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BLOG

High Court Could Expand FCA Reach In Resolving Circuit Split

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The U.S. Court of Appeals for the Third Circuit's decision in U.S. v. Care Alternatives that a subjective medical judgment can be deemed false for purposes of establishing liability under the False Claims Act,[1] as well as a potential U.S. Supreme Court decision on this issue could have wide-ranging implications for companies doing business with the government in myriad industries and contexts, well beyond health care.

Specifically, whether or not subjective opinions and other business judgments could be considered false for purposes of FCA liability has significant consequences for any person or entity that must make subjective judgments in order to establish eligibility for payments, reimbursements or funding from the government, including those seeking funding under programs such as the Paycheck Protection Program, which was enacted under the Coronavirus Aid, Relief and Economic Security, or CARES, Act, and other pandemic relief programs.

Indeed, the U.S. Small Business Administration's recent release of new loan-necessity questionnaires for loans over $2 million reveals an intent to engage in a retroactive analysis of the judgements made by PPP applicants regarding their loan eligibility, including whether economic uncertainty made their loan request "necessary to support [their] ongoing operations."[2] These borrowers may be more likely to face FCA scrutiny and potential exposure under the Third Circuit's interpretation of falsity articulated in Care Alternatives, especially if affirmed by the Supreme Court.

Further, a Supreme Court decision in this case could signal the newly composed court's receptiveness to efforts to expand the reach of the FCA. It could also provide much-needed certainty for those that do business with the government and seek to mitigate risks of FCA exposure.

BACKGROUND

Care Alternatives, a New Jersey hospice provider, was named as a defendant in a qui tam complaint filed by four former employees, alleging that Care Alternatives submitted false claims for hospice reimbursement to Medicare and Medicaid in 2006 and 2007.[3] The FCA claims were based on allegations that Care Alternatives admitted ineligible

patients based on physicians' judgments that the patients were terminally ill and had a need for hospice care. The complaint also alleged that Care Alternatives altered Medicare certifications.[4]

In the litigation that followed the government's decision to decline intervention, both Care Alternatives and the relators submitted expert reports regarding Care Alternatives' hospice certifications.[5] The relators' expert opined that the medical records of 35% of the patients reviewed did not support a certification of need for hospice care because the patients were not terminally ill and that any reasonable physician would have reached the same conclusion.[6] Conversely, Care Alternatives' expert opined that, for each of the reviewed patient records, a reasonable physician could have determined that the patient was terminally ill.[7]

Care Alternatives sought summary judgment in the U.S. District Court for the District of New Jersey, arguing, in part, that the relators had not produced sufficient evidence of falsity.[8] The district court agreed, granting summary judgment in favor of Care Alternatives based on the falsity issue. Significantly, the district court stated that "mere difference of opinion between physicians, without more, is not enough to show falsity."[9]

The court noted that medical opinions "are subjective and cannot be false" and that falsity under the FCA requires objective falsehood.[10] Specifically, the district court stated that, although the respective experts disagreed as to whether there was a reasonable basis for admitting several patients, "their diverging opinions do not create a genuine issue of material fact about the falsity of a physician's determinations that the patient meets hospice eligibility" where there is no evidence that the certifying doctor made knowingly false determinations.[11]

On appeal by the qui tam relators, the Third Circuit addressed the question of "whether a hospice-care provider's claim for reimbursement can be considered 'false' under the FCA on the basis of medical-expert testimony that opines that accompanying patient certifications did not support patients' prognoses of terminal illness."[12] According to the court, "[t]he answer is a straightforward yes."[13]

The Third Circuit took issue with the lower court's premise, which it described as "an opinion is subjective and a difference of opinion is not enough to show falsity."[14] The Third Circuit found that such a premise is "inconsistent with the meaning of 'false' under the FCA," noting that falsity under the FCA has been interpreted to encompass factual falsity as well as legal falsity, such as where there is a failure to comply with the relevant statutory or regulatory requirements.[15]

The Third Circuit rejected the district court's objective falsity standard, which it held conflated scienter and falsity. According to the Third Circuit, scienter serves a separate purpose under the FCA and "helps 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."[16]

The Third Circuit declined to follow the decision of the U.S. Court of Appeals for the Eleventh Circuit in U.S. v. Asera Care Inc.,[17] which held that when a hospice provider submits a claim that certifies that a patient is terminally ill based on a physician's clinical judgment, the claim cannot be false under the FCA unless the underlying clinical judgment reflects an objective falsehood.[18]

The Third Circuit specifically noted its disagreement with the Eleventh Circuit's determination that clinical judgments cannot be untrue.[19] In doing so, the Third Circuit stated that "the common-law definition of fraud permits a finding that subjective opinions may be considered false and that medical opinions can be false and are not shielded from scrutiny."[20]

Based on these findings, the Third Circuit held that the experts' conflicting opinions regarding whether the patients were terminally ill and thus qualified for hospice care created a triable issue of fact, and reversed the district court's grant of summary judgment.[21]

CERTIORARI PETITION

On Sept. 16, Care Alternatives filed a petition for a writ of certiorari seeking Supreme Court review of the Third Circuit's decision.[22] Care Alternatives' cert petition, as well as supporting amici briefs,[23] highlight the increasing

uncertainty surrounding the critical issue of whether a subjective judgment can be deemed false for purposes of establishing liability under the FCA.

Care Alternatives' certiorari petition argues not only that the Third Circuit's opinion was incorrectly decided, but also that the split between the Third Circuit's opinion and that of the Eleventh Circuit is stark and outcome-determinative.[24] In addition, Care Alternatives positioned the referenced split as part of a larger disagreement among courts of appeal "regarding when an opinion, including physicians' clinical judgments, can be 'false' under the FCA."[25]

In its cert petition, Care Alternatives urged the Supreme Court to clarify the falsity standard for physicians' hospice certifications, arguing that doing so would also provide clarity on the falsity standard in the FCA context more generally.

KEY TAKEAWAYS

A Supreme Court decision in the Care Alternatives case could have wide-ranging implications not only for hospice care providers, but also for those doing business with the government in many other industries and contexts. An affirmance of the Third Circuit's decision could mean that falsity under the FCA may turn on the degree to which experts are able to cast doubt retrospectively on a particular judgment and related representations made in connection with obtaining funds from the government.

This would create greater exposure risks for organizations that must make subjective determinations in order to establish eligibility for payments, reimbursements or funding from the government, including those seeking funds under programs such as the PPP and various other coronavirus relief programs.

Specifically, with respect to PPP loans, the Small Business Administration recently proposed new loan-necessity questionnaires requiring supplemental information from businesses that received loans in excess of $2 million in order to evaluate the good-faith certification that borrowers made on their PPP loan applications that economic uncertainty made the loan request necessary.[26] These questionnaires suggest that the agency will undertake a retrospective review of earlier business judgments regarding eligibility based on loan necessity.

An affirmance of the Care Alternatives decision by the Supreme Court could make businesses that received PPP loans more susceptible to the risk of FCA actions that question the borrowers' initial judgments regarding loan eligibility. In such cases, we could expect scrutiny of relevant communications among all those who were involved in making the necessity determination.

The circuit split created by the Care Alternatives decision is symptomatic of an ongoing issue within FCA jurisprudence — disparate interpretations of falsity under the FCA. The circuits' varied approaches to this issue create practical challenges for businesses. For example, a company may need to take additional steps to mitigate FCA risks with respect to its operations in the Third Circuit that it would not have to take with respect to its operations in other circuits, which reached a different interpretation of falsity than the Third Circuit did in Care Alternatives.

Where subjective judgments can be deemed false under the FCA, companies may need to implement additional layers of internal review, potentially delaying operations and increasing costs, in order to mitigate the risk of having those judgments called into question and potentially give rise to FCA liability.

A decision by the Supreme Court to grant certiorari and address the merits of the Care Alternatives case is likely to provide greater uniformity regarding how the government and courts will assess the subjective judgments that form the basis of claims for payment, reimbursement or funding by the government. This would provide much-needed certainty to those doing business with the government, including those receiving government funds under a wide array of programs.

A grant of certiorari in this case may provide the Supreme Court one of its first opportunities to consider the FCA since the appointment of Justice Amy Coney Barrett, and thereby reveal the significance of recent changes in the makeup of the bench for developing areas of FCA law, including the scope of the FCA.

An affirmance by the Supreme Court of the Third Circuit's decision would significantly expand the reach of the FCA and would likely lead to an increase in FCA enforcement initiatives, as well as whistleblower cases, in many different industries.

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[1] United States ex rel. Druding v. Care Alternatives , 952 F.3d 89 (3d Cir. 2020).

[2] Small Business Administration, SBA Form 2483, Paycheck Protection Program Borrower Application Form (Apr. 2020).

[3] United States ex rel. Druding , 952 F.3d at 91–93.

[4] Id.at 92.

[5] Id.at 93–94.

[6] Id.

[7] Id.

[8] Id.

[9] Id.(citing Druding v. Care Alternatives, Inc. , 346 F. Supp. 3d 669, 685 (D.N.J. 2018)) (emphasis in original).

[10] Id.at 94 (citing Druding, 346 F. Supp. 3d at 685).

[11] Druding, 346 F. Supp. 3d at 685.

[12] United States ex rel. Druding, 952 F.3d at 94.

[13] Id.

[14] Id.at 95-96.

[15]I d.at 95–98.

[16] Id.at 96.

[17] United States v. AseraCare, Inc. , 938 F.3d 1278 (11th Cir. 2019).

[18] United States ex rel. Druding, 952 F.3d at 98–100.

[19] Id.at 100.

[20] Id.

[21] Id.at 101.

[22] Petition for Writ of Certiorari, Care Alternatives v. United States, et al. ex rel. Druding , et al., No. 20-371 (Sept. 16, 2020).

[23] See Brief of Amici Curiae Hospice, Health Care, and Physician Organizations in Support of Petitioner, Care Alternatives v. United States, et al. ex rel. Druding, et al., No. 20-371 (Oct. 23, 2020); Brief of the Chamber of Commerce of the United States of America and the Pharmaceutical Research and Manufacturers of America (PhRMA) as Amici Curiae in Support of Petitioner, Care Alternatives v. United States, et al. ex rel. Druding, et al., No. 20-371 (Oct. 23, 2020).

[24] Petition for Writ of Certiorari at 12–13,Care Alternatives v. United States, et al. ex rel. Druding et al., No. 20-371 (Sept. 16, 2020).

[25] Id.at 19.

[26] Small Business Administration, SBA Form 3509, Paycheck Protection Program Loan Necessity Questionnaire (For-Profit Borrowers) (2020); Small Business Administration, SBA Form 3510, Paycheck Protection Program Loan Necessity Questionnaire (Non-Profit Borrowers) (2020); see also Reporting and Recordkeeping Requirements Under OMB Review, 85 Fed. Reg. 67,809 (Oct. 26, 2020).

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