation of contract terms, specification, statute, or regulation,' '' the respondents point out that a claim ''may be false even though the services are provided as claimed.'')

In addition to the plain language, the respondents argue that there is a duty to disclose defects, particularly when contracting with the government. They cite Supreme Court Justice Oliver Wendell Holmes Jr.'s maxim that contractors must ''turn square corners when they deal with the Government.''

Multiple amici support the respondents, including the federal government and more than 20 states.

Although the United States declined to intervene in the suit, its amicus brief emphasizes the common law, which ''has long condemned, as a form of actionable fraud, efforts to mislead commercial counter-parties through the use of literally accurate but misleading partial disclosures.''

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Echoing this argument is the amicus brief from Sen. Charles Grassley (R-Iowa), a sponsor of the 1986 amendments to the FCA. After providing a brief historical background on the genesis of the FCA in light of government contracting in the Civil War, Senator Grassley turns to the 1986 amendments, asserting that Congress was ''specifically concerned with . . . implicitly false or fraudulent behavior.''

The Taxpayers Against Fraud Education Fund (TAFEF) argues that liability is ''bounded by materiality and knowledge,'' and that these mechanisms will ''prevent the parade of horribles petitioner fears.''

Its amicus brief notes that contractors relying on a good faith interpretation of a regulation will not be subject to liability, and that the FCA's materiality requirement will preclude liability for ''mere technical violations.''

To support this argument, TAFEF provides statistics from a survey it conducted of FCA cases decided over

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the past few years ''where materiality or knowledge was at issue. Of 104 district court cases reviewed, the Government intervened in approximately 15 percent. Of the declined cases, courts dismissed over half.''

Similarly, the amicus brief of Professor David Freeman Engstrom of Stanford Law School contains data that ''unmistakably establish two points'': (1) qui tam litigation has not ''skyrocketed,'' contrary to Petitioner's position, and (2) the Department of Justice exercises control over qui tam litigation. Professor Engstrom suggests that one explanation for the growth in qui tam litigation is the growth of government spending on healthcare and defense.

The AARP, in its amicus brief, emphasizes how important qui tam litigation is in improving ''conditions in nursing and other healthcare facilities,'' arguing that false certification theories have a ''life-saving impact'' because they are ''essential'' tools upon which government and relators depend to address substandard conditions.

The AARP maintains that the implied certification theory is a "catalyst for reforming providers that have been continuously and flagrantly out of compliance with minimum safety protections."

Relying on the fact that the Department of Health and Human Services often requires settlements of FCA cases to include remedies such as appointment of a monitor, creation of a compliance committee, employee training programs and confidential disclosure systems, the AARP maintains that the implied certification theory is a ''catalyst for reforming providers that have been continuously and flagrantly out of compliance with minimum safety protections.''

Law school professor Joel Hesch, of the Liberty University School of Law, takes a different approach in support of the respondents by arguing there is no certification requirement at all in the FCA. He reasons that judges ''made up the certification requirement,'' which is unnecessary in light of the knowledge and materiality requirements.

Professor Hesch points out that ''five safeguards'' in the FCA protect potential defendants and ''eliminate the need for a certification requirement'':

(1) the FCA's materiality requirement;

(2) the requirement of actual knowledge or deliberate ignorance or reckless disregard for the truth;

(3) statutory protection against relators by giving the government the power to intervene, settle the case, and dismiss the action;

(4) a contractor's ability to seek legal advice about whether a regulation is ''material,'' as well as the ability to engage in discussions with the government about such regulations; and

(5) the measure of damages must correspond to the provision that was violated.

This bevy of briefing reflects how important the Supreme Court's ruling will be on this issue. The parties and numerous amici have laid out differing scenarios for the Court. The decision will have wide-ranging impact no matter what the justices decide.