Insurers Refute Relator’s Argument That Stay Would Prejudice U.S., N.J. Governments

Mealey's (March 16, 2016, 12:22 PM EDT) -- CAMDEN, N.J. — Insurers on March 11 replied to a relator’s opposition to their motion to stay a qui tam action against them pending the outcome of a U.S Supreme Court case that is scheduled for oral argument in April (Elizabeth Negron v. Progressive Casualty Insurance Co., et al., No. 14-577, D. N.J.; 2016 U.S. Dist. LEXIS 24994).

(Defendants’ reply available. Document #13-160317-022B.)

False Claims Act

Elizabeth Negron filed a qui tam action in the U.S. District Court for the District of New Jersey pursuant to the federal False Claims Act and the New Jersey False Claims Act.

Negron alleged that Progressive Casualty Insurance Co. and Progressive Garden State Insurance Co. permitted Medicare and Medicaid beneficiaries to elect a "health first" automobile insurance policy in an online application. Negron argued that this action caused health care providers to submit medical claims to Medicare and Medicaid that violated secondary payer laws.

The insurers moved to dismiss the relator’s complaint.

On March 1, Judge Noel L. Hillman denied the insurers’ motion, distinguishing the present case from Mason v. State Farm Mut. Auto. Ins. Co. (398 F. App'x 233 [9th Cir. 2010]).

“First, in Mason there was no dispute that State Farm was the primary payer, while here Relator enrolled in a health first policy whereby Relator's health insurer, Medicare, was to be the primary payer. Second, State Farm's basis for denying the claim was a pre-existing condition. Here, Relator alleges Defendants did not have a legitimate basis for denying the claim and kept deliberately ignorant of their obligation to be primary payers.”

The judge concluded that the relator has sufficiently pleaded her claims under both the federal and state False Claims Act.

‘Implied Certification’

Six days before Judge Hillman denied their motion to dismiss, the insurers moved to stay pending the U.S. Supreme Court’s decision in Universal Health Services Inc. v. United States ex rel. Escobar (No. 15-7 [U.S. Sup. 2016]).

“The Supreme Court in Escobar will soon decide whether the ‘implied certification’ theory of liability under the False Claims Act (‘FCA’) is viable — precisely the same (and only) legal theory that Negron asserts in this action.”

The insurers argue that if the Supreme Court rejects the implied certification theory in its entirety, the District Court must dismiss the present lawsuit.

“If the Supreme Court recognizes the implied certification theory, it will likely clarify the scope of the theory and address whether only expressly stated preconditions of payment can give rise to liability. Either outcome would guide the parties and this Court on how to proceed in this action.”

‘Ongoing Fraud’

On March 4, the relator filed her opposition to the insurers’ motion to stay, arguing that United States of America and the State of New Jersey will be “significantly damaged” if the defendants’ stay is granted.

“Defendants fail to address the harm that the United States of America and State of New Jersey (the actual Plaintiffs) will incur as the result of a stay. The government should not have to endure an extra day, let alone three to four months, of Defendants’ fraud. Indeed, Defendants continue to palm bills off onto Medicare and Medicaid. As of March 2, 2016, Defendants’ online application is substantially the same as at the time the complaint was filed. The current application does not ask any new, relevant questions. It does not ask whether the applicant is insured by Medicare or Medicaid. Nor does applicant asked to identify her health insurer. If anything, Defendants’ application has gotten worse. Now an applicant has to click on two links (a question mark icon, then “Learn more”) before reaching

Defendants' disclosure. Defendants are not merely asking for a stay, they are asking the Court to turn a blind eye to their ongoing fraud. Until Defendants end their scheme, and can prove the same, any delay in this matter necessarily comes at the expense of Medicare, Medicaid, and taxpayers. Defendants cannot conjure any justification for such prejudice, nor do they try."

The relator alleges that the Supreme Court's upcoming decision in Escobar does not warrant a stay.

"The First Circuit's ruling in Escobar could be affirmed. Or, with Justice Scalia's passing, the Supreme Court could render a split opinion. Escobar could change Relator's evidentiary burden, either making her case harder or easier to prove. Escobar could also settle before the Supreme Court rules. No one can offer more than a guess as to how Escobar will be decided, and how that decision will affect this case. Defendants are free to file a motion for summary judgment the day after Escobar is decided. In the interim, Defendants should not be permitted to gamble with the parties' time."

Dispositive Issue

"Tellingly, Relator's opposition does not cite any opinions that considered whether to stay an action pending the resolution of a Supreme Court case bearing on a dispositive issue such as this," the insurers argue in their reply.

The insurers further contend that the relator's argument that the U.S. and New Jersey governments "will be prejudiced by a stay of possibly a few months ignores that this action was effectively stayed for over a year before the Defendants were served, presumably at the behest of the federal government itself while it decided whether to intervene."

"Moreover, the alleged prejudiced to the government — that it may pay medical claims that should be paid by the Defendants while this action is on-going — can be adequately remedied at the damages stage, where — if Relator is able to prove her theory of liability — Defendants could be subject to the penalty provided under the FCA, which includes potentially multiples of the value of the claims paid and a civil penalty per claim."

Oral arguments for Escobar are scheduled to begin on April 19.

Counsel

Jeremy Edward Abay of Sacks Weston Diamond in Philadelphia represents Negron.

Carl D. Poplar of Cherry Hill, N.J., and Michael K. Loucks and Kara E. Fay of Skadden, Arps, Slate, Meagher & Flom in Boston represent Progressive Casualty and Progressive Garden State.

Bernard John Cooney of the U.S.'s Attorney's Office in Newark, N.J., represents the United States of America, as an interested party.

(Additional documents available: Defendants' motion to stay. Document #13-160317-020M. Relator's memorandum in opposition to defendants' motion to stay available. Document #13-160317-021B. Opinion on motion to dismiss. Document #13-160317-019Z.)

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