IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Consolidated Case Nos. 15-238 & 15-239

IN RE: UNITED STATES *ex rel.*
BRIANNA MICHAELS and AMY WHITESIDES,

BRIANNA MICHAELS and AMY WHITESIDES,

Plaintiff-Petitioners,

v.

AGAPE SENIOR COMMUNITY, INC., *et al.*

Defendant-Respondents/Cross-Petitioners.

ON PETITIONS FOR PERMISSION TO APPEAL UNDER 28 U.S.C. § 1292(b) FROM AN INTERLOCUTORY ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

UNITED STATES' RESPONSE IN OPPOSITION TO PETITIONS FOR INTERLOCUTORY REVIEW

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INTRODUCTION AND SUMMARY

This matter arises out of a False Claims Act, *qui tam* action brought by the relators, Brianna Michaels and Amy Whitesides, against a group of providers of hospice care, referred to here as "Agape." The United States has not intervened in the *qui tam* action but filed in district court a statement of interest and a response on two issues: whether a settlement agreement between the plaintiff-relators and defendants can be enforced over the government's objection, and whether plaintiff-relators may rely on statistical sampling to establish liability and damages under the False Claims Act in this case.

The district court held that the government's consent to a settlement agreement is a prerequisite to settlement and dismissal of a *qui tam* case and accordingly denied a motion to enforce the parties' settlement agreement over the government's objections. As part of this same order, the court also reasoned that the use of statistical sampling is not an appropriate method of proving the claims at issue. The court then, *sua sponte*, certified the order for interlocutory review under 28 U.S.C. 1292(b).

The plaintiff-relators have now filed a petition seeking permission to appeal both questions. The defendants have also petitioned for permission to

appeal with respect to the settlement authority issue. The Court, by order of July 7, 2015, consolidated both petitions.

Although we have not intervened in the action, the United States should be deemed a respondent with respect to these petitions for purposes of appeal. The United States' interests diverge in key respects from the interests of both the plaintiff-relators and defendants, and we oppose appeal of either of the issues subsumed by the certified order. Moreover, we are the real party in interest with respect to the government's power to disapprove settlement of a qui tam action, have substantial interests in the means of proving liability and damages under the False Claims Act, and filed briefs and appeared at hearings on both issues in district court. In this posture, there is ample basis for the Court to deem the United States respondent as to both petitions and to entertain this response to the parties' petitions for interlocutory review. *Cf. United States ex rel. Eisenstein v. City of New York*, 129 S .Ct. 2230, 2233 n.2 (2009) (United States may appeal certain collateral orders entered in an FCA action, including dismissal of an FCA action over its objection, even if it has not intervened); *United States ex rel. Searcy v. Phillips Electronics N. Am. Corp.*, 117 F.3d 154, 155-58 (6th Cir. 1997) (government may appeal from order approving settlement and dismissing qui tam action over its objection, even if it has not intervened). As we will explain more fully below, the

issues presented by the petitions do not warrant section 1292(b) interlocutory review. As an initial matter, the district court correctly held that the government's consent is an absolute prerequisite to settlement and dismissal of a *qui tam* action, and there is no substantial basis for disagreement with the court's holding. The plain language of 31 U.S.C. 3730(b)(1) provides that "[t]he action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting." The statute does not limit this authority to cases in which the United States has intervened. Nor does it give the court any authority to pass upon the reasonableness of the government's objections.

The great weight of authority supports this reading. *See Searcy*, 117 F.3d at 158-60; *United States v. Health Possibilities, P.S.C.*, 207 F.3d 335 (6th Cir. 2000); *see also Ridenhour v. Kaiser-Hill Co., L.L.C.*, 397 F.3d 925 (10th Cir. 2005) (recognizing in dicta the government's right to object to settlement in non-intervened cases); *Hoyte* v. *Am. Nat'l Red Cross*, 518 F.3d 61, 63 n.2 (D.C. Cir. 2008) (same). And while there is one outlier decision, *United States ex rel. Killingsworth* v. *Northrup Corp*., 25 F.3d 715 (9th Cir. 1994), the Ninth Circuit's decision there is inconsistent with the statutory text and has been rejected by all the other courts of appeals that have considered the

question. It thus, standing alone, does not demonstrate that there are substantial grounds for disagreement warranting this Court's review.

Moreover, even if this Court were to reverse and remand for consideration of whether the government's objections to the parties' settlement are reasonable, it is by no means clear that this would result in approval of the settlement and swift termination of the litigation. The government objected to the parties' settlement, not merely because it believed the settlement amount insufficient in light of the scope of the proposed False Claims Act release, but also because the settlement purported to effect a "full release as to all potential government claims, administrative, civil and criminal against the defendants." Clerk's Record No. 273-1, Proposed Settlement, ¶ 4.[1] The relators have no authority whatsoever to release the defendants from such claims, and the extraordinary scope of the proposed release was an important basis for the government's objections to the settlement. And as it is eminently reasonable to object to a settlement that would not adequately compensate the government and would effect such a broad release of defendants' prospective criminal, civil, and administrative

[1] The settlement also required the parties to negotiate (and presumably enter into) a confidentiality order related to the settlement, and purported to allow defendants to pay the settlement amount over a period of 72 months without paying any interest on the deferred payments. The United States' objection to the parties' settlement agreement was based upon these components of that agreement as well.

liability, it is likely that the district court would again be compelled to reject the settlement, and to remit the parties to a trial or further negotiation. The parties thus err in asserting that granting review of the settlement authority issue would materially advance termination of the litigation.

The sampling issue is similarly unsuited for interlocutory review. The district court considered the sampling issue to be intertwined with the settlement issue, because in the district court's view if the government's veto of the settlement were subject to a reasonableness inquiry, then the unavailability of sampling weighed against the reasonableness of the government's objection to the settlement. Op. at 18. As noted above and discussed further below, however, the court correctly concluded that the government's veto authority was unfettered.

Moreover, armed with the knowledge that they cannot settle over the government's objection, the parties might very well choose to fashion a new settlement that is acceptable to the parties and the United States, obviating the need for review of the sampling issue. And, in any event, the court's sampling ruling is, at bottom, a determination of the admissibility of one piece of evidence at trial. Although interlocutory review of evidentiary rulings could conserve judicial resources by avoiding the need for a retrial in the event that the ruling is reversed, that is rarely sufficient grounds for departing

from the ordinary rule against piecemeal appeals. Were the rule otherwise, interlocutory review would be the norm rather than a narrow exception.

The petitions for permission to appeal should therefore be denied.

STATEMENT

1. The False Claims Act ("FCA"), 31 U.S.C. 3729, *et seq*., prohibits the submission of false or fraudulent claims for payment to the United States. A violation of the FCA occurs when a person "knowingly presents, or causes to be presented" to the government "a false or fraudulent claim for payment or approval," 31 U.S.C. 3729(a)(1)(A), "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim," 31 U.S.C. 3729(a)(1)(B), or "conspires to commit" such a violation or other misconduct specified in the statute, 31 U.S.C. 3729(a)(1)(C). Violators are liable to the United States for civil penalties and treble damages. 31 U.S.C. 3729(a)(1).

Suits to collect statutory damages and penalties may be brought by either the Attorney General of the United States or a private person (known as a relator), in the name of the United States, in an action referred to as a *qui tam* suit. 31 U.S.C. 3730(a) & (b)(1). *See Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 769-78 (2000). When a *qui tam* action is filed, the government may intervene and take over

the case. 31 U.S.C. §§ 3730(b)(2) & (c)(3). If the government declines to intervene, the relator may conduct the litigation. In either event, if the judgment awards damages and/or civil penalties, the proceeds are divided between the government and the relator. 31 U.S.C. 3730(d).

The statute expressly provides that where the *qui tam* relator brings an FCA action, "[t]he action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting." 31 U.S.C. 3730(a)(1). This latter provision is the focus of the petitions now before the Court.

2. In this action, the plaintiff-relators allege that the Agape chain of hospice and skilled nursing care providers submitted Medicare claims in instances where the provider knew the care was not medically necessary, paid unlawful kickbacks in exchange for patient referrals or falsified certain certifications necessary to obtain Medicare reimbursement. The United States declined to intervene and the case has been prosecuted by the relators.

Following a mediation session in which the United States was not invited to participate, the relators and defendants reached a tentative settlement. The United States objected to the settlement on two principal grounds: the settlement amount is only a fraction of the government's estimate of the damages sustained as a result of the conduct for which

defendants seek a release and therefore is insufficient, and the settlement purported to broadly release defendants from other present and future criminal, civil, and administrative claims that might be asserted by the United States at a later time and that relators have no authority to release.[2]

On June 25, 2015, the court issued an order denying Agape's motion to enforce the settlement agreement over the government's objections and, in addition, *sua sponte* certifying the order for interlocutory review under 28 U.S.C. 1292(b). First, the court denied the parties' motion to enforce their settlement, reasoning that 31 U.S.C. 3730(b)(1) makes the Attorney General's written consent an absolute prerequisite to dismissal of a qui tam action. The court strongly implied that the government's objections were not reasonable in light of the cost and difficulty of litigating the many thousands of claims at issue in the case and the government's asserted failure to adequately explain the basis for its estimate of the defendants' potential liability. Op. 10-12. The court acknowledged, however, that the statutory language empowering the

[2] The district court redacted references to the proposed settlement amount from its order to avoid potential future prejudice to the parties. *See* CR. 303, Order of July 6, 2015. We will accordingly refrain from publicly identifying in this submission the amount of the proposed settlement and have not attached the proposed settlement to our response. We note, however, that the district court's order incorrectly stated both the government's estimate of potential damages and the relationship between that estimate and the amount of money defendants agreed to pay to the government under the proposed settlement.

United States to veto settlements is clear and that the weight of judicial authority supports its holding that the Attorney General's consent is a prerequisite to dismissal. Op. 8-9. It nonetheless concluded that an appellate decision on whether that rule applied in the circumstances of this case would materially advance the litigation. Op. 18-19.

Second, the court explained the basis for its prior conclusion in an earlier order that statistical sampling could not be employed to establish liability and damages in this case.[3] Further, the court observed that the court's ruling on the unavailability of sampling was intertwined with the settlement question presented by the case. The court explained that "the question of whether the Government should be allowed to reject a settlement in a case for which it has not intervened, while relying upon a damages model that this Court has rejected for purposes of trial," warranted resolution by the Fourth Circuit.

The district court then certified its order for interlocutory review.

REASONS FOR DENYING INTERLOCUTORY APPEAL

Section 1292(b) provides that a district court may certify an otherwise unappealable order for interlocutory appeal if it determines that "such order

[3] In a prior order in this case, the court also held that the use of sampling was not appropriate. See CR. 255, Order of March 16, 2015. That order did not detail the court's rationale for its holding, nor did the court certify that order for interlocutory review.

involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation * * *."

Upon the district court's certification and a timely petition for appeal, the court of appeals may "in its discretion" permit an appeal to be taken. *Id*. Appellate review is thus wholly within the court of appeals' discretion. And while the exercise of that discretion may properly be informed by whether the court of appeals agrees with the district court that the matter involves a controlling question of law whose resolution will advance termination of the litigation, it is in no way bound by the district court's certification of the issues for review. It is instead free to consider *de novo* whether the certified order meets the statutory criteria and, if it does, whether other reasons counsel against discretionary review. *See generally* Wright and Miller et al., 16 Fed. Prac. & Proc. Jurisd. § 3929 (3d ed. Westlaw 2015). Indeed, "[t]he immediate appeal of a certified question is an extraordinary remedy, which may be granted or denied at the sole discretion of the court of appeals." *Fannin v. CSX Transp., Inc.*, No. 88-8012, 1989 U.S. App. Lexis 20859, at *5 (4th Cir. Apr. 26, 1989). All these factors counsel against review here.

I. The Statute Expressly And Unequivocally Conditions Settlement and Dismissal Of A Qui Tam Action On The Government's Consent.

A. The plain language of the statute is clear and affords no reasonable basis for disputing the district court's holding that the government's consent is an absolute prerequisite to settlement and dismissal of a qui tam action. As the district court reasoned, 31 U.S.C. 3730(b)(1) provides that "[t]he action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting." The statute does not limit this authority to cases in which the United States has intervened under 31 U.S.C. 3730(b)(2). Rather, the "action" referenced by section 3730(b)(1) is *any* action brought under the statute by a private party, without regard to whether the action is prosecuted by the relators or taken over by the government.

Nor does it give the court any authority to pass upon the reasonableness of the government's objections. Indeed, while the statute provides that the court may determine whether a settlement negotiated *by* the government over the *relator's* objection is "fair, adequate, and reasonable" in instances where the government has intervened in the case and taken over its prosecution, *see* 31 U.S.C. 3730(c)(2)(B), there is no comparable provision authorizing review of the government's objections to a settlement negotiated by the relator and

the defendant. "[W]hen Congress includes particular language in one section of the statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002).

The great weight of authority supports this construction of the statute. In *Searcy*, for example, the Fifth Circuit reasoned that the statutory provision supporting the government's absolute right to veto a settlement is "as unambiguous as one can expect." *Id*. at 159. Moreover, in an analysis directly applicable here, the court reasoned that restrictions on the government's veto power would enable relators to enrich themselves at the government's expense by trading away the government's right to bring future claims in order to secure a favorable settlement of the claims it has chosen to press in the litigation. *Id*. at 160.

The Sixth Circuit reached the same result in *Health Possibilities, P.S.C.* There, the Court reasoned that the plain language of the statute clearly vests the government with an absolute right to veto a relator's settlement, without regard to whether government has intervened, *id*, 207 F.3d at 338-39, and that "the power to veto a privately negotiated settlement of public claims is a critical aspect of the government's ability to protect the public interest in *qui*

tam litigation." *Id*. at 140; *accord Hoyte* v. *Am. Nat'l Red Cross*, 518 F.3d 61, 63 n.2 (D.C. Cir. 2008) ("a motion to dismiss by the relator requires the consent of both the Government and the court, even where the Government has declined to intervene") (internal quotation and citation omitted); *Ridenour* v. *Kaiser Hill Co., LLC*, 397 F.3d 931 n.8 (10th Cir. 2005)(same).

Although neither the Supreme Court nor the Fourth Circuit has directly addressed the question, both also have suggested that the government's consent is an absolute prerequisite to settlement and dismissal of a qui tam action. *See U.S. ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 932 (2009) (noting that if the United States decides not to intervene in an FCA case, its rights in the proceeding still include "vetoing a relator's decision to voluntarily dismiss the action"); *United States ex rel. UBL v. IIF Data Solutions*, 650 F.3d 445 (4th Cir. 2011) (indicating that it would interpret the statute to require government consent to settlements even when the government has declined to intervene).

In *United States ex rel. Killingsworth v. Northrup Corp*., 25 F.3d 715 (9th Cir. 1994), the Ninth Circuit partially disagreed with this analysis and held that permitting the government to veto settlements after it has made an election decision would be inconsistent with Congress's intent to vest relators with full responsibility for litigating such cases. It therefore concluded that

the government's objections to a *qui tam* settlement in non-intervened cases may be sustained only if the court finds the government has good cause for its objections. The *Killingsworth* court acknowledged that the statutory language provided the government with an unqualified veto over a settlement before the government has made an election decision. *Id* at 722.

The temporal limitation that the Ninth Circuit imposed on the Government's veto authority cannot be reconciled with the plain language of the statute. Moreover, it overlooks the government's substantial and continuing interests in ensuring that a relator's settlement furthers the overriding statutory purpose of deterring fraudulent conduct and compensating the government for damages caused by the submission of false claims. The Ninth Circuit's reasoning is unpersuasive and, in the more than twenty years since *Killingworth* was decided, has not been followed by any court of appeals to address the question. It thus, standing alone, affords no indication that there is a substantial basis for disagreeing with the district court's conclusion that the government's consent is an absolute prerequisite to settlement of a *qui tam* action.

B. Moreover, an appellate decision overturning the district court's holding and remanding for consideration of whether the government has good cause for objecting to the proposed settlement is unlikely to materially

advance termination of the litigation. The district court indicated that the government had not demonstrated that the proposed settlement amount is insufficient in light of the costs of fully litigating the case and implied that it would likely affirm the parties' settlement over the government's objection if it had such review authority, a step that would of course put a swift end to the litigation. *See* Op. 10-12.

There is, however, no basis for treating approval of the settlement as a foregone conclusion if the matter were remanded for consideration of whether the government's objections are reasonable. In particular, the district court overlooked the fact that we objected, not merely because the settlement amount is insufficient relative to the False Claims Act release sought by the defendant, but because it also purports to release the defendant from a wide range of additional administrative, civil, and even criminal claims wholly beyond the relator's authority.[4]

It is difficult to fathom how a settlement could be approved over these objections. The government has a compelling interest in ensuring that *qui tam* settlements do not compromise the public interest in vigorous enforcement of the law. There is plainly good cause to object to settlements that would

[4] As discussed *supra*, note 1, there were additional bases for the United States' objection as well.

extinguish this crucial public interest to further the private pecuniary interests of the relators and defendants. If these objections were fully considered – as we submit they must be if the case were remanded for further review – the district court would have no discernable ground for deeming them unreasonable. There is thus no basis for concluding that an interlocutory appeal, reversal of the district court's holding, and subsequent remand for consideration of whether the government has good cause to object to the settlement would likely result in approval of the settlement as currently constructed by the parties.

II. The Court Should Decline to Review At this Stage the Court's Ruling on Statistical Sampling

A well designed sampling methodology may afford a valid means of establishing liability and damages in cases involving a very large volume of claims and may offer a valid means of proof while conserving valuable judicial resources and protecting the government's ability to obtain full compensation for damages caused by the repeated submission of false of fraudulent claims. We therefore support the use of sampling as a general proposition and disagree with the district court's rationale for rejecting it in this particular case.

Nevertheless, the Court's review of this issue at this stage is not warranted. As the district court correctly concluded, its conclusion regarding the unavailability of sampling would potentially be relevant to the settlement question if the government's veto authority were subject to a reasonableness test. For the reasons discussed above, however, the district court also correctly concluded that this is not the proper standard for evaluating the government's objection to a settlement, and that the government's power to object is unfettered.

Moreover, armed with the knowledge that they cannot settle over the government's objection, it is entirely possible that the parties will elect to fashion a new settlement that is satisfactory to the parties as well as the United States. Accordingly, this court should decline at this time to exercise its discretion to address the appropriateness of sampling in this case.

Even apart from these considerations, the court's sampling ruling is, at bottom, a determination as to the admissibility of one piece of evidence at trial. Such evidentiary rulings are commonplace in trial litigation. Though interlocutory appeal of evidentiary rulings would conserve judicial resources by avoiding the need for a retrial should the evidentiary ruling be reversed on appeal, that is rarely a sufficient basis for departing from the ordinary rule that appeals must await the end of the case and final judgment. Indeed, were the

rule otherwise, interlocutory appeal would be the norm rather than a narrow exception. *See Pollock & Riley, Inc. v. Pearl Brewing Co.*, 498 F.2d 1240, 1246 (1974) (pretrial rulings as to admissibility of evidence not ordinarily certifiable under 28 U.S.C. 1292).

* * *

We recognize that 28 U.S.C. 1292(b) affords the courts flexibility in determining whether to hear an interlocutory appeal and that judicious use of this procedure can conserve the resources of the courts as well as the litigants. But piecemeal appeal of issues that are not controlling questions of law likely to advance the termination of the litigation erodes the rule that appeal must in most instances await final judgment. Such appeals impair rather than further the interests in judicial economy -- interests that include this Court's interest in avoiding a succession of piecemeal appeals in the same litigation. The petitions now before the Court do not meet the section 1292(b) criteria or otherwise warrant review at this stage. They should accordingly be denied.

CONCLUSION

The petitions for interlocutory appeal should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on July 20, 2015, I electronically filed the foregoing response in opposition to petitions for permission to appeal using the Court's CM/ECF system, which constitutes service under the Court's rules.

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