THE GOVERNMENT CONTRACTOR®

THOMSON REUTERS

Information and Analysis on Legal Aspects of Procurement

Vol. 59, No. 9 **March 8, 2017**

Decisions

¶ 61

U.S. Can Veto FCA Settlements, Fourth Circuit Holds

U.S. ex rel. Michaels et al. v. Agape Senior Cmty., Inc. et al., 848 F.3d 330 (4th Cir. 2017)

The U.S. Court of Appeals for the Fourth Circuit held that the Government has absolute veto power over voluntary settlements in False Claims Act qui tam actions. The Court affirmed the district court's decision upholding the Government's objection to a proposed settlement between relators and the defendants.

Relators brought a qui tam action alleging that Agape Senior Community Inc. and other affiliated entities (collectively "Agape") fraudulently billed Medicare and other federal programs for services to thousands of patients.

The FCA authorizes qui tam actions by private individuals, known as relators, seeking civil remedies for fraud against the Government. See 31 USCA § 3730(b)(1). Within 60 days of receiving a qui tam complaint, the Government must (A) "proceed with the action" by assuming primary responsibility for the action's prosecution, or (B) "notify the court that it declines to take over the action" from the relator, who will then "have the right to conduct the action." § 3730(b)(4)(A)–(B). If the Government declines to intervene during the initial 60 days, the court may permit intervention later "upon a showing of good cause." § 3730(c)(3).

If the Government intervenes, the relator can remain a party, subject to certain limitations. For example, the Government can settle the action over the relator's objection, but only "if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances." § 3730(c)(2)(B).

The relator receives a share of an award. The amount of the relator's share depends on whether the Government intervened in the action. See § 3730(d)(1)–(4). The Government declined to intervene in this case.

In pursuing their qui tam action against Agape, relators sought to rely on statistical sampling to avoid the cost of reviewing charts for 10,000 patients to identify false claims. Relators said that expert fees to review each chart could amount to more than $36 million.

The district court refused to allow statistical sampling. The court explained that although sampling may be appropriate if "evidence has dissipated, thus rendering direct proof of damages impossible," the patient charts in this case were available for review.

After unsuccessful settlement negotiations with the Government, the relators and Agape agreed on a settlement amount. Without seeking leave to intervene, the Government objected to the proposed settlement, citing § 3730(b)(1). The Government based its objection, in part, on the ground that the settlement was appreciably less than the Government's estimate of damages based on its own use of statistical sampling.

Addressing Agape's motion to enforce the settlement, the district court said that it faced a "unique dilemma":

> [t]he Government, claiming an unreviewable veto right over the tentative settlement in this case, objects to a settlement in a case to which it is not a party, using as a basis of its objection some form of statistical sampling that this Court has rejected for use at the trial of the case.

Citing § 3730(b)(1), the district court declined to enforce the proposed settlement, and held that the Government has unreviewable veto power over voluntary settlements in FCA qui tam actions. The district court certified its statistical-sampling and absolute-veto rulings for interlocutory appeal.

Unreviewable Veto—Section 3730(b)(1) provides that a qui tam "action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting." To interpret this provision in the context of a qui tam action in which the Government has not intervened, the Fourth Circuit looked to cases from other circuits.

The Ninth Circuit in *U.S. ex rel. Killingsworth v. Northrop Corp.*, 25 F.3d 715 (9th Cir. 1994); 36 GC ¶ 220, held that the Government-consent provision in § 3730(b)(1) "applies only during the initial sixty-day (or extended) period" for Government intervention. If the Government does not intervene, *Killingsworth* permits the Government to object with "good cause" to a proposed settlement and obtain a hearing on whether the settlement is "fair and reasonable."

In reaching this conclusion, the Ninth Circuit held that the Government's position that, in a nonintervened case, the Government "possesses an absolute right to reject a proposed settlement at any time and for any reason" conflicts with § 3730(b)(4)(B), which gives the relator "the right to conduct the action" once the Government declines to intervene. The Ninth Circuit also relied on § 3730(d)(2), which provides that in a nonintervened case, "the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages." *Killingsworth* emphasized the phrase "or settling the claim," which in its view, "confirms the relator's right to settle the action if the government declines to intervene."

Two circuits have rejected *Killingsworth* and held that the Government has absolute veto power over settlements of qui tam suits. See *Searcy v. Philips Elec. N. Am. Corp.*, 117 F.3d 154 (5th Cir. 1997); 39 GC ¶ 389; *U.S. v. Health Possibilities, P.S.C.*, 207 F.3d 335 (6th Cir. 2000); 42 GC ¶ 148.

In *Searcy*, the Fifth Circuit said that § 3730(b)(1)'s consent-for-dismissal provision is unambiguous and addressed the § 3730 provisions relied on in *Killingsworth*. First, the relator's "right to conduct the action," if the Government does not intervene does not foreclose the Government's authority over settlements. Second, rejecting *Killingsworth*'s interpretation of § 3730(d)(2), which provides for a reasonable amount to "the person bringing the action or settling the claim," the Fifth Circuit stated that "the government's power to block settlements does not mean that the relator will never be the person settling the claim."

Searcy also recognized "that relators can manipulate settlements in ways that unfairly enrich them and reduce benefits to the government." Section 3730(b)(1)'s consent-for-dismissal provision allows the Government to protect its interests. The Sixth Circuit in *Health Possibilities* similarly noted that "the power to veto a privately negotiated settlement of public claims is a critical aspect of the government's ability to protect the public interest in qui tam litigation." *Health Possibilities* also said that "[t]he location of the consent provision [in § 3730(b)(1)] immediately after the command that the action be brought in the government's name suggests that it is an important component of the government's ability to regulate qui tam actions."

Considering the FCA's legislative history, *Killingsworth* discerned a congressional "intent to place full responsibility for [FCA] litigation on private parties, absent early intervention by the government or later intervention for good cause." *Killingsworth* said that intent is "fundamentally inconsistent with the asserted 'absolute' right of the government to block a settlement and force a private party to continue litigation."

In contrast, the Fifth and Sixth Circuits concluded that Congress intended to grant the Government the full veto authority that has existed since the original FCA statute was enacted in 1863. That intent remained after amendments to increase relator incentives and to create and expand the Government's power to intervene. The Fifth and Sixth Circuits concluded that:

> [f]or more than 130 years, Congress has instructed courts to let the government stand on the sidelines and veto a voluntary settlement. It would take a serious conflict within the structure of the [FCA] or a profound gap in the reasonableness of the [consent-for-dismissal] provision for us to be able to justify ignoring this language. We can find neither.

Health Possibilities, 207 F.3d 335 (quoting *Searcy*, 117 F.3d 154).

The Fourth Circuit agreed that the Government has absolute veto power over voluntary settlements in FCA qui tam actions and affirmed the district court on that issue. The Fourth Circuit said that nothing in § 3730 led it to doubt that Congress meant exactly what it said in § 3730(b)(1): a qui tam action "may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting."

Agape argued that the Government cannot unreasonably withhold its consent to a settlement. Agape reasoned that an unlimited veto power conflicts with § 3730(b)(4)(B), which gives the relator "the right to conduct the action" when the Government declines to intervene, and with § 3730(d)(2), which gives a share of the award to "the person bringing the action or settling the claim."

The Fourth Circuit rejected these arguments and concluded that § 3730(b)(4)(B) and § 3730(d)(2) cannot reasonably be understood to give relators an unfettered right to settle. The § 3730(b)(1) consent-for-dismissal provision is not temporally qualified or otherwise limited. Section 3730(b)(1) does not require the Government to satisfy any standard or make any showing reviewable by the court, unlike other provisions of § 3730. For example, under § 3730(c)(2)(B), the Government may settle a qui tam action over the relator's objection, but only "if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances." Congress' decision not to expressly limit the Government's right to oppose settlement "is enlightening," the Court said. See *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438 (2002) (including language in one section of a statute but omitting it from another section of the same statute indicates an intentional difference).

The Government's absolute veto authority is consistent with the FCA's statutory scheme. Even if the Government does not intervene, the U.S. is the real party in interest. Moreover, relators primarily seek a monetary reward rather than the public good, the Court said.

The Court therefore held that under the plain language of § 3730(b)(1), the Government has an absolute veto power over voluntary settlements in FCA qui tam actions. Addressing statistical sampling, the Court held that the issue was not a pure question of law, and therefore, interlocutory review was not proper.

✦ **Practitioner's Comment**—The FCA allows private citizens, and not just Government attorneys, to sue recipients of Government funds. Colloquially referred to as "whistleblowers," private citizens bringing suit under the FCA are known as "relators." A relator's suit is styled qui tam, the first words of a Latin phrase meaning one "who sues in this matter for the monarch as well as for herself." But the FCA's allocation of responsibility and control between the "monarch" and the relator is not always clear, nor is the relationship harmonious. In *Agape*, the Fourth Circuit ruled that the Government could prevent a relator from settling a case with a defendant, even when the Government declines to intervene in the litigation. While the decision diminishes relators' autonomy in conducting FCA suits, it may also increase their bargaining power in settlement negotiations—especially if more courts join the Fourth Circuit's side of a growing split on this issue.

In *Agape*, the Fourth Circuit heard an interlocutory appeal filed by both relators and nursing-home-company defendants, which had attempted to settle their dispute before trial. Although the Government had not intervened in the case, it objected to the settlement proposal. Citing § 3730(b)(1), which allows settlement "only if the court *and the Attorney General* give written consent to the dismissal" (emphasis added), the trial court reluctantly concluded that it had to defer to the Government's "veto"—even though, in its view, "a compelling case could be made here that the Government's position is not, in fact, reasonable." *U.S. ex rel. Michaels v. Agape Senior Cmty., Inc.*, 2015 WL 3903675 (D.S.C. June 25, 2015). The trial court then took the unusual steps of certifying the settlement-veto issue for an interlocutory appeal on its own initiative and "implor[ing]" the relators and the defendants to file such an appeal, in the hope that they might avoid a costly trial if the Fourth Circuit allowed the settlement to proceed over the Government's objection.

The district court also certified for interlocutory appeal its earlier decision prohibiting relators from establishing liability on a broad set of claims by extrapolating from a statistical sample. The Fourth Circuit ultimately declined to opine squarely on this important issue. See generally Turetzky and Cuddihy, "Fourth Circuit Punts at Rare Opportunity to Rule on Statistical Sampling," Nat'l L. Rev. (Feb. 16, 2017), *www.natlawreview.com/article/fourth-circuit-punts-rare-opportunity-to-rule-statistical-sampling*.

Prior to this case, three federal appellate courts had ruled on the extent of the Government's settlement veto power under § 3730(b)(1), with divergent results. In *Killingsworth*, the Ninth Circuit decided that the U.S. District Court for the Central District of California abused its discretion by shutting the Government out of the settlement process entirely. The Government initially declined to intervene, and

when the parties reached a settlement to which the Government objected, the district court both denied the Government any opportunity to object to the settlement proposal and rejected as untimely the Government's motion to intervene for purposes of appealing the denial. Rather than giving the Government an absolute veto power, however, the Ninth Circuit remanded to the district court for a hearing on the settlement proposal's reasonableness.

According to the Ninth Circuit, the FCA's legislative history shows "Congress' intent to place full responsibility for [FCA] litigation on private parties, absent early intervention by the government or later intervention for good cause." To achieve that perceived intent, the Ninth Circuit determined that § 3730(b) "must be read as a whole." The Government-consent requirement in § 3730(b)(1) is fully operative only during the Government's 60-day intervention review window set out in § 3730(b)(2), the Ninth Circuit determined. After that, the relator's "right to conduct the action" under § 3730(b)(4) is paramount unless the Government shows "good cause" to intervene under § 3730(b)(3). And if the Government elects not to "proceed with the action," § 3730(b)(2), but merely vetoes a settlement, the Ninth Circuit decided the appropriate standard should mirror § 3730(c)(2)(B), which governs *relators*' objections to the *Government*'s settlement proposals: "that the proposed settlement is fair, adequate, and reasonable under all the circumstances."

The Fifth and Sixth Circuits, however, both explicitly rejected the Ninth Circuit's interpretation. These courts held that the Government's statutory veto authority in § 3730(b)(1) was "as unambiguous as one can expect," and found nothing in the structure or purpose of the FCA's qui tam litigation mechanism to justify a departure from that text. As the Fifth Circuit explained in *Searcy*, a relator's "right to conduct the action" under § 3730(b)(4) absent initial Government intervention is still vindicated if the relator "devises strategy, executes discovery, and argues the case in court, even if the government frustrates [the relator's] settlement efforts." *Searcy*, 117 F.3d at 160; see also *Health Possibilities*, 207 F.3d at 340. In *Health Possibilities*, the Sixth Circuit further noted that "private opportunism and public good do not always overlap" and that the Government is entitled to at least 70 percent of the amounts recovered by relators even if it does not intervene, necessitating further opportunities for Government involvement. *Health Possibilities*, 207 F.3d at 340. Both circuits raised the possibility that in cases involving both FCA and private causes of action, defendants might shift settlement payments from the FCA claims (of which the Government takes a share) to the private claim (of which the relator takes all) in exchange for a lower overall payoff demand. See *Health Possibilities*, 207 F.3d at 341; *Searcy*, 117 F.3d at 160.

In its decision last month, the Fourth Circuit joined the Fifth and Sixth Circuits and affirmed the district court's ruling that the Government's "veto power over voluntary settlements in FCA qui tam actions" is "absolute." *Agape*, 848 F.3d at 339. Finding no temporal qualification or other explicit limitation in the text of § 3730(b)(1) itself, the Fourth Circuit emphasized that "the United States is the real party in interest in any FCA suit," leading it to conclude that a hard Government veto is "entirely consistent with the statutory scheme of the FCA." Id. at 340.

With this decision, the Fourth Circuit joins other jurisdictions in which the Government may prevent an FCA defendant from settling with a willing relator for any reason, even if the Government has not intervened in the case.

The specter of a Government objection—even an unreasonable one—is likely to shape relators' behavior in settlement negotiations. Relators will be able to argue credibly that too low an offer from defendants will trigger a Government veto threat, or even a total failure of negotiations resulting in a mutually costly trial. Within this new bargaining framework, a defendant may find itself tempted to offer higher settlement payments. If Government representatives participate informally in FCA proceedings (as in *Agape*), the defendant should therefore monitor their statements closely for information about their likely valuation of the case to avoid surprises and have the most accurate and relevant information possible for negotiations with relators. Defendants may even wish to try to convince the Government of the accuracy of their own case valuations from an early stage, since the Government is now a sort of shadow party to any FCA settlement negotiation in these circuits.

✦

***This Practitioner's Comment was written for THE GOVERNMENT CONTRACTOR by* Robert T. Rhoad, *a Partner, and* Matthew W. Turetzky *and* Sean**

M. Cuddihy, ***Associates, in the Washington, D.C. office of Sheppard, Mullin, Richter & Hampton LLP. Messrs. Rhoad and Turetzky are members of the firm's Government Contracts, Investigations, and International Trade Practice Group, where they both focus their practice on investigations and litigation under the False Claims Act. Mr. Cuddihy is a member of the firm's Corporate Practice Group, where he focuses on matters affecting health care entities.***

