THOMSON REUTERS

Westlaw®

Top 10 developments in FCA case law in 2020

By Marc Van Allen, Esq., and Scott Whitman, Esq., *Jenner & Block*

JANUARY 15, 2021

In 2020, even in the midst of a pandemic, there were significant developments in False Claims Act ("FCA") case law. Below we discuss some of the key decisions that will shape the FCA landscape for years to come.

1. LITIGATION FUNDING

Litigation funding *of qui tam* cases is on the rise. In these cases, financiers make cash payments to relators in return for a share of any future recovery. Because the government is the real party in interest in *qui tam* cases, the Department of Justice ("DOJ") has voiced concern as to whether these arrangements improperly shift control of FCA lawsuits to third parties.

Despite these concerns, in *Ruckh v. Salus Rehabilitation, LLC*, 963 F.3d 1089 (11th Cir. 2020), the Eleventh Circuit determined that litigation funding agreements are not *per se* prohibited by the FCA.

With the rise in big data, we expect courts will frequently need to assess whether fraud claims based on inferences from publicly available statistical data are sufficient under FRCP Rules 8 and 9(b).

With respect to the specific funding agreement at issue, the *Ruckh* court found that the relator had maintained "sufficient interest" in the litigation because (1) Ruckh had surrendered only a 4% interest in the case and (2) the agreement provided that the litigation funder had "no power to influence or control th[e] litigation," making it clear that Ruckh had "retain[ed] sole authority over the litigation." *Id*.

Given growing popularity of litigation finance, we expect we will continue to see disputes regarding the relator's actual control of *qui tam* litigation financed by third parties.

2. FALSITY (STATISTICS)

In the archetypal FCA case, a relator accuses his employer of fraud. In recent years, however, *qui tam* suits have been filed by individuals "outside" the company based primarily on their analysis of publicly available statistical data. In one such case, a court ruled that such allegations can satisfy Rules 8 and 9(b) of the Federal Rules of Civil Procedure ("FRCP").[1]

In *United States ex rel. Integra Med Analytics LLC v. Baylor Scott & White Health*, 816 F. App'x 892 (5th Cir. 2020), the Fifth Circuit affirmed the dismissal of the case because the publicly available statistical data from which the "outside" relator inferred the alleged fraud was "equally consistent" with a completely innocent explanation. *Id*. at 898.

The Fifth Circuit left the door open for future *qui tam* actions brought by "outsiders" relying on statistical data, provided they utilize such data in conjunction with particular "example[s] [which] give[] an[] indication about what makes it a false claim" rather than simply doing so in a "conclusory" manner. *Id*.

With the rise in big data, we expect courts will frequently need to assess whether fraud claims based on inferences from publicly available statistical data are sufficient under FRCP Rules 8 and 9(b).

3. FALSITY (OPINIONS)

Can medical opinions be "false" under the FCA? In 2019, the Eleventh Circuit held in *United States. v. AseraCare*, 938 F.3d 1278 (11th Cir. 2019), that mere difference of clinical opinions, without more, cannot establish falsity because differences of opinion do not create "an objective and knowing falsehood" under the FCA. *Id*. at 1302.

Last year, in *U.S. ex rel. Druding v. Care Alternatives*, 952 F.3d 89, 96 (3d Cir. 2020) and *Winter ex rel. United States v. Gardens Regional Hospital and Medical Center, Inc.*, 953 F.3d 1108, 1112 (9th Cir. 2020), the Third Circuit and the Ninth Circuit rejected an objective-falsehood requirement in FCA cases.

The defendant in *Care Alternatives* has filed a *certiorari* petition asking the Supreme Court to resolve the circuit split and adopt the "objective falsity" standard.[2] But for now, FCA defendants should be wary of relying on the "objective falsity" standard as a defense.

4. SCIENTER

To survive a motion to dismiss, relators must allege particularized facts of *scienter*. In *United States ex rel. Complin v. North Carolina Baptist Hosp.,* 818 F. App'x 179 (4th Cir. 2020), the Fourth Circuit affirmed that "the FCA does not punish honest mistakes or

incorrect claims submitted through negligence[.]" *Id.* at 181 (quotation omitted).

This is especially true where the alleged fraud "turns on a disputed interpretive question" and the defendant has not been "warned away" from its interpretation. *Id.* at 181–184 (noting that the complaint did not allege that the defendants were aware "of the potential for a violation of the [regulation]").

Accordingly, where there is a "disputed interpretative question" regarding the contract requirement at issue, defendants should file a motion to dismiss if the relator has not alleged specific facts that the defendant was "warned away" from its interpretation.

5. MATERIALITY

The Supreme Court has emphasized that there is a "rigorous" materiality standard in FCA cases. *Escobar*, 136 S. Ct. at 2002. In *United States ex rel. Janssen v. Lawrence Memorial Hospital*, 949 F.3d 533 (10th Cir. 2020), the Tenth Circuit held that government action taken after a *qui tam* suit was filed precluded FCA liability. There, the relator reported her allegations through a whistleblower hotline before filing suit.

> There is a growing split in how different courts are reviewing the government's *qui tam* dismissal power.

In addition, the contractor investigated the allegations and flagged a "quality issue" for the government. Nevertheless, the government "continued to pay claims . . . for years despite [the] ongoing litigation." *Id.* 542. The Tenth Circuit reasoned that the government's "inaction in the face of detailed allegations from a former employee suggests immateriality." *Id.*

In short, the *Janssen* decision provides a road map for defendants seeking to dismiss FCA cases where the government has continued to make contract payments after the filing of the *qui tam* complaint.

6. GOVERNMENT DISMISSAL OF *QUI TAM* CASES

There is a circuit split on the standard that a court should apply when evaluating a government motion to dismiss a *qui tam* case. Under the "*Swift* standard," the government has an unfettered right to use its dismissal authority. *See Swift v. United States*, 318 F.3d 250, 252 (D.C. Cir. 2003).

Under the "*Sequoia Orange* standard," the government must (1) identify a valid governmental purpose for the dismissal and (2) establish a rational relation between the dismissal and accomplishment of that purpose. *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1339, 1145 (9th Cir. 1998). Two recent decisions have further complicated the issue.

In *United States v. UCB, Inc.*, 970 F.3d 835 (7th Cir. 2020), the Seventh Circuit ruled that the district court's perceived choice between the *Sequoia Orange* or *Swift* standards was "a false one[.]" The Seventh Circuit determined that FRCP 41 provides the government with unfettered discretion to dismiss a complaint before the defendant has moved for summary judgment.

Thereafter, a government motion to dismiss must be accompanied by a motion to intervene, which is governed by the FCA's "good cause" standard.[3] With respect to this "good cause" standard, the court characterized it as lying "much nearer to *Swift* than *Sequoia Orange*." *UCB*, 970 F.3d at 840.

In *United States v. Academy Mortgage Corporation*, 968 F.3d 996 (9th Cir. 2020), the Ninth Circuit ruled that it did not have jurisdiction to consider an appeal of a district court order denying the government's motion to dismiss. Applying the *Sequoia Orange* standard, the district court ruled that the government's justification for dismissing the case was based on an incomplete understanding of the potential recovery in the case.

The government appealed under the collateral order doctrine, but the Ninth Circuit held that the collateral order doctrine does not apply to denials of motions to dismiss under Section 3730(c)(2)(A), "at least in cases where the Government has not exercised its right to intervene." *Academy Mortgage*, 968 F.3d at 1005. By dismissing the appeal for lack of jurisdiction, the Ninth Circuit did not address the merits and simply remanded the case to the district court.

There is a growing split in how different courts are reviewing the government's *qui tam* dismissal power. Thus, all other things being equal, the DOJ may be more willing to move to dismiss a *qui tam* case in a jurisdiction where the *Sequoia Orange* standard does not apply. FCA defendants should consider this factor when developing a defense strategy.

7. PRESENTMENT

With respect to FRCP 9(b)'s particularity requirement, some circuits require the relator to plead (1) representative examples of the false claims or (2) particular details of a scheme to submit false claims paired with reliable *indicia* that lead to a strong inference that false claims were actually submitted. *See, e.g., United States ex rel. Grant v. United Airlines*, 912 F.3d 190 (4th Cir. 2018).

Other circuits have adopted a more lenient pleading standard that does not require relators to plead the particular details of an actually-submitted false claim. *See, e.g., United States ex rel. Prather v. Brookdale Senior Living Communities*, 838 F.3d 750 (6th Cir. 2016).

In *United States ex rel. Benaissa v. Trinity Health*, 963 F.3d 733 (8th Cir. 2020), the Eighth Circuit strictly enforced the Rule 9(b) requirement. In *Trinity*, the relator alleged that the defendant regularly presented Medicare claims to the government for payment at the same time defendant was paying physicians for illegal referrals. The *Trinity* court held that relator's allegations that the defendant's scheme "most likely" resulted in the presentment of false claims were insufficient under Rule 9(b).

In short, to survive a motion to dismiss, relators must specify the "dates that services were fraudulently provided or recorded, by whom, and evidence of the department's standard billing procedure." *Trinity*, 963 F.3d at 741.

8. FIRST-TO-FILE BAR

Once a *qui tam* action is filed, only the Government may intervene or bring a related action based on the same facts. Prior to 2020, circuits were divided on whether the first-to-file bar is jurisdictional. The Fourth, Fifth, Sixth, Ninth, and Eleventh Circuits have held it is jurisdictional.[4] In contrast, the First, Second, and D.C. Circuits have held that is it not jurisdictional.[5]

In *In re Plavix Mktg, Sales Practices & Prod. Liab. Litig.* 974 F.3d 228 (3rd Cir. 2020), the Third Circuit held that the first-to-file bar is not jurisdictional because Congress did not plainly state that this rule was jurisdictional. *Id*. at 232. In addition, the *Plavix* court explained that the first-to-file bar does not prohibit an existing relator from voluntarily adding another relator through joinder, substitution, or an amendment. *Id*.at 233.

In jurisdictions where the first-to-file bar is not jurisdictional, litigants seeking to defeat copycat suits will need to raise this defense early in the case to avoid waiver.

9. PUBLIC DISCLOSURE BAR

A relator's allegations may not be "substantially the same" as those in a prior public disclosure, unless she has knowledge that "materially adds" to the public disclosure. In a pair of decisions issued in 2020, the Sixth Circuit further defined the bounds of the public disclosure bar.

In *United States ex rel. Holloway v. Heartland Hospice*, 960 F.3d 836 (6th Cir. 2020), the Sixth Circuit concluded that three *qui tam* complaints filed against the defendant's parent company and related entities which "depict[ed] essentially the same scheme" satisfied the "substantially the same" test. *Id*. at 848. Furthermore, the Sixth Circuit held that because the government is the real party in interest in FCA cases, a *qui tam* relator is the government's agent for purposes of the public disclosure bar. *Id*.

In *United States ex rel. Maur v. Hage-Korban*, 981 F.3d 516, 2020 WL 7038408 (6th Cir. 2020), the Sixth Circuit emphasized that the key question with regard to the "materially adds" exception is whether the relator's new information "would affect" the "government's decision-making[.]" *Id*. at *528.

Accordingly, the *Maur* court held, because the complaint "merely provid[ed] additional instances of the same type of fraud," the relator failed to "materially add" to the government's knowledge so as to overcome the public disclosure bar. *Id*.

In short, to survive a motion to dismiss, it is not enough for the relator to allege "slightly different, or more detailed factual allegations." *Id*.

10. DAMAGES

In FCA cases, actual damages are often computed as the difference between the value of the goods that the government received and the value of those goods if they had been of the specified quality. *United States v. Bornstein*, 423 U.S. 303, 316 n.13 (1976).

In several FCA cases, though, the entire contract price has been awarded as damages where, for example, a grant was obtained by means of a false claim and "the government entirely lost its opportunity to award the grant money to a recipient who would have used the money as the government intended." *U.S. ex rel. Longhi v. Lithium Power Techs., Inc.*, 575 F.3d 458, 473 (5th Cir. 2009); *see also U.S. ex rel. Feldman v. van Gorp*, 697 F.3d 78, 86–88 (2d Cir. 2012).

Recently, in *United States ex rel. Concilio De Salud Integral De Loiza, Inc. v. J.C. Remodeling.*, 962 F.3d 34, 44 (1st Cir. 2020) (hereinafter, "*CSILO*"), the First Circuit ruled that a relator may not recover the entire contract price where the government received some value from the services provided.

Affirming the district court's decision to not permit damages equaling the contract price, the First Circuit emphasized that the contractor actually performed roof repair work — the specific activity for which funding was approved — "albeit in a shoddy manner requiring subsequent repairs." *Id*. For this reason, the First Circuit distinguished *Longhi* and *Feldman*, "where [the] government entities . . . never made good on their . . . promises in any way whatsoever." *Id*.

CSILO presents another example in a long line of cases where relators seek actual damages equaling the contract price. Notably, the relator in *CSILO* filed a *certiorari* petition with the U.S. Supreme Court in which it continues to press this argument regarding damages.[6] Yet, absent exceptional circumstances where the government receives no benefit,[7] courts have not been receptive to this damages theory.

Notes

[1] See, e.g., United States ex rel. Customs Fraud Investigations, LLC v. Victaulic Co., 839 F.3d 242, 247–48, 258 (3d Cir. 2016).

[2] See Brief of Petitioner, Care Alternatives v. United States, et al., 20-371 (Sep. 16, 2020).

[3] See 31 U.S.C. § 3730(b)(4)(B) & (c)(3).

[4] See United States ex rel. Carter v. Halliburton Co., 710 F.3d 171, 181 (4th Cir. 2013); United States ex rel. Branch Consultants v. Allstate Ins. Co., 560 F.3d 371, 376–77 (5th Cir. 2009); Walburn v. Lockheed Martin Corp., 431 F.3d 966, 970 (6th Cir. 2005); United States ex rel. Lujan v. Hughes Aircraft Co., 243 F.3d 1181, 1187–89 (9th Cir. 2001); Grynberg v. Koch Gateway Pipeline Co., 390 F.3d 1276, 1278 (10th Cir. 2004).

[5] See United States ex rel. Heath v. AT&T, Inc., 791 F.3d 112, 120–21 (D.C. Cir. 2015); United States ex rel. McGuire v. Millennium Labs., Inc., 923 F.3d 240, 250–51 (1st Cir. 2019); United States ex rel. Hayes v. Allstate Ins. Co., 853 F.3d 80, 85–86 (2d Cir. 2017) (per curiam).

[6] See Petition for Writ of Certiorari, United States ex rel. Concilio De Salud Integral De Loiza, Inc. v. J.C. Remodeling, No. 20-781 (U.S. Dec. 3, 2020).

[7] See, e.g., United States ex rel. Roby v. Boeing Co., 302 F.3d 637, 647 (6th Cir. 2002) (concluding that the value of a helicopter manufactured by Boeing, as received, was zero).

This article first appeared on the Westlaw Practitioner Insights Commentaries web page on January 15, 2021.

ABOUT THE AUTHORS

Marc Van Allen (L) is a co-chair of **Jenner & Block's** Government Contracts Practice who counsels clients in disputes over corporate transactions, joint ventures, partnerships, licenses and contracts. He is based in Washington and can be reached at mvanallen@jenner.com. **Scott Whitman** (R) is a Washington-based law clerk in the firm's Government Contracts Practice. He can be reached at swhitman@jenner.com.

Thomson Reuters develops and delivers intelligent information and solutions for professionals, connecting and empowering global markets. We enable professionals to make the decisions that matter most, all powered by the world's most trusted news organization.