Mere Disagreement or Knowing Falsehood: The Circuit Split on False Claims Act "Falsity"

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On March 4, 2020, the Third Circuit Court of Appeals held in *United States ex rel. Druding v. Care Alternatives*, No. 18-3298, 2020 U.S. App. LEXIS 6795 (3d Cir. Mar. 4, 2020) that a difference of opinion between a medical expert and a treating physician is sufficient to create a triable issue of fact regarding False Claims Act (FCA) falsity. In so holding, the Third Circuit overturned the underlying District Court decision and furthered a split between Circuits on this issue.

The Circuit Split: Mere Disagreement Versus Knowing Falsehood

The FCA imposes per-claim civil penalties (which are currently a *minimum* of $11,181 per fraudulent claim), *plus* treble damages, on any person who knowingly presents, or causes to be presented, a false or fraudulent claim for payment to the federal government, or who knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim. 31 U.S.C. S. § 3729(a)(1)(A)-(B).

In addition to allowing the government to file suit on its own, the FCA allows private citizens (known as relators) to file *qui tam* suits on behalf of the government against those who have allegedly defrauded the government. Successful relators are then entitled to receive between 15% and 30% of any recoveries made by the government as a result of the relator's FCA claims.

To prevail on an FCA claim, a plaintiff must prove the defendant (1) made a false statement; (2) with scienter (intent or knowledge of wrongdoing); (3) that was material; and (4) caused the government to make a payment. Thus, the "falsity" of a statement is an essential element of an FCA claim. Courts are currently split as to whether medical expert testimony, alone, can prove a defendant made a false statement, or whether such testimony only indicates a mere disagreement of clinical opinions.

To date, cases in the 11th and 5th Circuits have held that expert medical testimony, absent any other evidence, can only constitute "mere disagreement," and is not sufficient to allege falsity under the FCA. *See U.S. v. AseraCare, Inc.*, 938 F.3d 1281 (11th Cir. 2019)("a clinical judgment of terminal illness warranting hospice benefits under Medicare cannot be deemed false, for purposes of the [FCA], when there is only a reasonable disagreement between medical experts as to the accuracy of that conclusion, with no other evidence to prove the falsity of the assessment."); *U.S. ex rel. Wall v. Vista Hospice Care, Inc.*, Civil Action No. 3:07-cv-0604-M, 2017 U.S. Dist. LEXIS 187496, at *9 (N.D. Tex. Nov. 14, 2017). 2018 WL 3054767 (5th Cir. Jan. 11, 2018)("[a] testifying physician's disagreement with a certifying physician's prediction of life expectancy is not enough to show falsity," and is "insufficient to create a fact issue as to whether physician certifications and resulting claims were false.")

In contrast, the 6th and 10th Circuits had held the opposite, that medical expert testimony can create a triable issue of fact as to whether or not a defendant knowingly made a false statement. *See U.S. v. Paulus*, 894 F.3d 267, 277 (6th Cir. 2018)("the government need not offer direct evidence [of willful false statements]; instead, a jury may consider circumstantial evidence and infer intent."); *U.S. ex rel. Polukoff v. St. Mark's Hosp.*, 895 F.3d 730, 742 (10th Cir. 2018)("the fact that an allegedly false statement constitutes the speaker's opinion does not disqualify it from forming the basis of FCA liability.")

And now, the 3rd Circuit has weighed in, rejecting the arguments set forth in *Aseracare* and *Vista*, and instead adopting the reasoning set forth in *Paulus* and *Polukoff*.

In *U.S. ex rel. Druding v. Care Alternatives*, No. 18-3298, 2020 U.S. App. LEXIS 6795 (3d Cir. Mar. 4, 2020), the relators, who were former employees of the defendant hospice provider, Care Alternatives, filed a *qui tam* suit alleging Care Alternatives admitted patients to hospice who were ineligible for hospice care and directed its employees to improperly alter those patients' Medicare certifications to reflect eligibility. Id. at *1-2. The relators retained an expert, who opined, based on the records of the forty-seven patients he examined, the patients were inappropriately certified for hospice care thirty-five percent of the time. Id. at *2. Care Alternatives' expert disagreed and testified that a reasonable physician would have found all of the patients to be hospice-eligible on each occasion. Id.

At trial below, the District Court granted summary judgment in favor of Care Alternatives, determining "a mere difference of opinion between experts regarding the accuracy of the prognosis was insufficient to create a triable dispute of fact as to the element of falsity," and the relators must "instead provide evidence of an objective falsehood." Id. The relators appealed, and the 3rd Circuit vacated the District Court's judgment and remanded for further proceedings, stating, "we reject the District Court's objective-falsehood requirement for FCA falsity... [because] Appellants' expert testimony created a genuine dispute of material fact as to falsity." Id., at *2-3.

Takeaways

The U.S. Department of Justice (DOJ) has stated it recovered more than $3 billion in settlements and judgments related to FCA cases during the 2019 fiscal year, of which $2.1 billion arose from lawsuits filed by *qui tam* relators, earning the relators over $265 million as their share of the government's recoveries. The DOJ also noted, of the $3+ billion in FCA recoveries during FY2019, $2.6 billion were related to healthcare fraud, making FY2019 the 10th consecutive year the DOJ's civil healthcare fraud recoveries exceeded $2 billion.

It is evident healthcare FCA claims mean big business not only to the government, but also to relators who can benefit greatly by filing successful *qui tam* suits. As such, any uncertainty regarding the essential elements of proving a healthcare FCA claim could be very costly for healthcare entities, whose decision-making might be impacted by confusing or even contradictory legal standards. For example, healthcare entities may feel comfortable reasonably relying on their treating physicians' clinical opinions in the 11th and 5th Circuits. However, healthcare entities in other Circuits should consider whether their respective documentation and other policies and procedures already contain, or need, provisions which provide safeguards and/or mechanisms to help dispute any potential claims of falsity in locations where an opposing medical expert's opinion may be enough to create a triable issue of fact as to whether or not a treating physician knowingly submitted false claims to the government for reimbursement. This is especially true for large healthcare entities whose practices extend to multiple states, as relators' suits alleging the same conduct at different locations could lead to a jury trial in some states, or to dismissal for failure to state a claim in others. Under the 3rd Circuit's holding in *Druding*, an expert's opinion is now enough to create a genuine dispute of fact as to falsity and secure a trial in Delaware, New Jersey and Pennsylvania.

If you have any questions or would like additional information, please contact Debra Weinrich (weinrichd@whiteandwilliams.com; 215.864.6260) or another member of the Healthcare Group.