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Top Cases And Developing Trends In FCA Litigation: Part 2

By **Andy Liu, Bob Rhoad and Jason Lynch** (February 8, 2019, 10:38 PM EST)

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In the final installment of our two-part series, we continue our discussion of the most important recent False Claims Act decisions and what we predict will be their implications for FCA jurisprudence in the coming months. See part 1 **here**.

Multiple FCA Defendants: Group Pleading and Conspiracy Theories

This happens more and more, especially with the rise of individual defendants being named in FCA suits: a number of defendants are accused of perpetrating a single scheme. As they move separately for dismissal or summary judgment, the question becomes: What must be pled or proven as to each defendant?

U.S. ex rel. Silingo v. WellPoint Inc.[1] was brought by a former compliance officer at a home-health contractor which managed risk-adjustment data for several Medicare advantage organizations. All were named defendants. The district court had dismissed the relator's complaint against the MAOs for impermissible "group pleading."

The U.S. Court of Appeals for the Ninth Circuit reversed:

> There is no flaw in a pleading ... where collective allegations are used to describe the actions of multiple defendants who are alleged to have engaged in precisely the same conduct.[2]

Where the defendants engage in precisely the same conduct, that is known as a "wheel" conspiracy. The court of appeals offered something of a refresher on conspiracy theory:

> [I]f a fraudulent scheme resembles a wheel conspiracy, then any parallel actions of the 'spokes' can be addressed by collective allegations.[3]

This is in contrast to a "chain conspiracy," in which "a complaint must separately identify which defendant was responsible for what distinct part of the plan."[4]

This is an interesting opinion with mixed implications. Defendants 'up the chain,' who are often named

because of their deep pockets, will take heart that their participation in the conspiracy cannot be based merely on "collective allegations." But defendants accused of being another spoke in the proverbial wheel conspiracy — with no plausible, particular facts alleged as to their specific participation — will find cold comfort.

The Ninth Circuit's approach to wheel conspiracies also seems in tension, at least, with the court's expressed need for plaintiffs to "differentiate their allegations" when naming multiple defendants.[5] As other courts have held in FCA conspiracy cases, plaintiffs must offer "'specific allegations with respect to the separate Defendants' that would inform each individual defendant of the specific acts that gave rise to its liability."[6] We think this a better reading of Rule 9(b).

Is Escobar the Only Way to Alleged Implied False Certifications?

There is a debate unfolding in the lower courts over whether Escobar set the exclusive means by which a plaintiff can make out an implied certification claim, or merely one way to do so. In U.S. ex rel. Rose v. Stephens Institute,[7] that debate was laid bare. The Ninth Circuit entrenched its view — expressed twice before — that Escobar's "misleading half-truths" are the only cognizable form of implied false certifications.

Illustrating the counterarguments, however, the Ninth Circuit made clear that its holding was driven by stare decisis alone:

> Were we analyzing Escobar anew, we doubt that the Supreme Court's decision would require us to overrule Ebeid. The Court did not state that its two conditions were the only way to establish liability under an implied false certification theory.[8]

The Ninth Circuit denied panel rehearing and rehearing en banc and, on Dec. 6, 2018, stayed the issue of its mandate by an additional 90 days "pending the filing of a petition for writ of certiorari in the United States Supreme Court."

The ramifications are apparent. If Escobar really did close off 'pure' implied certifications — those that do not rely on a misleading half-truth — then plaintiffs will be required to plead much more absent an express certification.

Reasonableness Still Proves a Formidable Defense

There is an ever-strengthening strand in FCA jurisprudence for the proposition that the reasonable interpretation of an ambiguous regulation or contract provision will insulate the defendant from FCA liability. The principle was revitalized a few years ago in U.S. ex rel. Purcell v. MWI Corporation.[9]

U.S. v. Allergan[10] revolved around how to calculate the average manufacturer's price, or AMP, paid by drug wholesalers seeking reimbursement under the Medicaid drug rebate program. Under that program, the manufacturers pay a rebate to the states in proportion to the AMP; the lower the AMP, the lower the rebates.

The applicable law[11] went through three iterations during the time frame relevant to the case. None of those iterations spoke directly to whether "price-appreciation credits" given by wholesalers to manufacturers — separate from the sale itself — had to be accounted for in calculating the AMP. More than that, the relevant agencies interpreting the law refused to give guidance on this specific question.

We welcome the decision of the U.S. Court of Appeals for the Third Circuit, which confirms that the reasonable interpretation of an ambiguous statute, regulation or contract cannot be deemed knowingly false under the FCA.

Medical Judgment and Relators' Access to Information

U.S. ex rel. Polukoff v. St. Mark's Hospital[12] is significant for two reasons. First, it implicates the ongoing debate about whether medical judgments or opinions can be "false or fraudulent" for FCA purposes. Second, it addresses the oft-trotted-out argument by relators that they cannot satisfy Rule 9(b) because they lack access to the necessary information.

In St, Mark's, the relator accused a doctor of performing thousands of unnecessary heart surgeries and obtaining Medicare reimbursement by fraudulently certifying that the operations were medically necessary. The relator also claimed that certain hospitals where the defendant doctor worked were complicit in, and profited from, the fraud. The defendants obtained dismissal from the district court, which reasoned that a medical judgment cannot be "false" under the FCA.

The U.S. Court of Appeals for the Tenth Circuit disagreed. As a preliminary matter, consistent with precedent from other circuits, the court reaffirmed that "[i]t is possible for a medical judgment to be 'false or fraudulent' as proscribed by the FCA."[13] This may have been the first such holding from the Tenth Circuit.[14]

The court also held that the defendants had acted "knowingly," based on circumstantial evidence: The "unusually large number" of surgeries, the defendants' violation of industry and hospital guidelines, other doctors' objections to the defendant doctor's practices and the doctor's mischaracterization of the indication for the procedures as recurrent strokes, when in fact the patients suffered only migraines.[15]

After the court reversed the district court's Rule 9(b) holding, relying in part on relators' lack of access to the necessary information, two defendants petitioned the court for a rehearing en banc. These defendants called the lack-of-access reasoning a "judicial exception" to Rule 9(b) that is both "unprecedented and unsound."

After the Tenth Circuit denied the petition, those defendants moved to stay the mandate so that they could appeal a "substantial question" on which there is "a protracted split among the federal courts of appeal." That motion was denied, and the mandate issued on Nov. 6, 2018.

We would welcome the U.S. Supreme Court's addressing the lack-of-access argument under Rule 9(b), which is especially common among relators in declined cases. This would be an opportunity to close a "judicial loophole" — to paraphrase — that has excused too many relators from pleading fraud with particularity.

Does the U.S. Department of Justice's Intervention Bear on Materiality?

Two cases, United States ex rel. Folliard v. Comstor Corporation, and United States ex rel. Cressman v. Solid Waste Services,[16] exemplify a broader, recurring theme. In the wake of Escobar, with litigants and courts focusing on materiality and the "effect on the listener," — i.e. the government — one natural question is: How did the government react when these allegations were presented in a sealed qui tam complaint?

If the government declined to take the case — and notwithstanding boilerplate disclaimers that its decision was not merit-based — doesn't that suggest, at least, that the government found the falsity immaterial? In Folliard and Cressman, the courts expressly considered the government's decision not to intervene in ruling that the falsity alleged by relators was immaterial.[17]

If this reasoning takes hold, the government's intervention decision may become a referendum on whether the falsity alleged by the relator was material to the government's decision to pay. That would obviously raise the stakes of such decisions, which might have mixed consequences — as it could lead to more interventions or raise the pressure/tempo on predecisional investigations by the U.S. Department of Justice.

The Government's Prerogative (or Not?) to Dismiss Qui Tam Suits

Assuming that the so-called Granston memorandum has teeth, and that the DOJ will exercise its right to dismiss certain qui tam suits, is that right limited at all?

Two district court cases, coincidentally issued on the same day, exemplify the circuit split over what level of deference to give the government when it moves to dismiss a declined case under 31 U.S.C. § 3730(c)(2)(A):

> The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

In United States v. Academy Mortgage Corp,[18] the court relied on Ninth Circuit precedent starting with United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.[19] to hold that the relator was entitled to an evidentiary hearing because "the Government ha[d] not fully investigated the allegations."[20] The same day, in U.S. ex rel. Maldonado v. Ball Homes LLC,[21] the court expressly disagreed with the Sequoia Orange line of cases and adopted the view of the U.S. Court of Appeals for the District of Columbia Circuit that the government has "unfettered" discretion to dismiss qui tam complaints.[22]

The government is not the only party interested in the right answer here. One arrow in every defendant's quiver is trying to persuade the DOJ to dismiss a declined case. The Sequoia Orange approach naturally disincentivizes the DOJ from filing such motions, as they have to meet a higher burden under that approach. Thus, there is less opportunity to enlist the DOJ's help in dismissing meritless qui tam suits.

The First-to-File Bar: How it Works and What Issues are Ripe for Review by the Supreme Court

We have largely avoided cases about qui tam procedure — cases on the public-disclosure bar,[23] for example, or criminal remedies as "alternative remedies" for relator-share purposes[24] — but the next case illustrates a common problem and a few circuit splits that may get resolved at the Supreme Court.

The procedural history of U.S. ex rel. Wood v. Allergan Inc.[25] is complicated but can be summarized as follows: When the second case — Case B — was filed, there was already a related case — Case A — pending. By the time the third amended complaint in Case B was filed, Case A had been dismissed. The district court held that Case B could proceed at that point, but it certified the question for interlocutory appeal to the U.S. Court of Appeals for the Second Circuit, which had not previously decided the question.

The court of appeals reversed, holding that a relator cannot avoid the first-to-file bar by amending her pleading. On that reasoning, Case B would be forever barred by Case A, a related action pending when Case B was first filed. In so holding, the Second Circuit joined the D.C. Circuit and disagreed with the U.S. Court of Appeals for the First Circuit.[26]

Another circuit split is also implicated by Wood. The U.S. Court of Appeals for the Sixth Circuit has ruled that a prior action must satisfy Rule 9(b) if it is to qualify as a "pending" action sufficient to trigger the first-to-file bar.[27] The Second Circuit rejected that approach, joining the D.C. Circuit and the U.S. Court of Appeals for the Fifth Circuit.

Wood is notable for larger, institutional defendants who find themselves subject to repeated, geographically diverse allegations and investigations. The answers to the questions on which the lower courts have split could drive litigation strategy: Which cases to target with motions to dismiss under the first-to-file bar and how to obtain dismissal thereof.

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Disclosure: Two of the authors represented the defendant in U.S. ex rel. Purcell v. MWI Corporation, a case discussed in this article.

[1] U.S. ex rel. Silingo v. WellPoint Inc., 904 F.3d 667, 678 (9th Cir. 2018).

[2] Id. at 677 (citing United States ex rel. Swoben v. United Healthcare, 848 F.3d 1161, 1184 (9th Cir. 2016)).

[3] Id. at 678.

[4] Id.

[5] Id. at 677 (citing Swartz v. KPMG LLP, 476 F.3d 756, 765

[6] U.S. ex rel. Bibby v. Wells Fargo Bank N.A., 906 F. Supp. 2d 1288, 1297 (N.D. Ga. 2012) (quoting Brooks v. Blue Cross and Blue Shield of Florida Inc., 116 F.3d 1381 (11th Cir. 1997))

[7] U.S. ex rel. Rose v. Stephens Institute, 909 F.3d 1012 (9th Cir. 2018).

[8] Id. at 1018.

[9] U.S. ex rel. Purcell v. MWI Corporation, 807 F.3d 281, 287–88 (D.C. Cir. 2015). Two of the authors (Messrs. Rhoad and Lynch) represented the defendant, tried the case, and prevailed on appeal.

[10] U.S. v. Allergan, -- Fed. App'x --, 2018 WL 3949031 (3d Cir. Aug. 16, 2018).

[11] 42 U.S.C. § 1396r-8(k)(1).

[12] U.S. ex rel. Polukoff v. St. Mark's Hosp., 895 F.3d 730 (10th Cir. 2018).

[13] Id. at 742.

[14] The court cited the First Circuit, which had held, in the Social Security benefits context, that "an applicant's opinion regarding the date on which he became unable to work" can give rise to FCA liability. Id. (citing United States ex rel. Loughren v. Unum Grp., 613 F.3d 300, 310 (1st Cir. 2010)).

[15] Id. at 744.

[16] United States ex rel. Folliard v. Comstor Corporation, 308 F Supp 3d 56 [DDC 2018]; United States ex rel. Cressman v Solid Waste Servs., 2018 US Dist LEXIS 59183 [ED Pa Apr. 6, 2018, No. 13-5693], 2018 WL 1693349 (E.D. Pa. Apr. 6, 2018).

[17] Folliard, 2018 WL 1567620 at *19; Cressman, 2018 WL 1693349 at *6.

[18] United States v Academy Mtge. Corp., 2018 US Dist LEXIS 109489 [ND Cal June 29, 2018, No. 16-cv-02120-EMC], 2018 WL 3208157 (N.D. Cal. June 29, 2018).

[19] United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp., 151 F.3d 1139, 1145 (9th Cir. 1998)

[20] Id. at 1145.

[21] United States ex rel. Maldonado v Ball Homes LLC, 2018 US Dist LEXIS 109127 [ED Ky June 29, 2018, Civil Action No. 5: 17-379-DCR], No. 5:17-cv-379, 2018 WL 3213614 (E.D. Ky. June 29, 2018).

[22] 2018 WL 3213614, at *4.

[23] United States ex rel. Freedom Unlimited, Inc. v. City of Pittsburgh, No. 17-1987, 2018 WL 1517159 (3d Cir. Mar. 28, 2018); United States ex rel. Silver v. Omnicare, Inc., 903 F.3d 78 (3d Cir. 2018).

[24] United States v. Couch, 906 F.3d 1223, 1224 (11th Cir. 2018).

[25] U.S. ex rel. Wood v. Allergan, Inc., 899 F.3d 163 (2d Cir. 2018).

[26] Compare United States ex rel. Shea v. Cellco P'ship, 863 F.3d 923, 926 (D.C. Cir. 2017) (dismissing amended complaint as blocked by first-to-file bar), with United States ex rel. Gadbois v. PharMerica Corp., 809 F.3d 1, 4-5 (1st Cir. 2015)(finding defendant's position that supplementation cannot cure first-to-file defect "untenable").

[27] Compare Walburn v. Lockheed Martin Corp., 431 F.3d 966, 973 (6th Cir. 2005).