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2016 Supreme Court Healthcare Cases: Post-Scalia

Several healthcare commentators have noted that there are a number of pressing matters before the *Supreme Court of the United States* (SCOTUS) in 2016 that may be impacted by the February 13, 2016 passing of Associate Justice Antonin Scalia.[1] In the wake of Justice Scalia's death, SCOTUS has been reduced to an eight-member court, which, as a bench with an even number of judges, holds the potential for an equally divided court. Amongst the entirety of SCOTUS's caseload for this term, decisions of the eight-member Court may significantly affect the landscape of healthcare issues affecting actors in the healthcare industry, including the *False Claims Act* (FCA). This Health Capital Topics article will briefly describe the procedures and standards for SCOTUS associated with an eight-member bench, as well as detail the potential impact of split rulings on healthcare-related cases SCOTUS will consider this term, including:

(1) *Universal Health Servs., Inc. v. United States ex rel. Escobar* (*Escobar*) – a challenge regarding the scope of FCA liability; and,
(2) *Alfred Gobeille v. Liberty Mutual Insurance Company* (*Gobeille*) – a challenge regarding health data reporting requirements for operators of self-funded health insurance plans under the *Employer Retirement Income Security Act* (ERISA).

Since the February 2016 death of Justice Scalia, all SCOTUS matters, including healthcare-related cases, have been heard and decided by an eight-member Court.[2] In the event of SCOTUS provides a *split decision*, a term to describe a decision in which the judges on a bench divide their votes evenly on an issue presented,[3] the Court "*affirms by an equally divided Court*."[4] However, for matters decided by a full majority, the Court's decision takes precedence. Split decisions have been negatively viewed by past members of SCOTUS. Former Chief Justice William Rehnquist is often cited on this topic, stating:

> "*[T]he prospect of affirmance by an equally divided Court, unsatisfactory enough in a single case, presents even more serious problems where companion cases reaching opposite results are heard* […] *[A]ffirmance of each of such conflicting results by an equally divided Court would lay down 'one rule in Athens, and another rule in Rome' with a vengeance*."[5]

In an effort to avoid this result, SCOTUS often orders cases be reargued in situations where a split decision is likely.[6] Thus, observers of SCOTUS are not projecting a series of affirmations by an equally divided Court this Term.[7]

Within this environment, SCOTUS is expected to consider cases that may wide-ranging impacts on healthcare providers. In particular, SCOTUS is expected to consider the scope of the FCA in *Escobar*, which may impact the overall application of the FCA to healthcare providers. As discussed in a January 2016 Health Capital Topics article, entitled "*SCOTUS to Weigh in on Definition of 'False' Under FCA*" *Escobar* examines a circuit split regarding the definition of "*falsity*" under the "*False Claims Act*" (FCA).[8] Nine of the twelve federal courts of appeals share a view of "*legal falsity*" that differs from "*factual falsity*" as defined under the FCA:[9] (1) *factually false* claims involve claims for federal reimbursement regarding items or services never provided;[10] and, (2) *legally false* claims, also known as the *implied certification theory*, which involves claims that fail to satisfy an underlying legal requirement because of a violation of statute, regulation, or contract.[11] Oral arguments are scheduled for April 19, 2016, and a decision is expected before July 2016.[12] In this case, a split decision would leave the United States Courts of Appeals for the First, Second, Third, Fourth, Sixth, Ninth, Tenth, Eleventh, and D.C. circuits' applications of the implied false certification theory under the FCA in place; in the Seventh Circuit, the theory would remain invalid.[13] Numerous legal commentators have encouraged providers with potential FCA exposure to follow the developments in *Escobar* as it could have a significant impact on FCA jurisprudence.[14]

In another potentially influential case impacting health insurance, on March 1, 2016, SCOTUS issued its decision in the *Employer Retirement Income Security Act* (ERISA) case *Alfred Gobeille v. Liberty Mutual Insurance Company* (*Gobeille*).[15] In *Gobeille*, the Court considered a Vermont law that required detailed reporting of payments relating to healthcare claims to a state healthcare database, including from self-funded

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plans subject to ERISA.[16] Liberty Mutual contested the statute, arguing that "*disclosure such confidential information might violate its fiduciary duties*," ordered its third-party claims administrator to defy the statute, and filed suit to challenge the validity of the statute.[17] In a 6-2 decision, SCOTUS struck down the reporting requirement, noting, "*The state statute imposes duties that are inconsistent with the central design of ERISA, which is to provide a single uniform national scheme* […] *without interference from laws of the several States* …."[18] Legal commentators noted that the *Gobeille* decision may have broad implications on the ability of states to collect healthcare claims data from insurance plans, which could impact the utilization of claims data in the consideration of certain public health issues.[19]

The current potential for a split decision will remain until a new justice is appointed and sworn into SCOTUS. Providers should take note that the uncertainty in political arena regarding this appointment is likely to prolong the current voting environment on SCOTUS into the near future, which could impact the disposition of noteworthy issues for providers, such as the scope of the FCA. Providers would be prudent to carefully monitor these regulatory developments as part of its overall efforts to maintain compliance with applicable laws.

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1 "Scalia's death certain to complicate current Supreme Court cases, cause election-year clash" By Harold Bishop, J.D., et al., Wolters Kluwer Health Law Daily, February 16, 2016, http://www.dailyreportingsuite.com/health/news/scalia_s_death_certain_to_complicate_current_supreme_court_cases_cause_election_year_clash (Accessed 2/29/2016); "Healthcare cases arrive soon for eight-member Supreme Court" By Lisa Schencker, Modern Healthcare, February 16, 2016, http://www.modernhealthcare.com/article/20160216/NEWS/160219929 (Accessed 2/29/2016).

2 See, "Alfred Gobeille, in his official capacity as Chair of the Vermont Green Mountain Care Board, Petitioner v. Liberty Mutual Insurance Company" 2016 WL 782861 (U.S., March 1, 2016); See also, "U.S. top court rules for Liberty Mutual over Vermont healthcare law" By Lawrence Hurley, Reuters, March 1, 2016, http://www.reuters.com/article/us-usa-court-healthcare-idUSKCN0W34YN (Accessed 3/2/2016).

3 "What Happens in a SCOTUS Tie?" By Brendan I. Koerner, Slate, 2004, http://www.slate.com/articles/news_and_politics/explainer/2004/11/what_happens_in_ascotus_tie.html (Accessed 4/29/16).

4 "Coming Off the Bench: Legal and Policy Implications of Proposals to Allow Retired Justices to Sit By Designation on the Supreme Court" Duke Law Journal Vol. 68:81, 2011 p. 92.

5 See, "Filling the Supreme Court Vacancy" Senator Ben Cardin, February 24, 2016, https://www.congress.gov/crec/2016/02/24/CREC-2016-02-24-pt1-PgS977.pdf (Accessed 3/15/2016) p. S981 quoting then Associate Justice Rehnquist's dissent in Laird v. Tatum, 409 U.S. 824, 838 (1972).

6 "Indian Towing Co. v. U.S." 350 U.S. 61 (1955), re-argued October 13, 1955 and decided 5-4 on November 21, 1955 following an initial 4-4 ruling; "United States ex rel. Toth v. Quarles" 350 U.S. 11 (1955) argued February 8-9, 1955, reargued October 13, 1955 and decided 6-3 on November 7, 1955; "Ellis v. Dixon" 349 U.S. 458 (1955) reargued April 20, 1955 and decided 5-4 on June 6, 1955.

7 See, "Tie votes will lead to reargument, not affirmance" By Eugene Volokh, February 16, 2016, https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/02/16/tie-votes-will-lead-to-reargument-not-affirmance/ (Accessed 3/15/2016) citing "Tie votes will lead to reargument, not affirmance" By Tom Goldstein, SCOTUSblog, February 14, 2016, http://www.scotusblog.com/2016/02/tie-votes-will-lead-to-reargument-not-affirmance/ (Accessed 3/1/2016) analyzing the Warren Court precedent where Justice Robert Jackson died suddenly of a heart attack at the beginning of the 1954 Term (on October 9, 1954). "Jackson's replacement, John Marshall Harlan II, was confirmed later that Term (on March 17, 1955). So for cases argued in the 1954 Term before March 17, there is a direct parallel to the present circumstances."

8 "Universal Health Servs., Inc. v. United States ex rel. Escobar" No. 15-7, 2015 WL 4078340, p. ii (U.S. Dec. 4, 2015).

9 Ibid.

10 "Will the Supreme Court Weigh In? Implied Certification Theory Under The False Claims Act" Mintz Levin Cohn Ferris Glovsky and Popeo PC, October 17, 2011, https://www.mintz.com/newsletter/2011/Advisories/1428-1011-NAT-HCED/web.htm (Accessed 1/18/2016).

11 647 F.3d 377, 385 (1st Cir., 2011); Mintz Levin Cohn Ferris Glovsky and Popeo PC, October 17, 2011.

12 "Calendar of Events" SCOTUSblog, 2016, http://www.scotusblog.com/events/2016-04/ (Accessed 3/15/2016); "Supreme Court Will Take Up Implied Certification Theory of FCA Liability" Morrison Foerster, December 4, 2015, http://govcon.mofo.com/health-care/supreme-court-implied-certification-theory-fca-liability/ (Accessed 1/25/2016).

13 "United States v. Universal Health Servs., Inc." 780 F.3d 504, 512 (1st Cir. 2015); "United States v. Triple Canopy, Inc." 775 F.3d 628, 636 (4th Cir. 2015); "United States ex rel. Susan Hutcheson v. Blackstone Med. Inc." 647 F.3d 377 (1st Cir., 2011); and "United States v. Sci. Application Int'l Corp." 626 F.3d 1257, 1269 (D.C. Cir. 2010); "The End of the Implied Certification Theory?: The U.S. Supreme Court Grants Certiorari in Case That Could Substantially Limit the False Claims Act" Cadwalader, Wickersham, & Taft LLP, 12/11/2015, http://www.cadwalader.com/resources/clients-friends-memos/the-end-of-the-implied-certification-theory-the-us-supreme-court-grants-certiorari-in-case-that-could-substantially-limit-the-false-claims-act (Accessed 1/18/2016).

14 "The End of the Implied Certification Theory?: The U.S. Supreme Court Grants Certiorari in Case That Could Substantially Limit the False Claims Act" Cadwalader, Wickersham, & Taft LLP, 12/11/2015, http://www.cadwalader.com/resources/clients-friends-memos/the-end-of-the-implied-certification-theory-the-us-supreme-court-grants-certiorari-in-case-that-could-substantially-limit-the-false-claims-act (Accessed 1/18/2016); "Government Contracts Insights" Morrison Foerster, 2015, http://govcon.mofo.com/health-care/supreme-court-implied-certification-theory-fca-liability/ (Accessed 1/25/2016); and "The Supreme Court will review False Claims Act circuit split regarding what counts as a 'false' claim for payment" Nixon Peabody, 12/9/2015, http://www.nixonpeabody.com/Supreme-Court-will-review-False-Claims-Act-circuit-split (Accessed 1/18/2016).

15 "Alfred Gobeille, in his official capacity as Chair of the Vermont Green Mountain Care Board, Petitioner v. Liberty Mutual Insurance Company" 2016 WL 782861 (U.S., March 1, 2016).

16 Ibid.

17 Ibid.

18 Ibid.

19 "Supreme Court Strikes Down Vermont Health Data Reporting Law as Applied to Self-Funded ERISA Plans: Ruling Could Have Broader Implications" By Carolyn Smith, et al., Alston and Bird, March 9, 2016, http://www.alston.com/Files/Publication/bab2cd94-9e58-4b00-8a60-7971d58707f6/Presentation/PublicationAttachment/04aec86b-d469-4c38-a356-7a09f244034b/16-726%20ERISA%20Preemption.pdf (Accessed 3/11/2016).

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