

THOUGHT LEADERSHIP

NEWS RELEASES

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Husch Blackwell Authors U.S. Supreme Court Amicus Brief in Key FCA Litigation

Husch Blackwell prepared an *amicus curiae* brief on behalf of multiple healthcare and physician organizations calling for the U.S. Supreme Court to review *United States v. Care Alternatives*, a potentially monumental case affecting any business that submits claims to the federal government for payment. Earlier this year, the U.S. Court of Appeals for the Third Circuit established that reasonable differences of opinion between physicians should be resolved by a jury in the context of the federal False Claims Act (FCA). That lower court ruling creates potential legal liability for healthcare providers and physicians even in the absence of fraudulent activity and even if it is undisputed that the patient's treating physician reasonably exercised clinical judgment.

The Third Circuit's decision created a circuit split on the issue of how to view disagreements over the clinical condition of patients when that condition becomes the subject of a FCA lawsuit. Some circuits have held that reasonable disagreements concerning a patient's condition are insufficient to demonstrate that the treating physician's conclusion was "false" or "wrong." The Eleventh Circuit in *United States v. Aseracare, Inc.*, for example, held recently that objective falsity is required to show an FCA violation and that a physician's reasonable and good faith exercise of clinical judgment is not objectively false.

Created during the Civil War, the FCA is one of the U.S. government's primary tools to pursue contractors who defraud government programs. Under the FCA, private parties (known as *qui tam* relators) can file lawsuits on behalf of the government and receive a portion of any recovered damages. According to the U.S. Department of Justice, FCA lawsuits have led to the recovery of \$62

billion since 1987. Recently, plaintiffs have relied on the law to challenge physicians' medical decision-making and corresponding Medicare claims.

"Certainly, the government requires tools to combat waste and fraud; however, redefining differences in medical opinion as fraud under FCA rules is counterproductive," said Meg Pekarske, a Partner with Husch Blackwell and the leader of the firm's Hospice & Palliative Care practice group. "We are concerned that the Third Circuit has opened the door for baseless lawsuits and has endangered the doctor-patient relationship that quality medical care—particularly end-of-life care—depends upon."

The brief supporting the grant of certiorari was filed in late October by the National Hospice and Palliative Care Organization, along with National Association for Home Care & Hospice, American Health Care Association, American Academy of Hospice and Palliative Medicine, and American Medical Association.

The Husch Blackwell team included Pekarske, Bryan Nowicki, Jody Rudman, and Joseph Diedrich.