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DOJ Aims Torpedo At FCA Sampling Suit In 4th Circ.

By **Jeff Overley**

Law360, New York (March 24, 2016, 6:36 PM ET) -- The U.S. Department of Justice is trying to avert an eagerly anticipated ruling on the use of statistical sampling to prove False Claims Act liability, telling the Fourth Circuit that the issue doesn't necessarily need to be resolved.

In a brief filed last week, the DOJ addressed two issues that the circuit has **agreed to consider** in a whistleblower suit alleging Medicare fraud at hospice chain Agape Senior Community Inc. One issue is whether sampling can used to establish FCA liability. The other issue is whether the DOJ has an unreviewable right to block settlements in FCA cases, such as this one, where it hasn't intervened.

According to the DOJ, if the settlement issue is resolved in its favor, then there will be no need to explore the sampling issue.

"If this court concludes that the United States has unreviewable authority to withhold consent to the settlement and dismissal of qui tam claims brought on its behalf, the court need not reach any of the other issues raised in this case," the brief stated.

The DOJ had previously discouraged the Fourth Circuit from taking up either issue in the first place. It wanted to leave intact a district court ruling that found its veto power to be unreviewable. And even though the district court ruled against the use of sampling, the DOJ apparently had no desire to get the circuit involved.

The department's resistance to a circuit decision on sampling is not surprising. Most district courts have allowed the practice, giving the DOJ little incentive to test the waters at the Fourth Circuit, which would be **the first appeals court to decide** if sampling can prove FCA liability.

"They're probably happier to continue litigating this in the lower courts," Scott D. Stein, a Sidley Austin LLP partner who has been tracking the case, told Law360.

In an amicus brief filed on Thursday, nursing chain SavaSeniorCare — which is **facing an FCA case of its own** — put things more bluntly. It accused the DOJ of trying to "avoid an appellate decision that could hamper the government's ability to extract exorbitant settlements by threatening health care providers with the use of statistical sampling."

The DOJ's preferred outcome also has a potential catch. In the case against Agape, the cost of examining every disputed billing claim — as opposed to sampling a subset of claims and extrapolating the findings — could actually exceed the $25 million in potential damages for allegedly bogus determinations of terminal illness.

Last year, U.S. District Judge Joseph F. Anderson Jr. cited that cost as a key reason for asking the Fourth Circuit to step in.

"[If] the government's veto is upheld ... and the case proceeds without the use of statistical sampling ... the parties in this action face a trial of monumental proportions ... which would possibly be unnecessary if this court's determination to reject statistical sampling were to be reversed," Judge Anderson wrote. "It would be much more judicially efficient to have a ruling on both of the questions before, rather than after, such a monumental trial."

Laurence J. Freedman, a member at Mintz Levin Cohn Ferris Glovsky & Popeo PC, told Law360 that the Fourth Circuit may be wary of ignoring the sampling question for that very reason.

"The DOJ position is a bit perplexing," Freedman said. "If the Fourth Circuit decides that DOJ can veto the proposed settlement, it would seem critical that the Fourth Circuit then decide the statistical sampling issue so that the district court would have the benefit of that guidance before a substantial trial."

In its amicus brief, Sava echoed that point as well, asserting that the DOJ's argument "makes no logical sense."

"If this court affirms the district court's decision on the settlement-veto question, relators and Agape will be in the same untenable position," Sava wrote. "There is no reasonable basis for avoiding a decision on [sampling] if this court finds that the government has unreviewable veto authority over settlements."

The DOJ has rejected a proposed $2.5 million settlement with Agape, calling the amount insufficient in light of a proposed release of liability. Judge Anderson upheld the rejection, but he also said that the DOJ may be acting unreasonably, given that sampling has been disallowed in the case.

At the Fourth Circuit, the DOJ is at least a slight favorite to win on the settlement question. A Ninth Circuit ruling in 1994 limited the government's veto power, but its logic has not been embraced by other circuits.

Although the DOJ's brief argued that a ruling on sampling may not be necessary, it nonetheless defended the practice.

"There was no basis for the court to categorically reject the use of statistical sampling as a method to prove liability and damages in this case," the brief stated.

Nexsen Pruet LLC member Mark C. Moore, counsel for Agape, told Law360 that the company intends to "respond in detail" to the DOJ's arguments, but he otherwise declined to comment.

Attorneys for the whistleblowers, Brianna Michaels and Amy Whitesides, didn't respond to requests for comment.

The whistleblowers are represented by Richardson Patrick Westbrook & Brickman LLC, Strom Law Firm LLC and Christy Deluca LLC. The federal government is represented by the U.S. Department of Justice.

Agape is represented by Nexsen Pruet LLC and Deborah B. Barbier LLC.

SavaSeniorCare Administrative Services LLC is represented on the amicus brief by James F. Segroves, Kelly A. Carroll and David J. Vernon of Hooper Lundy & Bookman PC.

The cases are U.S. ex rel. Michaels et al. v. Agape Senior Community Inc. et al., case numbers 15-2145 and 15-2147, in the U.S. Court of Appeals for the Fourth Circuit.

--Editing by Katherine Rautenberg.