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False Claims Act Circuit Splits—FCA Issues That May Soon Reach the Supreme Court or Lead to Congressional Amendment—Part III

By Robert S. Salcido*

Under the False Claims Act there are multiple circuit court splits related to how power should be allocated between the United States and the relator and whether the relator has contributed sufficient value to merit obtaining a significant portion of the government's recovery. In the first part of this multi-part article, which appeared in the April 2018 issue of Pratt's Government Contracting Law Report, *the author discussed the circuit splits addressing the proper allocation of power between the government and relators, and how they should be resolved. The second part of the article, which appeared in the May 2018 issue of* Pratt's Government Contracting Law Report, *explored circuit splits addressing whether relators should be permitted to advance actions when they fail to report non-public information to the government. This final part discusses the False Claims Act and Rule 9(b), and will offer conclusions.*

THE FALSE CLAIMS ACT AND RULE 9(B)

Rule 9(b) provides that in "alleging fraud . . . , a party must state with particularity the circumstances constituting fraud. . . . Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally."

In False Claims Act ("FCA") Rule 9(b) cases, where courts have split concerns whether the plaintiff must plead some representative examples of actual false claims or can proceed without pleading some representative examples of actual false claims but instead simply plead a fraudulent scheme with specificity together with strong indicia of reliability that actual false claims were submitted to the government.

Indeed, courts have even split regarding the extent to which the split exists, and, frequently, panels within the same circuit will disagree regarding whether

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Footnotes are continued from Part II of this article, which appeared in the May 2018 issue of *Pratt's Government Contracting Law Report*.

there is even a split. For example, one panel in the U.S. Court of Appeals for the Second Circuit, in *United States ex rel. Polansky v. Pfizer, Inc.*, in 2016, summarized the split as follows:

> . . . we need not wade into the circuit split regarding whether, to satisfy Rule 9(b), an FCA relator alleging a fraudulent scheme must provide the details of specific examples of actual false claims presented to the government (which Polansky does not do). (That split is detailed in the margin.)[10]
>
> n. 10 *Compare, e.g., United States ex rel. Bledsoe v. Cmty. Health Sys., Inc.*, 501 F.3d 493, 504 (6th Cir. 2007) ("We hold that pleading an actual false claim with particularity is an indispensable element of a complaint that alleges a FCA violation in compliance with Rule 9(b)."), and *United States ex rel. Nathan v. Takeda Pharms. N. Am., Inc.*, 707 F.3d 451, 457–58 (4th Cir. 2013) ("[W]hen a defendant's actions, as alleged and as reasonably inferred from the allegations, could have led, but need not necessarily have led, to the submission of false claims, a relator must allege with particularity that specific false claims actually were presented to the government for payment. To the extent that other cases apply a more relaxed construction of Rule 9(b) in such circumstances, we disagree with that approach."), *with United States ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 190 (5th Cir. 2009) ("[A] relator's complaint, if it cannot allege the details of an actually submitted false claim, may nevertheless survive by alleging particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted."), and *Foglia v. Renal Ventures Mgmt., LLC*, 754 F.3d 153, 156–57 (3d Cir. 2014) (adopting same approach and discussing circuit split).[63]

One year later, in 2017, another panel in the Second Circuit, *United States ex rel. Chorches v. Am. Med. Response, Inc.*, reviewed the same body of case law and denied that a split even exists, noting that its holding that the relator's complaint need only allege the scheme with specificity together with a strong inference that false claims were submitted to the government was "consistent with the law as generally stated by a majority of our sister circuits, and that the reports of a circuit split are, like those prematurely reporting Mark Twain's death, 'greatly exaggerated.' "[64]

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[63] 822 F.3d 613, 619 & n. 10 (2d Cir. 2016).

[64] 865 F.3d 71, 89 (2d Cir. 2017). *See also United States ex rel. Nargol v. DePuy Orthopaedics, Inc.*, 865 F.3d 29, 38 (1st Cir. 2017) ("The circuits have varied . . . in their statements of exactly what Rule 9(b) requires in a *qui tam* action. Of most relevance here, a consensus has yet to

In addressing Rule 9(b) FCA cases, it is more useful not to address circuit splits at the circuit level (which is frequently impossible because the cases within the circuit are hopelessly irreconcilable), but merely describe how panels within the same circuit have diverged.

When panels hold that the relator should be able to identify a single false claim with specificity, the principle upon which they rely is the "fairly obvious notion that a False Claims Act suit ought to require a false claim."[65] This is because the "[FCA] attaches liability, not to the underlying fraudulent activity or to the government's wrongful payment, but to the 'claim for payment.' "[66] "Therefore, a central question in False Claims Act cases is whether the defendant ever presented a 'false or fraudulent claim' to the government."[67] Thus, multiple courts have pointed out that an "actual false claim is 'the *sine qua non* of a[n FCA] violation.' "[68]

Those panels that hold that specific false claims need not be alleged, but only a specific scheme, together with reliable indicia that lead to a strong inference that false claims were submitted have found reliable indicia when the relator sets forth (1) statistical proof,[69] (2) direct personal knowledge of the fraud[70] or (3) direct personal knowledge about the billing process.[71]

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develop on whether, when, and to what extent a relator must state the particulars of specific examples of the type of false claims alleged.") (citation omitted).

[65] *United States ex rel. Cafasso v. Gen. Dynamics C4 Sys.*, 637 F.3d 1047, 1055 (9th Cir. 2011) (quoting *United States ex rel. Aflatooni v. Kitsap Physicians Serv.*, 314 F.3d 995, 997 (9th Cir. 2002)); *see also United States ex rel. Hendow v. Univ. of Phx.*, 461 F.3d 1166, 1173 (9th Cir. 2006) ("[F]or a false statement or cause of action to be actionable . . . , it is necessary that it involve an actual claim . . ."); *United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1265 (9th Cir. 1996) ("The FCA . . . requires a false claim").

[66] *Cafasso*, 637 F.3d at 1055 (quoting *United States v. Rivera*, 55 F.3d 703, 709 (1st Cir. 1995); *see also In re: Baycol Prods. Litig.*, 732 F.3d 869, 875 (8th Cir. 2013).

[67] *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 785 (4th Cir. 1999).

[68] *Aflatooni*, 314 F.3d at 1002 (quoting *United States ex rel. Clausen v. Lab. Corp. of Am.*, 290 F.3d 1301, 1311 (11th Cir. 2002)); *see also Cafasso*, 637 F.3d at 1055; *United States ex rel. SNAPP, Inc. v. Ford Motor Co.*, 618 F.3d 505, 513 (6th Cir. 2010); *United States ex rel. Rost v. Pfizer, Inc.*, 507 F.3d 720, 727 (1st Cir. 2007), *abrogated on other grounds by Allison Engine v. United States ex rel. Sanders*, 553 U.S. 662 (2008). *See generally United States ex rel. Hockett v. Columbia/HCA Healthcare Corp.*, 498 F. Supp. 2d 25, 71 (D.D.C. 2007) (holding that, when a relator cannot "point to a single, specific false claim" or sufficiently describe one, he has "failed to create a triable issue of fact").

[69] *See, e.g., United States ex rel. Nargol v. DePuy Orthopaedics, Inc.*, 865 F.3d 29, 41 (1st Cir. 2017) (finding that the relators had fit into the "more flexible" approach used when evaluating the sufficiency of fraud pleadings in connection with indirect false claims for government payment and demonstrated "reliable indicia that lead to a strong inference that claims were

* * *

In resolving these circuit splits regarding whether the relator provided the government with sufficient, valuable and nonpublic information to merit a substantial portion of the government's recovery for the fraud committed against the government, courts should apply the FCA's plain language to rule that:

- Under Section 3730(b)(5), relators are not permitted to intervene in an existing *qui tam* action, and, if "related" facts are part of a pending FCA *qui tam* action (even if the pending action is otherwise defective under Fed. R. Civ. P. 9(b) or the public-disclosure bar) or the action is no longer pending at the time the court considers the motion to dismiss, the first-to-file rule should operate to bar the subsequent action because it is based upon "related" facts of a pending lawsuit at the time in which the subsequent action was filed.
- Under Section 3730(e)(4), the court should find an action to be

actually submitted" when the "Relators allege that, over a five-year period, several thousand Medicare and Medicaid recipients received what their doctors understood to be Pinnacle MoM device implants; that more than half of those implants fell outside the specifications approved by the FDA; and that the latency of the defect was such that doctors would have had no reason not to submit claims for reimbursement for noncompliant devices" and where the complaint essentially alleges facts showing that it is statistically certain that [defendant] caused third parties to submit many false claim to the government).

[70] *See, e.g., United States ex rel. Chorches v. Am. Med. Response, Inc.*, 865 F.3d 71, 84–85, 93 (2d Cir. 2017) (where complaint set forth specific instances in which defendant's supervisors required that records be falsified so that reimbursable claims could be submitted to Medicare, the court found that, "in alleging that supervisors specifically referenced Medicare as the provider to whose requirements the allegedly falsified revisions were intended to conform, the [complaint] supports a strong inference that false claims were submitted *to the government*" and noting that the relator does not need to provide details of actual bills or invoices submitted to the government as long as the relator makes plausible allegations that lead to a strong inference that specific claims were indeed submitted and that information about the details of the claims submitted are peculiarly within the opposing party's knowledge).

[71] *See, e.g., United States ex rel. Thayer v. Planned Parenthood of the Heartland*, 765 F.3d 917–20 (8th Cir. 2014) (finding that "relators whose allegations lack sufficient indicia of reliability should be required to plead representative examples of the false claims because their allegations are more likely to be unfounded" but that "a relator who provides sufficient indicia of reliability to support her allegations that false claims were submitted, such as by pleading details about defendant's billing practices and pleading details about the defendant's billing practices and pleading personal knowledge of the defendant's billing practices fulfills Rule 9(b)'s objective"); *United States ex rel. Walker v. R&F Properties of Lake Cty., Inc.*, 433 F.3d 1349, 1360 (11th Cir. 2005) (finding that relator's conversations with billing employees regarding the allegedly fraudulent practices can provide well-founded belief that the defendant submitted actual false or fraudulent claims).

"public[ly]" disclosed whenever it reaches a nonparticipant in the alleged fraud because, at that point, the information has reached a member of the public, and no "whistleblower" action is needed, unless the relator discloses the information before it is public (and hence is a true whistleblower) or the relator contributes new information that "materially adds" to the information in the public domain.

- In FCA cases, to satisfy Rule 9(b), the relator must directly allege a single false claim with specificity because that is what the relator must prove to establish an FCA violation.

Not only are these conclusions consistent with the FCA's plain language, but they also effectuate the FCA's purpose, which, as noted, is to advance the government's interest, and not simply to enrich relators or their counsel.[72]

As to the public-disclosure bar and the first-to-file rule, Congress found that *qui tam* "whistleblower" actions do not generally advance the public interest, but actually undermine that interest, once a related *qui tam* action is filed or the allegations have been publicly disclosed, unless the relator is able to establish that it provided the government with materially useful information, because at that point no whistleblower action is needed, and the government should not needlessly have to share a recovery with a relator who did not break the conspiracy of silence.

For example, under the public-disclosure bar, 31 U.S.C. § 3730(e)(4), Congress forced would-be "whistleblowers" to report the fraud before the information was publicized in various formats. In enacting this bar, Congress viewed that actions where the relator merely repeated public information was not valuable enough to compel the government to share a substantial portion of its recovery with the relator, unless the relator was an informant or was materially added to the allegations in the public domain. Congress wisely found, in establishing the public-disclosure bar, that, if information is in the public domain, the Attorney General will pursue the matter when warranted and that under these circumstances, should obtain 100 percent of the recovery and not share any portion to pay a whistleblower for republishing public information. Given this purpose, and consistent with its plain language, the circuit split should be resolved by courts' ruling that the word "public" applies to any disclosure of allegations to strangers to the fraud and disclosures to responsible governmental officials, who also are members of the public.

[72] *See Health Possibilities*, P.S.C., 207 F.3d at 340; *Northrop Corp.*, 59 F.3d at 968.

Qualified relators can always still bring actions if they qualify as "original sources" under the FCA.[73]

Similarly, under the first-to-file rule, 31 U.S.C. § 3730(b)(5), Congress prohibited all actions that are based upon the facts underlying a pending action. Unlike the public-disclosure bar, the first-to-file rule applies even if the relators in the subsequent action would otherwise qualify as "original sources" and if the first-filed action is still under seal (and hence is not public). In enacting such a broad bar, Congress concluded that, once a *qui tam* lawsuit has been filed, no additional *qui tam* action is necessary in order for the government to effectively enforce its rights.[74] If courts were to permit would-be relators to intervene in an existing action or file related actions, Congress' chief purposes in amending the statute would be undermined because those relators who lost the race to the courthouse—and thus who did not promptly provide the government with information that it would need to prosecute the action—would be permitted to proceed, and the government's ultimate recovery would be reduced. Accordingly, in light of these purposes, and consistent with its language, courts should resolve the circuit split by ruling that, once a *qui tam* is filed, a relator cannot intervene in a *qui tam* action and that no other relator can bring a related action even if the first-filed action is potentially defective or no longer pending because the government will have already received notice of the underlying facts and can bring its own action and retain 100 percent of the recovery and should not be required to share any recovery with a relator who does nothing more than, by definition, file a duplicative action.[75]

As to Rule 9(b), strict adherence to the Rule will also effectuate the purposes underlying the FCA. For example, as courts have noted, a literal application of Rule 9(b) in FCA actions is needed to effectuate the FCA's purposes because

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[73] *See generally Graham Cty. v. United States ex rel. Wilson*, 130 S. Ct. 1396, 1410 (2010) (broadly construing the public-disclosure bar and noting that its ruling "is buttressed by the fact that Congress carefully preserved the rights of the most deserving *qui tam* plaintiffs: those whistleblowers who qualify as original sources").

[74] *See, e.g., United States ex rel. LaCorte v. SmithKline Beecham Clinical Labs., Inc.*, 149 F.3d 227, 234 (3d Cir. 1998) ("interpreting section 3730(b)(5) as imposing a broader bar furthers the Act's purpose by encouraging *qui tam* plaintiffs to report fraud promptly. . . . In addition, . . . duplicative claims do not help reduce fraud or return funds to the federal fisc, since (once the government knows the essential facts of the fraudulent scheme, it has enough information to discover related frauds.") (citation omitted).

[75] Once any *qui tam* action is filed, the government must investigate the facts underlying a *qui tam* action. *See* 31 U.S.C. § 3729(a). Thus, even a defective first-filed action will provide the government with sufficient facts (name of defendant and general allegations) so that government can discharge its duty to investigate further without the need of any additional *qui tam* action.

such an interpretation protects the government from broadly worded complaints, and broadly worded, nonspecific complaints have the effect of depriving the United States of its full recovery due to the fact that the United States must share a portion of its recovery with the relator filing a cause of action who does not provide specific information regarding a fraud.[76] Indeed, in *qui tam* actions when the purported insider supposedly has direct access to the alleged wrongdoing, Congress expected the *qui tam* plaintiff to be a "close observer" to the misconduct, and, hence, any deviation (or relaxation) from the literal language of Rule 9(b) is not needed and will only needlessly result in a transfer of wealth from the government to private individuals who do not provide specific facts to the government. Finally, by not dismissing generally alleged, nonspecific *qui tam* actions, relators, seeking a larger recovery, will have an incentive to include additional defendants and schemes, which will ultimately harm the government because, by virtue of the first-to-file rule, the nonspecific pending *qui tam* action will likely deter other relators, who may have greater access to specific facts, from filing their actions in the first instance.[77]

CONCLUSION

In its language, Congress carefully crafted the *qui tam* provisions to ensure the primacy of the United States over private individuals in determining what allegations advance the government's interest, and it tailored the provisions to ensure that relators obtained only a portion of the government's funds when the

[76] *See, e.g., United States ex rel. Walburn v. Lockheed Martin Corp.*, 431 F.3d 966, 973 (6th Cir. 2005) (heightened pleading requirement of Rule 9(b) in FCA cases "deters would-be relators from making overly broad allegations that fail to adequately alert the government to possible fraud in an effort to preclude future relators from sharing in any bounty eventually recovered"); *United States ex rel. Bledsoe v. Cmty. Health Servs., Inc.*, 342 F.3d 634, 642 (6th Cir. 2003) ("Application of Rule 9(b) is appropriate in that it would deter those alleging FCA violations from making overly broad allegations.") (citation and internal quotation omitted); *United States ex rel. Lacorte v. SmithKline Beecham*, 149 F.3d 227, 234 (3d Cir. 1998) (stating that Rule 9(b) provides "sufficient deterrence" to relators to prevent them from alleging broad claims or otherwise engaging in "artful pleading" to maximize their recoveries).

[77] *See, e.g., United States ex rel. Joshi v. St. Luke's Hosp., Inc.*, 441 F.3d 552, 561 (8th Cir. 2006) ("As this court stated in Kinney, 'The [FCA] is intended to encourage individuals who are either close observers or involved in the fraudulent activity to come forward, and is not intended to create windfalls for people with secondhand knowledge of the wrongdoing.' ") (citation omitted); *Bly-Magee v. Cal.*, 236 F.3d 1014, 1019 (9th Cir. 2001) (noting that the court had "observed that qui tam suits are meant to encourage insiders privy to a fraud on the government to blow the whistle on the crime. . . . Because insiders privy to a fraud on the government should have adequate knowledge of the wrongdoing at issue, such insiders should be able to comply with Rule 9(b)") (citation and internal quotation omitted).

relator actually contributed real value to the government. Otherwise, the *qui tam* provisions would operate as only a mechanism to transfer wealth from the government to private individuals.

Courts should apply these principles in resolving the current circuit splits so that the FCA can be applied uniformly.