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Can Anyone Say What's False Anymore? SCOTUS Denial of Cert Leaves Uncomfortable Uncertainty and Strategic Opportunities

March 9, 2021

It should surprise absolutely no one that "falsity" is a core element of the False Claims Act – it is the FALSE Claims Act, after all. However, it may come as a surprise that there is substantial disagreement over what exactly can be false, and how falsity can be established. This term, the U.S. Supreme Court received two petitions for certiorari associated with cases raising just that issue; however, on February 22, 2021, it declined both, leaving in place a circuit split that creates considerable uncertainty for people and entities that have a financial relationship with the government – particularly those in the health care space, who participate in COVID-19 economic incentive programs, who hold government contracts, or who otherwise have a financial relationship with the government – and amplifies the strategic imperative of forum selection.

Background: The False Claims Act

Initially established to prosecute fraud against the Union Army during the Civil War era, but now the government's primary civil tool to fight fraud, the False Claims Act (FCA) is a federal statute aimed at persons and entities who knowingly submit, or cause the submission of, false claims to the government or knowingly make false records or statements to get a false claim paid by the government. The FCA is a heavy hammer, as violations can result in per-claim penalties and treble damages – not to mention debarment from federal contracting or exclusion from federal health programs. For this reason, as well as the reputational damage that naturally flows from FCA liability, these cases can result in tense litigation over whether the core elements of an FCA case have been adequately alleged or established.

Authors

Brandon J. Moss
Partner
202.719.7554
bmoss@wiley.law

Practice Areas

Civil Fraud, False Claims, *Qui Tam* and Whistleblower Actions

White Collar Defense & Government Investigations

Can Reasonable Minds Differing Amount to Fraud?

A key battleground for FCA litigants for the last few years has been falsity. Nowhere is that more true than in health care cases in which plaintiffs allege that defendants were improperly reimbursed for medically unnecessary services based on *post hoc* attacks on a physician's medical judgment. As anyone who has ever sought a second opinion can attest, different doctors can – and often do – have different opinions and propose differing treatment strategies. The key questions raised in these FCA cases – and the recently rejected cert petitions – are whether a physician's reasoned judgment can be proven false absent an objective falsehood and, if so, whether one physician's differing opinion can be used to show another physician's opinion is false.

In tackling these issues, the Eleventh Circuit has adopted the "objective falsity" standard. In the 2019 case *United States v. AseraCare, Inc.*, that circuit held that a hospice reimbursement claim cannot be "false" unless the physician's clinical judgment of a terminal prognosis did not reflect some objective falsehood. In doing so, the court affirmed that a clinical judgment that a patient suffered from a terminal illness warranting hospice benefits under Medicare cannot be deemed false, for purposes of the FCA, based only on a reasonable disagreement between medical experts as to the accuracy of that conclusion – subjective disagreements are insufficient for FCA liability. In short, a "sincerely held clinical judgment is not untrue even if a different physician later contends that the judgment is wrong." This position is consistent with positions taken by courts in the Fourth, Seventh and Tenth Circuits.

Last year, however, the Third and Ninth Circuits issued opinions rejecting an objective falsity standard. As was the case in *AseraCare*, the key issue before the Third Circuit in *United States ex rel. Druding v. Care Alternatives* was whether doctors at a hospice facility had appropriately decided that patients were expected to die within six months, and thus "terminally ill" and eligible for Medicare reimbursement of hospice expenses. Unlike *AseraCare*, though, the Third Circuit rejected an objective falsity standard and concluded that falsity could be properly established based on testimony of a plaintiff's medical expert. In other words, a doctor's clinical judgment CAN be considered a legal falsity if later called into question by a testifying expert with a contradictory opinion.

Weeks later, the Ninth Circuit followed the Third Circuit's lead by declining to adopt an objective falsity standard in *United States ex rel. Winter v. Gardens Regional Hospital & Medical Center, Inc.* In rejecting the district court's conclusion that "subjective medical opinions ... cannot be proven to be objectively false," the Ninth Circuit ruled that the FCA "does not distinguish between 'objective' and 'subjective' falsity or carve out an exception for clinical judgment and opinions." Instead, clinical judgment could be false for purposes of the FCA if "it implies the existence of facts that do not exist, or if it is not honestly held." To that end, certifications of medical necessity could be false based on evidence that inpatient admissions were not medically necessary – here, statistical anomalies and a showing that at least 86 admissions for inpatient treatment were inapposite to the facility's own admission criteria. However, the Ninth Circuit went out of its way to distinguish its ruling from the Eleventh Circuit's *AseraCare* decision, citing that court's focus on the use of reasonable disagreements to prove falsity and dicta that "objective falsity" may not apply to medical necessity

certifications. The Ninth Circuit also did not go as far as the Third Circuit, in that a simple battle of the experts could preclude summary judgment, seemingly indicating that a more substantive attack is needed to establish the falsity of a clinical judgment. Indeed, those very distinctions could be the impetus behind the Supreme Court's decision to deny cert at this time.

Where Do We Go From Here: Key Takeaways

Regardless of the precise contours, the Supreme Court's decision to deny cert in *Winter* and *Druding* leaves in its wake an undesirable situation in which a case's outcome could turn on where it was brought or litigated. And, while *AseraCare*, *Druding*, and *Winter* all involve the appropriateness of Medicare reimbursement claims, the uncertainty attributable to this circuit split transcends the health care space. Without a universally applicable precedent on whether falsity must be objective, cases with fact patterns involving judgment assessments – including eligibility for participation in certain government programs or payment under government contracts – may resolve one way if litigated in Florida, but another way if litigated in Pennsylvania, and yet another way if litigated in California.

Of course, this situation also creates strategic opportunities for those who litigate FCA cases. In some circuits that reject an objective falsity requirement, plaintiffs may be able to overcome summary judgment merely by producing an expert with a different assessment. This is an incredibly important result because, given the risks associated with putting complicated fact patterns before unpredictable juries and the high stakes involved in many FCA cases, surviving summary judgment is often an event that precipitates settlement. In light of this situation, FCA litigants must consider venue a strategic imperative. Because the FCA includes a generous venue provision, relator counsel has wide discretion in where they chose to file a case. Defense counsel should also think carefully about whether there are good reasons to move to transfer a case into a venue with more favorable case law.

While offering strategic opportunities for litigants, the unresolved circuit split puts those who do business with the government in an awkward position. Because it is difficult to know where a case (if brought) could land, contractors, health care providers, and those who otherwise seek government funds should be aware that relying on an expert's opinion to determine eligibility for payment may not offer the same FCA protections it used to, and take steps to avoid situations where such judgments can be called into question. For example, it is wise to consider adopting clear – and externally validated – procedures to act as scaffolding for such opinions (e.g., require decision-makers to "show their work" by documenting all due diligence performed, lawyers or experts consulted, the factors they took into consideration, and the standards applied in rendering their judgment). And, consistent with DOJ compliance guidance, it is more important than ever to consistently review and audit policies and procedures and make necessary adjustments.