

Supreme Court Declines to Resolve Circuit Split Regarding Standard for “Falsity” in FCA Claims

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by Jack Huerter

On February 22, 2021, the United States Supreme Court declined to resolve a circuit split regarding the proper standard under which False Claims Act (“FCA”) claims in the medical context should be reviewed. See *Care Alternatives v. United States*, No. 20-371, 2021 U.S. LEXIS 915 (Feb. 22, 2021). The Court’s decision leaves open the question of what constitutes “falsity” under the FCA and opens the door to further expansion of the circuit split as additional appeals reach jurisdictions that have not yet determined this question of law.

In *United States ex rel. Druding v. Druding*, the Third Circuit Court of Appeals considered whether the district court properly concluded relators were required to demonstrate “objective falsity” in order to satisfy the falsity element of an FCA claim. 952 F.3d 89 (3d Cir. 2020). There, relators alleged that Care Alternatives, a palliative care provider, submitted false hospice-reimbursement claims to Medicare and Medicaid for care provided to patients that were not sufficiently ill to qualify for hospice care. *Id.* at 93. The relators’ case relied heavily upon the expert report of a geriatric care physician, who examined the records of dozens of hospice-admitted patients and opined that 35 percent (35%) of the patients did not qualify for hospice care under the federal guidelines. *Id.* at 94. Care Alternatives’ expert, also a physician, concluded the opposite, finding that a physician could have reasonably determined that each patient was near the end of life and appropriately admitted to hospice care. *Id.* After extensive discovery, including the dueling expert opinions, Case Alternatives moved for summary judgment, arguing *inter alia* that relators had not produced sufficient evidence of falsity. *Id.* The district court agreed with Case Alternatives, holding that the “mere difference of opinion between physicians, without more, is not enough to show falsity” because “medical opinions are subjective and cannot be false.” *Id.* In so holding, the district court embraced the “objective falsehood” standard for falsity under the FCA articulated by the Eleventh Circuit Court of Appeals in *United States v. AseraCare, Inc.*, 938 F.3d 1278 (11th Cir. 2019).

On appeal, the Third Circuit reversed, finding that the district court’s reliance upon an

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“objective falsity” standard “improperly conflates the elements of falsity and scienter, inconsistent with the application of the FCA.” *Druding*, 952 F.3d at 95. Turning to the text of the statute, the court noted the FCA provides that “any person who ‘knowingly presents, or causes to be presented, a *false or fraudulent* claim for payment or approval’ is liable to the United States...” *Id.* (emphasis in original). Based on that statutory text, and the lack of a definition within the statute for the terms “false” or “fraudulent,” the court determined that, under common law principles, an “opinion can be considered ‘false’ for purposes of liability” and therefore medical opinions may supply a basis for finding falsity under the FCA. *Id.* The court further noted that the scienter element of an FCA claim, distinct and separate from the falsity element, served to limit the possibility that hospice providers would be “exposed to liability under the FCA any time the Government could find an expert who disagreed with the certifying physician’s medical prognosis.” *Id.* at 96. Thus, “[b]y requiring ‘factual evidence that Defendant’s certifying doctor was making a knowingly false determination,’ the court determined the lower court’s “‘objective’ falsity standard conflates scienter and falsity” by “incorporat[ing] a scienter element into its analysis regarding falsity.” *Id.* at 96. The court explained that the correct standard for falsity under the FCA “simply asks whether the claim submitted to the government as reimbursable was in fact reimbursable, based on the conditions for payment set by the government.” *Id.* at 97.

Following its defeat at the Third Circuit Court of Appeals, Care Alternatives sought to appeal the decision to the Supreme Court. In its petition, Care Alternatives noted the need for the Court to resolve the “square circuit split” between the Third and Eleventh Circuits which “creates the untenable prospect that hospices in New Jersey will face treble damages for the same difficult medical judgments that cannot be second-guessed in Florida.” Care Alternatives also emphasized the importance of the legal issue, contending that “the Third Circuit’s decision opens up hospices and physicians to crushing financial liability and reputational harm, notwithstanding near universal acknowledgment that determinations about life expectancy are notoriously difficult and inexact.”

On February 22, 2020, the Supreme Court declined to hear Care Alternatives’ appeal without comment, leaving unresolved a growing circuit split between the Fourth, Seventh, Tenth, and Eleventh Circuits, which have adopted the objective falsity standard, and the Third and Ninth Circuits, which have embraced the more lenient standard for falsity.

Given the prevalence of FCA claims premised upon medical reimbursements, the circuit split is likely to expand. Although the Third and Ninth Circuits have established a lower bar for relators to establish the falsity element for a claim—perhaps eliminating a pathway for defendants to resolve FCA claims at the summary judgement stage—both courts have stressed that the scienter requirement under the FCA, *i.e.*, the requirement that Defendant knows “the treatment was not medically necessary,” *Winter ex rel. United States v. Gardens Reg’l Hosp. & Med. Ctr., Inc.*, 953 F.3d 1108, 1114 (9th Cir. 2020), should serve to appropriately limit liability. Whether and to what extent this circuit split bears on the outcomes of FCA cases is an issue for FCA practitioners and their clients to monitor.