Fifth Circuit Reinstates Claims Against Caremark In Medicaid False Claims Act Case

The U.S. Court of Appeals for the Fifth Circuit court reinstated several claims in a False Claims Act lawsuit——including allowing a “reverse” false claim charge—brought against pharmacy benefit manager Caremark for allegedly failing to reimburse Medicaid and other government programs (*United States ex rel. Ramadoss v. Caremark Inc.,* 5th Cir., No. 09-50727, 2/24/11).

Although the appeals court ruling upholds summary judgment on some of the claims by the federal government and state appellants, it reverses others. In a 2008 ruling, the U.S. Court of Appeals for the Western District of Texas severely limited claims by the qui tam relator, Janaki Ramadoss, the federal government, and state governments (12 HFRA 720, 9/10/08).

The Fifth Circuit reversed the trial court's decision that the federal government cannot bring a claim under FCA Section 3729(a)(7) for a so-called reverse false claim. It overturned the lower court ruling that the Arkansas FCA does not allow liability for reverse false claims.

Additionally, the appeals court vacated the district court's decisions regarding whether the government's complaint-in-intervention relates back to the relator's complaint and whether preauthorization restrictions are substantive. The court remanded for proceedings consistent with the opinion.

Summary Judgment

Conversely, the Fifth Circuit affirmed the district court's entry of summary judgment for Caremark on claims by the federal government and state appellants that Caremark made false statements when it cited restrictions that were contained in a client's plan as a reason for rejecting reimbursement requests.

Joseph E. B. White, with Nolan & Auerbach PA, Philadelphia, a law firm that represents whistleblowers, said the ruling is very important in that it explains “what we have to show in a reverse false claim. There has always been a question whether reverse false claims reached false statements not presented to the federal government. Medicaid is an example.”

The ruling “removes that uncertainty in a whole area of cases involving [pharmacy benefit managers] and state Medicaid funds,” White added.

The FCA lawsuit, and state and federal government claims, asserted that Caremark failed to reimburse Medicaid, the Veterans Administration, and the Indian Health Service for payments for prescription drugs when program-eligible individuals and families also were insured by one of Caremark's pharmacy benefit plans.

Medicaid is a payer of last resort and private insurers are required to pay for those benefits available to dual eligibles under their plans, the court said.

The case involves what is known as “pay and chase,” under which a state Medicaid program or other government program pays the prescription drug provider at the outset and then seeks reimbursement from a third-party payer if or when it determines the recipient had private insurance. The situation arises in many cases because a dual eligible may prefer to utilize the government program because it has lower copays, the court noted.

When a program seeks reimbursement, the government argued, Caremark is required to make the payment regardless of restrictions contained in the plan, because coverage under government programs is deemed secondary to the private health coverage. The failure to reimburse such a program is allegedly a reverse false claim, the lawsuit said.

Caremark countered that, as a plan administrator, its decision to reimburse a state or federal agency in the case of dual eligibles is driven entirely by the terms of that individual's plan, which may limit the circumstances or amount of such reimbursement. It also argued that the federal government was not in a

position to sue over alleged false claims made to state Medicaid officials.

Appeals Court's Reasoning

In its ruling, the appeals court pondered whether Caremark violated FCA Section 3729(a)(7) when it denied reimbursement requests from state Medicaid agencies. Claims under Section 3729(a)(7) "require proof that the defendant 'knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government,'" the court said. This section defines a reverse false claims.

The government appealed the trial court's conclusion that Caremark has no obligation to the government for denial of reimbursement requests that Caremark submitted to state Medicaid agencies.

The Fifth Circuit agreed with the federal government's argument that "even if Caremark does not owe an 'obligation' directly to 'the Government,'it may be held liable [under Section 3729(a)(7) for causing the States to impair their obligations to the Government."

"On the whole, it's a great decision,"White said. "It removes some uncertainty for both sides. It has quite an impact. The court is saying that if the False Claims Act applies, even though you're hiding behind a state Medicaid agency, the federal government can reach over and protect those funds you're trying to conceal."

Impact of FERA

Next the court addressed the affect on the litigation of the Fraud Enforcement and Recovery Act of 2009 (FERA). Provisions in FERA amended the FCA.

"Caremark concedes that the district court's analysis has been superseded by statute, and we agree," the Fifth Circuit said. "In FERA, Congress specified that the Government's complaint-in-intervention'shall relate back to the filing date of the complaint of the person who originally brought the action, to the extent that the claim of the Government arises out of the conduct, transactions, or occurrences set forth, or attempted to be set forth, in the prior complaint of that person.'"

Unlike other sections of FERA, Section 4(b), quoted by the court above, was to apply to all cases pending on the date of enactment.

"Because this case was pending on the date FERA was enacted, the Government's complaint-in-intervention relates back to the relator's complaint," the court said. "Therefore, we vacate the district court's order on this issue."

Reimbursement Request

Both the state appellants—Arkansas, California, Illinois, Louisiana, Texas, Delaware, Massachusetts, and the District of Columbia—and the federal government argued that the district court erred in holding that statements made by Caremark were not false and subject to liability under FCA Section 3729(a)(7).

"The State Appellants challenge the district court's conclusion that a true statement cannot be false under the FCA," the appeals court said. "They argue that a factually true statement can still be false if it is 'legally impermissible.' The [federal] Government challenges the district court's conclusion that a claim is not false when there is a legitimate good faith disagreement about the applicable law. It argues that an ambiguity in the governing law does not preclude falsity; rather, the existence of an ambiguity concerns whether the defendant acted knowingly, which is a distinct element under the FCA."

The appeals court affirmed the trial court's ruling that factually true statements, "without more," were not false for the purposes of the FCA.

Goetz Test

State appellants and the federal government argued on appeal that the trial court erred in applying *Caremark Inc. v. Goetz,* 480 F.3d 779 (6th Cir. 2007) to the facts of the case because Caremark's reliance on out-of-network and preauthorization requirements were false as a matter of law under *Goetz*.

The court in *Goetz* made a distinction between plan requirements that were "procedural" and those that were "substantive," ruling that procedural restrictions, such as "card presentation" and "timely filing"requirements that imposed preconditions to plan coverage, could not be asserted as a justification for denial of reimbursement to Tennessee's Medicaid program.

Substantive restrictions, such as requiring preauthorization of a claim or use of in-network pharmacies, could provide a defensible basis for Caremark to deny reimbursement, the Sixth Circuit said. It was against this backdrop of uncertain legal requirements that the trial court ruled that the federal government's FCA lawsuit respecting program claims asserted pre-*Goetz* had to be dismissed.

Dismissal of the federal government's claims was appropriate, the district court said, because Caremark never made a false statement with respect to these Medicaid claims and, in any event, had no underlying obligation to pay money to the federal government.

Any statements Caremark made to state Medicaid officials based on plan restrictions were not false, the lower court said. Although the *Goetz* court ultimately found certain procedural restrictions could not be asserted against the state programs because they improperly discriminated against Medicaid, the ruling did not render Caremark's prior actions denying state program reimbursement false.

Factual Development

The Fifth Circuit, however, concluded that "further factual development on this issue is necessary." From the limited record, the appeals court said it could not determine whether the preauthorization requirement functions as a procedural roadblock to reimbursement or a substantive limitation on coverage.

Further, the appeals court agreed with the trial court that Caremark's conduct is not actionable under the Arkansas FCA.

"Based on the text of the statute, we conclude that the district court did not err in holding that Sections 20-77-902(1), (2), (3), and (10) cannot be interpreted to allow liability for a reverse false claim," the Fifth Circuit ruled. "These subsections use the terms 'benefit' and 'payment,' both of which imply a payment or transfer of services from the State of Arkansas to an individual, rather than a means to avoid an obligation to pay money to the State of Arkansas."

Howard M. Pearl and William P. Ferranti, attorneys with Winston & Strawn, Chicago, represented Caremark. Ferranti referred questions on the ruling to Pearl and Pearl had not responded by press time.

Benjamin M. Shultz and Allie Pang, Department of Justice, Washington, argued for the United States.

By Daniel J. Roy

The ruling is available at http://op.bna.com/hl.nsf/r?Open=droy-8eep7d.