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Fraud and Abuse

Escobar FCA Claims Clear First Circuit Setting Up Implied Certification Theory Trial

A closely watched False Claims Act case against a mental health facility is headed back to trial court after a federal appeals court found fraud claims asserted by a Massachusetts couple involved material regulatory violations (*United States ex rel. Escobar v. Universal Health Servs.*, 2016 BL 390617, 1st Cir., No. 14-1423, 11/22/16).

Whistle-blowers Julio Escobar and Carmen Correa Nov. 22 got the green light from the U.S. Court of Appeals for the First Circuit to proceed on claims brought against Universal Health Services Inc. They sufficiently alleged Universal's regulatory violations were material to a state Medicaid agency's decision to pay Universal for the treatment, the court said.

The decision follows a June ruling by the U.S. Supreme Court validating the whistle-blowers' implied certification theory of FCA liability. Since then, FCA attorneys have been closely watching for lower court decisions to provide additional guidance on the issue.

The Supreme Court resolved a circuit split over the implied false certification theory's validity as a basis for FCA liability. It didn't, however, say whether the whistle-blowers' complaint, which alleged the provider unlawfully sought Medicaid payment for treatment provided by unlicensed and unsupervised caregivers, satisfied the materiality standard (25 HLR 922, 6/23/16).

The First Circuit, in an opinion by Judge Norman H. Stahl, concluded the alleged regulatory violations were material to the state government's payment decision, a requirement for FCA claims.

Common Sense Decision. The court's decision was ''obviously right,'' Brian J. Markovitz told Bloomberg BNA. Markovitz, of Joseph Greenwald & Laake PA in Greenbelt, Md., represents whistle-blowers in FCA actions.

If government payers, ''using a common sense approach,'' would deny a provider's claims based on its undisclosed noncompliance with certain regulations, then the noncompliance is material, Markovitz said. The provider's misrepresentation that it was in compliance can be used as the basis for an FCA claim.

''It's an easy test for FCA defendants,'' he said. A provider that fails to tell the government about its regulatory noncompliance in its payment request probably is committing fraud.

This has been the standard all along, Markovitz said. The Supreme Court's decision didn't change it.

It is difficult to think of a more obvious regulatory violation than putting people who aren't qualified into positions the state requires to be filled by certified and licensed people, he said, referring to the facts alleged in the case.

Egregious Fact Pattern. Fraud defense attorney Melissa L. Jampol agreed the decision wasn't surprising, given the facts pleaded by the whistle-blowers—known as relators in FCA parlance—were ''so egregious.'' The allegations included Universal's misrepresentations about staff members' education, licenses and supervision. In some cases, the facility's staff members had fraudulently obtained National Practitioner Identifier numbers, the complaint said.

Jampol, a former assistant U.S. attorney, is a member of Epstein Becker & Green in New York.

The relators now can conduct discovery. ''Moving forward, the question will be whether the evidence exists to sufficiently support the facts alleged by the relators of the materiality of the misrepresentations Universal submitted to MassHealth, the Massachusetts Medicaid program,'' she said.

There is still another important issue the First Circuit didn't address, Jampol said. Namely, whether MassHealth knew Universal wasn't in compliance with the pertinent state regulations and paid claims anyway. The answer ''may ultimately change the materiality calculus regarding the government's payment decisions if the case proceeds along to trial,'' she said.

''The question of materiality of misrepresentations in connection with payment decisions in FCA cases still very much remains fact and circumstance dependent, relying on the unique circumstances of each case,'' Jampol added. ''For cases where there are not obvious misrepresentations and cases in gray areas, the issue of materiality is still very much up in the air.''

Regulatory Violations. Massachusetts regulations require mental health facility caregivers to be properly licensed and certified, or to be supervised by someone who is. Caregivers at the facility where Yarushka Rivera received treatment were neither, the complaint said.

Rivera's parents, Escobar and Correa, sued Universal, saying it made an implied false certification that it had complied with state regulations when it submitted claims for Medicaid reimbursement to MassHealth.

The U.S. District Court for the District of Massachusetts dismissed the complaint, saying even if Universal falsely certified its compliance with Medicaid regulations, the falsity wasn't material in this instance.

The First Circuit reversed, and Universal took the case to the Supreme Court. The justices recognized the implied false certification liability theory, but vacated

the First Circuit's judgment and sent the case back for reconsideration of whether the false certification was material enough that the state, had it known the truth, wouldn't have paid the provider.

Did Payments Prove Immateriality? The First Circuit, on remand from the Supreme Court, said the whistleblowers alleged a regulatory violation that could have led the state to refuse to pay Universal. Thus, they alleged Universal violated the FCA by misrepresenting its compliance with regulations the state considered to be material.

The court gave three reasons for its decision: The relators said regulatory compliance was a condition of payment; Massachusetts's licensing and regulatory requirements for mental health facilities were central to the state's agreement to reimburse those providers; and the Supreme Court didn't say payment entirely settled the matter, only that it was a factor in determining materiality.

MassHealth paid Universal up to the time the complaint was filed, the court noted. The complaint, however, didn't say whether the agency continued paying the provider after Universal's regulatory noncompliance came to light. There wasn't any evidence the Medicaid agency actually knew of the whistle-blowers' allegations at the time it paid the claims, the court said.

There wasn't any reason to dismiss the case just to require the whistle-blowers to find out if the agency continued paying Universal in order to establish the government's view on the materiality of the allegations, the court said. It sent the case back to the district court for further proceedings.

Michael Tabb, Thomas M. Greene, Elizabeth Cho, of Greene LLP, Boston, represented the relators. Mark T. Stancil and Donald Burke, of Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP, Washington; and Mark W. Pearlstein, Evan Panich and Laura McLane, of McDermott Will & Emery LLP, Boston, represented Universal.

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