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SCOTUS May Resolve Circuit Split on the Specificity Required of False Claims Act Claims: Relief or More FCA Grief for Providers?

June 17, 2022

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Currently, providers have different risks of potential False Claims Act (FCA) liability depending on where they are geographically located due to the difference in the standards required by the U.S. Courts of Appeals regarding the level of specificity when relators (whistleblowers) plead FCA violations. The FCA imposes civil liability on any person requesting government funds or property who "knowingly presents... a false or fraudulent claim for payment or approval." 31 U.S.C. § 3729(a)(1)(A). A pleading, "alleging fraud or mistake... *must state with particularity* the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b) (emphasis added). And the Circuits of the U.S. Courts of Appeals are split on what information is required in a relator's FCA complaint under Rule 9(b) to avoid a dismissal of the complaint. The U.S. Supreme Court may resolve the difference in the standards if it grants certiorari in *Johnson, et al. v. Bethany Hospice & Palliative Care of Ga., LLC*.

The Circuit Split

Two circuit courts have concluded there should be a high threshold of "particularity" for FCA pleadings under Rule 9(b) because of the potential criminal

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consequences and treble damages for an FCA violation. The Eleventh and Sixth Circuit Courts of Appeals agree that an FCA complaint should include an example of a specific fraudulent claim made to the U.S. government. *Johnson, et al. v. Bethany Hospice & Palliative Care of Ga., LLC,* 853 F. App'x 496, 501 (11th Cir. 2021) (finding a relator must allege an actual submission of a false claim with "some indicia of reliability"); *U.S. ex rel. Owsley v. Fazzi Assocs., Inc.*, 16 F.4th 192, 197 (6th Cir. 2021) (finding an FCA complaint should include a "specific representative claim").

The Seventh Circuit Court of Appeals, however, has ruled that while FCA claims should be precise and substantiated, specific details about a submitted false claim are not necessarily needed at the pleadings stage, and more specific information can be required as the litigation proceeds. *U.S. v. Molina Healthcare of Ill., Inc.*, 17 F.4th 732, 739, 741 (7th Cir. 2021) (noting a case does not have to be proven in the complaint).

Consequently, there is disagreement among the Circuit Courts of Appeals regarding whether an FCA allegation must include specific examples of false claims submitted to the U.S. government. As a result, a relator in two circuits would be required to have and plead more specific information, while a relator in the Seventh Circuit would have a much lower burden and could use the discovery process to determine if there is actually an FCA violation.

Response to the Circuit Split

The U.S. Supreme Court requested the U.S. Solicitor General's feedback on the level of specificity required in FCA allegations to address the above circuit split. Recently, the U.S. Solicitor General Elizabeth B. Prelogar responded to this request saying that the courts have "largely converged on a more flexible standard." Brief for U.S. as Amicus Curiae at 15, *Johnson, et al., v. Bethany Hospice and Palliative Care, LLC* (No. 21-462). This more flexible standard, the Solicitor General argued, requests

either a showing of specific false claims or allegations of fraud containing some "indicia of reliability" to support an inference that a false claim was submitted. *Id.* The Solicitor General stated the Circuit Courts of Appeals are generally using similar standards, with some different caveats. *Id.* at 16. The circuits, she asserted, are just coming to different decisions as they make individualized assessments of various allegations. *Id.* at 17-18. The Solicitor General stated that this pleading standard does not warrant the Supreme Court's review. *Id.* at 18.

However, in responding to the Solicitor General's brief, Petitioners challenged the notion that circuit courts have converged on a similar standard. Supplemental Brief for Petitioners at 3, *Jolie Johnson, et al., v. Bethany Hospice and Palliative Care of Ga., LLC* (No. 21-462). Rather, Petitioners asserted that the circuits are indeed split and relators and providers are subject to very different standards in understanding what must be stated with particularity. *Id.* at 4. One side of the circuit split interprets Rule 9(b)'s particularity requirement as needing particularity in alleging the specific nature of the false claims themselves, while other circuits require particularity in describing the circumstances surrounding a fraudulent scheme, leaving the specific nature of the false claims to be determined in discovery. *Id.* The latter approach may not require any specific information about claims for payment. *Id.* at 5. Petitioners describe these varying approaches as an "undeniable circuit conflict." *Id.* at 6.

Despite the U.S. Solicitor General's feedback, providers still need clarity regarding the FCA pleading standards and what level of particularity is required under Rule 9(b) for an FCA complaint to survive dismissal. Providers under a lax standard could be required to defend themselves against protracted FCA litigation akin to a "fishing expedition." Providers under a more stringent standard would have a better opportunity to have a case dismissed at the earliest stage. Similarly,

relators and the government would benefit from a more uniform standard. If the U.S. Supreme Court grants the certiorari petition, its decision will have a huge impact on the future of FCA litigation.
