TEXAS ASSOCIATION OF DEFENSE COUNSEL

DEVELOPMENTS IN WHITE COLLAR CRIMINAL DEFENSE AND INTERNAL INVESTIGATIONS

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PREVENTING DEFENDANTS FROM USING UNTAINTED PROPERTY TO PAY DEFENSE COUNSEL VIOLATES SIXTH AMENDMENT'S RIGHT TO SECURE THEIR COUNSEL OF CHOICE

***Luis v. United States*, 578 U.S. ___ (2016)**

In a major victory for defendants accused of criminal violations of False Claims statutes, federal health care laws and banking laws, on March 30, 2016, the United States Supreme Court in *Luis v. United States*, 578 U.S. ___ (2016), struck down the Court of Appeals for the Eleventh Circuit's affirmation of a trial court order freezing untainted, "substitute" assets. The Supreme Court ruled that preventing defendants from using untainted property to pay defense counsel violated the Sixth Amendment's right to secure their counsel of choice. As a result, defendants are now better able to use assets unrelated to criminal allegations to hire defense counsel and mount a strong defense.

Before the *Luis* ruling, prosecutors used their broad statutory authority for pretrial asset restraint as a tactical advantage. When indictments alleged false claims against the government, health care fraud, or banking violations, 18 U.S.C. § 1345 allowed courts, before trial, to freeze not only the proceeds of the alleged crime and assets traceable to the crime, but also the defendant's wholly unrelated assets that amounted to "property of equivalent value" to the tainted assets. In banking, false claims, and health care indictments—which often allege multi-million dollar losses—pretrial freeze orders covering these "substitute" assets often precluded defendants with meager unfrozen assets from retaining qualified defense counsel.

In a 5-3 plurality opinion, Justice Stephen Breyer recognized the dire strategic disadvantage such freeze orders create for criminal defendants. The Court held that "the pretrial restraint of legitimate, untainted assets needed to retain counsel of choice violates the Sixth Amendment." The Court recognized the important difference between assets traceable to the alleged crime and, thus, subject to pretrial freezing, and other, unrelated assets belonging to the defendant. It explained that "[t]he property at issue here, however, is not loot, contraband, or otherwise 'tainted.' It belongs to the defendant." Justice Breyer further held that this distinction "… is thus an important one, not a technicality. It is the difference between what is yours and what is mine."

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As a result of the *Luis* decision, defendants facing indictment for False Claims, health care, and banking violations will be much better able to retain counsel of their choice and advance a formidable defense. Likewise, defense counsel should be prepared to demand strict, evidence-based tracing of all assets subject to a freeze order to ensure that only "tainted" assets are restrained from use for retaining counsel.

SIXTH AMENDMENT RIGHT TO SPEEDY TRIAL DOES NOT APPLY ONCE A DEFENDANT HAS BEEN FOUND GUILTY AT TRIAL OR HAS PLEADED GUILTY TO CRIMINAL CHARGES AND, THEREFORE.DOES NOT IN AND OF ITSELF PROTECT A DEFENDANT FROM LENGTHY SENTENCING DELAYS

***Betterman v. Montana*, .578 U.S. ___ (2016)**

On May 19, 2016, the United States Supreme Court, in *Betterman v. Montana*, .578 U.S. ___ (2016), held that the Sixth Amendment's speedy trial clause does not apply once a defendant has been found guilty at trial or has pleaded guilty to criminal charges and, therefore, does not apply to delayed sentencing.

In that case, Petitioner Betterman, who had pleaded guilty to a state court charge, spent over 14 months in jail awaiting sentencing. The Supreme Court noted that "the holdup, in large part, was due to institutional delay", with the presentence report having taken nearly five months to complete; the trial court having taken several months to deny two presentence motions; and the trial court having been slow in setting a sentencing hearing. Betterman was eventually sentenced to seven years in prison, with four of those years suspended, leading him to argue that the 14-month gap between conviction and sentencing having violated his speedy trial right. He further argued that an appropriate remedy for the delay in his sentencing would be reduction of his sentence by 14 months.

In rejecting Betterman's arguments, the Supreme Court explained that criminal proceedings generally occur in three discrete phases and that there are checks against delay for each particular phase.

In the first phase, the Court said, the government investigates to determine whether to arrest and charge a suspect. Statutes of limitations are the primary protection against delay and the due process clause safeguards against fundamentally unfair prosecutorial conduct in the first stage, during which the suspect remains at liberty.

The Supreme Court further stated that when the second phase begins, upon the defendant's arrest or the defendant's having been formally charged, the suspect is shielded by the presumption of innocence. The speedy trial act clause, which attaches at this phase, implements the presumption of innocence by minimizing the amount of time under which a presumptively innocent person "should …languish under an unresolved charge," "preventing undue and oppressive incarceration prior to trial…minimiz[ing] anxiety and concern accompanying public accusation[,] and limit[ing] the possibilities that long delay will impair the ability of an accused to defend himself.

The Court explained that at the third stage of the criminal justice process, between conviction and sentencing, while "the Constitution's presumption-of-innocence protective speedy trial right is not engaged," Defendants do have safeguards in federal and state statutes and rules to protect against undue delay in sentencing. The Supreme Court also pointed out that in appropriate circumstances, a defendant

seeking relief or redress from undue delay in sentencing may nevertheless find relief under the "more pliable standard" of the due process clauses of the Fifth and Fourteenth Amendment. (The Court noted that "relevant considerations [under that standard] may include the length of and reasons for delay, the defendant's diligence in requesting expeditious sentencing, and prejudice.") As Betterman had not preserved a due process challenge and had advanced only a Sixth Amendment speedy trial act clause claim, however, that potential relief was not available to him.

The Court explicitly reserved the questions of whether (1) the speedy trial clause applies to bifurcated proceedings in which, at the sentencing state, facts that could increase the prescribed sentencing range are determined and whether (2) the right reattaches upon renewed prosecution following a defendant's successful appeal, when the defendant "again enjoys he presumption of innocence." See *Betterman* at fn. 2. The Court also was careful to point out that it did not "mean to convey that provisions of the Sixth Amendment protecting interests other than the presumption of innocence are inapplicable to sentencing,' noting that it has previously held [in *Mempa v. Rhay,* 389 U.S. 128, 135-137 (1967] that the right to defense counsel extends to some post conviction proceedings. See *Betterman* at fn. 4.

Justice Ginsburg delivered the opinion for a unanimous court. Justices Thomas, Alito, and Sotomayor filed concurring opinions.

WITH THE YATES MEMORANDUM, THE DEPARTMENT OF JUSTICE SETS OUT REQUIREMENTS FOR OBTAINING CORPORATE COOPERATION

On September 9, 2015, the U.S. Department of Justice (DOJ) announced that it is refocusing its efforts on individual accountability in civil and criminal investigations of corporate misconduct. The policy change has ramifications for companies' officers and employees as well as counsel involved in internal or government investigations. The policy applies broadly to financial services, healthcare, manufacturing and other industries alike and will be enforced by all divisions of the DOJ, including civil, criminal, antitrust, tax and environmental divisions.

Deputy Attorney General Sally Quillian Yates explained in her memorandum (Yates Memo) that companies will have a greater responsibility to provide information to the DOJ if they want to receive credit for their cooperation. Under the Yates Memo, the DOJ will revise several internal guidance documents relied upon by the DOJ attorneys in the prosecution of companies.

One key feature of the policy is that companies will be required to assist the DOJ's efforts in identifying and prosecuting culpable individuals so that the company can get credit for cooperating in the investigation. Though branded a new policy, this plan to prosecute individuals is a reiteration, with less flexibility, of DOJ's longstanding approach.

In October 2014, Assistant Attorney General Leslie Caldwell foreshadowed this policy shift with remarks she gave focusing on means the DOJ can utilize to get companies to cooperate in ongoing investigations, including investigations of responsible individuals. She announced, "[t]he prosecution of culpable individuals—including corporate executives—for their criminal wrongdoing continues to be a high priority for the [DOJ]" (Caldwell Speech, October 1, 2014, Atlanta, GA).

The DOJ identified four reasons for instituting the policy "change": (1) pursuing individuals will deter future illegal activity; (2) the policy incentivizes change to corporate behavior; (3) it will ensure that proper parties are held accountable for their actions; and (4) it will promote the public's confidence in the justice system. This rationale is not new—rather, it affirms established DOJ objectives.

The DOJ has articulated six ways in which the DOJ will enforce the new policy in civil and criminal matters. Deputy Attorney General Yates expanded on these actions in a speech delivered on September 10, 2015:

1. To be eligible for any cooperation credit, corporations must provide the DOJ with all relevant facts about the individuals involved "regardless of their position, status or seniority in the company" and provide all relevant facts about their misconduct. (Yates Speech, September 10, 2015, New York, NY)

2. Government investigations should focus on individuals from the inception of the investigation "regardless of whether the investigation begins civilly or criminally." (Yates Speech)

3. Civil and criminal attorneys at the DOJ will be directed to "collaborate [with each other] to the full extent permitted by law at all stages of the investigation" so that "criminal prosecutors don't need to go back and build a new case after the civil attorneys finish their inquiry—or vice versa." (Yates Speech)

4. Absent extraordinary circumstances, no resolution of a corporate investigation will provide protection from criminal or civil liability for any individuals.

5. Corporate cases should not be resolved without a clear plan to resolve related individual cases before the statute of limitation expires; any declinations as to individuals in such cases must be memorialized.

6. Civil attorneys should consistently focus on individuals as well as the company and evaluate whether to bring suit against an individual based on considerations beyond that individual's ability to pay.

In order to get cooperation credit in a DOJ investigation, the company must determine the employee responsible for the wrongdoing and disclose all non-privileged evidence. There will be "[n]o more partial credit for [company] cooperation that does [not] include information about individuals" (Yates Speech). For example, in the civil context, in order to qualify for reduced damages provisions under the False Claims Act, a company must identify culpable individuals as well as produce material facts relating to the individuals' involvement in the corporate violations. In a criminal matter, a prerequisite of cooperation is disclosure of information, potentially including employee statements.

Additionally, a company's disclosure obligations will not end at the resolution of the corporate investigation; going forward, corporate plea and settlement agreements must include a provision that companies will continue to provide relevant information regarding individuals implicated in the

wrongdoing. Failure to cooperate will be considered a material breach of the agreement and grounds for revocation or application of stipulated penalties.

This policy, which applies to all new and ongoing investigations and is not limited to Wall Street, raises significant concerns. For companies and employees, the policy underscores the importance of deciding early on when separate counsel for employees is needed. It also raises an issue of whether employee interviews and other potential attorney/client information will become a part of a disclosure to DOJ. While the policy refers to using only "non-privileged" information, critical information is often derived from potentially privileged employee interviews during the course of internal investigations. It remains to be seen why this "new" policy was announced because it has been DOJ's established position to hold individuals accountable as well as companies. The six outlined changes in implementing this policy could make internal investigations longer and more difficult to resolve as officers and employees will be unwilling to provide information, especially without the presence of their counsel for fear that they will be subject to individual liability. The DOJ's harsher tone certainly raises concerns for companies subject to civil and criminal investigations.

DEPARTMENT OF JUSTICE'S INCREASED SCRUTINY OF ALL WHISTLEBLOWER COMPLAINTS FOR POTENTIAL CRIMINAL PROSECUTION

Counsel who handle civil False Claims Act cases also should bear in mind that in September 2014, before the issuance of the Yates Memo, Assistant U.S. Attorney General Leslie Caldwell announced that DOJ's Criminal Division Fraud Section would be increasing its scrutiny of whistleblower complaints alleging fraud against the government for potential criminal prosecution of health care fraud, financial fraud, and procurement fraud cases under the False Claims Act. As a result, Assistant Attorney General Caldwell stated, prosecutors in the Criminal Fraud Section would immediately begin reviewing civil qui tam cases when the government receives them to determine whether to open a parallel criminal investigation. In addition, she stated, this policy would increase coordination between Main Justice prosecutors and the U.S. Attorneys' offices throughout the country. Of special interest to Texas counsel should be the health care fraud strike forces operating in Houston and Dallas.

DEPARTMENT OF JUSTICE LAUNCHES PILOT PROGRAM TO ENCOURAGE VOLUNTARY SELF-REPORTING OF FOREIGN CORRUPT PRACTICES ACT VIOLATIONS

On April 18, 2016, DOJ Assistant Attorney General Leslie Caldwell announced the launch of a pilot program to encourage voluntary self-reporting for Foreign Corrupt Practices Act (FCPA) violations. The pilot program, which is effective for only one year from its start date of April 5, 2016, lays out conditions under which companies that self-report violations of the FCPA can obtain considerable mitigation of penalties and, potentially, total avoidance of prosecution.

According to AAG Caldwell, companies that self-report under the pilot program's terms can obtain reductions of up to 50 percent on fines and "should not require" a monitor to ensure their compliance with the FCPA. To earn the benefit of the pilot program, a company must:

1. Make a *self-disclosure* about its violations of the FCPA;
2. That is *timely* and *voluntary*;
3. Disclose all relevant facts and wrongdoers; and

4. *Remediate* the violation appropriately.

Companies that satisfy all four conditions will be eligible for the full 50 percent reduction, while those that cooperate but do not make voluntary self-disclosures will be eligible for up to 25 percent reduction. The guidance provides that "if a company chooses not to voluntarily disclose its FCPA misconduct, it may receive limited credit if it later fully cooperates and timely and appropriately remediates—but any such credit will be markedly less than that afforded to companies that do self-disclose wrongdoing." In either case, all profits from the violation must be disgorged.

The pilot program for FCPA cases marks the next step in the DOJ's campaign to encourage self-reporting among companies following last year's Yates Memo. This new pilot program continues to shift the DOJ's emphasis from recovering the greatest amount of money lost to prosecuting the most culpable persons. As announced by the Yates Memo in September 2015, corporations must provide *all* relevant facts to the government once a violation is discovered.

Although the pilot program aims to strike a conciliatory note to companies, it will work in concert with, not in lieu of, extant FCPA programs and provisions. That the DOJ has doubled the number of prosecutors in its FCPA Unit and added three squads of FBI agents devoted to FCPA violations should serve as a sobering reminder that the DOJ has taken and continues to take an adversarial approach to FCPA compliance. As the end of the Obama Administration draws closer, the DOJ is encouraging companies to self-disclose as well as fortifying its own resources to uncover violations that may have previously gone unnoticed, a point which Caldwell's announcement hammers home with its emphasis on "transparency.

The pilot program presents new opportunities for companies to mitigate penalties through self-disclosure, but it remains to be seen how it will comport with the DOJ's established practice of "holding individuals accountable" as announced in last year's Yates memo. Though there has been a renewed emphasis on self-reporting practices in the past year, the basic tenets of corporate cooperation and individual culpability have long been the guiding principles for the DOJ. No matter what the DOJ cooperation policy, the indisputable lesson is that companies need robust and comprehensive FCPA compliance programs to protect themselves and their employees.

THE DEPARTMENT OF JUSTICE APPOINTS ITS FIRST COMPLIANCE COUNSEL WITHIN THE CRIMINAL DIVISION

On November 2, 2015, DOJ announced the appointment of Hui Chen as its first Compliance Counsel within the Criminal Division. Ms. Chen has had experience in both federal law enforcement and the private sector, having served as the head of anti-bribery and corruption compliance at Standard Chartered Bank and having served as an Assistant United States Attorney in Brooklyn and as a DOJ trial lawyer in the 1990's.

DOJ has indicated that Chen will lead DOJ's efforts to more rigorously assess the corporate compliance programs of companies who are under investigation, with an emphasis on the FCPA. The Compliance Counsel's recommendations will be important in deciding whether a company will face charges and in determining the appropriate level of oversight to require when companies seek to enter non-prosecution agreements. The selection of Ms. Chen suggests that DOJ is prepared to substantively

challenge companies on the effectiveness of their compliance regimes, rather than accepting assurances that whatever was in place is "good enough."

In September 2015, Deputy Attorney General Sally Yates issued a memorandum entitled *Individual Accountability for Corporate Wrongdoing*, setting forth new and aggressive enforcement policies for corporate and individual prosecution. In that "Yates Memo," DOJ emphasizes that corporations will not be credited as cooperating unless they take significant and specific actions to assist law enforcement, including providing DOJ with all information relating to wrongdoing, including naming all high-level and low-level individuals responsible. According to the Yates memo, a company "cannot pick and choose what facts to disclose. That is, to be eligible for any credit for cooperation, the company must identify all individuals involved or responsible for the misconduct."

The announcement of DOJ's new Compliance Counsel following on the heels of the announcements of other DOJ initiatives aimed at more aggressively prosecuting corporate crime and holding individual officers and employees criminally responsible (see above), when viewed together, portend a more aggressive government approach to assigning criminal responsibility for corporate violations of law and a more adversarial approach to evaluating corporate compliance programs. This development has important implications for Boards of Directors. DOJ is sending a clear signal that compliance programs cannot be static procedures or window dressing. Rather, the Board of Directors and senior management must confirm that compliance policies and processes keep up to date with evolving risks.

D.C. CIRCUIT AGAIN PROTECTS ATTORNEY-CLIENT PRIVILEGE OVER INTERNAL INVESTIGATION MATERIALS

On August 11, 2015, the U.S. Court of Appeals for the District of Columbia Circuit issued its second writ of mandamus in the same action to vacate the District Court's order requiring the disclosure of privileged materials. The decision came in *In re Kellogg, Brown & Root, Inc.*, No. 14-5319, where plaintiff and whistleblower Harry Barko alleged that the defendant defense contractor falsely billed and paid kickbacks related to Iraq War subcontracts. Previously, the District Court ordered that KBR must turn over 89 reports created in KBR's internal investigation of possible False Claims Act violations. In June 2014, the D.C. Circuit issued its first writ of mandamus, reversing the District Court's order. In that opinion, the D.C. Circuit held that because providing legal advice was one reason the investigation reports were created, attorney-client privilege protected their disclosure even if the company had additional, overlapping reasons to create the reports, such as complying with regulatory mandates.

In this case, the plaintiff argued that KBR waived the privilege covering the reports when its in-house attorney reviewed them in preparation for his Rule 30(b)(6) deposition. After the District Court ordered disclosure, the D.C. Circuit again vacated the lower court's order, noting that the attorney had no choice but to review documents related to the internal investigation in order to prepare adequately for his deposition. The D.C. Circuit further noted that if questioning deponents on facts related to an assertion of a privilege would entitle an adversary to production of the privileged materials, "the attorney client privilege and work product protection would mean nothing at all."

The Circuit Court recognized that "… the District Court's rulings would ring alarm bells in corporate general counsel offices throughout the country about what kinds of descriptions of investigatory

and disclosure practices could be used by an adversary to defeat all claims of privilege and protection of an internal investigation." The D.C. Circuit opinion restores certainty that attorneys may protect the confidentiality of communications made in the course of an internal investigation.

While the D.C. Circuit vacated the disclosure order in full, it did signal that not *all* materials created in an internal investigation are necessarily afforded the same level of protection. In particular, the Circuit Court analyzed communications from investigators, working at the direction of in-house counsel, to in-house attorneys. Because the investigators step into the shoes of the attorney for privilege purposes, the D.C. Circuit held that such communications are essentially attorney-to-attorney communications—not attorney-client communications—and their protection from disclosure is governed by the attorney work product doctrine. Unlike attorney-client communications, non-opinion work-product is subject to exceptions upon a showing of "substantial need" and "undue hardship." Still, the D.C. Circuit opinion offers important clarity on the scope of attorney-client privilege and allows attorneys to conduct internal investigations with their reports remaining non-discoverable when the appropriate steps are taken.

CMS FINALIZES 60-DAY RULE

On February 12, 2016, the Centers for Medicare & Medicaid Services ("CMS") published its much-anticipated final regulations ("Final Rule") regarding the 60 day reporting and returning of Medicare Part A and B overpayments. 81 FR 7654-7684. Since the enactment of the Affordable Care Act on March 23, 2010, there has been much confusion surrounding the requirements of Section 1128J(d) of the Social Security Act, which requires a person who has received an overpayment to report and return the overpayment within 60 days after the overpayment was "identified" or the date any corresponding cost report is due, whichever is later (the "60-Day Rule").

While the Final Rule provides a great deal of detail regarding the application of the 60-Day Rule, the critical points are (1) what it means to "identify" an overpayment and (2) what is the established lookback period. The Final Rule notes that a "person has identified an overpayment when the person has or should have, through the exercise of reasonable diligence, determined that the person has received an overpayment and quantified the amount of the overpayment." *Id*. CMS describes "reasonable diligence" as including "both proactive compliance activities conducted in good faith by qualified individuals to monitor for receipt of overpayments and investigations conducted in good faith and in a timely manner by qualified individuals in response to obtaining credible information of a potential overpayment." 81 FR 7661. The Final Rule clarifies that the 60-day clock does not begin running until after the "reasonable diligence" period has concluded, which "is at most 6 months from receipt of credible information, except in extraordinary circumstances." 81 FR 7662. In addition, CMS confirmed that an overpayment is not "identified" until the amount of the refund has been "quantified." 81 FR 7661. As a practical matter, providers and suppliers may have up to 8 months (6 months for timely investigation and 2 months for reporting and returning) to comply with the 60-Day Rule.

The Final Rule also limits the lookback period to 6 years. *Id*. Scaling back from the 10-year lookback period initially proposed, CMS settled on the 6-year lookback period to be consistent with the federal False Claims Act. In addition, CMS found that many providers and suppliers retain records and claims data for between 6 and 7 years as a result of various existing federal and state requirements. CMS concluded that the 6-year lookback period was appropriate to avoid imposing unreasonable additional burden or cost on providers and suppliers. 81 FR 7654.

The Final Rule became effective March 14, 2016. Thus, all providers and suppliers reporting and returning Medicare Part A or B overpayments on or after March 14, 2016—even overpayments received prior to this effective date—must comply with the new regulatory requirements.

CASES TO WATCH IN THE COMING MONTHS

***Universal Health Services, Inc. v. United States ex rel. Escobar,* No. 15-7, 2015 WL 4078340 (U.S. Dec. 4, 2015) in the United States Supreme Court**

The government and relators frequently allege that simply by submitting claims to the government for payment or reimbursement, the entity submitting the claim is "impliedly certifying" that it has complied with all applicable laws, regulations, and contracts relevant to the claim, such that if it has not, in fact, so complied, it has violated the conditions of payment for such claim, and the claim is "false".

The Supreme Court granted Universal Health Services' petition for certiorari in *Universal Health Services, Inc. v. United States ex rel. Escobar* to resolve a split among the circuits as to whether the "implied certification" claim is a viable one. Universal Health Services' petition presented the following questions:

(1) Whether the "implied certification" theory of legal falsity under the FCA--applied by the First Circuit below but recently rejected by the Seventh Circuit [2]--is viable; and

(2) Whether, if the "implied certification" theory is viable, a government contractor's reimbursement claim can be legally "false" under that theory if the provider failed to comply with a statute, regulation, or contractual provision that does not state that it is a condition of payment, as held by the First, Fourth, and D.C. Circuits; or whether liability for a legally "false" reimbursement claim requires that the statute, regulation, or contractual provision expressly state that it is a condition of payment, as held by the Second and Sixth Circuits.

The case was argued before the Supreme Court on April 19, 2016.

***United States ex rel. Brianna Michaels and Amy Whitesides v. Agape Senior Community, Inc.*, No. 15-2145(L), 15-2147 in the United States Court of Appeals for the Fourth Circuit**

Recent years have seen the government and whistleblowers attempt to use extrapolation from statistical sampling to carry their burden of proof instead of having to prove all the elements—including damages-- of a False Claims Act case as to each individual claim. Defendants have countered with the argument that sampling defies the entire statutory scheme of the False Claims Act by relieving claimants

[2] Universal Health Services' petition for certiorari states that "the Fifth Circuit has not explicitly rejected the implied certification theory, but has not adopted it either", noting that in *U.S. ex rel. Steury v. Cardinal Health, Inc. (Steury I)*, 625 F.3d 262, 268 (5th Cir. 2010), the Fifth Circuit, in affirming dismissal of the case, stated that "this court has not yet recognized the implied-certification theory…The FCA is not a general 'enforcement device' for federal statutes, regulations, and contracts" and further noting that in *Steury II, U.S. ex rel. Steury v. Cardinal Health, Inc.*, 735 F. 3d 202, 207 (5th Cir. 2013), the Fifth Circuit, once again affirming dismissal, stated that "this court has not definitively ruled on the cognizability of implied false certification claims."

of their burden of proof and shifting the burden of proof to defendants to disprove liability and damages as to each and every claim.

In this case, Relators, former employees of Agape Senior Community, alleged that Agape had submitted thousands of false claims for reimbursement by Medicare. The trial court, the United States District Court for the District of South Carolina, ruled it would not allow Relators to use statistical sampling and extrapolation, based on a small sample of alleged false claims, to prove liability and damages. The trial court certified the sampling and extrapolation question for interlocutory appeal to the Fourth Circuit.

On March 24, 2016, the American Health Care Association (AHCA) filed an *amicus curiae* brief on behalf of the defendants-appellees. As AHCA succinctly argued,

> Relators were required to prove that each allegedly false claim for each patients was (1) actually submitted, (2) objectively false, and (3) knowingly made, or caused to be made, by Agape. Given the significant variations among the many individual claims, patients, and subjective medical judgments involved, however, no statistical methodology could substitute for the claim-by-claim and patient-by-patient evidence required to show that, *in fact*, a given patient was improperly deemed eligible for hospice care or a given claim was knowingly submitted. ….Further, allowing sampling would violate defendants' fundamental due proves rights to defend themselves against every claim, or even to know which particular claims out of thousands, or even tens or hundreds or [sic] thousands, are alleged to be false. It would also usurp the jury's constitutionally enshrined fact-finding function.

Brief of *Amicus curiae* at 4-5.