TEXAS LAWYER

ALM. texaslawyer.com | July 8, 2022

Third Time's a Charm: The Supremes Will Finally Settle the Rule 9(b) False Claims Act Circuit Split

Reading the tea leaves, we anticipate the Supreme Court will rule in favor of a stricter Rule 9(b) standard, along the lines of the standard adopted by the Eleventh Circuit, in an effort to curb the number of meritless FCA claims, say Sheppard Mullin attorneys Erica Kraus, Bill Mateja, Audrey Crowell and Megan Miller.

BY ERICA KRAUS, BILL MATEJA, AUDREY CROWELL AND MEGAN MILLER

Twice before, in 2010 and 2014, the Supreme Court denied writs of certiorari asking that it resolve the critical question of whether Fed. R. Civ. Pro. 9(b) requires that False Claims Act (FCA) plaintiffs plead specific false claims. Now, this question has again bubbled up to the high court in three separate petitions. The circuit courts remain split on the way to apply Rule 9(b) in a FCA suit. We anticipate that this time, after another decade of the lower courts failing to align, the Supreme Court will grant certiorari, despite the solicitor general's recent amicus brief recommending against it. This article will give you the "cheat sheet" on the competing Rule 9(b) standards of review, our prediction for the winning standard, and some of the potential implications of the Supreme Court's decision.

Courtesy photos

(L-R) Erica J. Kraus, Bill Mateja, Audrey Crowell and Megan Miller of Sheppard Mullin.

Background on Rule 9(b) and the FCA

Rule 9(b) requires a relator alleging fraud to state with particularity the circumstances constituting fraud. However, the circuits are split on the level of particularity that needs to be pled in FCA cases to show that false claims have been submitted to the government. Half of the circuits require the FCA complaint to allege that specific false claims were presented to the government for payment. The

other half follow a standard allowing the FCA complaint to allege a scheme to submit false claims along with "reliable indicia" that those claims were submitted to the government.

We Expect that the Supreme Court Will Grant Certiorari

We anticipate that the Supreme Court will grant certiorari to at least one of the Rule 9(b) FCA petitions before it to finally resolve this long-standing question. The solicitor general has submitted a brief in response to one of these petitions discouraging a grant of certiorari, claiming that the circuit split is superficial and that, in fact, circuit courts have applied similar standards by looking to reliable indicia of claim submission, with outcomes varying primarily based on the "fact-intensive nature" of each case. However, this position is implausible; FCA practitioners across the board recognize that there is a clear split among the circuits. To that point, the three cases in front of the Supreme Court include appeals from both plaintiffs and defendants. Additionally, multiple amici curiae on both sides of the bar are urging the Supreme Court to review this issue. The court has also invited the solicitor general to weigh in on another of the Rule 9(b) petitions pending before the court. Given this strong overarching support for resolution of the pleading standard issue, we expect the Supreme Court to grant certiorari.

Moreover, the Supreme Court recently granted certiorari to resolve another FCA circuit split, announcing that it will review the government's authority to dismiss qui tam claims. This action signals the Supreme Court's increasing willingness to intervene in the FCA realm to resolve confusion impacting and creating unnecessary delay and expense for plaintiffs and defendants alike.

Reviewing the Rule 9(b) Circuit Split

Notwithstanding that the sine qua non of the FCA is the submission of false claims, courts have struggled to determine the level of particularity with which this element of the FCA must be pleaded in a complaint. The U.S. Court of Appeals for the Eleventh Circuit applies the most rigid standard, requiring the relator to plead "specific details" of false claims. The Eleventh Circuit has stated that it will not infer the submission of a false claim, and relators cannot "rely on mathematical probability to conclude that [a defendant] surely must have submitted a false claim at some point." In the case of *Johnson v. Bethany Hospice*, even when the facility billed the government for almost all of its business, such a probability of submission was not enough. In effect, to succeed with a FCA claim at the Eleventh Circuit, a relator "must identify 'actual, and not merely possible or likely, claims' for payment."

Several circuits follow a standard similar to that of the Eleventh Circuit, but with some exceptions. Generally, the First Circuit requires that a plaintiff plead the "essential particulars of at least some false claims," but allows plaintiffs alleging that a defendant caused a third party to file false claims to proceed based on reliable indicia of claim submission. The Fourth Circuit also requires that a complaint describe the specific false claims in detail, but also allows plaintiffs to "allege a pattern of conduct that would 'necessarily have led to submission of false claims' to the government for payment." The Sixth Circuit also has created an exception to its requirement for a plaintiff to plead representative examples of false claims, allowing a plaintiff with a high degree of billing-related knowledge to plead specific facts based on that knowledge in place of representative examples. Similarly, the Eighth Circuit has allowed a plaintiff to proceed without a representative example claim where the plaintiff has personal knowledge that false claims were submitted. The Second Circuit also generally requires that a plaintiff allege a specific false claim, but has waived that requirement where the information to identify the false claim is not within the plaintiff's knowledge.

Other courts follow a more lenient standard, allowing plaintiffs to proceed based on allegations that "show the specifics of a fraudulent scheme and provide an adequate basis for a reasonable

inference that false claims were submitted as part of that scheme." Generally, the Third, Fifth, Seventh, Ninth, Tenth and DC Circuits apply this standard, which "allow[s] plaintiffs to proceed if the submission of false claims can reasonably be inferred from other well-pleaded facts."

Which Standard Will Prevail?

Reading the tea leaves, we anticipate the Supreme Court will rule in favor of a stricter Rule 9(b) standard, along the lines of the standard adopted by the Eleventh Circuit, in an effort to curb the number of meritless FCA claims.

For instance, in its unanimous 2016 decision in *Escobar*, the court emphasized the FCA's intended limited scope and restrictive application. In *Escobar*, the court laid out the requirement that a statutory or regulatory violation be material to the government's decision to pay a claim to form the basis for a FCA action. The language used by the court in *Escobar* to describe the FCA is telling. The court affirmed that the FCA is not "an all-purpose antifraud statute." Likewise, the court reiterated that allegations of fraudulent schemes need to be linked to specific claims presented to the government. Although not dispositive, we believe this commentary implies that the court may adopt a stricter Rule 9(b) pleading standard.

Additionally, in 2020, the Supreme Court denied a petition to review a Fifth Circuit case involving a corporate whistleblower whose FCA claim was dismissed under Rule 9(b). In that case, the relator relied on publicly accessible data on Medicare inpatient claims to allege fraud. The Fifth Circuit affirmed the lower court's dismissal because the relator's near exclusive reliance on statistical analyses failed to satisfy Rule 9(b), particularly where the defendant has a "legal and obvious alternative explanation" of the statistical findings. The Supreme Court's denial of certiorari effectively left in place the Fifth Circuit's Rule 9(b) pleading standard limiting the use of statistical data to establish fraud where other reasoning exists for the billing and claims. This may signal the court's willingness to uphold a more stringent pleading standard that would require representative examples of fraudulent claims rather than relying on statistical data that points to a fraudulent claim with only "conclusory allegations." This decision also may point to the court's desire to crack down on professional relators who have access to data, but may not have the particular details of false claims.

If the court grants certiorari to determine the appropriate standard for pleading a FCA case under Rule 9(b), its decision will obviously have a major impact on the future of FCA litigation. Affirmation of a requirement that relators plead specific examples of false claims will heighten challenges for relators in bringing their cases to trial, and would be likely to further curb the number of FCA cases filed. The number of qui tam cases has steadily increased over the last thirty years, and, as of 2021, qui tam cases were more than double the number of non-qui tam cases. An amicus brief in *Molina* argues that many of these cases lacked merit and should have been dismissed. A more rigorous standard could reduce some baseless claims, saving time and resources for the courts, and avoid "burdensome discovery" for defendants. At the same time, some fraud might go unrevealed where those with knowledge of the fraud are unable to access specific false claims examples, and are therefore not able to pursue successful FCA actions. The practical impact of a Supreme Court ruling on this issue cannot be overstated. And, regardless of the substance of the court's decision, it will bring much needed uniformity to the standard applied by the circuit courts, avoiding uncertainty and mitigating the potential for forum shopping. We predict that this upcoming Supreme Court session will finally bring this clarity.

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