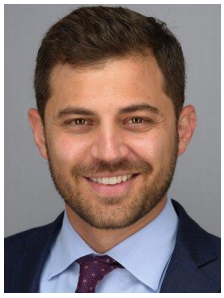
A Look At Jackson's False Claims Act Jurisprudence

By **Brad Robertson and Giovanni Giarratana** (March 23, 2022)

Brad Robertson



Giovanni Giarratana

U.S. Supreme Court nominee Ketanji Brown Jackson is not a stranger to the False Claims Act. In her eight years as a U.S. district judge for the District of Columbia, before she was elevated to the U.S. Court of Appeals for the D.C. Circuit in 2021, she handled at least two FCA cases — one about a federal grant recipient and one about a government contractor.

Her decisions in these cases show a meticulous and thorough approach, with particular attention to pleading standards. This article will provide a summary of the two FCA cases and discuss whether they provide any insight as to how Jackson might lean when evaluating an FCA pleading standard case as a Supreme Court justice.

Si v. Laogai Research Foundation

In 2013, Jackson issued her first opinion in declined qui tam action Pencheng Si v. Laogai Research Foundation.[1] Si, the relator, alleged that two nonprofits and their director fraudulently induced grant contracts by providing false information, used grant funding for personal expenses, and engaged in lobbying in violation of the contract.

Jackson found that the complaint — which incorporated by reference paragraphs of factual background to each claim — did not meet the plausibility standard for notice pleading under Rule 8. Regardless, she declined to grant the defendants' motion to dismiss and instead directed the relator to revise the complaint to make clear which legal theory applied to which facts.

The relator amended his complaint. Jackson ruled on the defendants' next motion to dismiss in a much lengthier order, dismissing all the relator's claims except for his retaliation claim.[2]

After determining once again that Si failed to specify which alleged facts related to each count, and noting that this deficiency alone was again enough to dismiss his FCA fraud allegations, she proceeded to analyze each theory alleged and the "deluge of irrelevant examples of supposed misconduct" to determine which alleged factual examples supported which theories, and to assess the particularity with which those examples were pleaded and their materiality to the government's decision to award the grant.

She allowed only the retaliation claim to proceed. She also found that the director of the nonprofit could be a defendant in his individual capacity because he was an alter ego of the company and therefore an employer for retaliation purposes.

U.S. v. Computer Sciences Corporation

Jackson once again showed her meticulousness U.S. v. Computer Sciences Corporation, in which she denied all but one of the defendants' motions to dismiss.[3] In that case, the relator brought a qui tam action alleging that CSC, a prime contractor for technology information services, fraudulently induced the U.S. Department of Homeland Security to award it a $200 million contract based on its promise to subcontract a specific portion of its

work to small businesses.

The relator, Tien Tran, alleged that CSC devised a pass-through scheme with two other entities, Modis Inc. and Sagent Partners LLC, whereby CSC subcontracted with a small business — i.e., Sagent — that was required to subcontract with larger businesses — i.e., Modis. This was allegedly done to make it appear that CSC was subcontracting its work to small businesses when in reality the work was performed by larger businesses.

Each of the three defendants filed a motion to dismiss for failure to state a claim under Rule 12(b)(6) and for failure to plead with particularity under Rule 9(b). In a thorough and lengthy order, Jackson denied CSC's and Modis' motions to dismiss — first dismantling their theory that federal law condones the alleged pass-through arrangement and then analyzing the complaint for particularity in connection with each cause of action asserted.

Jackson granted only defendant Sagent's motion to dismiss, focusing on the lack of allegations concerning Sagent's knowledge, noting that it was the "linchpin of establishing fraud under the circumstances."

Whereas CSC submitted the claims, and the complaint included statements from a Modis employee about the need to increase small-business spending, she found the complaint lacked "any suggestion that Sagent was even aware that its business relationship with CSC was part of a broader plan related to ... small business obligations."

Jackson then turned to the retaliation claim, finding that the complaint failed to allege a plausible retaliation claim. Though the relator refused to participate in the alleged scheme, Jackson found that a mere refusal to participate was not a protected activity. Further, she found that the complaint did not establish any causal connection between the refusal to participate and the relator's termination.

In a moment of whimsy addressing for the third time the defendants' argument that the pass-through arrangement was entirely appropriate — which the defendants raised multiple times in different contexts — Jackson included a footnote citing to Zombiepedia for the contention that it "'will rarely take only one swing' to kill a zombie."

Jackson's Approach to Rule 9(b) Pleading Standards

In both of these cases, Jackson analyzed the relators' claims under Rule 9(b). For many years now, there has been a split among the circuits regarding how Rule 9(b)'s particularity requirements apply in the FCA context.

Some circuits have taken a strict approach, requiring a complaint to allege specific representative false claims in order to survive a motion to dismiss.[4] Other circuits have taken a more lenient approach that allows a complaint to survive so long as the claims allege enough particular details regarding the scheme, paired with sufficient indicia of reliability.[5]

Of particular relevance, the D.C. Circuit — the circuit in which Jackson presently serves — takes the more lenient approach of the two,[6] which it adopted in a 2015 ruling in U.S. v. AT&T Inc.[7]

The two opinions by Jackson discussed above were written while she was on the D.C. district court and predate the D.C. Circuit's lenient position in the circuit split over application of Rule 9(b). While Jackson did not have the AT&T ruling as precedent to follow

when deciding these cases, in CSC she seems to have taken the more lenient approach.

Specifically, in CSC, she held that Rule 9(b) only required that the details of the scheme be stated with particularity,[8] and cited the 2009 U.S. Court of Appeals for the Seventh Circuit ruling in U.S. v. Rolls-Royce Corp. for the proposition that a relator is not required to identify specific false claims "if the relator has alleged sufficient facts to allow the court to infer" the claims were submitted.[9]

This may indicate that she would take a similar position if faced with the question as a Supreme Court justice.

How Jackson might approach the issue if it came before the Supreme Court is not entirely clear, however, because the relator in CSC did plead some information about the claims submitted — alleging that the false claims were invoices submitted at particular intervals for a specific task order of the contract but not providing specific details about the contents of the invoices or the dates they were submitted.

A Thorough Jurist

Jackson's two FCA cases mirror one another. Whereas in Si she dismissed the substantive FCA counts for pleading failures and allowed the retaliation claim to proceed, in CSC she dismissed the retaliation claim for pleading failures and allowed the substantive FCA counts to proceed.

The main consistency between the two opinions is a demonstrated patience and meticulousness of parsing the law and the pleadings to arrive at her conclusions.

In both cases, Jackson wrote at length, outlining and explaining the law of each theory under the FCA, before beginning her analysis. She made significant effort to analyze the facts alleged, consider whether each claim and element was pled with the requisite particularity and exhaust any potential alternative legal theories.

While Jackson issued both of these decisions early in her judicial career, they evidence a thoughtful and thorough approach to the FCA that would presumably continue during her tenure on the supreme court.

Brad Robertson is a partner and Giovanni P. Giarratana is an associate at Bradley Arant Boult Cummings LLP.

[1] Pencheng Si v. Laogai Research Found., No. CIV.A. 09-2388 KBJ, 2013 WL 4478953 (D.D.C. Aug. 21, 2013).

[2] Pencheng Si v. Laogai Rsch. Found., 71 F. Supp. 3d 73 (D.D.C. 2014).

[3] U.S. ex rel. Tran v. Comput. Sci. Corp., 53 F. Supp. 3d 104 (D.D.C. 2014).

[4] See U.S. ex rel. Bledsoe v. Cmty. Health Sys., Inc., 501 F.3d 493, 510 (6th Cir. 2007) ("We conclude that the concept of a false or fraudulent scheme should be construed as narrowly as is necessary to protect the policies promoted by Rule 9(b). Specifically, we hold that the examples that a relator provides will support more generalized allegations of fraud only to the extent that the relator's examples are representative samples of the broader class of claims."); see also U.S. ex rel. Strubbe v. Crawford Cty. Mem'l Hosp., 915 F.3d 1158 (8th Cir. 2019); U.S. ex rel. Grant v. United Airlines, 912 F.3d 190 (4th Cir. 2018); U.S. ex rel. Clausen v. Lab. Corp. of Am., 290 F.3d 1301 (11th Cir. 2002).

[5] See U.S. ex rel. Heath v. AT&T, Inc., 791 F.3d 112, 126 (D.C. Cir. 2015) ("The central question ... is whether the complaint alleges 'particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted."); see also U.S. ex rel. Chorches for Bankr. Estate of Fabula v. Am. Med. Response, 865 F.3d 71, 89 (2d Cir. 2017); Foglia v. Renal Ventures Mgmt., LLC, 754 F.3d 153, 157 (3d Cir. 2014); Ebeid ex rel. U.S. v. Lungwitz, 616 F.3d 993, 998–99 (9th Cir. 2010); U.S. ex rel. Lemmon v. Envirocare of Utah, Inc., 614 F.3d 1163, 1171 (10th Cir. 2010); U.S. ex rel. Grubbs v. Ravikumar Kanneganti, 565 F.3d 180, 190 (5th Cir. 2009); U.S. ex rel. Duxbury v. Ortho Biotech Prods., L.P., 579 F.3d 13, 29 (1st Cir. 2009); U.S. ex rel. Lusby v. Rolls-Royce Corp., 570 F.3d 849, 854 (7th Cir. 2009).

[6] Heath, 791 F.3d at 126.

[7] Id.

[8] Tran, 53 F. Supp. 3d at 122.

[9] Id. at 123 (citing to Lusby, 570 F.3d at 854).