On September 13, 2019, the Ninth Circuit heard oral argument in the False Claims Act Case of *Winter v. Gardens* (18-55020). The government, as an *amicus* in the case, carried the bulk of the argument on behalf of the plaintiff side even though the government had declined to intervene in the case. Having watched the oral argument, health care companies in the western states should expect the Court to reverse the district court and hold that doctors, when admitting patients to a hospital, can potentially falsify the records in order to justify the medical necessity of the admissions to an acute care hospital. The district court had dismissed the nurse-relator’s complaint because the district court believed, as a matter of law,
that the opinions of two admitting physicians could not legally be refuted by the nurse’s opinion regarding the admissibility of those patients transferring from a nursing home.

Presiding Judge Rawlinson drilled into the appellees’ lawyers’ attempt to uphold the approach of the district court. She asked one of the appellees’ counsel what the Court’s holding would be if the Court affirmed, and she summarized it as “a nurse cannot second guess a doctor.” She was skeptical of the answers and reacted strongly to the idea that a nurse could not challenge a doctor’s opinion. Her colleague, Judge Bennett, jumped in on the same concept and focused on the procedural posture of the case; he had little interest in the sanctity of a physician’s opinion. The third member of the panel, Judge Owens, listened carefully but did not reveal his views during the argument.

One of Appellees’ counsel sought to spark a discussion of the recent Eleventh Circuit opinion in AseraCare (see our post on that decision here), but the panel did not seem interested, thereby potentially setting up a circuit split depending on the holding in Winter. Appellees’ counsel also sought to invite the Court to affirm on other grounds not decided below, including materiality and scienter, but it was clear that Judge Rawlinson was not likely to sign on to any opinion that reached out in that way, to try to save the ruling below. The real question is whether the government will now wade into the case and seek to take over the prosecution of this qui tam after the Ninth Circuit rules on the viability of the complaint.

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National Law Review, Volume IX, Number 261

Source URL: https://www.natlawreview.com/article/ninth-circuit-expected-to-rule-doctors-can-be-wrong-winter-v-gardens-false-claims