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Gov't Nonintervention In Agape And Future FCA Cases

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Law360, New York (April 26, 2017, 12:51 PM EDT) -- If, as the saying goes, power corrupts and absolute power corrupts absolutely, what then to make of the government's absolute veto power over False Claims Act settlements? In United States ex rel. Michaels v. Agape Senior Community Inc., the Fourth Circuit recently confirmed that even when the government declines to intervene in a False Claims Act case, it still has wide latitude to affect the direction of the litigation by vetoing an agreed-upon settlement.[1] Though the Fourth Circuit is just the latest court to rule that the government has such absolute veto power, its opinion is a reminder that the government's nonintervention in an FCA case should not be mistaken for government disinterest.

The FCA is the government's primary civil enforcement tool for fighting alleged fraud perpetrated on the government. The act authorizes private individuals (called relators) to pursue civil actions in the name of the government. At the outset of a claim, the relator's complaint must be served on the government and remain under seal for at least 60 days to allow the government time to investigate the relator's allegations. The government may choose to intervene in the litigation and assume "primary responsibility" for the case. Or the government may decline to intervene, in which case the relator is free to carry on with the action. Even after declining to intervene, the government may request that it be kept abreast of the matter and, for example, receive copies of pleadings and deposition transcripts.

In the Agape case, the government declined to intervene and take over the litigation, but it was an active participant in the litigation and actively investigated the allegations for nearly three years. In 2014, the parties and the government participated in a mediation session in which the government "made the primary presentation and initiated the settlement demand to Agape."[2] The mediation failed. In 2015, the parties engaged in a second mediation session to which the government was not invited.[3] At this mediation session, the parties were able to reach a comprehensive settlement. Upon the parties' announcement of the settlement, the government promptly declared its opposition to it.[4] The government had estimated that the defendants' potential liability was $25 million, exceeding the settlement amount.[5]

The government's right to object to negotiated settlements in FCA cases stems from Section 3730(b)(1), which states that a qui tam case "may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting."[6] In light of the statutory language

— and given the government's opposition — the Agape trial court felt it had no choice but to deny the parties' joint motion to enforce the settlement agreement.[7] The relator appealed. This was an issue of first impression in the Fourth Circuit, and the court joined the Fifth and Sixth Circuits in affirming the government's absolute veto authority. When considering the government's veto power in this case, each of these courts noted that for "more than 130 years, Congress has instructed courts to let the government stand on the sidelines and veto a voluntary settlement."[8] Only the Ninth Circuit has rejected the government's absolute veto authority.[9]

The FCA has grown from its roots in prosecuting Civil War-era fraudsters to its current incarnation as a multibillion-dollar fraud recovery tool. As the stakes have grown higher, the government's absolute veto authority is ever more powerful. In 2015, settlements and judgments in FCA cases in which the government declined to intervene totaled more than $1.1 billion.[10] In the 2016 fiscal year, the government obtained more than $4.7 billion in FCA settlements and judgments, and $2.9 billion of that amount related to actions filed under the qui tam provisions of the FCA.[11] The government has reported that an average of 13.5 new qui tam lawsuits were filed every week during 2016 — 702 in total.

It is too early to determine to what extent the new administration will devote resources to FCA enforcement. We know, however, the new administration has been vocal in prioritizing the enforcement of drug and immigration law. Yet the U.S. Department of Justice is understaffed. As of the publication of this article, the Senate has not confirmed a single U.S. attorney. Given a potential shift in government resources and the ever-growing number of qui tam cases, the government is unlikely to intervene in every action in which it believes the government has been injured. And, as it increasingly stands on the sidelines while allowing relators to pursue litigation, we may observe the government asserting its absolute veto authority with increasing frequency. This is hardly an optimal scenario for companies thinking they have achieved a victory of sorts based on a nonintervention decision, which is often (and rightly) a signal of meritless claims.

What is a company to do when defending a nonintervened FCA case? The problem is that relators' motives are aligned directionally with those of the government, but not perfectly. Because relators receive a share of settlements and judgments, they stand to gain from larger recoveries and are, in that sense, aligned with the government. Relators, however, are also driven by private concerns regarding, for example, timing, mounting litigation expenses, and (for counsel especially) the opportunity costs of pursuing the case in place of others. In Agape, the government plainly valued the case at an amount in excess of the negotiated settlement. As the number of nonintervened cases increases — either because the number of qui tam lawsuits continues to grow or government resources devoted to FCA cases decline — defendants would be well served to determine whether the government has assigned a value to the case. Keeping in mind Rule 408 of the Federal Rules of Evidence, defendants may insist that the relator keep the government apprised of settlement negotiations and obtain the government's feedback. In all events, to avoid surprise government objections, defendants should consider including the government in discussions as settlement negotiations mature.

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[1] United States ex rel. Michaels v. Agape Senior Cmty., Inc., 848 F.3d 330 (4th Cir. 2017), slip op. available at http://www.ca4.uscourts.gov/Opinions/Published/152145.P.pdf.

[2] United States ex rel. Michaels v. Agape Senior Cmty., Inc., Opening Brief of Appellants, 2016 WL 197519, at *5-6 (filed Jan. 14, 2016).

[3] Opening Brief of Appellants, 2016 WL 197519, at *6; United States ex rel. Michaels v. Agape Senior Cmty., Inc., Public Brief for the United States as Intervenor-Appellee, 2016 WL 108478, at *9 (filed Mar. 17, 2016).

[4] Opening Brief of Appellants, 2016 WL 197519, at *6-7.

[5] Public Brief for the United States as Intervenor-Appellee, 2016 WL 108478, at *13.

[6] 31 U.S.C. § 3730(b)(1).

[7] United States ex rel. Michaels v. Agape Senior Cmty., Inc., No. CA 0:12-3466-JFA, 2015 WL 3903675, at *4 (D.S.C. June 25, 2015), order corrected by, 2015 WL 4128919 July 6, 2015), and aff'd in part, appeal dismissed in part by, 848 F.3d 330 (4th Cir. 2017).

[8] Agape Senior Cmty., 848 F.3d at 339 (citing United States v. Health Possibilities, P.S.C., 207 F.3d 335, 344 (6th Cir. 2000) and quoting Searcy v. Phillips Elecs. N. Am. Corp., 117 F.3d 154, 160 (5th Cir. 1997)).

[9] United States ex rel. Killingsworth v. Northrop Corp., 25 F.3d 715 (9th Cir. 1994).

[10] U.S. Dep't of Justice, "Fraud Statistics Overview, October 1, 1987 – September 30, 2015," (available at http://www.justice.gov/opa/file/796866/download).

[11] U.S. Dep't of Justice, "Justice Department Recovers Over $4.7 Billion From False Claims Act Cases in Fiscal Year 2016: Third Highest Annual Recovery in FCA History," (Dec. 14, 2016), available at https://www.justice.gov/opa/pr/justice-department-recovers-over-47-billion-false-claims-act-cases-fiscal-year-2016.
