APSCU

A MESSAGE FROM STEVE

January 4, 2016

Happy New Year!

One of the challenges facing our sector has been the incredible increase in regulations. One of the real concerns is that hostile government agencies might use the theory of "implied certification" as the basis for denying – or retro-actively trying to collect – federal funds for compliance issues on other matters not directly related. You can imagine the real or potential problems our sector could face from a hostile Department of Education and specifically related to Title IV funding.

Accordingly, we seek your help and consideration on a legal issue! We have been presented with an opportunity to file an amicus brief in a case that has been elevated to the Supreme Court regarding the False Claims Act (FCA). In *Universal Health Services v. U.S. ex rel. Escobar*, the Supreme Court is expected to decide two critical questions under FCA:

1. Whether the "implied certification" theory of legal falsity under the FCA—applied by the First Circuit [in this case] but recently rejected by the Seventh Circuit—is viable.

2. If the "implied certification" theory is viable, whether a government contractor's reimbursement claim can be legally "false" under that theory if the provider failed to comply with a statute, regulation, or contractual provision that does not state that it is a condition of payment, as held by the First, Fourth, and D.C. Circuits; or whether liability for a legally "false" reimbursement claim requires that the statute, regulation, or contractual provision expressly state that it is a condition of payment, as held by the Second and Sixth Circuits.

Both questions are of critical importance to APSCU and its member schools. An amicus brief from APSCU would give the Court additional information and insight into how an overly broad reading of the FCA gives rise to unfair and unacceptable results.

The demise of the implied certification theory would significantly decrease the liability risks faced by schools. As exemplified by other lawsuits brought against numerous schools, both big and small, the implied certification theory has been a favorite plaintiff's tool because it allows relators to argue that each and every time a school submits a request for Title IV funding, the school is effectively certifying compliance with the thousands of pages of federal statutes and regulations referenced in the Program Participation Agreement (PPA).

A violation of one of those regulations—at any point in time after signing the PPA—has the potential to turn a mere regulatory violation into a potential "fraud" on the United States and potentially expose a school to damages equal to the amount of Title IV funding received by its students over a several year period — trebled. By submitting an amicus brief in *Escobar*, APSCU and the schools have an opportunity to persuade the Supreme Court that the implied certification theory is not just dangerous in the medical field (as the defendant in *Escobar* will focus on), but to schools and other organizations operating in heavily regulated fields.

Moreover, the demise of the implied certification theory at the Supreme Court would not only limit the potential for liability under the FCA, but significantly reduce the potential financial exposure schools face in FCA cases. That is because in addition to treble damages, relators frequently argue in

cases against schools that each request for Title IV funding is a "false claim," and thus triggers a civil penalty up to $11,000 for each and every such claim. For a school with thousands of students, this could result in crippling liability. A well-drafted amicus brief describing how the implied certification theory can impose such draconian, possibly unconstitutional penalties, could help persuade the Court to reject the theory outright.

Even if the Supreme Court were inclined to adopt the implied certification theory, an amicus brief from APSCU has the potential to persuade the Court to adopt a narrow version of the theory that would limit the risk of the theory to schools. The circuit courts are currently divided on whether the regulation must expressly state it is a condition of payment or whether that too can be implicit to support FCA liability. This is a critically important issue for schools because many of the regulations identified in the PPA are not express conditions of payment.

Finally, your support becomes crucial in supporting the legal fees associated with filing an amicus brief. APSCU is prepared to file such an amicus brief on behalf of the sector – PROVIDED that we are able to raise the funds to cover such costs. The law firm handling this case has indicated the total cost for such a brief would be $80,000. Unless we raise this amount of money, we will not be able to file the brief. Thus, we are reaching out to every member of the sector – member and non-member of APSCU – to seek your financial support for this important case. Rest assured that this is a one-time fee and not a recurring cost. But your support is vital to combating the overregulation in our sector! Please contact Michael Dakduk at Michael.Dakduk@apscu.org to discuss how you can support this cause.

Thanks for your consideration of this request. Due to the holidays, timing is a bit challenged. We will need to receive your commitment within the next couple of weeks and your payment by the end of this month for us to file such a brief. Please let us know if you would consider supporting this important legal matter on behalf of the sector.

Sincere thanks for all you do!

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