Client Alert

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False Claims Act Pleading Standard Left Unsettled

How much particularity is required to plead a claim under the False Claims Act ("FCA"), a statute designed to root out fraud against the government? While courts purport to apply the requirements of Federal Rule of Civil Procedure 9(b) and its stringent standards for pleading fraud, several circuits take a more flexible approach when assessing claims brought under the FCA. The United States Supreme Court recently declined to take up the matter and resolve this key question. Accordingly, the forum in which an FCA suit is brought continues to have a dramatic impact on whether it will be subject to an early dismissal.

The Fourth, Sixth, Eighth and Eleventh Circuits apply a more stringent standard in assessing FCA claims. For example, in *United States ex rel. Nathan v. Takeda Pharmaceuticals North America, Inc.*, 707 F.3d 451 (4th Cir. 2013), the Fourth Circuit affirmed the dismissal of a whistleblower complaint alleging fraudulent off-label marketing of the prescription drug Kapidex. The whistleblower had alleged that Takeda claimed to the government that more than 90 percent of Kapidex prescriptions were for a 90 milligram dose, when, in fact, most prescriptions were for heartburn, which calls for a 30 milligram dose. The whistleblower did not, however, plead any specific examples of Takeda's having submitted a false claim to the government for repayment, relying instead on allegations of this overarching scheme. In affirming dismissal of the action, the Fourth Circuit found that without pleading at least a representative sample of claims actually submitted to the government, the whistleblower's allegations were "inherently speculative in nature."

The Eastern District of Virginia recently cited to *Takeda* in deciding a case applying federal pleading standards to a claim brought under Virginia's version of the False Claims Act. In *Commonwealth ex rel. Hunter Labs., LLC v. Quest Diagnostics, Inc.*, No. 1:13-CV-1129 (May 13, 2014), the whistleblower alleged that Quest Diagnostics violated the Virginia Fraud Against Taxpayers Act by charging the state more than its "usual and customary" rates for testing services and by certifying that it was in compliance with all laws and regulations when it was allegedly violating the anti-kickback and other laws. The court dismissed the complaint with prejudice, finding that it failed to comply with the pleading standards required by Rule 9(b) for pleading fraud.

The court found that the whistleblower, like the one in *Takeda*, failed to identify a single false claim made to the government. Pleading generally that Quest Diagnostics engaged in a scheme, and even pleading the details of that scheme and the fee schedules allegedly in place, was not enough to state a claim without identifying at least some representative claims for payment. Moreover, the court found that the whistleblower had failed even to meet the plausibility standards of Rule 8(a) based on Quest's certification that it would comply with all contracts, laws and regulations. The court found that the certification in that case was one required for participation in the state program, not payment. As a condition of participation, a whistleblower has to show both that the certification was an intentional lie at the time it was made and that it related to a specific statute or rule closely related to the subject of the work done.

The ruling of the Fourth Circuit, and applied by district courts within the circuit, stands in contrast to those of the First, Fifth, Seventh and Ninth Circuits, which have applied Rule 9(b) in a more flexible manner. Those courts have held that a whistleblower pleads a case with sufficient particularity where he pleads the details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference

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that claims were actually submitted. *See Grubbs v. Kanneganti*, 565 F.3d 180 (5th Cir. 2009). In those jurisdictions, whistleblowers do not need to plead the existence of a single bill or claim sent to the government for payment. Indeed, just this month, these courts were also joined by the Third Circuit, which reversed the dismissal of a complaint in which the plaintiff did not point to a single claim actually submitted to the government, relying instead on allegations of a scheme to defraud. *Foglia v. Renal Ventures Management, LLC*, (3d Cir., June 6, 2014).

The whistleblower in *Takeda* filed a petition for writ of certiorari with the United States Supreme Court, asking it to resolve this circuit split. Before declining to consider the ruling in *Takeda*, the Supreme Court requested input from the US Solicitor General, who urged the Court not to take up the appeal. Despite the fairly stark differences in the manner in which the various circuits assess FCA claims, the government argued that the circuits appear to be moving toward consensus on the question of the requisite pleading standard for FCA claims.

Whether the circuits are, in fact, moving toward consensus, and at what pace, remains to be seen. Indeed, given the cases that have been decided even since the Supreme Court denied the cert petition in *Takeda*, it does not appear as if any such move is afoot. Any defendant facing a claim under the FCA needs to be aware of what the pleading standards are in the jurisdiction where they are facing suit. A strict application of the pleading standards of Rule 9(b) can make the difference between a successful defense at the pleadings stage and a protracted, expensive legal battle.

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