Fourth Circuit Decides Closely Watched False Claims Act Case, Michaels v. Agape Senior Community, But Declines to Rule on Validity of Statistical Sampling

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The February 14 decision in a closely watched Fourth Circuit False Claims Act (FCA) case did not, as initially anticipated, address the issue of the validity of statistical sampling to establish FCA liability. However, it did address another question that has split the circuits—whether the U.S. Department of Justice has the unreviewable right to veto FCA settlements in cases in which it has declined to intervene. See United States ex rel. *Michaels v. Agape Senior Community, et al.*, 2017 WL 588356 (4th Cir. 2017.)

In Agape, two former employees of one or more of the 24 nursing homes operated by Agape in South Carolina alleged that Agape fraudulently billed Medicare and other federal health care programs for nursing home-related services for thousands of patients that had not actually been provided or for which the patients were not eligible. As in all qui tam actions, the government had the option to intervene and assume primary responsibility for prosecuting the action, or to decline to take over the action, leaving the right to conduct the action to the former employees (relators). In Agape the government declined to intervene.

To establish liability and damages, the relators sought to rely on statistical sampling, i.e., examining a subset of billing claims and extrapolating any fraud findings to a larger universe of the claims. The district court ruled that using statistical sampling to prove the relator's case would be improper. The court also rejected a proposed settlement between the relators and Agape because the U.S. Attorney General objected to it. In doing so, the court concluded that the government, despite having declined to intervene, possesses an unreviewable veto power over the action's proposed settlement.

The district court certified both the statistical sampling ruling and the unreviewable veto ruling for interlocutory appeals under 28 U.S.C. § 1292(b).

The Fourth Circuit found that the certification of the statistical sampling ruling for interlocutory review was not appropriate, since the question focused on whether the particular methods of

statistical sampling used in the Agape matter were reliable, and not the pure legal question of whether sampling is a legally valid technique in determining damages in FCA actions. In Agape, the parties estimated that it would cost between $1,600 and $3,600 for experts to review the claims of a single patient, resulting in potentially $16 million to over $36 million to review the potentially improperly submitted claims of over 10,000 patients (over 50,000 individual claims). The Fourth Circuit's decision not to address the issue leaves FCA lawyers without guidance from any circuit court as to whether sampling is an acceptable method to calculate FCA claims or violates due process.

In the meantime, the relators and Agape negotiated a settlement for a fraction of the $25 million that the government estimated as the reasonable total damages based on its own use of statistical sampling. Because of this, the government objected to the proposed settlement and Agape filed a motion to enforce it over the Attorney General's objection.

The district court ruled that under the statutes at issue the government had absolute veto power in FCA matters, whether it intervened in the case or not. The Fourth Circuit agreed, basing its ruling on the plain language of 31 U.S.C. § 3730(b)(1), which states in relevant part, "[t]he action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting." Thus, the Fourth Circuit held the government has an absolute veto power over voluntary settlements in FCA matters even when it declines to intervene in the case.

The Fourth Circuit's ruling puts a significant restriction on relators proceeding without government intervention in FCA cases. At the same time, the ruling reinforces the notion that the government remains the "real party in interest," in an FCA matter by giving the government the continued authority to ensure relators do not act solely in their own interests. In other words, the ruling emphasizes that enforcement of the FCA is to be in the interests of the government recovering fraudulent reimbursements, not the relators' personal financial gain.

In rendering its unreviewable veto ruling, the Fourth Circuit agreed with the *Fifth Circuit in Searcy v. Philips Electronics North America Corp., 117 F.3d 154 (5th Cir. 1997)*, and the *Sixth Circuit in United States v. Health Possibilities, P.S.C., 207 F.3d 335 (6th Cir. 2000)*. To date, the Ninth Circuit is the only circuit court to rule otherwise, deciding instead that the position that "without intervention [the Attorney General] possesses an absolute right to reject a proposed settlement at any time and for any reason" cannot comport with the plain language of section 3730(b)(4)(B), which affords the relator "the right to conduct the action" once the government has declined to intervene. See United States ex rel. *Killingsworth v. Northrop Corp., 25 F.3d 715, 722 (9th Cir. 1994)*.

Although the Agape case did not substantively address the statistical sampling issue as anticipated, it did address one recurring question regarding the government's power in FCA cases. Moreover, because FCA cases often involve the dilemma seen in Agape—allegations of billing fraud in hundreds (or thousands) of claims—it is likely that the validity of the use of statistical sampling will remain in the foreground until a decision is rendered by an appellate court.

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