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Supreme Court won't weigh in on False Claims Act standards case

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The Supreme Court declined to clarify how false claims should be verified under the False Claims Act, which could draw out some related healthcare cases, legal experts said.

Hospice provider Care Alternatives asked the Supreme Court to review the Third U.S. Circuit Court of Appeals' determination that a false claim could arise if an expert contradicted a physician's reasoning for recommending hospice treatment. That threshold was lower than most other appellate courts' rulings, which found that a reasonable difference of doctors' opinions was not enough to certify a false claim.

The Supreme Court denied Care Alternatives' petition Monday, in addition to a petition filed by healthcare management company RollinsNelson LTC Corp., which could make it harder for providers to dismiss cases and lead to longer and more expensive legal proceedings, experts said.

"It will definitely make it harder to dismiss," said Adam Tarosky, a partner at Nixon Peabody. "Exposing providers to extended litigation is problematic."

Clinicians could be swayed by looming legal risks, said Robert Salcido, a partner at Akin Gump.

"A clinician might think additional treatment is medically beneficial, but if that reasonable clinician judgment is disputed in the context of the FCA and there is a higher possibility of getting sued, the doctor may be disinclined to do that service."

The Care Alternatives case stems from a whistleblower who alleged that the hospice provider admitted patients who were not terminally ill.

The plaintiffs called on an expert who claimed that more than a third of the patients he examined did not warrant hospice care. Care Alternative's expert opined that a doctor could have found that each one of the patients examined was terminally ill. The district court ruled in favor of Care Alternatives, supporting a summary judgment because the "mere difference of opinion between physicians without more, was not enough" to establish falsity.

That decision was overturned on appeal, with the Third Circuit finding that a jury should consider an expert testimony that challenges a medical opinion.

While the Ninth Circuit came to a parallel conclusion in a similar case, the Eleventh Circuit held in the AseraCare proceedings that "a reasonable difference among physicians" was not enough to demonstrate falsehood.

The Eleventh Circuit ruled that a plaintiff must prove "objective falsehood" by showing that a physician did not review the medical records, didn't believe the treatment determination or that no reasonable physician would've made a similar recommendation. Four other courts also upheld that standard.

"Now that the disagreement in the lower courts remains intact, qui tam relators will be able to continue to argue that even good faith medical judgments can open providers to False Claims Act suits," said Ethan Davis, a partner at King & Spalding.

While David Honig, an attorney at Hall Render, wasn't surprised by the Supreme Court's denial, their silence will contribute to providers' lack of clarity regarding false claims cases and likely expose more to the "draconian penalties of the FCA."

A dissenting expert opinion is a remarkably low threshold compared to actual falsity, said Mark Silberman, chair of the white collar, government investigations and regulatory compliance practice group at Benesch.

"Do we want to reduce the False Claims Act to nothing more than a modified malpractice vehicle?" he asked. "We have continued to weaken the requirement that fraud is a specific-intent crime."

The Justice Department's civil fraud section chief Michael Granston issued a memo in January 2018 that aimed to weed out frivolous FCA cases. Even if the government declines to intervene on a case, Granston established that department attorneys have the power to ask courts to dismiss FCA complaints if they have no merit, could create bad case law or if the government relator acted inappropriately.

Still, healthcare fraud remains a primary target for state and federal authorities and government relators. Healthcare-related cases made up more than 80% of the total $2.2 billion in False Claims Act cases last year.

Whistleblowers might be more inclined to bring FCA cases against healthcare companies amid the ambiguity, Nixon Peabody's Tarosky said, noting though that the government will require more evidence than a dissenting opinion. Meanwhile, providers' best defense will be thorough record keeping, he said.

The Supreme Court will eventually take up the case on what falsity means under the FCA, Tarosky said.

"That is the one material element that was never defined explicitly in the statute —it's an area that is ripe for further clarification," he said. "I think what the Supreme Court may have seen is that there is a lot of law that could still be developed on what it means for a claim to be false."

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