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Circuits Left To Develop FCA Discovery Case Law

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On Monday, Jan. 7, 2019, the U.S. Supreme Court denied certiorari in two major False Claims Act cases.[1] Though factually distinguishable, both cases involve the government's knowledge or suspicion of the regulatory or contractual violations alleged to have resulted in knowingly false claims.

Gilead Sciences

In April, we discussed[2] how the Supreme Court had asked for the views of the solicitor general in Gilead Sciences Inc. v. U.S. ex rel. Campie.[3] The case presented an opportunity for the court to affirm the prevailing reading of Universal Health Services Inc. v. U.S. ex rel. Escobar[4]: that the government's continued approval and acceptance of goods or services, after learning of the alleged falsity, renders that falsity immaterial and precludes a False Claims Act claim absent countervailing evidence. The solicitor general later filed an amicus brief asking the court to deny cert.[5]

The case involved the manufacturer of three drugs marketed by Gilead Sciences for use in HIV treatment. The record reflected the U.S. Food and Drug Administration's monitoring of Gilead's production of those drugs and even "warning letters" outlining potential regulatory violations, yet the FDA never rescinded its approval of Gilead's medicines. The U.S. Department of Justice never intervened — though it did file briefs in the district and appellate courts.

The Ninth Circuit Court of Appeals had found no actual government knowledge of the defendant's — later petitioner's — violations when the government continued to pay. The solicitor general agreed: "Most of the circumstances on which petitioner relies do not necessarily show relevant government knowledge."[6] Those "circumstances" are case specific, and do not warrant further elaboration here.

The legal distinction, for materiality purposes, is now frequently between government knowledge of "allegations" versus "violations." Although Escobar spoke in terms of "actual knowledge that certain requirements were violated,"[7] the "holistic inquiry" endorsed by the government[8] should at least include government knowledge of allegations. While

knowledge of allegations may not be per se sufficient, neither should it be per se insufficient to dismiss a case. It would have been helpful had the Supreme Court given further guidance on how to account for government knowledge of similar allegations — which is common in FCA cases.

The solicitor general emphasized — as did the Ninth Circuit — that the case is at the "pleading stage." But if we are to take seriously Escobar's admonition that materiality is not too fact intensive to be examined at the pleading stage,[8] courts must require more of FCA plaintiffs. For example, it cannot be enough that "the parties dispute exactly what the government knew and when."'[10] That will always be true at the pleading stage. The question must always be whether the complaint has alleged, plausibly and particularly, facts supporting the materiality element.[11]

Although the solicitor general ultimately sided with the Ninth Circuit and respondent, there is helpful language in the solicitor general's brief from a defendant's perspective:
Petitioner correctly emphasizes (Reply Br. 5) that, even at the pleading stage, an FCA relator cannot rest solely on "conjecture" or "speculation." A relator's burden is to plead with particularity facts from which a factfinder might plausibly infer that the relevant misstatements were material. And given Escobar's holding that not every violation of a federal payment condition is material, see 136 S. Ct. at 2003, a complaint may be inadequate as to materiality even though it adequately alleges a violation.[12]

This all comes directly from Escobar, of course, but it is helpful to hear the solicitor general agree that "conjecture" and "speculation" are not enough, and to reiterate that not all violations are material violations.

After agreeing with the Ninth Circuit on the merits, the solicitor general took an unexpected turn by promising the Supreme Court that, if the case is remanded, the government will move to dismiss it under 31 U.S.C. § 3730(c)(2)(A). This is based on the "merits" of the case, but also on the "burdensome discovery and Touhy requests" that might follow if the case proceeds.[13]

We welcome the government's sudden consideration of the discovery burdens in meritless qui tam cases — something that defendants have born for decades as the DOJ kept sheathed Section 3730(c)(2)(A). But we also question whether this argument proves too much.

With materiality cemented by Escobar as an essential element of liability, won't every FCA case involve some discovery into what the relevant agency knew and when they knew it? Drafting Touhy requests in FCA cases should now be as automatic as preparing Rule 26 initial disclosures. If the government moves to dismiss every case in which discovery might be sought from its agencies, that will leave precious few cases proceeding. If the government refuses such discovery outright, moreover, relators will struggle to make their cases on materiality.

Finally, in an interesting footnote, the solicitor general suggests that the government has "means short of dismissal" to torpedo a relator's case.[14] From the passages quoted, it seems that the solicitor general envisions introducing an agency declaration to the effect that the alleged violations are not material. This approach would surely draw fire from the relators' bar, and it might frustrate courts as well. Time will tell.

Trinity Industries

This case involved guardrails installed on state highways, the purchase of which was reimbursed partly by the federal government.[15] The defendant/respondent producers of such guardrails sought

U.S. Federal Highway Administration safety certification, on which all 50 states relied in approving the guardrails for installation.

The relator in Trinity Industries essentially alleged that the company modified the guardrails without telling the government. Trinity and the relator met separately and repeatedly with FHWA, which was made aware of every alleged defect — before the qui tam case was filed. Ultimately, FHWA issued an official memorandum in which it "validated that the [relevant guardrail] was crash tested" and that it was "eligible for Federal reimbursement," such that there was "an unbroken chain of eligibility for Federal-aid reimbursement" during the relevant time period. Nonetheless, the district court refused to dismiss the case, the case went to trial. The relator obtained a $575 million judgment in treble damages, $138 million in statutory penalties and $19 million in attorneys' fees and costs.

The Fifth Circuit vacated the entire judgment, holding that the "continued approval of reimbursement" by FHWA both vitiated any claim of damages and, more fundamentally, precluded a finding of materiality.

Conclusion

These cases do not necessarily suggest a circuit split or difference in approach. In fact, the Fifth Circuit in Trinity Industries drew "guidance" from the Ninth Circuit in Gilead Sciences. The principal difference is likely that the court in Gilead was at the pleading stage, whereas the Trinity court had the benefit of a record comprising full discovery and a jury trial's worth of evidence. This is in tension with Escobar, however, where the Supreme Court went out of its way to say that materiality — which must be alleged with particularity under Rule 9(b) — is not too fact intensive to resolve on a motion to dismiss. Thus, "discovery is needed" cannot be a silver bullet. We will see how that argument fares as the case law develops.

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[1] https://www.supremecourt.gov/orders/courtorders/010719zor_m6ho.pdf.

[2] https://nicholsliu.com/wp-content/uploads/2018/04/Client-Alert-One-Step-Closer-to-Building-on-Escobar.pdf.

[3] Gilead Sciences Inc. v. U.S. ex rel. Campie, No. 17-936 (pet. filed Dec. 26, 2017).

[4] Universal Health Servs. Inc. v. United States ex rel. Escobar, 136 S. Ct. 1989, 2002 (2016).

[5] https://dlbjbjzgnk95t.cloudfront.net/1080000/1080928/http-www-supremecourt-gov-docketpdf-17-17-936-73707-20181130111638483_17-936-20gilead-20sciences-20ac-20pet-10-pdf.pdf

[6] Br. at 11.

[7] 136 S. Ct. 1989, 2003 (2016).

[8] Br. at 17.

[9] 136 S. Ct. at 2004 n.6.

[10] Br. at 10.

[11] See Escobar, 136 S. Ct. at 2004 n.6.

[12] Br. at 14.

[13] Br. at 15.

[14] Br. at 16 n.*.

[15] See generally, Petition for Certiorari, United States ex rel. Harman v. Trinity Indus., No. 17-1149 (S. Ct. Feb. 12, 2018).