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Same FCA Question — Different Answers

Law360, New York (February 25, 2013, 12:25 PM ET) -- So far this year, three appellate courts have answered a question on the pleading standard necessitated by the False Claims Act: Does the complainant have to plead the existence of a false claim?

Specifically, the Fourth, D.C. and Ninth Circuits have all addressed whether the particularity requirements of Federal Rule of Civil Procedure 9(b) permit a complaint relying only on an inference about false claims submitted to the government.

The Fourth Circuit, in the only published decision, and the D.C. Circuit refused to make inferences about false claims. The Ninth Circuit, relying on its own precedent — and United States ex rel. Grubbs v. Kanneganti, 565 F.3d 180 (5th Cir. 2009) — did.

U.S. ex rel. Nathan v. Takeda Pharmaceuticals N. Am., Inc., 11-2077, (4th Cir. Jan. 11, 2013)

A sales manager for Takeda Pharmaceuticals, the relator alleged Takeda's marketing practices for a drug used to treat various gastric conditions, Kapidex, violated the FCA by causing doctors to write prescriptions for certain medical uses not approved by the U.S. Food and Drug Administration. In particular, the relator alleged Takeda engaged in two types of improper marketing schemes: (1) promoting Kapidex to rheumatologists who typically did not treat patients with conditions for which the FDA had authorized Kapidex; and (2) promoting high doses of Kapidex for treating conditions, despite the FDA having only approved a lower dose for those conditions. The district court found these allegations insufficient as it dismissed the complaint for, among other reasons, the failure to allege that a false claim for payment was presented to the government.

On appeal, the Fourth Circuit distinguished the Grubbs case and held that the relevant pleading standards require plausible — i.e., detailed — allegations of specific false claims presented to the government — unless the defendant's actions necessarily led to a false claim submitted to the government.

Applying its holding, the Fourth Circuit determined that four categories of allegations offered by the relator all permitted other inferences besides the submission of a false claim. Broadly speaking, both the downstream doctor and patient recipients of Kapidex might have done something besides submitting a claim to Medicare.

U.S. ex rel. Bender v. North American Telecommunications Inc., No. 10–7176, (C.A.D.C. Jan. 25, 2013)

In Bender, the relator, an electrician employed by a government contractor, alleged that his employer and other government contractors engaged in several wrongful activities: falsifying response times to service calls to attain monthly bonuses, misrepresenting nonreimbursable repairs as reimbursable ones,

charging the government for work by unqualified employees, wrongly billing for overtime work, and misrepresenting the amount of work performed.
The district court noted that the relator, as an electrician, had limited access to documentation about submitted claims. Thus, the district court dismissed the complaint because, generally speaking, the relator didn't allege that specific false claims followed from specific instances of misconduct.

The D.C. Circuit affirmed dismissal because the relator "failed to allege specific false claims and instead relied on general statements of alleged practice." In particular, the relator "failed to allege the time, place, and content of particular false claims, whether those claims were actually submitted to the government, who precisely was involved in making those claims, and what was obtained as a result."

United States v. Kaplan Inc., 11-16651, (Ninth Cir. Feb. 13, 2013)

As alleged in Kaplan, the relator, an admissions representative at a for-profit college, inquired about boxes of undistributed diplomas he'd seen. After inquiry, he allegedly found out about a practice by which students were kept on attendance rolls and graduated, despite little or no participation in coursework. But the relator had his complaint dismissed by the district court "for not identifying which false claims were submitted and when."

Rejecting that the relator had to identify representative examples of false claims for his allegations, the Ninth Circuit relied on a previous decision holding that a relator can meet the pleading burden 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." The Ninth Circuit found such an inference because "[i]t would stretch the imagination to believe that Kaplan employees fastidiously (and secretively) documented fake student enrollment statistics and met about them once the threshold for financial aid eligibility was crossed, only for the scheme to deviate at the last moment such that they did not submit those claims to the Department of Education."

Though the Ninth Circuit partially reversed the dismissal, the opinion was not unanimous. The dissent acknowledged the previous decision but faulted the relator for "not provid[ing] a representative false claim for any allegation." In addition, trial courts within the Ninth Circuit continue to dismiss claims by applying the more Takeda-like approach refusing to make inferences when other possibilities exist. See, e.g., Zeman ex rel. U.S. v. USC Univ. Hosp., 11-05755, at *2 (C.D. Cal. Feb. 19, 2013) ("The mere fact that Plaintiff received a bill, however, does not necessarily establish that the service was covered by Medicare in the first instance or indicate that the Hospital submitted any claims, let alone false or fraudulent claims, to the United States.")

At bottom, these cases all reflect the ongoing tension between many relators' relative ignorance of internal billing records and the purpose of the FCA — to punish not every type of fraud committed upon the government but, rather, to punish fraud designed to extract money from the government.

Practically, Takeda and Bender serve as welcome contra-indicators. Nevertheless, these two decisions aside, appellate courts increasingly appear to resolve the tension by favoring the relator, thereby permitting relators — including those not employed by defendants — to leverage the asymmetries of civil discovery against defendants.

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