CASE NO. 05-4088

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA *ex rel.* EDYTH L. SIKKENGA, and EDYTH L. SIKKENGA, on her own behalf, *Plaintiffs-Appellants,*

v.

REGENCE BLUECROSS BLUESHIELD OF UTAH, f.k.a. BLUE CROSS AND BLUE SHIELD OF UTAH, ASSOCIATED REGIONAL AND UNIVERSITY PATHOLOGISTS, INC., JOHN P. MITCHELL, JED H. PITCHER, and FRANK BROWN, *Defendants-Appellees*

APPEAL FROM THE UNITED STATES DISTRICT COURT,
DISTRICT OF UTAH, CENTRAL DIVISION
Case no. 2:99CV086DAK
HONORABLE DALE A. KIMBALL,

BRIEF *AMICUS CURIAE* OF TAXPAYERS AGAINST FRAUD EDUCATION FUND IN SUPPORT OF APPELLANT AND REVERSAL

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Taxpayers Against Fraud Education Fund is a nonprofit public interest organization dedicated to combating fraud against the Federal Government through the promotion of the *qui tam* provisions of the False Claims Act (FCA). It has a profound interest in ensuring that the Act is appropriately utilized. The issue here is the applicability of the FCA to Medicare contractor-defendants accused of defrauding Medicare. The decision below gravely undermines the efficacy of the False Claims Act in policing fraud on the Federal Government, because it exempts from FCA liability Medicare contractors who knowingly make or certify fraudulent claim records, allowing healthcare providers to fraudulently or falsely receive millions of dollars in reimbursement funds from the Federal Government.

STATEMENT OF THE ISSUE

Whether the district court erred in dismissing the Relators' 31 U.S.C. § 3729(a)(2) claims on the grounds that fraudulent claim records knowingly made or certified by a Medicare contractor, which allows a healthcare provider to get a false or fraudulent claim paid or approved by the Government, are not actionable because the Medicare Act includes a supposed full immunity provision for Medicare contractors.

SUMMARY OF THE ARGUMENT

The False Claims Act (FCA), 31 U.S.C. §§ 3729 *et seq.*, imposes civil liability on any person who "knowingly makes . . . a false record . . . to get a false . . . claim paid or approved by the Government." *Id.* § 3729(a)(2). The Medicare Act, 42 U.S.C. § 1395u(e), provides Medicare contractor employees immunity for false payments certified or made "in the absence of gross negligence or intent to defraud the United States." 42 U.S.C. § 1395u(e)(1) and (2). Likewise, the Medicare Act extends the same level of immunity to the Medicare contractor. *Id.* § 1395u(e)(3). Indeed, as the legislative history explains, Congress intended to limit Medicare contractors to "the *same* immunity from liability . . . as would be provided their certifying and disbursing officers." H.R. Conf. Rep. No. 89-682 (1965), *reprinted in* 1965 U.S.C.C.A.N. 1943, 2231 (emphasis added).

The district court held that fraudulent claim records knowingly made or certified by a Medicare contractor, which allows a healthcare provider to get a false or fraudulent claim paid or approved by the Government, are nevertheless excluded from the scope of

the False Claims Act because the Medicare Act includes a supposed full immunity provision that permits fraudfeasing contractors to escape liablity with impunity. This reading of the Medicare statute is inconsistent with its plain language, irreconciable with applicable legislative history, and at odds with accepted False Claims Act prosecution policy and practice.

The district court decision, by failing to recognize that contractor immunity only applies to payments certified or made "in the absence of gross negligence or intent to defraud" the Government, significantly restricts the reach of the False Claims Act in a manner that Congress did not intend, weakening False Claims Act protection with respect to the Medicare system, leaving hundreds of billions of dollars in federal funds in jeopardy. The decision is legally unsustainable, andshould be reversed.

The lower court's ruling selectively reads the language of 42 U.S.C. § 1395u(e)(1)-(3), which explicitly limits carrier immunity to "payments referred to in paragraph (1) or (2)." *Id.* § 1395u(e)(3). The district court decision overly restricts the plain meaning of paragraphs (1) and (2), which, by their very terms, limits immunized "payments" to those certified or made "in the absence of gross negligence or intent to defraud the United States." *Id.* § 1395u(e)(1) and (2). Thus, the Medicare Act includes no "full immunity" bypass to False Claims Act liability.

The district court's ruling is particularly flawed with respect to the Medicare system, a federally funded program, which, by its very nature, depends upon Medicare

contractors making honest claim records for subsequent submission to the Federal Government. By adopting a blanket rule that pierces the FCA shield protecting Medicare, the district court jeopardizes the federal fisc, the very entity Congress sought to protect.

Additionally, the relevant legislative history shows beyond question that the result reached by the district court is contrary to the intent of Congress. In the accompanying Conference Report, Congress, in clarifying the existing scope of liability, unequivocally stressed that the Medicare Act's immunity veil only pardons a carrier to the same extent as its individual employees. Congress, when recently amending the Medicare Act, again stressed the continued False Claims Act liability of fraudfeasing Medicare contractors. Thus, the lower court's ruling not only ignores the plain meaning of the Medicare Act, but also disregards the relevant legislative history.

Furthermore, in support of its strained statutory reading, the district court announces that it is adopting the Eleventh Circuit's interpretation in *United States ex rel. Body v. Blue Cross & Blue Shield of Alabama*, 156 F.3d 1098 (11th Cir. 1998). However, despite this lone circuit court highlighting this supposed free pass for fraudfeasing Medicare contractors, no other defendant outside of the Eleventh Circuit has successfully argued the "full immunity" defense to FCA liability. In fact, in the nearly seven years since the *Body* decision, at least four Medicare contractors have inked False Claims Act settlements with the Department of Justice, returning over $264 million to the public treasury. Thus, the Eleventh Circuit and the lower court stand alone, while the United

States Congress, the Department of Justice, and even fraudfeasing Medicare contractors have failed to read blanket immunity into the Act.

ARGUMENT

I. THE DISTRICT COURT ERRED IN RULING THAT FALSE CLAIM RECORDS MADE OR CERTIFIED BY A MEDICARE CONTRACTOR, WHICH ALLOWS A HEALTHCARE PROVIDER TO GET A FALSE OR FRAUDULENT CLAIM PAID OR APPROVED BY THE GOVERNMENT, ARE NEVERTHELESS EXCLUDED FROM THE SCOPE OF THE FALSE CLAIMS ACT BECAUSE A SUPPOSED GRANT OF FULL IMMUNITY PERMITS THE CONTRACTOR TO ESCAPE LIABILITY WITH INPUNITY.

A. The District Court's Ruling Ignores The Plain Language Of The Medicare Act.

In 31 U.S.C. § 3729(a)(2), the False Claims Act imposes civil liability and treble damages upon any person who "knowingly makes . . . a false record . . . to get a false . . . claim paid or approved by the Government." *Id.* The Medicare Act provides in relevant part:

> (1) No individual designated pursuant to a contract under this section as a certifying officer shall, in the absence of gross negligence or intent to defraud the United States, be liable with respect to any payments certified by him under this section.
>
> (2) No disbursing officer shall, in the absence of gross negligence or intent to defraud the United States, be liable with respect to any payment by him under this section if it was based upon a voucher signed by a certifying officer designated as provided in paragraph (1) of this subsection.
>
> (3) No such carrier shall be liable to the United States for any payments *referred to in paragraph (1) or (2).*

42 U.S.C. § 1395u(e) (emphasis added). As the lower court correctly deduced, the Medicare statute extends immunity to Medicare carriers for "payments referred to in paragraph (1) or (2)." *Id.* § 1395u(e)(3). The lower court held that under this provision of the Medicare Act, a fraudulent claim record made by a Medicare carrier to get a false claim paid or approved by the Government does not fall within the scope of the False Claims Act, even if the record was made with the intent to defraud the United States.

By its terms, Section 1395u(e)(3) immunity does not extend to "any payments" made or certified by a Medicare carrier, but instead only to those payments "referred to in paragraph (1) or (2)." The lower court, borrowing an Eleventh Circuit interpretation that has yet to be adopted by any other circuit, interpreted the language in Section 1395u(e)(3) to extend "full immunity" to Medicare contractors simply because "[a] clause limited immunity to payments not involving gross negligence or fraud is conspicuously absent" from paragraph (3). *United States ex rel. Body v. Blue Cross & Blue Shield of Alabama*, 156 F.3d 1098, 1111 (11th Cir. 1998). However, as the United States Supreme Court warned, "There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted." *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978). By striking the reference to paragraphs (1) and (2), the district court rewrites paragraph (3) to read: "No such carrier shall be liable to the United States for any payments." Perhaps the U.S. Supreme Court said it best in *United States v. Naftalin*: "The short answer is that Congress did not write the statute that

way." 441 U.S. 768, 773 (1979).

In addition to selectively reading the language of Section 1395u(e)(3), the district court also ignores the explicit qualification of "payments" defined in Sections 1395u(e)(1) and (2). Most importantly for this case, these sections explicitly limit "payments" to those certified or made "in the absence of gross negligence or intent to defraud the United States." *Id.* § 1395u(e)(1) and (2). Thus, Congress, in limiting carrier liability to these particularly defined payments, explicitly clarified that fraudfeasing contractors cannot escape liability by simply arguing that they are not legally accountable for their fraudulent actions. The lower court's cursory interpretation is therefore legally unsustainable.

B. The District Court's Ruling Is Inconsistent With The Relevant Legislative History.

Whatever one may think of the arguments that can be made from the actual text, no one can say the Medicare Act unambiguously grants "full immunity" to Medicare carriers under Section 1395u(e)(3). Accordingly, the lower court's strained interpretation at least demands a review of the legislative history. *See Blum v. Stevenson*, 465 U.S. 886, 896 (1984). Once the legislative history is consulted, any residual uncertainty about whether to read a full immunity bypass into the statute disappears. Indeed, the Conference Report accompanying the Medicare Act states that Section 1395u(e)(3) is intended to limit Medicare contractors to "the *same* immunity from liability for incorrect payments as

would be provided their certifying and disbursing officers." H.R. Conf. Rep. No. 89-682 (1965), *reprinted in* 1965 U.S.C.C.A.N. 1943, 2231 (emphasis added). Because certifying and disbursing officers are immune from liability only when they act "in the absence of gross negligence or intent to defraud the United States," 42 U.S.C. §1395u(e)(1) and (2), the characterization of Section 1395u(e)(3) in the accompanying legislative history insists that the contractor's immunity be similarly limited. By contrast, the reading adopted by the lower court required it to ignore this legislative history. Because Section 1395u(e)(3) may plausibly be interpreted in a manner consistent with the applicable legislative history, the district court should not have adopted its strained interpretation that blindly disregards the underlying congressional intent.

Furthermore, when Congress recently amended the Medicare Act, the accompanying legislative history reiterated the intent underlying the original statute: "[T]he False Claims Act *continues, as in the past,* to remain available as a remedy for fraud against Medicare by certifying officers, disbursing officers, *and Medicare administrative contractors alike…*" 149 Cong. Rec. S15644 (emphasis added). Conversely, neither the Defendant nor the lower court could point to a single legislative utterance championing unlimited carrier immunity. Thus, in addition to misinterpreting the Medicare Act, the district court's analysis directly conflicts with the relevant legislative history, blatantly casting a jaundice eye upon the intent of Congress.

C. The District Court's Ruling Impermissively Legislates An Exception to the False Claims Act.

Congress "endorse[d]" the Supreme Court's interpretation that the federal False Claims Act "'was intended to reach all types of fraud, without qualification, that might result in financial loss to the Government.'" S. Rep. 99-345, 99th Cong., 2d Sess., at 19, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5284 (quoting *United States v. Neifert-White Co.*, 390 U.S. 228, 232 (1968)). The district court's ruling, on the other hand, impermissively legislates a Medicare contractor "full immunity" limitation that appears nowhere in the relevant statutory language, weakening the False Claims Act shield that Congress erected around the Medicare system.

In other words, reading "full immunity" into Section 1395u(e)(3) trumps the explicit language and purpose of the False Claims Act, repealing by implication Congress's intention to "reach all types of fraud." However, such a reading is inconsistent with the "cardinal principle of statutory construction that repeals by implication are not favored." *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976) (internal quotation marks and citation omitted). As the United States Supreme Court has stressed, "[j]udges are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian*

Nation, 502 U.S. 251, 265-66 (1992) (citations omitted). For nearly four decades, the judicial system has honored the congressional intent behind both the False Claims Act and the Medicare Act, holding Medicare contractors liable "for all types of fraud, without qualification." Thus, the two Acts are not only "capable of co-existence," but have succeeded in protecting the Medicare system from fraudfeasing Medicare contractors.

D. The District Court's Ruling Conflicts With Accepted False Claims Act Prosecution Policy And Practice.

The district court, reaching for a statutory interpretation that has only been accepted by one circuit, relied on *United States ex rel. Body v. Blue Cross & Blue Shield of Alabama*, 156 F.3d 1098 (11th Cir. 1998), and ruled that Medicare contractors are fully immunized for all fraudulent activity under Section 1395u(e). Perhaps viewing this reading of the Act as being inconsistent with its plain language and irreconceilable with with its applicable legislative history, fraudfeasing carriers have, time and time again, refused to reach out for this supposed ironclad plank of immunity. Instead, since the *Body* decision first discovered this alleged passageway around FCA immunity, at least another four Medicare contractors have signed FCA settlement agreements with the Department of Justice, recovering over $264 million in ill-received federal funds.[1]

[1] *See, e.g.*, *United States ex rel. Doe v. Pennsylvania Blue Shield*, 54 F. Supp.2d 410 (M.D. Pa. 1999) (Pennsylvania Blue Shield, the Part B carrier for Pennsylvania, Delaware, New Jersey and the District of Columbia, and its parent, Highmark, Inc., paid $38.5 million to settle four False Claims Act suits); *United States ex rel. Dodson v. Blue*

Thus, unlike the lower court, the United States Congress, the United States Department of Justice, and fraudfeasing Medicare contractors have refused the invitation to read "full immunity" into the Act. If the district court had properly read Act, the lower court would have ruled that the type of fraud alleged in this case could form the basis for an FCA claim, when the Medicare contractor makes or certifies a fraudulent claim record with "gross negligence or intent to defraud the United States." Perhaps this is why Medicare contractor fraud cases involving millions of federal dollars have been successfully settled under the federal False Claims Act, but no other court outside of the Eleventh Circuit has reached the same conclusion as this Utah district court. With an annual budget of over $325 billion in federal funds, the Medicare system—and the U.S. taxpayer—deserve an accurate reading of the Medicare Act.

Shield of Calif., No. C94-3626 EEL, (N.D. Cal. 1998) (The United States recovered $12 million in settlement of a *qui tam* case alleging that the Part B carrier for Northern California mischarged costs under its carrier contract and misrepresented its performance to HCFA); *United States ex rel. Knoob v. Health Care Service Corporation*, No. 95-4071 (S.D. Ill. 1998) (United States recovered $140 million in settlement of a suit alleging that the Part B carrier for Illinois and Michigan had shredded claims, deleted claims from its computer system, paid all claims under $50, shut off its beneficiary and provider telephone lines, and intentionally misrepresented its performance to HCFA). In yet another example, a Medicare contractor, Anthem Blue Cross & Blue Shield (formerly Blue Cross & Blue Shield of Connecticut), in order to improve its ratings under the Contractor Performance Evaluation Program, intentionally overpaid tens of millions of dollars to hospitals, falsifying cost reports. The United States reached a $74 million settlement with Anthem in December 1999.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

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July 11, 2005

CERTIFICATE OF COMPLIANCE

In accord with Fed. R. App. P. 32(a)(7)(C), the undersigned certifies that this brief complies with the type-volume limitation set forth in the Rule. Excluding the portions exempted by Rule 32(a)(7)(B)(iii), the brief contains 2,479 words as reported by the word count function of Microsoft Word. The brief was prepared in Microsoft Word in Times New Roman font, 14-point type for both text and footnotes.

_____/s/_____

July 11, 2005

Joseph White
Taxpayers Against Fraud Education Fund

CERTIFICATE OF SERVICE

I hereby certify that copies of this Brief *Amicus Curiae* of Taxpayers Against Fraud Education Fund, The False Claims Act Legal Center, were served by first-class mail, postage prepaid, and sent by email this 11 day of July, 2005, upon:

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This 11th day of July, 2005.

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CERTIFICATION OF DIGITAL SUBMISSIONS

Pursuant to the Emergency General Order filed October 20, 2004, as amended (the "Order"), the undersigned certifies: 1) all privacy redactions required by the Order have been made and that this electronically submitted document is otherwise an exact copy of the written document filed with the Clerk; and 2) that this electronic document has been scanned with the most recent version of McAfee's Managed VirusScan and according to that program is free of viruses.

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