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False Claims Act Alert: Fourth Circuit Punts on Sampling and Extrapolation

Yesterday, the Fourth Circuit Court of Appeals ruled in the interlocutory appeal in *United States ex rel. Michaels v. Agape Senior Community, Inc.*. In an opinion considering two significant questions arising under the *qui tam* provisions of the False Claims Act, the court (1) upheld the government's right to exercise an unreviewable veto over a proposed settlement despite having declined to intervene in the *qui tam* action; and (2) refrained from expressing any view as to whether relators could rely on statistical sampling to establish liability and damages. Slip Op. 6.

The case has been closely watched because in March 2015, the district court found that the facts of the case – which arises from allegations that specific patients treated by the defendant were not eligible for hospice care under the Medicare program – made the use of statistical sampling improper. *See United States ex rel. Michaels v. Agape Senior Community, Inc.*, No. 0:12-cv-03466, at 2 (D.S.C. March. 16, 2015). Shortly thereafter, in June 2015, the district court held that the government had an unreviewable right to veto a proposed settlement between the relators and defendant notwithstanding arguments from the parties that "because the Government had declined to intervene… the objection to the proposed settlement was subject to the district's court's reasonableness review." *United States ex rel. Michaels v. Agape Senior Community, Inc.*, No. 0:12-cv-03466, at 6, 12 (June 25, 2015). The district court noted that the proposed settlement was appreciably less than the government's estimate of total damages based on its own application of statistical sampling. *Id.* at 9. The district court described the "unique dilemma" that it faced as follows:

> The Government, claiming an unreviewable veto right over the tentative settlement in this case, objects to a settlement in a case to which it is not a party, using as a basis of its objection some form of statistical sampling that this Court has rejected for use at the trial of the case.

Id. at 6. On its own motion, the district court certified both issues for interlocutory appeal. *Id.* at 6, 18.

On the first issue, the Fourth Circuit concurred with the Fifth and Sixth Circuits that the language of Section 3730 is unambiguous. It granted the government "absolute veto power" over relator-defendant settlements throughout the litigation, regardless of whether the government has intervened. *Id*. at 12; 18-26. The only Circuit to have limited the government's veto power over voluntary relator-defendant settlements is the Ninth Circuit,

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see United States ex rel. Killingsworth v. Northrop Corp., 25 F.3d 715 (9th Cir.1994) (holding that the FCA grants the government unreviewable veto only in the initial 60-day (or extended) period in which the government must determine whether it will intervene in a *qui tam* action).

The Fourth Circuit opinion continues a trend among the circuits reviewing this issue, favoring the government's absolute veto power over settlements in *qui tam* actions. The court noted the plain language of Section 3730(b)(1) does not limit the government's consent-for-dismissal in any manner and specifically rejected the relators' contention that the government's objection must be "reasonable." *Id.* at 22. The Fourth Circuit also recognized "that the Attorney General's absolute veto authority is entirely consistent with the statutory scheme of the FCA," specifically noting that even in cases in which the government declines to intervene, the United States remains "the real party in interest in any [FCA] suit." *Id.* (internal quotations omitted).

On the second issue the Fourth Circuit dismissed the relators' appeal as "improvidently granted," because "the question of whether the district court may, in its discretion, allow the relators to use statistical sampling to prove their case" did not "present a pure question of law" as required under 28 U.S.C. § 1292(b) for interlocutory appeal. Slip Op. at 6; 26-27. The court noted that the district court had not ruled as a matter of law that statistical sampling evidence is never permissible in False Claims Act litigation. Rather, the district court concluded that using statistical sampling and extrapolation would not be appropriate in this case based on the particular facts and evidence presented. The Court relied upon earlier Fourth Circuit precedent which holds that the district court has broad latitude in ruling on the admissibility of evidence, including expert opinion, and such rulings will not be overturned absent an abuse of discretion. *See Bryte v. Am. Household, Inc.*, 429 F.3d 469, 475 (4th Cir. 2005).

The Fourth Circuit acknowledged an understandable desire on the part of the district court to obtain review of its statistical sampling ruling before undertaking complex trial proceedings. But the Fourth Circuit found that the issue was not reviewable under 28 U.S.C. § 1292(b). Thus, the question whether statistical sampling can be applied in other cases involving close questions of clinical judgment and medical necessity remains an issue that will have to be litigated in other cases. For now, the district court's decision barring the relators' use of statistical sampling stands as the rule of decision in this case.

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