## U.S. Supreme Court Declines Review Of Case on Liability for Causing False Claims

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### BNA Snapshot

*Blackstone Medical Inc. v. United States ex rel. Hutcheson*, U.S., No. 11-269, *review denied* 12/5/11

**Key Holding:** Supreme Court declines to hear appeal of First Circuit ruling that device maker may be liable under the FCA for causing others to file legally false Medicare claims.

**Key Takeaway:** Federal appeals courts will continue to wrestle with what constitutes the parameters of liability under the False Claims Act.

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By Daniel J. Roy

The U.S. Supreme Court Dec. 5 declined to review a federal appeals court ruling in a closely watched case over whether a defendant can be held liable under the False Claims Act for “causing”others to file “legally false” Medicare claims (*Blackstone Medical Inc. v. United States ex rel. Hutcheson*, U.S., No. 11-269, *review denied* 12/5/11).

The Supreme Court's decision not to hear the case lets stand a ruling by the U.S. Court of Appeals for the First Circuit in *United States ex rel. Hutcheson v. Blackstone Medical Inc.* (1st Cir., 647 F.3d 377 (2011)) (15 HFRA 523, 6/15/11). Chief Judge Sandra L. Lynch of the First Circuit held that the fact that Blackstone was not responsible for submitting the Medicare claims itself cannot shield the company from FCA liability.

The FCA imposes liability on those who cause a false claim to be made, the court said, not just those who actively send the bill to the government.

**Blackstone Touted Court Split**

In itspetition for review, Blackstone said that federal circuit courts are split on the issue. The device company framed the issue as whether an allegation that a defendant committed a statutory violation renders a claim submitted by an unrelated party “legally false”for FCA purposes.

“A rapidly expanding number of FCA qui tam cases are premised on a theory of ‘legal—as contrasted with ‘factual’—falsity,”the petition said. “Under a ‘legal falsity’ theory, qui tam relators assert that despite being factually true, claims submitted to the government are somehow ‘legally false,’ because the claims(explicitly or implicitly) represent compliance with some underlying statutory, regulatory, contractual, or other condition related to a government program.”

**Kickbacks for Device Use Alleged**

Whistleblower Susan Hutcheson, who worked for Blackstone for two years prior to filing the qui tam action that gave rise to the appeal, outlined in her complaint Blackstone's alleged practice of paying kickbacks to doctors in exchange for using the company's products in certain surgical procedures.

The alleged result of this scheme was that doctors performed procedures on Medicare patients using Blackstone's products and submitted claims to the federally funded health care program. As compliance with the anti-kickback statute is a condition of receiving payment from Medicare, Blackstone “knowingly cause[d]” health care providers to present “false or fraudulent” claims for payment within the meaning of 31 U.S.C. § 3729(a), the relator alleged.

**Split Manufactured, Attorney Says**

"Today, the Supreme Court cemented the First Circuit's holding that entities that pay kickbacks are liable under the False Claims Act for the resulting false claims," attorney Joseph E.B. White of Nolan & Auerbach PA, Philadelphia, told BNA Dec. 5. "Upon close inspection, the Supreme Court realized that the so-called circuit split had really been conjured up by the petitioners."

The First Circuit followed "the long-settled False Claims Act principle that fraudsters are liable for causing others to submit false claims to the government. Certainly, this sends another powerful message to wayward drug and medical device companies that they cannot bribe their way into our medicine cabinets."

**High Court Review Could Have Helped**

However, other attorneys agreed with petitioners that the case raised important issues that the Supreme Court could have helped to settle(15 HFRA 840, 10/19/11).

J. Mark Waxman of Foley & Lardner LLP, Boston, told BNA earlier that he believes there is a circuit split and "the Supreme Court would do people a favor by hearing the case."

Thomas S. Crane of Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, Boston and Washington, said earlier that there was a lot at stake in clarifying the implied certification theory of FCA liability. "The Supreme Court is ultimately being asked to decide whether the FCA is an appropriate tool for policing violations of the myriad other laws and regulations under which providers operate," he said.

In its petition, Blackstone said: "In conflict with the [U.S. Courts of Appeal for the] Third, Fifth, Eighth, and Tenth Circuits,[the First Circuit] has declined to recognize any differences between conditions of participation and conditions of payment when it comes to assessing which claims qualify as false for the purposes of the FCA."

The Supreme Court still could visit the issue of legally false claims. It has not yet ruled on whether to hear an appeal by pharmaceutical company Amgen Inc., on similar issues, *Amgen Inc. v. New York* (U.S., No. 11-363, *petition filed* 9/19/11)(15 HFRA 787, 10/5/11).

Catherine E. Stetson of Hogan Lovells LLP, Washington, filed the petition for Blackstone.

The First Circuit ruling is available at http://pub.bna.com/lw/101505.pdf.

The Blackstone petition for U.S. Supreme Court review is available at http://op.bna.com/hl.nsf/r?Open=droy-8p9rtm.