Modern Healthcare

Supreme Court takes up UHS case that could expand False Claims Act liability

By Lisa Schencker | April 19, 2016

Several U.S. Supreme Court justices seemed skeptical of Universal Health Services' arguments Tuesday that providers should not be held liable for fraud for failing to comply with certain regulations.

But the oral arguments[1] shed little light on how the court may rule in the case, which has the potential to reduce or increase the number of False Claims Act suits brought against healthcare providers. A decision is expected by June.

The case, *Universal Health Services v. U.S. ex rel Escobar*[2], centers on whether a legal theory known as "implied certification" may be used to bring False Claims Act cases against providers. Under that theory, providers can be held liable for submitting false claims to government programs for failing to follow certain regulations even if the government never explicitly stated that following the regulations was a condition of payment and even if the provider never explicitly vouched that it had complied with the

regulations.

The outcome of the case could affect a number of industries, but the biggest impact could be on healthcare players. In 2015, two-thirds of federal whistle-blower lawsuits targeted healthcare entities. Implied certification is the basis of many suits brought against providers, and the federal circuit courts are split on whether it should be allowed.

Major healthcare groups such as the American Medical Association, the American Hospital Association and the Pharmaceutical Research and Manufacturers of America have all **filed briefs in the case supporting Universal Health Services**[3], an investor-owned hospital operator based in King of Prussia, Pa.

The healthcare groups argue that imperfect compliance is not the same as fraud and that allowing implied certification could open the door to more meritless lawsuits.

Whistle-blower groups and mental health advocates, however, say the legal theory can protect patients from substandard care. The petitioners in the case, for example, brought the lawsuit after their daughter died at a Massachusetts mental health clinic. They alleged her caregivers were not properly supervised and the facility lacked board-certified or -eligible psychiatrists and licensed psychologists, in violation of state Medicaid regulations.

On Tuesday, Justices Elena Kagan and Sonia Sotomayor were sensitive to that argument.

Sotomayor said it was difficult to accept that a provider could claim money for a service not rendered by a qualified, supervised individual as required by regulations.

“I'm having a hard time understanding how you have not committed a fraud,” Sotomayor said.

Kagan said it's the same type of fraud the False Claims Act was first meant to address when it became law during the Civil War, when contractors sold the government nonfunctioning guns, rancid food and boots that fell apart.

“I would think that this is the exact same—that the contract was for a doctor's medical care, and a doctor's medical care was not provided,” Kagan said.

Chief Justice John Roberts, however, seemed sympathetic to the providers' arguments that the False Claims Act is an inappropriately harsh tool for going after failure to comply with certain regulations. Roberts said he suspects many situations in which providers fail to comply are complex, “and that's where the difficulty comes in when you have hundreds of thousands of pages of regulations.”

The justices' questions to lawyers on both sides Tuesday suggest they don't see this as a case with an easy answer, said Jessica Ellsworth, a partner at Hogan Lovells who **filed a brief**[4] in the case on behalf of the American Hospital Association, the Federation of American Hospitals and the Association of American Medical Colleges.

“This case really does raise fundamental questions about how issues of regulatory noncompliance should be dealt with,” Ellsworth said.

Claire Prestel, an attorney with James & Hoffman who **filed a brief**[5] in the case siding with the patient's family on behalf of the Service Employees International Union, Mental Health America and the Judge David L. Bazelon Center for Mental Health Law, agreed that Tuesday's arguments offered few clues about how the court will rule.

Prestel disputed the suggestion that allowing implied certification would lead to a flood of lawsuits against providers based on technical violations. To be held liable, providers must have violated a rule knowingly and with knowledge that the violation would have been important to the government, she said. Also, a number of circuit courts have already upheld implied certification.

“We don't have to speculate about what happens if implied certification claims are allowed because that's the world we've been living in,” Prestel said.

But Larry Freedman, an attorney with Mintz Levin who defends providers in false claims cases, said he hopes the justices impose some boundaries on the government and whistle-blowers' ability to allege any regulatory violation is a False Claims Act violation. Otherwise, allowing implied certification triggers litigation that can be “very troublesome” for providers to resolve, Freedman said.

Most False Claims Act cases are settled before going to trial, partly because of the severe consequences that can be imposed under the statute—up to $11,000 in penalties per false claim, plus triple damages.

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