LEGAL UPDATES

Supreme Court Declines To Clarify the Standard for Proof of Falsity Under the False Claims Act

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On February 22, 2021, the United States Supreme Court denied a petition to review the decision of the Third Circuit Court of Appeals in the case *United States ex rel. Druding v. Care Alternatives*, 952 F.3d 89 (2020), thus declining to resolve a split among the federal appellate courts on the issue of the standard for proof of falsity under the False Claims Act.

In the *Care Alternatives* case, four employees brought a whistleblower suit against their former employer, Care Alternatives, a provider of hospice services, alleging that Care Alternatives had submitted false claims for Medicare hospice benefits to patients who were not eligible for the benefit because they were not "terminally ill." The plaintiffs presented the testimony of a physician who reviewed the medical records of a selection of patients and opined that, based on the available records, patients had been inappropriately certified for hospice care 35% of the time. Care Alternatives' expert disagreed, opining that the medical documentation supported a conclusion that each of the allegedly ineligible patients was terminally ill. The district court granted summary judgment in favor of Care Alternatives, holding that a difference of medical opinion, without more, was insufficient proof of falsity for purposes of a claim under the False Claims Act.

The Third Circuit reversed the lower court's grant of summary judgment in favor of the hospice provider, rejecting what it referred to as the "objective falsity standard." The Court found that, rather than "factual falsity," the relevant test was "legal falsity" — i.e., did the claim meet the requirements for payment. With respect to the hospice benefit, there were two such requirements: 1) that a physician certify the patient as terminally ill; and 2) that clinical information and documentation support that certification. According to the Court, the jury could consider a medical opinion contrary to that of the certifying physician in determining whether the medical record sufficiently supported the eligibility certification. "We therefore find that a difference of medical opinion is enough evidence to create a triable issue of fact as to FCA falsity." 952 F.3d at 100.

In *Care Alternatives*, the Third Circuit expressly rejected the standard the Eleventh Circuit adopted in *United States v. AseraCare*, 938 F.3d 1278 (2019). Like *Care Alternatives*, *AseraCare* also involved a hospice provider and also involved allegations that the provider had falsely submitted Medicare claims for patients

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who were not terminally ill and, therefore, were not eligible for benefits. As in *Care Alternatives*, the parties in *AseraCare* offered dueling expert opinions on either side of the eligibility issue. The Court, however, reached the opposite conclusion regarding the standard for proof of falsity.

Noting a general policy of giving deference to the clinical judgments of physicians as well as the challenges of determining individual life expectancy, the *AseraCare* Court held "a reasonable difference of opinion among physicians reviewing medical documentation ex post is not sufficient on its own to suggest that those judgments — or any claims based on them — are false under the FCA. A properly formed and sincerely held clinical judgment is not untrue even if a different physician later contends that the judgment is wrong." 938 F.3d at 1297.

With its decision in *Care Alternatives*, the Third Circuit aligns itself with the Tenth Circuit (*United States ex rel. Polukoff v. St. Mary's Hosptial*, 895 F.3d 730 (2018)) and the Ninth Circuit (*Winter ex rel. United States v. Gardens Regional Hospital*, 953 F.3d 1108 (2020)), which have rejected objective falsity as the only test for proving a false certification under the False Claims Act. Compare *United States ex rel. Riley v. St. Luke's Episcopal Home*, 355 F.3d 370 (5th Cir. 2004) (legitimately held but incorrect medical opinions are not sufficient basis for finding a false certification under the FCA). Other circuits, including the Seventh and Eighth Circuits, have not yet decided the issue, although there are a few district court decisions touching on the question. See, e.g., *United States ex rel. Geschrey v. Generations Healthcare*, 922 F.Supp.2d 695 (N.D. Ill. 2012) (relators' disagreement with certifying physician's determination of eligibility for hospice services insufficient to support a finding of falsity).

By denying further review in the *Care Alternatives* case, the Supreme Court passed up what many believed was a tailor-made opportunity to provide definitive guidance to the lower courts regarding the proof necessary to establish falsity under the False Claims Act. This is a significant issue, particularly in the health care field, where FCA claims are prevalent and disagreement among experts is common. Given the large volume of litigation under the False Claims Act, it seems very likely that the Court will again be presented with this issue in the relatively near future. Until then, however, whether a difference of medical opinion will be enough for an FCA plaintiff to get to the jury on the issue of falsity may depend on the federal circuit where the case is venued.

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