NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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Re: The Commonwealth of Virginia *ex rel.* Hunter Laboratories, LLC and Chris Riedel v. Quest Diagnostics Incorporated, *et al.*

Dear Counsel:

This matter is before the Court after the Fourth Circuit Court of Appeals remanded the case to the Federal District Court. The remand instructed the District Court to transfer the case to this court for final disposition. The Court of Appeals found that the

District Court lacked subject matter jurisdiction to adjudicate the "Motion to Determine the Amount of Relators Share" filed by the Commonwealth of Virginia.

For the following reasons, the Motion to Determine the Amount of Relators Share is resolved in favor of the Relators and the Court finds that the Relators are entitled to 28% of the entire amount established in the Settlement Agreement.

**Background**

This motion returns to the Fairfax Circuit Court with a complex background and procedural history. Plaintiffs Hunter Laboratories, Inc. and Chris Reidel (together "Relators") filed this suit in the Circuit Court for Fairfax County on December 9, 2007 alleging violations of the Virginia Fraud Against Taxpayers Act ("VFATA"). Acting on behalf of the Commonwealth, the Relators alleged that Quest Diagnostics, among other named defendants (together "Defendants"), defrauded the Commonwealth's Medicaid program by engaging in pricing fraud and unlawful kickbacks. Pursuant to *qui tam* procedure[1], the Commonwealth was given an opportunity to investigate, intervene, and elect to prosecute the case. The case was placed under seal from December 9, 2007 until April 11, 2013, when the Commonwealth concluded its investigation. At that point, the Commonwealth declined to prosecute the case and the Relators moved forward to litigate the matter.

On August 8, 2013, the case was unsealed and the Defendants timely removed the case to the U.S. District Court for the Eastern District of Virginia, Alexandria Division ("District Court"). While the matter was pending in federal court, the parties settled the case.

Defendant Quest agreed to pay $1,250,000.00 to the Commonwealth in order to resolve certain past and all future civil liability. The Settlement Agreement ("Settlement

[1] This Court incorporates the *Qui Tam Plaintiff's* explanation of *qui tam*, as referenced in the Motion to Determine Amount of Relator Share at footnote 4. The phrase *qui tam* is short for "*qui tam pro domino rege quam pro se ipso in hac parte sequitur.*" The translation for the Latin term is "who pursues this action on our Lord the King's behalf as well as his own." *See Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 769 n.1 (2000).

*Qui tam* actions allow private parties to enforce the law, sue on behalf of the Government, and recover a portion of any resulting reward. *United States ex rel. Zizic v. Q2Administrators, LLC*, 728 F.3d 228, 231 n.1 (3d Cir. 2013). Pursuant to Va. Code § 8.01-266, a *qui tam* Plaintiff in Virginia has the right to proceed with the action on his own after the Commonwealth declines to intervene.

Agreement") was executed on September 25, 2014 and specifically included a release period[2] to forgive Quest of any liability for their conduct during the agreed time period.

Two days after all parties had signed the Settlement Agreement, the Commonwealth filed a Motion for Relators' Share Disbursement in District Court on September 26, 2014. In that Motion, the Commonwealth argued that while the parties agreed the Relators were statutorily entitled to receive a portion of the settlement proceeds[3], and the agreed percentage was 28% of the settlement proceeds, the disbursement was to be calculated from the remaining funds in the Commonwealth's possession after reimbursing the United States Government.[4] The Relators understood the Settlement was 28% of the gross, rather than the net proceeds, which amounted to $350,000.00.

Ultimately this matter presents as a dispute over what the statutory language in Va. Code § 8.01-216.7(B) requires in this particular context. As indicated, the Court construes the statute in favor of the Relators.

In support of its position, the Commonwealth argues two points: first, the VFATA does not apply retroactively and the Relators are only entitled to recover their statutory share from the point when VFATA was enacted, forward. Second, the Commonwealth argues that the language of Va. Code § 8.01-216.7(B), supports their position that the Relators may only receive a percentage of the funds which the Commonwealth retains after the required federal payment.

Since there is sparse Virginia law on the matter, the Commonwealth looked to interpretations of the Federal False Claims Act ("FCA") for the position that VFATA was not drafted to be retroactive. Therefore, the Commonwealth argues that the Relators are only entitled to 28% of the Settlement Agreement from 2002 forward and only from the Commonwealth's net proceeds of $496,161.00. The practical implementation of that argument would result in a payment to the Relators of $138,925.00, or 11% of the $1.25 million settlement amount. This Court disagrees with that interpretation.

[2] The Settlement Agreement provided a release to Quest for conduct that occurred from November 1, 1997 through September 24, 2014, the day the Agreement was signed by all parties.

[3] Va. Code § 8.01-216.7(A) & (B) allows *qui tam* plaintiffs to recover between 15% and 25% if the Commonwealth intervenes or between 25% and 30% if it does not.

[4] 42 U.S.C. § 1369b(d)(3)(A) requires the Commonwealth to provide the United States Government a portion of the payment obtained through the Settlement Agreement as a result of the *qui tam* action in a Medicaid case. In this case, the amount paid to the federal government would be $681,086.00.

## Standard of Review

The issue of subject matter jurisdiction upon removal was never litigated in the district court and the Fourth Circuit Court of Appeals, *sua sponte*, found that this state-law claim was not subject to federal review. Moreover, the Settlement Agreement clearly stated that venue for any disputes related to the agreement would be in state court. [5]

Considering a question that requires statutory interpretation begins with the Court attempting to "ascertain and give effect to the intention of the legislature." *Andrews v. Shepherd*, 201 Va. 412, 414 (1959); *see also Conyers v. Martial Arts World of Richmond, Inc.*, 273 Va. 96, 104 (2007) (citing *Boynton v. Kilgore*, 271 Va. 220, 227 (2006)). If a statute is subject to more than one interpretation, the Court "must apply the interpretation that will carry out the legislative intent behind it." *Martial Arts World of Richmond*, at 104 (citing *Garrison v. First Federal Savings & Loan Ass'n*, 241 Va. 335, 340 (1991)). It is well settled law in Virginia that a Court, in interpreting a statute, must apply the plain language of the statute, unless the "terms are ambiguous or applying the plain language would lead to an absurd result." *Baker v. Commonwealth*, 284 Va. 572, 576 (2012); *Boynton v. Kilgore*, 271 Va. 220, 227; *Woods v. Mendez*, 265 Va. 68, 74-75 (2003); *see also*, *Williams v. Commonwealth*, 265 Va. 268, 271 (2003).

## Analysis

This is question of first impression for this Court and clearly requires statutory interpretation. Va. Code § 8.01-216.7(B), in relevant part, states:

> "If the Commonwealth does not proceed with action, the person bringing the action or settling the claim shall receive an amount that the court decides is reasonable for collecting the civil penalty or damages. The amount shall not be less than twenty-five percent and not more than thirty percent of the proceeds of the award or settlement and shall be paid out of the proceeds.
>
> (emphasis added).

[5] See Settlement Agreement, ¶18 stating, "This Agreement is governed by the laws of the State and venue for addressing and resolving any and all disputes relating to this Agreement shall be the state courts of appropriate jurisdiction of the State." Venue is proper in the Circuit Court of Fairfax County where the case was initially filed.

The Commonwealth was given an opportunity to intervene and prosecute this matter and declined to do so. As a result, the Relators expended substantial time, energy, and resources to prosecute this matter on behalf of the Commonwealth. While there is no dispute that the Relators are entitled to 28% of the recovery, the issue is the interpretation of what the legislature meant by the term "proceeds" in Va. Code § 8.01-216.7(B).

It is important to note that the VFATA is based on the FCA and mirrors its provisions. *Lewis v. City of Alexandria*. 287 Va. 474, 489 (2014). The General Assembly adopted the "same substantive language" in the FCA when originally enacting the VFATA, indicating the legislature's intent for state courts to construe the state statute as the federal courts construe the federal statute. *Id.* at 487. Due to the lack of Virginia jurisprudence interpreting the VFATA, FCA cases provide useful guidance for this Court to interpret the VFATA. *See United States ex rel. DeCesare v. Americare in Home Nursing*, 757 F. Supp. 2d 573, 582-90 (E.D. Va. 2010).

"*Qui Tam* relators' share of the proceeds must be based on a claim-by-claim analysis" and relators will not be entitled to "any share of the settlement attributable to claims subject to dismissal" under the U.S. Code. *See United States ex rel. Merena v. SmithKline Corp.*, 205 F.3d 97 (3d Cir. 2000). In the *SmithKline* case, the court was deciding what percentage of the settlement proceeds the relators in that case should receive. While factually distinct from the case at bar, because the percentage here is not disputed and in *SmithKline* the government intervened, it is relevant to note that the Third Circuit relied upon the language of the settlement agreement between the government and the defendant when rendering its decision. That court specifically determined that the settlement allocated payment to the realtors' claims as a whole in its analysis and this Court will do the same.

This Court finds that the legislative intent of the VFATA, much like the intent of the FCA, is to encourage whistleblowers and to reward them for providing substantial information to the government that exposes fraud. *See United States ex rel. Barajas v. United States*, 258 F.3d 1004, 1012 (9th Cir. 2001); *United States ex rel. Bledsoe v. Community Health Sys.*, 342 F. 3d 634, 648-49 (6th Cir. 2003). Additionally, once identified, the Commonwealth elected not to pursue litigation against those who defrauded it, requiring the Relators to pursue the bad actors on the Commonwealth's behalf. In that regard they were successful.

The Commonwealth chose not to intervene in this matter and as a result, it would be inequitable for the Relators to be undercut for performing a valuable service on behalf of the government, pursuant to VFATA. Inevitably, such a result could create a chilling

effect on the willingness of whistleblowers to bring claims under the VFATA. It would be poor public policy to construe the intent of the VFATA provisions to allow the outcome the Commonwealth is suggesting.

It is also important to note the statutory construction of the language at issue, specifically, the use of the disjunctive "or." The use of "or" in the context of the statute clearly indicates that the Relator is entitled to the "proceeds of the award," meaning something decided by the trier of fact, **or** "the settlement."(emphasis added). Since the parties in this case chose the latter and entered into a Settlement Agreement, the Commonwealth is bound to the terms of that agreement. The Commonwealth only realized there was an issue at the time of the proposed disbursement and never took the time to discuss this prior to the signing of the Settlement Agreement. The Court need not adjudicate the meaning of the "proceeds of the award." The parties decided that for themselves and only determining how the Settlement Agreement should be carried out is left before the Court.

Additionally, this Court finds that the retroactivity of VFATA is irrelevant in determining the amount of Relators share in this case and declines to address the issue substantively because the settlement captured, in part, timeframes occurring before the enactment of VFATA. That the Commonwealth would suggest that this Court surgically remove money from those timeframes which were obtained by the Relators and received by the Commonwealth just makes no sense.

## Conclusion

The parties in this case settled for of $1.25 million as a penalty for the fraudulent conduct perpetrated by Defendants. The Commonwealth, the Relators, and the Defendant all signed the Settlement Agreement. To hold that the Relators would be limited to 28% of the net proceeds would mean that they were only allowed 11% of the Settlement award. That is an absurd result under any objective reading of the Settlement Agreement in the context of the statute.

For these reasons the *Qui Tam* Plaintiffs' Motion to Determine Amount of Relators Share is granted and the Relators are entitled to 28% of the gross proceeds of the settlement of $1.25 million. I have entered an Order reflecting this ruling.

Very truly yours,

Thomas P. Mann