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Senate Judiciary Committee Debates Amendments Designed to Protect the False Claims Act

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The Senate Judiciary Committee is now embroiled in a sharp debate over the False Claims Amendments Act of 2021 (Senate Bill 2428), sponsored by Senators Charles Grassley (R-Iowa), Patrick Leahy (D-Vermont), Joseph Kennedy (R-Louisiana), and Richard Durbin (D-Illinois). The bill is designed to close a loophole in the False Claims Act ("FCA") that can permit federal contractors who violate the law to escape liability.

On Thursday, October 21, 2021, the Senate Judiciary Committee had scheduled a "mark-up" for the amendments to the False Claims Act ("FCA"). But the bill was not voted on. Senator Grassley explained that a simple technical amendment to the FCA has become a battle between Senators committed to fighting fraud in Medicare and Medicaid spending and special interests representing contractors and hospitals that have been sanctioned under the FCA for defrauding the government. (see video of hearing linked here, at 29:53).

Based in large part on intensive lobbying from the American Hospital Association, the Judiciary Committee postponed its vote on the FCA amendments. It is now scheduled for October 28. The outcome is anyone's guess.

The central issue in the debate on the amendments concerns an interpretation of the "materiality" requirement in the FCA. Under the FCA, persons obtaining federal monies (including payments under Medicaid or Medicare) can be held liable if they violate "material" conditions related to the payment of a grant or contract. Recipients of federal monies have argued for a narrow interpretation of "materiality" to avoid liability when they violate contractual obligations or the laws governing the services they are being paid to perform.

The current controversy has its roots in the U.S. Supreme Court decision Universal Health Services v. U.S. ex rel. Escobar. This case centered on the issue of "materiality." Escobar concerned the death of a nineteen-year-old Medicaid patient being treated at a medical facility owned by Universal Health Services. Universal Health Services is a Fortune 500 publicly traded healthcare company with over $11 billion in annual revenue, much of it paid for by the federal government via Medicaid or Medicare.

The facts in this case were not disputed. As explained by Justice Clearance Thomas, Universal used

a “psychologist” from an “unaccredited Internet college” to diagnose the teenager’s ailments, despite the fact that the State of Massachusetts “had rejected her application to be licensed as a psychologist.” Additionally, the Universal employee “who prescribed medicine” to the teenager and who was “held out as a psychiatrist” was “in fact a nurse who lacked authority to prescribe medications.”

The AARP Foundation provided further factual background, explaining that the teenager “was treated by five unlicensed, unsupervised therapists and psychiatrists for three years prior to her death—in flagrant violation of Massachusetts health regulations. She suffered two seizures under the care of UHS employees, the second of which was fatal. A state investigation found that UHS’s facility employed 23 unlicensed therapists, none of whom were supervised.”

Universal billed the government for these “services” pursuant to the federal Medicaid program. Despite its misconduct, Universal argued that the failure to use licensed medical providers was not “material” to the federal government’s payment for the services rendered to the deceased teenager. Universal argued that they should not be liable under the False Claims Act for any damages whatsoever.

It’s understandable that a large, publicly traded corporation would attempt to avoid liability for its misconduct. However, that the tax-exempt American Hospital Association went before the Supreme Court and supported Universal is not acceptable. The AHA argued for a radical interpretation of “materiality” that would shield all health care providers in the United States from any liability under the False Claims Act for the types of violations engaged in by Universal. Instead of supporting patient health or opposing the misuse of taxpayer money by large multi-billion-dollar medical providers, the AHA wanted the Supreme Court to enact a rule that would automatically shield Universal from liability for billing taxpayers for the “treatment” that led to the teenager’s death. Worse still, they wanted this rule to apply to every health care provider in the United States that engaged in abuses similar to those of Universal.

The Supreme Court rejected the AHA’s radical augments that would have automatically let abusive medical providers like Universal off the hook. But the Court did not outright rule in favor of the teenager’s family. They determined that “materiality” needed to be decided on a case-by-case basis and remanded the case to the lower courts to apply the “materiality” standard to the specific facts presented in Escobar. The parents of the deceased teenager could have their day in court.

However, the American Hospital Association, and other special interests representing government contractors (such as the Chamber of Commerce), were not done trying to use the “materiality” standard to shield abusive medical providers from liability. They switched tactics. Instead of arguing for a per se exemption from liability under the FCA, they instead argued that the “materiality” standard applied by the lower courts should be so strict that corporations that engaged in similar cost-saving tactics used by Universal could escape liability. They have again argued for a radical interpretation of the “materiality” requirement in the FCA. These arguments have resulted in conflicting lower court interpretations. Some courts have adopted the narrow approach to “materiality” advocated by the AHA, including decisions that let fraudsters who knowingly violated federal laws to escape liability, because their crimes were not “material.” Other courts have rejected these arguments. Regardless, the current uncertainty in the law is discouraging whistleblowers and undermining the ability of the federal government to police its contracts.

The amendment to the FCA being offered before the Senate Judiciary Committee is designed to ensure that the FCA is not misinterpreted by the lower courts. The current materiality standard in the

law remains unchanged, and guidance is provided as to how that provision should be interpreted to avoid the abuses witnessed in the Escobar case.

The American Hospital Association did a disservice to all honest medical providers when they argued that taxpayers should pay for the unqualified “providers” who “cared for” the teenager who died in the Escobar case. Taxpayers should never have to pay for unlicensed internet doctors when they treat poor patients under Medicaid. The American Hospital Association should have demanded, in all cases, that real doctors treat the poor and elderly and that corporations like Universal who profit from frauds be held strictly liable. Instead, the AHA is leading the lobbying efforts to undermine the plain language of the False Claims Act. They are using the same discredited arguments they raised before the Supreme Court in an attempt to resurrect the ability of health care providers to hide behind a radical interpretation of “materiality” to shield themselves from liability when they violate the law or ignore regulations, even when these violations result in the death of patients treated in taxpayer-funded health care programs.

The Senate Judiciary Committee should unanimously approve the FCA amendments at the next mark-up session. Congress should promptly approve this bi-partisan legislation. The American Hospital Association should stop defending members who violate the law, rip off taxpayers, or materially harm patient health. During the COVID-19 crisis, the AHA certainly has better things on which to spend their member’s money.

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