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FOURTH CIRCUIT SAYS ATTORNEY GENERAL HOLDS "UNREVIEWABLE VETO POWER" OVER QUI TAM SETTLEMENTS AND SENDS STATISTICAL SAMPLING ISSUE BACK TO THE TRIAL COURT

The Attorney General of the United States has an unreviewable veto power over *qui tam* settlements, according to the Fourth Circuit's recent published decision in *United States ex rel. Michaels v. Agape Senior Community*.[1] In the same decision, the court declined to decide an issue raised by the relators over the trial court's refusal to allow statistical sampling to prove damages, a method of proof that would have cost the relators an estimated $36 million, far more than the value of the case.

In *Michaels*, the relator brought an action alleging that 24 affiliated elder care facilities defrauded Medicare and other federal health care programs by charging for unnecessary services and services for which the patients were not eligible.[2] The federal government, after receiving an extension, declined to intervene.

According to the relators, it would have cost $36 million to present their proof of damages. They said it would take their experts four to nine hours per patient to review the charts for about 50,000 alleged claims submitted to federal health care programs. The trial court refused to allow statistical sampling under those circumstances because the evidence was available for expert review. It had not been "destroyed or dissipated."[3]

After that decision was made, the relators and the defendants reached a confidential settlement, but the Department of Justice, after being presented with notice, objected because the amount of the proposed settlement was appreciably less than the $25 million that the government estimated in damages based on its own statistical sampling.[4] When the relators moved to enforce the settlement, the trial court sustained the government's objection and concluded that the Attorney General's office had unreviewable veto power over *qui tam* settlements even, as in this case, where the government had not sought to intervene in the matter.[5] The trial court noted that if it could review that decision, it would have concluded that the government's position was not reasonable because it would have cost the relators between $16.2 million and $36.5 million for trial preparation alone.[6]

Instead of proceeding first to trial, the court certified both issues for appeal – the "unreviewable veto power" and the use of statistical sampling. Certification is a little-used procedural method of having significant pretrial issues decided by the appellate court before trial.

The Fourth Circuit first addressed the unreviewable veto power issue. It considered decisions from the Fifth, Sixth and Ninth Circuits. The Fifth and Sixth Circuits had concluded that the Attorney General has absolute veto power over voluntary *qui tam* settlements.[7] The Ninth Circuit, on the other hand, had held years earlier that the government carried unreviewable veto authority only during the limited initial 60-day (or extended) period during which the government was allowed by statute to intervene without court approval.[8] After that period, according to the Ninth Circuit, the government needed "good cause" in order for its objections to be sustained by a court.[9]

In *Michaels,* the Fourth Circuit agreed with the Fifth and Sixth Circuit because, it said, the "plain language" of 31 U.S.C. 3730(b)(1), that a "*qui tam* action may be dismissed only if the court and the Attorney General give written consent to the dismissal and the reasons for consenting," was unambiguous.[10] It rejected the Ninth Circuit's position based on language in 31 U.S.C. 3730(d)(2) that states that, where the government declines to intervene, "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."

The court then decided not to decide the statistical sampling issue presented by the relators.[11] The Fourth Circuit concluded that the relators had not presented a pure question of law that was appropriate for a pretrial review by the appellate courts.[12] This was because they presented a question about the trial court's exercise of discretion in refusing to allow such sampling.[13]

The decision in *Michaels* places the federal government in a strategically strong position in *qui tam* actions. By vetoing settlements without having intervened in the dispute at all, the government can avoid significant expenditure of money and resources by sitting back and watching the relators litigate with defendants and then saying "no" without that decision being subject to judicial review - regardless of

whether the government's objection is reasonable. That impacts both relators and defendants who may spend months (or years) in litigation with nothing to show for it prior to trial. The trial court's decision in *Michaels* with respect to statistical sampling also adds to the bar for relators because, as in that case, it could cost millions to prosecute the issues of damages alone.

If you have any questions, please contact Jon Rabin at jrabin@hallrender.com or (248) 457-7835 or your regular Hall Render attorney.

[1] No. 15-2145 (Feb. 14, 2017).
[2] *Id.* at 5.
[3] *Id.* at 10, 13.
[4] *Id.* at 11.
[5] *Id.* at 10-11.
[6] *Id.* at 12-13.
[7] *Searcy v. Philips Electronics North America Corp.*, 117 F.3d 154 (5th Cir. 1997); *United States v. Health Possibilities, P.S.C.*, 207 F.3d 335 (6th Cir. 2000).
[8] *United States ex rel. Killingsworth v. Northrop Corp.*, 25 F.3d 715 (9th Cir. 1994).
[9] *Id.*
[10] *Michaels, supra* at 21.
[11] *Id.* at 26-27.
[12] *Id.*