

Summary of Bazelon Ctr., MHA & SEIU *amici* brief in *UHS v. U.S. ex rel. Escobar*, S Ct. No. 15-7

The *amici* brief filed by the Bazelon Center, MHA and SEIU makes two main points.

First, the brief describes in detail the history of staffing problems at UHS facilities, as documented in official inspection reports. The brief begins with a close look at one UHS facility, the National Deaf Academy in Florida, which provides a telling example. The state of Florida has found evidence of patient abuse in multiple cases at NDA, and an NBC News in-depth investigation found patients and family members of patients who told heart-wrenching stories of abuse, as well as employees who say they were fired for objecting. The *amici* brief then shows that NDA is not alone among UHS facilities: many have been cited (in some cases repeatedly) for employing staff without required qualifications and training, for inadequately supervising staff, and for under-staffing that has left patients unattended and without care and services they need. UHS facilities have also been cited a number of times for failing to have timely completed background checks for employees, and a former patient at one of those facilities filed a lawsuit alleging that she was raped by a facility employee who had been hired notwithstanding an extensive criminal record.

Second, the brief explains that the “implied-certification” theory of liability under the FCA is important for protecting patients and protecting Medicare and Medicaid’s investment in quality care, and rebuts UHS’s claims that implied-certification claims expose it to too much potential liability. (In general, implied-certification liability refers to liability for a provider’s knowing submission of a claim for government payment that is false or fraudulent because the claim implies compliance with a material requirement that the provider has in fact violated.)

Implied-certification claims are important because they deter knowing and material violations of patient-care rules, which the administrative agencies charged with overseeing providers cannot adequately deter on their own. Those oversight agencies are often starved for funds, frequently operate on a state-by-state basis so cannot see system-wide patterns, and are limited in many cases to requiring meaningless “plans of correction” without any more serious sanction. Implied-certification claims under the FCA are also important because the FCA provides incentives to encourage whistleblowers to come forward, and the prospect of a recovery on an implied-certification claim (as well as the whistleblower protections of the FCA) are necessary to encourage whistleblowers to report the kind of knowing and material regulatory violations that support such claims.

Finally, UHS’s claims that implied-certification cases expose it to too much liability are contrary to available evidence. The FCA itself imposes significant limitations on liability that will continue to apply no matter the result in this case. Furthermore, data suggest that FCA claims recover only a small fraction of actual healthcare fraud (far from the “boundless” liability UHS purports to fear), and UHS itself has seen revenue growth and has expanded in mental and behavioral health even as courts have accepted implied-certification claims. UHS’s CFO even said recently that the company’s behavioral health business receives only “minimal scrutiny” from payers like Medicare and Medicaid.