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ALERT

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Second Circuit Affirms Dismissal of False Claims Act Medicare Secondary Payer Cases

The Second Circuit affirmed the dismissal of two False Claims Act ("FCA") cases brought by private relators against insurance and other companies based on the alleged failure to reimburse the Centers for Medicare & Medicaid Services for conditional payments under the Medicare Secondary Payer ("MSP") provision of the Medicare Act.

In *United States ex rel. Takemoto v. Nationwide Mut. Ins. Co., et al.*, Case No. 16-365, the Second Circuit affirmed dismissal because Takemoto did "not allege facts admitting an inference of a reimbursement obligation on the part of any defendant." While the parties disputed whether Rule 9 applied to the reverse false claim act provision as amended by the Fraud Enforcement and Recovery Act of 2009, the Second Circuit did not reach the issue, concluding that Takemoto's complaint failed to satisfy the more lenient Rule 8 standard: "Takemoto can only speculate that each defendant had one or more reimbursement obligations under the MSP based on the facts that approximately 17% of the population are Medicare beneficiaries and that defendants issue settlements, judgments, or awards for 'tens of thousands of claims involving Medicare beneficiaries' each year."

In *United States ex rel. Hayes v. Allstate Ins. Co., et al.*, Case No. 16-705, the Second Circuit affirmed dismissal under Rule 11 because Hayes admitted he did not have a factual basis to allege all named defendants had violated the MSP. In its opinion, the Second Circuit first assessed whether it had subject matter jurisdiction over the *Hayes* case under the first-to-file rule in light of the earlier-filed *Takemoto* case. The Second Circuit joined "the D.C. Circuit in holding that the FCA's first-to-file rule is not jurisdictional." As a result, the Second Circuit did not determine whether the *Hayes* action "satisf[ied] the first-to-file rule."

In a separate order, the Second Circuit affirmed the District Court's finding that Hayes's Rule 11 violation warranted dismissal of his complaint. Hayes had originally sued more than 60 companies, alleging that they all had systematically and intentionally violated their reimbursement obligations under the MSP. However, in a subsequent motion, Hayes admitted "that certain defendants might not have participated in the scheme alleged in the complaint and acknowledged that such defendants should be dismissed." As a result, the Second Circuit held "the finding of bad faith made by the magistrate judge and district court is not clearly erroneous."

Steve Sozio and Matt Corcoran of Jones Day represented certain defendant insurers in both Hayes and Takemoto.

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