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A Difference of Opinion Remains: The Third Circuit's Rejection of an "Objective Falsity" Requirement for FCA Liability Stands After the Supreme Court Denies Certiorari

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The Supreme Court denied a closely watched petition to review the Third Circuit's decision in *United States ex rel. Druding v. Care Alternatives*, a False Claims Act (FCA) case that created a circuit split around whether and when a medical opinion can be "false."[1] On the heels of this denial, health care providers should take stock of how the Third Circuit's decision lowers the bar for the government and *qui tam* relators to survive summary judgment in cases involving clinical decision-making.

District Court Proceedings[2]

The relators filed a *qui tam* action against their former employer, Care Alternatives, alleging that the New Jersey hospice care provider submitted false claims for reimbursement to government health care payors. The relators alleged that the claims were false because patients were not eligible for hospice care coverage, even though a physician certified the patients as terminally ill — *i.e.*, having life expectancies of six months or less — and, therefore, hospice eligible. The relators' falsity evidence hinged on the testimony of their medical expert, who reviewed a sample of patient records and found that, in his opinion, some of the records did not support a hospice eligibility certification. Care Alternatives' medical expert disagreed, concluding that each patient record supported a reasonable physician's certification.

Care Alternatives moved for summary judgment, arguing that the experts' differences of opinion failed to create a genuine dispute about the falsity of the physicians' hospice eligibility certification. The District of New Jersey agreed, adopting the Eleventh Circuit's reasoning in *United States v. AseraCare, Inc.*,[3] which involved almost identical facts. The Eleventh Circuit held that "a properly formed and sincerely held clinical judgment is not untrue even if a different physician later contends that the judgment is wrong." Therefore, to support FCA liability, a plaintiff cannot rely on a "mere difference of reasonable opinion," but rather must come forward with evidence of "an objective falsehood" — that is, "the clinical judgment on which the claim is based contains a flaw that can be demonstrated through verifiable facts."

Third Circuit Decision

The Third Circuit reversed the district court's decision, concluding that a reasonable difference of medical opinion created a triable issue of falsity for the jury and rejecting the Eleventh Circuit's reasoning in *AseraCare*.

In the Third Circuit's view, the "objective falsity" standard, in effect, required evidence of factual falsity and ignored legal falsity as a basis for FCA liability.[4] The Third Circuit held that the relators' expert's opinion was relevant to legal falsity because applicable regulations require hospice certifications to be accompanied by clinical information to support the prognosis, and the relators' expert's opinion was relevant to whether the clinical information for the patients at issue was sufficient.

The Third Circuit also held that requiring proof of "objective falsity" conflated the two independent FCA elements of falsity and scienter — that is, it required proof of improper intent to prove that a claim was false. These elements, the Third Circuit held, must be considered separately. To this end, the Third Circuit confirmed that the objectivity of a physician's clinical judgment still plays a role, but in the context of *scienter*, not falsity. In other words, the false certification of the patient's prognosis still must have been made *knowingly*, which "helps to limit the possibility that hospice providers would be exposed to liability under the FCA any time the Government [or a relator] could find an expert who disagreed with the certifying physician's medical prognosis."

Now that the Supreme Court has denied Care Alternatives' petition to review the Third Circuit's decision, the Third Circuit's holding — and the current circuit split — remains.[5]

Takeaways

While the Eleventh Circuit's decision in *AseraCare* was a victory for the defense bar, the Third Circuit's *Care Alternatives* decision has buoyed plaintiffs' attorneys and the government. Health care providers in the Third Circuit cannot be insulated from FCA liability based on the argument that medical judgments are subjective and cannot result in false claims for payment. Moreover, even outside of the Third Circuit, the strength of *AseraCare* is now diluted, and defendants litigating in circuits that have yet to take up this question should expect the government and relators to argue that the Third Circuit is right. In fact, the Ninth Circuit recently cited *Care Alternatives* when rejecting the "objective falsity" standard in a case alleging false certifications of medical necessity for inpatient hospitalizations.[6]

Nonetheless, health care providers can take comfort in the fact that the Third Circuit's decision does not impose open-ended liability for differences of medical opinion. Instead, the focus moving forward will be about *scienter*, not falsity. The Third Circuit left no doubt that the government and relators still must prove scienter as a separate and distinct element. And, as the Supreme Court explained in *Escobar*,[7] there must be "strict enforcement" of the scienter requirement. Therefore, it is vital for health care providers facing similar FCA actions to develop a strategy for discovery and trial that places scienter front and center and puts the government and relators to their burden.

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[1] *Druding v. Care Alternatives*, 962 F.3d 89 (3d Cir. 2020).

[2] *United States ex rel. Druding v. Care Alternatives*, 346 F. Supp. 3d 669 (D.N.J. 2018).

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

[4] FCA liability reaches “factual falsity,” where a claim rests on a false statement of fact, as well as “legal falsity,” where a claim misrepresents compliance with applicable statutes and regulations.

[5] *Care Alternatives v. United States ex rel. Druding*, No. 20-371 (U.S.).

[6] *Winter ex rel. United States v. Gardens Regional Hosp. & Med. Ctr., Inc.*, 953 F.3d 1108 (9th Cir. 2020).

[7] *See Universal Health Servs. v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016).

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