

FALSE CLAIMS

THE FEDERAL FALSE CLAIMS ACT—ORIGINALLY INTENDED TO STOP FRAUD AGAINST the Union Army during the Civil War—seemed destined to fade into history after 1943, when Congress limited the rewards and evidence it allowed. But Congress revived the law amid Reagan-era defense procurement scandals, and California led a parade of states adopting similar statutes. The laws let people who uncover fraud sue for recovery on the government's behalf and retain some of the damages awarded; in California, people can sue in the interest of local governments and agencies as well as the state. The reach of the federal law broadened with the Fraud Enforcement and Recovery Act of 2009 (Pub. L. No. 111-21), and the boom in False Claims Act practice has shown no sign of letting up since. Here's an update with Maria Ellinikos of Akin Gump Strauss Hauer & Feld; Ryan Hassanein of Morrison & Foerster; Lexi Hazam of Lieff Cabraser Heimann & Bernstein; and Sara Winslow of the U.S. Attorney's office, Northern District of California. The discussion was moderated by *California Lawyer* and reported by Cherree P. Peterson of Barkley Court Reporters.

EXECUTIVE SUMMARY

MODERATOR: How will the cases that are now before the U.S. Supreme Court change your practice under the False Claims Act (FCA, 31 U.S.C. §§ 3729-3733) in coming years?

LEXI HAZAM: The Fourth Circuit issued its decision in *Nathan v. Takeda* (707 F.3d 451 (4th Cir. 2013)) earlier this year, finding that the relator [the party filing on the government's behalf] had not adequately pled his claims under Rule 9(b) [of the Federal Rules of Civil Procedure] because he did not identify specific false claims that were submitted to the government. The relator then petitioned the Supreme Court, which in October invited the Solicitor General to weigh in.

From a plaintiff's lawyer's perspective, the relator pled all facts that could ever possibly be pled by a relator working for a pharmaceutical company alleged to have engaged in off-label marketing of a prescription drug. The pharmaceutical company doesn't actually submit the claim to the government—the doctor or hospital does—so an employee at such a company is almost never going to be able to identify specific instances of false claims. Yet the Fourth Circuit barred the claim on the grounds that he failed to do so.

RYAN HASSANEIN: This case presents the issue of how Rule 9(b)'s requirement that fraud must be pled with particularity applies to the FCA—at least to claims under the (a)(1) liability provision of the FCA. Specifically, there is a split in the circuits regarding whether an actual false claim must be pled or whether it is sufficient to plead a fraudulent scheme and indicia to infer that a false claim was made

on the government. From my perspective, since a false claim is the *sine qua non* of an FCA violation, an actual false claim should be pled in every case.

SARA WINSLOW: Rule 9(b) just says the plaintiff must state with particularity the circumstances constituting fraud; that doesn't automatically mean each false claim must be specifically pled. In my view, though, this case will mostly affect relators in cases where the government declines to intervene. What the relator lacked in this case is the type of information the government usually has access to.

HAZAM: And this relator, in fact, did allege specific prescriptions, but he was not able to identify specific false claims. So it basically is an impossible standard, in my view, for any off-label case where the relator works at a pharmaceutical company.

HASSANEIN: But where do you draw the line? Hypothetically, imagine a scheme in which a company is falsely advertising its consumer products—say, a ballpoint pen—and the government happens to purchase that product. Is the mere fact that a transaction was consummated by the government sufficient to infer that a false claim for payment was made on the government at some point between the advertising statements and the government's purchase? If such an inference could be drawn, it would entirely undermine Rule 9(b)'s particularity requirement, and the reach of the FCA, including its draconian penalty and treble damages provision, could be endless.

MARIA ELLINIKOS: The issue of whether a false claim may be inferred was discussed in a recent opinion in a case involving the California Insurance Frauds Prevention Act (Cal. Ins. Code §§ 1871-1879.9). The relators allege that Bristol-Myers Squibb violated the IFPA by paying doctors kickbacks to prescribe BMS drugs. The relators asked the court to infer that the kickbacks automatically rendered the claims false. Under California's Code of Civil Procedure Section 437c(s), the parties may ask the court to adjudicate specific issues that may not resolve an entire claim. The two issues presented to the court were, one, whether you could infer liability based on stipulated facts that BMS provided a gift to a doctor to influence him to prescribe a BMS drug, and the doctor then prescribed the BMS drug, which was medically appropriate. The second issue assumed those same facts and that the insurance claim submitted was factually correct but did not disclose the kickback.

The court answered both questions 'No.' (*State of California ex rel. Wilson et al. v. Bristol Myers Squibb, Inc.*, No. BC367873 (Los Angeles Super. Ct.)). It found that the relators have to prove there was a false claim, and the court could not infer that the doctor prescribed the drug based solely on the gift. The relator must present evidence that that is the case. Even though California's insurance fraud statute does not involve claims submitted to the government—but rather to private insurers—its interpretation will be impacted by how the U.S. Supreme Court rules.

HAZAM: So the issue was not so much that there was a failure to identify specific false claims, but a causation issue, in terms of whether the kickback had the requisite influence over the prescriber?

ELLINIKOS: Right. The relator would need to prove that causation in order for liability to attach.

MODERATOR: Lots of recent legislative action touches on false claims—the Dodd-Frank provisions regarding whistleblowers and the Whistleblower Protection Enhancement Act in 2012 (Pub.L.No.112-199) in particular. Do those developments affect your False Claims Act practice? What other developments are allowing application of the False Claims Act in new industries?

WINSLOW: If you're dealing with false claims for federal funds, people are still going to use the False Claims Act because of its treble damages and civil penalties.

HASSANEIN: The Dodd-Frank whistleblower provisions were modeled, to some extent, on the whistle-blower provisions of the FCA. (See 15 U.S.C. § 78u-6.) But Dodd-Frank addresses private securities fraud, whereas the FCA addresses fraud on the government, so I don't anticipate developments under Dodd-Frank affecting my FCA practice.

HAZAM: On a more practical level, for three of us at least, it may become part of our practice because we handle qui tam generally. In fact, my firm has an active securities practice as well as an active False Claims Act practice.

HASSANEIN: What we are seeing is the whistleblower bar pushing the envelope in new and different directions. There are exciting developments every week, which makes my job as a practitioner in this area interesting.

ELLINIKOS: The same is true about the cases being filed by California's attorney general. California was the only state to sue Standard & Poor's under a False Claims Act theory. And the complaint recently survived a demurrer, and the case is moving forward. So, as



MARIA ELLINIKOS, counsel in the San Francisco office of Akin Gump Strauss Hauer & Feld, focuses on complex commercial litigation with an emphasis on the areas of insurance, false claims, intellectual property, and securities. She represents public and private companies in government investigations and qui tam actions, including matters involving violations of the California Insurance Frauds Prevention Act. She is the editor of the firm's False Claims Act Blog, www.statefcaresourcecenter.com.

mellinikos@akingump.com

akingump.com



LEXI HAZAM is a partner with Lief Cabraser Heimann & Bernstein. She represents plaintiffs in qui tam actions, mass tort cases, and complex class actions. She has represented relators and local governments in health care, financial, and state and local government contract cases under the federal and state False Claims Acts. She also has represented plaintiffs in aviation disasters, medical device litigation, international litigation involving contaminated blood products, and class actions involving deficient nursing home care.

lhazam@lchb.com

liefcabraser.com



RYAN HASSANEIN, a partner in the San Francisco office of Morrison & Foerster, co-chairs the firm's False Claims Act task force. He represents companies and individuals under investigation for potential FCA violations, and he defends clients in FCA suits initiated by whistleblowers, the Department of Justice, and state attorneys general. He has substantial expertise in matters related to alleged Medicaid and Medicare fraud, Anti-Kickback Statute violations, procurement fraud, and fraud on public pension funds.

rhassanein@mof.com

mof.com



SARA WINSLOW, an assistant U.S. Attorney in the U.S. Attorney's office for the Northern District of California, is deputy chief of the civil division and supervises the office's affirmative civil litigation. She specializes in civil False Claims Act cases, including health care, financial, procurement, and other types of fraud against the government. Ms. Winslow previously handled False Claims Act cases across the country as a trial attorney in the U.S. Department of Justice's civil division in Washington, D.C.

sara.winslow@usdoj.gov

usdoj.gov

courts accept these new theories of FCA liability, you're going to see an expansion.

WINSLOW: The False Claims Act, when it first started being used in earnest after the 1986 amendments, was applied most prominently to defense procurement. Then, in the '90s, health care fraud cases took over the headlines, but it's all false claims for federal funds. So wherever federal funds are paid—or in the context of state laws, state funds—there's an opportunity for False Claims Act liability. To me it's not really pushing the envelope to apply the act to various different government programs.

MODERATOR: With all this expansion, what pushback do you see from industry in the next couple years?

HASSANEIN: There are multiple voices in the ongoing debate regarding the appropriate scope of the FCA. Industry is certainly one of those voices. The court system has a voice. Federal and state legislatures have a voice. Public prosecutors, relators, and their counsel also have a voice. These voices often disagree with one another.

Think back to the U.S. Supreme Court's decision in *Allison Engine*, where the court reined in the scope of the federal FCA, saying very bluntly that this is not an "all-purpose anti-fraud statute." (See *Allison Engine Co., Inc. v. United States*, 553 U.S. 662, 672 (2008)), In response, Congress amended the FCA and reversed some of the holdings in *Allison Engine*.

Very recently, the U.S. Chamber of Commerce proposed new amendments to the FCA. One proposal, for example, is to limit civil penalties to only those cases in which the government does not have a damages claim.

WINSLOW: As to the issue of pushback from industry, historically that has not been very successful. When the courts restrict the statute, Congress tends to remedy that with amendments that say, "No, we really want this to be a broad statute." So I don't think we're going to see restrictions of the False Claims Act. If, for example the Supreme Court adopts the Fourth Circuit's restrictive rule under 9(b), it's possible that Congress could remedy that. It seems that Congress wants relators to be able to proceed with cases when the government declines them, and the *Takeda* case—so far—doesn't seem consistent with that view.

HAZAM: We have found that the position of elected officials on False Claims Act cases does not align perfectly with traditional political categories. We work with a lot of AGs and other officials who may be conservative, may be Republicans, but have been very interested in False Claims Act actions.

ELLINIKOS: Also, from the industry perspective, the different theories that the government pursues and the settlements reached may lead to changes in their internal practices. Another FCA reform that the U.S. Chamber of Commerce suggested to encourage robust compliance programs is to calibrate damages based on a company's

culpability and any self-disclosure when the company has a certified compliance program. The thought is that the government would save a lot more money if the fraud never occurs in the first place than what the government ultimately recovers in a lawsuit. And compliance would save businesses the cost of litigation in addition to whatever damages result from the fraud.

MODERATOR: Are there cases on appeal now that we should watch regarding damages and penalties that are available under the False Claims Act?

HAZAM: There is a really interesting case that I've been watching, *United States ex rel. Bunk v. Birkart Globistics GmbH & Co.* (2012 WL 488256 (E.D. Va.)). After a jury awarded approximately \$50 million in civil penalties, the district court declined to apply any of those penalties. It found it didn't have the discretion to reduce the amount to make it proportional, and therefore it simply vacated the award, reducing the amount to zero.

ELLINIKOS: In that case, there were 9,136 claims submitted, and the alleged false statement was not in any of the invoices or claims submitted. The defendant contractors had met with other bidders and agreed upon prices that they would charge regardless of who won the contract; the allegation was that the bidders colluded, but had certified when they submitted their bids that they arrived at the prices in their bid independently. So I think that weighed in the court's mind as well.

WINSLOW: There are certainly judges who, under the facts as Maria [Ellinikos] just described them, would say you get one penalty. In the government's view, it's one penalty per false claim, but the courts don't always agree with us. So it's a little surprising that the court there thought it didn't have the discretion to reduce the penalties, because it seems plenty of judges believe they do.

ELLINIKOS: The court anticipated an appeal and teed up the issue for the Court of Appeals. It laid out three possible approaches for a court to calculate damages.

MODERATOR: What other cases in play now could affect the ways the Federal Claims Act is being applied?

WINSLOW: What I find very interesting in the *Halliburton* case [also known as the *KBR* case] (*United States ex rel. Carter v. Kellogg Brown & Root*, 710 F.3d 171 (4th Cir. 2013), cert filed June 24, 2013 (case pending as No. 12-1497)), is the finding on the Wartime Suspension of Limitations Act (WSLA, 18 U.S.C. § 3287), which basically says the statute of limitations for the False Claims Act goes back to when Congress declared hostilities in 2002 and is tolled until Congress declares an end to hostilities.

ELLINIKOS: That knocks out any opportunity to assert a statute of limitations defense.

HASSANEIN: In the last 18 months, about a half-dozen courts have addressed the applicability of the WSLA to the FCA. The issue presented to the Supreme Court in the cert petition in the *KBR [Halliburton]* case is whether the WSLA applies to FCA cases filed by private relators as opposed to the government. Other interesting legal issues that the courts have been grappling with include whether the WSLA applies only to claims arising in the defense industry during times of war or whether it applies to all FCA cases.

ELLINIKOS: Yes, there's a case pending in the Southern District of New York in which the district court held that the WSLA applies, even though the alleged fraud is unrelated to the war and Wells Fargo was not a defense contractor. (See *United States v. Wells Fargo, NA*, 2013 WL 531564 (S.D.N.Y.).)

HAZAM: At least two other federal district courts have applied the WSLA in the context of non-war-related contracts. One case in Texas (*United States v. BNP Paribas SA*, 884 F. Supp. 2d 589 (S.D. Tex. 2012)) had to do with an agricultural contract, and one in Missouri (*United States ex rel. Paulos v. Stryker Corp.*, 2013 WL 2666346 (W.D. Mo.)) had to do with a pharmaceutical issue. And yet the Act was found to apply in both instances.

MODERATOR: What specific issues are arising in your practice under California's unique False Claims Act?

HAZAM: We are working on case that originally was filed in California state court. It was removed to federal court under the Class Action Fairness Act (CAFA, Pub. L. No. 109-2). We analyzed the issue and determined that we thought CAFA did indeed apply and therefore we did not seek remand. But this summer Judge Fernando Olguin of the Central District issued an order to show why it should stay in federal court. The question was: Are the government entities that have not intervened plaintiffs under the definition in CAFA, and would 100 or more of them have their claims tried jointly? It was a case of first impression, which is why the court was issuing an order to show cause. Both parties argued that CAFA did apply, and the court withdrew the order to show cause. But I think this could come up again in California, where local entities can bring False Claims Act claims.

ELLINIKOS: Did you find that the plaintiff and defendants agreed generally on the reason CAFA applied?

HAZAM: Not entirely, but to a certain extent. The court also asked what would happen if not all the claims went to trial together. It is impractical to try the claims of thousands of entities altogether, so the parties were exploring various phasing approaches. And the court was concerned that would mean the claims wouldn't be tried jointly, which is another requirement of CAFA.

HASSANEIN: With respect to recent trends under California's FCA (Cal. Gov. Code §§ 12650-12656), keep in mind that FCA cases are filed under seal, and they often sit under seal for long periods of time. As a result, the defense bar has no ability to see the full breadth of cases that are on file right now, which makes it difficult for us to distill trends on a real-time basis. That is just a practical reality of FCA litigation.

ELLINIKOS: Regarding how long cases are under seal, are you encountering judges more frequently now than before who are trying to push the government to complete its investigation and make a decision as to whether it will intervene so the court can move the case forward?

WINSLOW: It's a court-by-court and judge-by-judge experience. Usually defendants want us to maintain the seal while we explore a resolution. If we've gotten a partial lift of the seal to talk to the defendant, we often will ask defense counsel to write us a letter and

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say we want the seal to be kept intact for these reasons, and then we present that to the judge. At least in the Northern District of California, that's usually been persuasive. I know there are other districts where judges, after a certain period of time, just do not want to keep the case under seal.

MODERATOR: You mentioned the use of *res judicata* in *qui tam* cases where there are filings in different states; what's the case law arising there?

HAZAM: In the *qui tam* context, you will sometimes see the same relator bringing claims in different states under different states' False Claims Acts for an alleged fraud of nationwide scope, such as manipulation of foreign exchange rates by a particular custodial bank, with the practices being the same for all of its pension fund clients, regardless of where they were located. And that has thus far happened without issues of *res judicata* arising.

In one case we are working on under the California False Claims Act, the defendant has brought a 12(b) [of the FRCP] motion based on *res judicata* because the relator brought an earlier complaint under the False Claims Act of another state, in that state's courts, on behalf of entities just in that state. That state's attorney general reached a settlement and dismissed that complaint with prejudice. The relator then filed a California False Claims Act action here

on behalf of just California entities, again a fairly typical approach.

But the argument by the defendant is that the California claims could conceivably have been brought as part of the prior action in the other state, but were not, and therefore *res judicata* applies. The plaintiffs' argument is that these are not the same causes of action, because they are under distinct statutes, and that it would frustrate legislative intent if public entities could not exercise the option of declining to intervene and instead having the relator prosecute the action on their behalf.

ELLINIKOS: Is there case law on point on either side?

HAZAM: There is not case law directly on point. We have pointed to Ninth Circuit precedent holding that a relator signing a general release does not bar the same relator from bringing a FCA claim thereafter. (See *United States ex rel. Green v. Northrop Corporation*, 59 F.3d 953, 964 (9th Cir. 1995).)

HASSANEIN: I would be interested in hearing the panel's thoughts about the following *res judicata* issue. Anytime a government program is funded by both state and federal dollars, the state agency administering the program is arguably in privity with the federal agency administering the program for purposes of *res judicata*. For example, there are two non-FCA cases in the environmental context where a defendant achieved a victory against a state environmental agency and that judgment was used against the U.S. Environmental Protection Agency in a later suit brought by the EPA. Medicaid is another example of a program funded by both state and federal dollars, and Medicaid fraud is, of course, one of the most common types of FCA cases. There are instances in which a state FCA case is brought on behalf of a given state, and a federal FCA case is brought on behalf of the United States. Both cases allege the same fraudulent scheme and put at issue the same allegedly false claims for payment. In that situation, under the case law that has developed in the environmental arena, a defendant who achieves a victory in the state FCA suit should be able to use that judgment against the United States in the federal FCA suit.

WINSLOW: As a practical matter there really shouldn't be two cases. The state False Claims Act claim can be brought in the federal case. I'm not sure I would agree with you that it would be *res judicata*, but that's one of many issues that could potentially arise if you've got two identical cases, one proceeding in state court and one proceeding in federal court. We would encourage relators to bring that in one case.

HASSANEIN: Lexi [Hazam], I have a question for you. I've noticed that an increasing number of qui tam cases have more than one relator, and I'm wondering if that is because counsel for relators are essentially hedging their bets in the event that one of the relators is deemed barred by the FCA's public disclosure rule, or is there another reason?

HAZAM: That's a good question. At times it could be for purposes of public disclosure, if you perceive one relator to have a vulnerability on that issue. Other times it's because the relators have comple-

mentary pieces of knowledge: Maybe one was employed during a certain period and the other replaced him or her, and together they cover a fuller gamut of years. It could also give a case greater geographical scope: You could have one relator in one office and another in another office. At times, the relators have found each other and come to you together. It may be prudent for relators' counsel to see if there are ways to alleviate or diminish risk through involving multiple relators.

WINSLOW: I'm not sure I've seen it increase recently. It's my impression that in most of the complaints with more than one relator, they're friends and coworkers and they get together and talk and then go to the lawyer together.

MODERATOR: How does this relate to the first-to-file bar?

HASSANEIN: There is currently a split in the circuits about whether a first-filed qui tam complaint actually constitutes the first-filed action for purposes of the first-to-file bar when the complaint does not meet the heightened pleading standards of Rule 9(b). The Sixth Circuit has held that the first-filed complaint needs to meet that heightened standard (*Walburn v. Lockheed Martin Corp.*, 431 F.3d 966 (6th Cir. 2005)). The D.C. Circuit (*U.S. ex rel. Batiste v. SLM Corp.*, 659 F.3d 1204 (D.C. Cir. 2011)), and the First Circuit (*U.S. ex rel. Heineman-Guta v. Guidant Corp.*, 718 F.3d 28 (1st Cir. 2013)), have held that the first-filed complaint does not need to meet Rule 9(b)'s heightened pleading requirement.

HAZAM: So there are some circuits that say, if the claims are similar, even on a very broad, general level, that means the later claim is barred, even if the first one was so broad it didn't meet the standards of Rule 9(b). And other circuits say if the first action did not meet the standards of Rule 9, it was not particular enough, then the later-filed action can proceed.

The policy rationales on both sides have to do with the incentives to relators, but they prioritize different incentives. The circuits that say the first-filed complaint doesn't have to meet Rule 9(b) to bar the later complaint want to incentivize relators to file as quickly as possible, giving prompt notice to trigger the government to investigate. The other circuits think what you want to do is to incentivize relators who are insiders and who have true close-up knowledge of the facts—you don't want a relator who just comes in and files a very general complaint to bar that later person from coming forward. ■

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