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False Claims Act

SCOTUS Contender Pryor Would Take 'No-Nonsense' False Claims Approach

Supreme Court contender and Eleventh Circuit Judge William H. Pryor has written one opinion involving the False Claims Act (FCA) in his time on the court — one that adopted an implied certification theory of liability long before the Supreme Court did in June 2016.

President Donald Trump has said he will announce his Supreme Court nominee Jan. 31.

By allowing the government to proceed with a case accusing a Medicare vendor of receiving payments despite committing disqualifying acts in *United States ex rel. McNutt v. Haleyville Med. Supplies Inc.*, 11th Cir., No. 04-14458, 9/9/05, Judge Pryor said FCA implied certification liability could attach for failure to satisfy an express condition for payment.

The Supreme Court adopted the implied certification theory in *Universal Health Servs. v. United States ex rel. Escobar*, U.S., No. 15-7, 6/16/16. which allows liability to attach if a contractor doesn't disclose violations of statutory, regulatory or contractual provisions to the government.

If selected to the Supreme Court, Pryor ''would likely take a no-nonsense approach to applications of the False Claims Act. That is certainly what he did in the Haleyville Medical Supply case,'' James F. Barger Jr., an attorney with Frohsin Barger & Walthall in Birmingham, Ala., told Bloomberg BNA.

Barger predicted that Judge Pryor would ''likely take the same no-nonsense approach to any interpretation of *Escobar*, which is in many ways just a more verbose version of Judge Pryor's reasoning in the Haleyville Medical Supply opinion — *Escobar* really doesn't create a higher materiality standard as some would argue, but rather cuts straight to the plain language and plain sense of the FCA.''

Judge Pryor's decision relied upon the stringent conditions of payment theory since neither party disputed that compliance with the Anti-Kickback Statute was a condition for Medicare payments, said Rebekah N. Plowman, a partner with Jones Day in Atlanta.

His ''willingness to adopt an implied certification theory of FCA liability certainly seems in keeping with the most important [Supreme Court] decision issued on the scope of the FCA in many years,'' she said.

Knowing Violator of Regulations. Judge Pryor's decision allowed the government to proceed with claims that a medical services company falsely received Medicare payments because the kickbacks the company paid to pharmacists made it ineligible under the program.

''When a violator of government regulations is ineligible to participate in a government program and that violator persists in presenting claims for payment that the violator knows the government does not owe, that violator is liable'' for submitting false claims, he wrote.

However, FCA doesn't create liability for merely disregarding regulations unless a contractor is knowingly asking for the government to pay amounts it doesn't owe, Judge Pryor added.

As a result, Judge Pryor placed the Eleventh Circuit among the circuits allowing for implied certification claims, but only when the unsatisfied provision was a condition for receiving payment from the government.

This approach fit between defendant-friendly circuits that wholly rejected implied certification, and pro-whistle-blower circuits that said any alleged noncompliance could result in liability.

Judge Pryor ''doesn't seem to be someone who bows to power, which can be a serious concern in the False Claims Act arena where the government contracting community can be extremely powerful and persuasive,'' Barger said.

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