

## SCOTUS Denies Certiorari in Cases Concerning FCA Liability Requirement, Objective Falsity Circuit Split Remains Intact

Article By:

Commercial Litigation Practice Group

---

The United States Supreme Court [denied certiorari without comment](#) in two cases seeking to resolve a Circuit split regarding the proof required to establish that a claim for payment was false or fraudulent under the False Claims Act.

[Two Petitioners](#) asked the Court to decide whether the False Claims Act, 31 U.S.C. §§ 3729-3733, requires proof of “objective falsity”, or whether a plaintiff expert’s opinion that differs from the judgment of the defendant is sufficient to show a claim for payment was false or fraudulent under the FCA. Both cases involved allegations that a physician’s certification of medical necessity for hospice services was false, and therefore sufficient to prove plaintiffs’ FCA claims.

The Circuit split at the heart of this issue is between the Third, Ninth, and Eleventh Circuits. The Eleventh Circuit is split from the Third and Ninth Circuits regarding whether the FCA requires an objective falsehood. In the context of the Medicare hospice benefit, the Eleventh and Third Circuits are split regarding whether a plaintiff expert’s testimony, alone, is sufficient to show falsity.

In [U.S. v. AseraCare](#), 938 F.3d 1278 (11th Cir. 2019), the Eleventh Circuit considered whether a physician’s subjective clinical judgment as to medical necessity could be deemed “false” for purposes of FCA liability, or whether a claim must involve a fact that could be proven to be objectively false. The Eleventh Circuit adopted the objective falsity standard by holding that the Government must show “something more than the mere difference of reasonable opinion” in order to establish a claim was false under the FCA.

Petitioner Care Alternatives d/b/a Ascend Hospice filed its petition following a contrasting decision by the Third Circuit. In [U.S. v. Care Alternatives](#), 952 F.2d 89 (3d Cir. 2020), the Third Circuit rejected the objective falsity standard, holding that a certification of medical necessity may be found false if a jury determines that an expert’s review of the same medical records was more persuasive. The Ninth Circuit in [Winter ex rel. U.S. v. Gardens Reg. Hosp. and Med. Ctr., Inc.](#), 953 F.3d 1108 (9th Cir. 2020), also rejected the objective falsity standard, in a non-hospice case.

A coalition of hospice and healthcare industry groups supported Care Alternatives’ petition in an [amicus brief](#), arguing that Congress had designed the Medicare hospice benefit to account for the “inherent uncertainty” in terminal illness, and that a failure to resolve the Circuit split could result

in doctors feeling hesitant to refer or accept patients for hospice care. The U.S. Chamber of Commerce and the Pharmaceutical Research and Manufacturers of America also filed an [amicus brief](#) stressing that by rejecting the objective falsity standard, the Third and Ninth Circuits had opened the door to punitive FCA liability for a variety of medical judgments outside of the hospice context.

Despite the Circuit split, the United States Supreme Court declined to grant certiorari in these matters without comment. Both decisions involved fact-specific issues and focused on a particular hospice-related Medicare regulation. Additionally, the relators in the *Care Alternatives* case filed a brief in January 2020 arguing that there was no issue requiring review by the Supreme Court. These relators argued that while a split existed between the Third and Eleventh circuits, the standard for liability under the FCA was effectively the same under either approach.

Based on the Court's denial of certiorari in these cases, leaving the Circuit split on this issue intact, healthcare providers face varying levels of potential risk when confronted by FCA claims depending on the jurisdiction where the claims are filed.

© 2024 Faegre Drinker Biddle & Reath LLP. All Rights Reserved.

---

National Law Review, Volumess XI, Number 56

Source URL: <https://natlawreview.com/article/scotus-denies-certiorari-cases-concerning-fca-liability-requirement-objective>