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*False Claims*

## Ruling on Statistical Sampling In Fraud Cases Left for Another Day

Health-care fraud attorneys hoping for judicial guidance on the use of statistical sampling to prove false claims violations were left wanting after a federal appeals court declined Feb. 14 to rule on the issue (*United States ex rel. Michaels v. Agape Senior Cmty., Inc.*, 2017 BL 43959, 4th Cir., No. 15-2147, 2/14/17).

The U.S. Court of Appeals for the Fourth Circuit agreed to hear an interim appeal that raised two issues in a False Claims Act whistle-blower lawsuit filed by two former employees of Agape Senior Community Inc., a chain of skilled nursing facilities. The Fourth Circuit addressed only one of the issues, holding that the Department of Justice has absolute veto power over proposed FCA settlements but that an attack on whether statistical sampling can be used to determine FCA liability—in lieu of examining over 50,000 individual alleged false claim submissions—was premature.

Brian J. Markovitz with Joseph Greenwald & Laake PA in Greenbelt Md., who frequently represents whistle-blowers, told Bloomberg BNA the decision not to rule on the statistical sampling issue was important because it ''left [statistical sampling use] as a possibility'' for deployment in other FCA actions ''at the discretion of the district court.'' Markovitz noted the appeals court left in place room for a district court to assess ''the practicality'' of FCA litigation without statistical sampling.

The appeals court sided with two other federal circuits in holding the DOJ has absolute statutory authority to block an FCA settlement reached between a whistle-blower and defendant, even when it declines to intervene. The case now heads back to the trial court, where the district judge initially rejected the use of statistical sampling and the DOJ has refused to approve a proposed settlement.

Agape was accused by the whistle-blowers of submitting false claims for hospice and general inpatient care to Medicare, Medicaid and TRICARE. Both sides agreed on a proposed settlement that would have Agape pay $2.5 million to resolve the matter, but the government, which didn't intervene in the case, withheld approval because the settlement amount was too low in relation to the potential $25 million in liability from alleged false claim submissions.

Other federal district courts have allowed statistical sampling to be used for FCA liability purposes, and Markovitz said he hoped this district court's decision was ''out of the norm.''

Markovitz said it's hard for a federal judge to ignore the judicial economy of using statistically valid sampling methods in a health-care FCA case involving thousands of individual claims ''from a practicality standpoint,'' rather than having each claim litigated through a lengthy trial.

Counsel for both Agape and the whistle-blowers didn't respond to Bloomberg BNA's requests for comment on the decision. The DOJ also didn't return a request for comment.

**Sampling Pass Suggested.** The court said reviewing a decision based on a question of fact that was within the trial court's discretion wasn't proper for the appeals court on interlocutory appeal.

The court signaled its thinking on this issue during oral arguments Oct. 26, when Judge Robert B. King (who also authored the opinion) pointedly questioned counsel for the whistle-blowers on whether the trial court's statistical sampling was simply based on the particular facts of the case, and if an appeal at this juncture was appropriate (25 HLR 1575, 11/3/16).

The trial court explained in a June 25, 2015, order that statistical sampling for FCA liability purposes could be appropriate where claims evidence was unavailable or otherwise ''dissipated,'' but said that because the medical record forms at issue here were available to be examined, liability for each claim at issue should be determined on the actual claims.

The trial court's rational for certifying the statistical sampling issue for interlocutory appeal, however, was that in recognition of the anticipated costs of reviewing each disputed claims by a medical professional ($36 million by the whistle-blowers' estimation), it would be wise to obtain the Fourth Circuit's view on whether statistical sampling should be allowed before committing the time and money to a claim-by-claim review.

The Fourth Circuit, however, said it was premature to rule on the statistical sampling issue because its appropriateness in this situation was a question of fact rather than a pure question of law like the DOJ's settlement veto authority.

The court latched on to the trial court's notion that statistical sampling could be appropriate in some factual situations where actual claim review is impossible as evidence that the issue on appeal was whether the trial court's decision on statistical sampling was correct in this particular instance.

**DOJ Veto Authority Absolute.** King affirmed the trial court's ruling on the DOJ's unfettered authority to deny FCA settlement approval as well, holding there was

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simply no limitations placed on the DOJ in this regard under the statute (31 U.S.C. § 3730(b)(1)).

King's ruling sided with Fifth and Sixth Circuit rulings that also interpreted the settlement approval statute as giving the DOJ absolute authority to withhold approval of a settlement between a whistle-blower and FCA defendant, based on the plain language of the statute. King, along with the Fifth and Sixth circuits, declined to follow an earlier contrary Ninth Circuit precedent.

The Ninth Circuit has interpreted the statute differently, finding that the DOJ's absolute veto authority only extends to the 60-day period when it may elect to intervene in the litigation. After that period, according to the Ninth Circuit, the DOJ may only veto a settlement in a nonintervened FCA action for ''good cause'' and request a court hearing on whether a proposed settlement is ''fair and reasonable.''

Markovitz viewed the Ninth Circuit's interpretation of the settlement approval statute as an outlier and didn't think the issue was ripe for review by the U.S. Supreme Court, even with its recent appetite for FCA cases.

Strom Law Firm LLC, Christy Deluca LLC and Richardson, Patrick, Westbrook & Brickman LLC represented the whistle-blowers. Nexsen Pruet LLC and Deborah B. Barbier in Columbia, S.C., represented Agape. The Department of Justice represented the government.

BY ERIC TOPOR

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