IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

UNITED STATES OF AMERICA *ex rel.* JOHN TIMOTHY DONEGAN,

Relator/Plaintiff,

v.

ANESTHESIA ASSOCIATES OF KANSAS CITY, P.C.,

Defendant.

Civil No. 12-00876-CV-W-DGK

THE UNITED STATES' STATEMENT OF INTEREST

I. INTRODUCTION

The United States respectfully submits this Statement of Interest pursuant to the False Claims Act (FCA), 31 U.S.C. §§ 3729-3733, and 28 U.S.C. § 517, to address an erroneous argument made by defendant that could adversely affect the United States' ability to enforce the FCA. Relator John Timothy Donegan (Relator) brought this *qui tam* action under the FCA to recover penalties and damages arising from false claims for payment made by defendant Anesthesia Associates of Kansas City, PC (AAKC), to the Centers for Medicare and Medicaid Services (CMS), for reimbursement of anesthesiology services. In particular, Relator alleges that AAKC's claims were knowingly false because it had knowledge that its claims for payment were in violation of 42 C.F.R. § 415.110, Condition for payment: Medically directed anesthesia services (Seven Steps Regulation). The United States declined to intervene in the action and Relator elected to proceed with the litigation. *See* 31 U.S.C. § 3730(b)(4). AAKC has now moved for summary judgment based, in part, on a legal argument that sweeps too broadly.

Specifically, AAKC urges the Court to enter judgment in its favor on the basis that the requisite *scienter* for a knowingly false claim cannot be established because the Seven Steps Regulation is ambiguous, and AAKC can now advance a reasonable interpretation of those rules. According to AAKC, to avoid summary judgment, "Relator must demonstrate the no one interprets the Seven Steps regulation as AAKC does." Defendant's Suggestions in Support of its Motion for Summary Judgment (Def. Br.) at 18. Although the United States takes no position on the ultimate question of liability in this case or on the other legal arguments made by AAKC, the standard for *scienter* urged by AAKC is contrary to law and, if adopted, could harm the government's ability to redress fraud and false claims. An FCA defendant's *scienter*, or lack thereof, depends on the surrounding facts as they existed at the time, not on whether its lawyers can point to ambiguities in regulatory language and advance plausible post hoc interpretations.

The FCA is "the government's primary litigative tool for the recovery of losses sustained as the result of fraud against the government." *Avco Corp. v. U.S. Dep't of Justice*, 884 F.2d 621, 622 (D.C. Cir. 1989). The vast majority of successful actions under the FCA are brought by the Attorney General. The government, therefore, has a significant interest in how decisions by the courts, even in declined actions, may shape future enforcement of the statute. Moreover, although the government has declined to intervene in this case, it remains the real party in interest, *see United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 934 (2009); *United States ex rel. Zissler v. Regents of the Univ. of Minn.*, 154 F.3d 870, 872 (8th Cir. 1998), and will receive the majority of any recovery that may be obtained. Accordingly, the United States files this Statement of Interest to ensure that the Court is apprised of applicable law and case authority. *See* 28 U.S.C. § 517 (providing for Department of Justice participation in any federal court litigation to attend to the interests of the United States).

AAKC argues that "the ambiguities inherent within the Seven Steps regulation are unresolved by CMS [Centers for Medicare & Medicaid Services] precluding any finding of a knowing violation under the FCA." Def. Br. at 10. The gravamen of AAKC's argument is that the Seven Steps Regulation is ambiguous and thus cannot serve as a basis for FCA *scienter*, and that its interpretation of the regulation is reasonable. The mere fact of ambiguity in federal regulations, however, does not establish an absence of *scienter* on the part of the defendant, even if defendant can later articulate a reasonable interpretation of those regulations. To hold otherwise would mistakenly absolve of liability any defendant who can later advance a plausible regulatory basis for his submission of false claims. It would allow a defendant who fully intended to submit false claims to escape liability. It would eliminate liability, across the board and regardless of circumstances, for those who recognized an ambiguity and made the decision not to inquire. To the contrary, in order to determine whether regulatory ambiguity precludes liability under the FCA, a court, or trier of fact, must conduct a fact-based assessment of whether the evidence shows that the defendant acted with the requisite actual knowledge, reckless disregard, or deliberate ignorance of the falsity of the challenged claims.

II. THE FALSE CLAIMS ACT

A person violates the FCA by "knowingly" presenting "a false or fraudulent claim for payment or approval" to the government. 31 U.S.C. § 3729(a)(1)(A). In addition, a person violates the FCA by "knowingly" making or using "a false record or statement material to a false or fraudulent claim" to the government. 31 U.S.C. § 3729(a)(1)(B). A person acts "knowingly" under the Act not only when he or she "has actual knowledge of the information," but also when he or she "acts in deliberate ignorance" or "reckless disregard" of the truth or falsity of the information. *Id.* at § 3729(b). No proof of specific intent to defraud is required. *Id.*

III. ARGUMENT

Under the plain language of the FCA, the mere fact of regulatory ambiguity does not foreclose a finding that a defendant knowingly submitted a false claim to the government. In order to determine whether the "knowledge" prong of FCA liability is satisfied, there has to be an analysis of the evidence to determine if it shows that the defendant submitted a false claim actually knowing that it was false, or acted with deliberate ignorance or reckless disregard of the truth or falsity of the claim. The factfinder must evaluate the defendant's state of mind at the time the claims are submitted to the government. To be sure, evidence of whether or not the defendant reasonably interpreted the governing regulation and submitted claims it, in good faith, believed to be truthful at the time of submission is important to consider. But the existence of a reasonable interpretation of an ambiguous regulation is certainly not an absolute bar to liability if the defendant in fact submitted false claims either actually knowing, or recklessly disregarding or deliberately ignoring, that those claims were false. If a defendant held a genuine belief that it was complying with the applicable legal standards and it was not reckless or deliberately ignorant in holding that belief, the defendant will not be liable. Simply making a case after the fact, however, that the applicable regulation is ambiguous and that defendant's stated interpretation of that ambiguous regulation is reasonable, is not the standard by which knowledge is determined.

The Eighth Circuit has held that liability under the FCA is not foreclosed by the fact that federal regulations are susceptible to the interpretation advanced by defendant. *Minnesota Ass'n of Nurse Anesthetists v. Allina Health Sys. Corp.,* 276 F.3d 1032 (8th Cir.), *cert. denied,* 537 U.S. 944 (2002). Instead, the court emphasized, the district court should consider evidence relating to the defendant's state of mind. *Id.* at 1053 ("The question on intent here is whether the

defendants knew (or would have known absent deliberate blindness or reckless disregard) that their bills would lead the government to believe that they had provided services that they actually did not provide."). If the defendant certified compliance with a federal regulation "knowing that the HCFA [now CMS] interpreted the regulations in a certain way and that their actions did not satisfy the requirements of the regulation as the HCFA interpreted it, any possible ambiguity of the regulations is water under the bridge." *Id.* The court went on to reason that the requisite *scienter* might also be found if "the defendants were on notice of the possibility" that the federal agency might interpret ambiguous regulations differently. *Id.* This approach correctly allows for liability for defendants who seek to hide behind a potentially ambiguous regulation, and thereby act in deliberate ignorance, while shielding from liability defendants who are genuinely confused by an ambiguous regulation and act in good faith.

In support of its contention that a defendant's reasonable interpretation of an ambiguous regulation forecloses the *scienter* necessary to establish an FCA violation, defendant relies on *U.S. ex rel. Hixson v. Health Mgmt. Sys., Inc.,* 613 F.3d 1186 (8th Cir. 2010) ("To prevail in an FCA action based on an ambiguous regulation a relator 'must show that there is no reasonable interpretation of the law that would make the allegedly false statement true.'" Def. Br. at 17, *citing Hixon* at 1191.). *Hixon*, however, following *Allina*, should only be read as applying the standard elucidated in *Allina*, holding that, in that instance, the defendant did not act with the requisite knowledge required by the FCA. Thus, *Hixon* should not be interpreted to espouse anything more than the unremarkable proposition that a defendant who submits a false claim with a good faith belief that its claim is true, based on its real time understanding of a governing regulation, lacks the requisite knowledge to be found liable for an FCA violation.

Other courts have likewise recognized that while relevant to the analysis of FCA *scienter*, a defendant's potential reasonableness in interpreting an ambiguous regulation is not a bar to establishing knowledge. *See United States ex rel. Oliver v. Parsons Co.*, 195 F.3d 457, 464 (9th Cir. 1999), *cert. denied*, 530 U.S. 1228 (2000) ("A contractor relying on a good faith interpretation of a regulation is not subject to liability, not because his or her interpretation was correct or 'reasonable' but because the good faith nature of his or her action forecloses the possibility that the *scienter* requirement is met."). *See also*, *United States v. Chen*, 2010 WL 4296658 (9th Cir. 2010) (despite defendant's argument that he did not act with the requisite knowledge because he relied on a good faith interpretation of the Medicare regulations, court, after analyzing the evidence presented, affirmed finding that defendant acted with the required *scienter* when he submitted claims); *United States v. Bourseau*, 531 F.3d 1159 (9th Cir. 2008), *cert. denied*, 555 U.S. 1212 (2009) (same); *United States ex rel. Chilcott v. KBR, Inc.*, 2013 WL 5781660 (C.D. Ill. 2013) (In concluding that the FCA allegations were sufficient, despite defendant's asserted reasonable interpretation of the governing requirements, the court noted that it could infer that, "Defendants did not simply choose, in good faith, a reasonable interpretation among equal alternatives. Though their interpretation is plausible, there are allegations of 'specific evidence of knowledge that the claim is false.'").

Additionally, evidence as to what steps the defendant took to ascertain the government's construction of an ambiguous regulation is also relevant to evaluating whether the defendant acted with knowledge. Congress has made clear that "ostrich-like conduct" is not a defense to the FCA. *See* S. Rep. No. 99-345, at 7 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5272. Contractors doing business with the government are expected to take reasonable steps to verify that their interpretation of a regulation is correct before submitting claims for payment. *See id.* at

5286 (explaining that official who refused "to learn of information which an individual, in the exercise of prudent judgment, had reason to know" will be considered knowing under the FCA). *See, e.g., Heckler v. Community Health Servs.*, 467 U.S. 51, 64 (1984) (reasoning that participant in Medicare program "had a duty to familiarize itself with the legal requirements for cost reimbursement" and to seek clarification by the agency of ambiguities in interpreting regulations); *Anesthesiologists Affiliated v. Sullivan*, 941 F.2d 678, 681 (8th Cir. 1991).

Finally, to the extent AAKC maintains that falsity under the FCA cannot be established in light of a reasonable interpretation of an ambiguous regulation ("Because AAKC's interpretation of the Seven Steps regulation is reasonable, Relator cannot demonstrate the falsity of any claim just based on AAKC's interpretation of the term." Def. Br. at 24), that proposition should be rejected as a misstatement of the law. It is clear that ambiguity in a federal regulation does not preclude a finding that a submission to the government was false within the meaning of the FCA. The question of whether a defendant "knowingly" submitted a false statement or claim is wholly distinct from the question of whether the submission was false. The latter question is a legal determination to be made by the district court, employing normal tools of construction to determine whether statements or claims are objectively false. And while, as noted above, the existence of regulatory ambiguity may be relevant to a defendant's *scienter*, it is irrelevant to whether a defendant's submission was false.

The Ninth Circuit correctly recognized the distinction between the knowledge and falsity elements of liability in *Parsons*, 195 F.3d at 462-63, reversing a district court holding that falsity was not established because the defendant demonstrated that it made a reasonable interpretation of an ambiguous accounting standard. The court explained that, "it is [the defendant's] compliance with these regulations, as interpreted by this court, that determines whether its

accounting practices resulted in the submission of a 'false claim' under the Act." *Id.* at 463. While "the reasonableness of [the defendant's] interpretation of the applicable accounting standards may be relevant to whether it *knowingly* submitted a false claim, the question of 'falsity' itself is determined by whether [the defendant's] representations were accurate in light of applicable law." *Id.* (emphasis added). The court explained that if ambiguity were relevant to falsity rather than *scienter*, a defendant who submitted a claim with the requisite knowledge of its falsity nevertheless would be able to "avoid liability by successfully arguing that its claim reflected a 'reasonable interpretation' of the requirements." *Id.* at 463 n.3.

In sum, the *scienter* requirement under the FCA does not allow those who accept taxpayer dollars to avoid all potential FCA liability simply by pointing to ambiguities in the governing regulations and advancing a post hoc, plausible construction. It does not matter that, in the context of later litigation, a defendant is able to find some theoretical ambiguity in the governing standard, if the facts and circumstances at the time that the claims were submitted show that they recklessly disregarded, deliberately ignored, or knew full well the proper application of the rule. The key is whether or not, as a factual matter, the defendant acted under a good faith belief that it was in compliance with the applicable regulation. To hold otherwise would rewrite the statutory definition of knowledge, contravene Eighth Circuit precedent, as well as precedent from other jurisdictions, and create an unwarranted escape hatch for defendants seeking to avoid liability by coming up with post hoc legal theories that did not motivate their conduct at the time they submitted the false claims.

IV. CONCLUSION

The United States retains an interest in this suit and in the proper interpretation and application of legal principles developed under the FCA, and, accordingly, respectfully submits

the foregoing for the Court's consideration. The United States welcomes the opportunity to provide further assistance at the Court's request.

Respectfully submitted,

JOYCE R. BRANDA
Acting Assistant Attorney General

TAMMY DICKINSON
United States Attorney

By: /s/ Lucinda S. Woolery
LUCINDA S. WOOLERY
Assistant United States Attorney

MICHAEL D. GRANSTON
SARA McLEAN
LINDA M. McMAHON
Attorneys, Civil Division
United States Department of Justice
P.O. Box 261, Ben Franklin Station
Washington, D.C. 20044
Telephone: (202) 307-0448

ATTORNEYS FOR THE UNITED STATES

Certificate of Service

I certify that on February 13, 2015, the United States' Statement of Interest was served electronically on all parties via the Court's electronic case filing system.

/s/ Lucinda S. Woolery