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DAILY NEWS

Health Care Providers Fight Against False-Claims Supreme Court Case

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The U.S. Supreme Court is deliberating a case that could make hospitals liable for far greater penalties when they file Medicare claims that are deemed false because services are provided by unlicensed staff. The question of the case is whether such situations are malpractice or mere false claims, according to Thomas Zeno, healthcare fraud coordinator at Squire Patton Boggs.

The decision could be out as early as Thursday (June 9). Jay Holland, a principal at Joseph, Greenwald & Laake, who represents plaintiffs in False Claims Act cases, told *Inside Health Policy,* he believes it is unlikely the Court will strike the concept of implied certification entirely.

The case, *Universal Health Services v. United States ex rel. Escobar,* involves a girl who died from a seizure while allegedly in the care of unlicensed and unsupervised staff. Due to the violation of supervision and licensure requirements, the representatives of the girl, said the providers' Medicaid reimbursement claim was false under the Massachusetts and federal False Claims Acts (FCA). The district court dismissed the case but the First Circuit reversed it.

The Supreme Court decided to look at UHS v. Escobar case to decide whether and to what extent the "implied certification" theory can be applied under FCA liability, according to the Federation of American Hospitals. The FCA makes it illegal to "knowingly" file a "false or fraudulent" claim for government reimbursement, Zeno writes in a blog post.

Zeno defines "implied certification" liability as "a theory that requires a provider to comply with underlying statutory, regulatory or contractual obligations associated with a service even though those obligations are not specified when the service is provided," he said. "If the provider fails to comply with those obligations but submits a claim for payment, it has breached the implicit promise, thus potentially giving rise to liability under the FCA," Zeno writes.

The Supreme Court Justices struggled over where to draw the line in defining a false claim and implied certification during oral arguments last month.

Chief Justice John Roberts used an example of staplers to explain his understanding of when the government can withhold payment. He said in a government contract for health services, if there is a provision staplers have to be made in America and not abroad, but the providers do everything but buy staplers from abroad, the government can withhold payment to penalize the provider.

Roberts also tried to distinguish what would constitute withholding payment versus invalidating a contract with a provider. He said if there is an improper billing code, he thinks payment should be withheld but doesn't know if the Medicare provider in the state should necessarily be fired.

"Now, until this last interchange, I thought that was the distinction you were drawing, that if the piece of paper says nothing, but pay me, and there is a violation of a reg, if the violation of that reg is such to be material, meaning, it would

be a basis for repudiation, then it is an implied--then it is an implied statement. It was complied with, and it's fraud. But if it's just staples, you may have to pay damage for staples, but that certainly doesn't -- to say the contrary there would make the contractor responsible for having complied with every one of 40,000 regulations, the size of the room, size of the table," Chief Justice Stephen Breyer said.

The Federation of American Hospitals, American Hospital Association and the Association of American Colleges filed an amicus brief in opposition to the false claim allegation. They say FCA liability comes with major penalties, including treble damages and per claim penalties. Treble damages allow courts to triple the amount of the actual damages.

The hospital groups say the False Claims Act is not a general enforcement mechanism for regulatory compliance.

"Were we to accept relator's theory of liability based merely on a regulatory violation, we would sanction use of the FCA as a sweeping mechanism to promote regulatory compliance, rather than a set of statutes aimed at protecting the financial resources of the government from the consequences of fraudulent conduct," the amicus brief said.

Additionally, the hospitals' brief says Medicaid and Medicare have measures to deal with noncompliance.

"Medicare and Medicaid's administrative mechanisms ensure that CMS and state agencies have discretion to investigate and resolve allegations of noncompliance. In doing so, CMS and these state agencies make individualized assessments of culpability, assess the seriousness of a violation, and fashion an appropriate remedy, balancing those factors against the program's interest in continuous delivery of care," the brief states.

Jimmy Hafner, healthcare fellow at Squire Patton Boggs, told *Inside Health Policy* **he thinks the implied certification theory will continue in some capacity following the court ruling**. However, hospitals hope the First Circuit's decision is overturned and there will be a more narrow definition for FCA liability.

"If the Court decision were to result in False Claims Act liability for healthcare providers, even if no false statement is made in connection with a payment request, this could cripple our health care system, which is a very intricate and complex system with thousands upon thousands of pages of federal healthcare program regulatory requirements," FAH told *Inside Health Policy*.

The decision is expected to come down before July, according to Zeno. -- *Erin Raftery (eraftery@iwpnews.com)*

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