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# Cos. Need Clarity on Divergent FCA Pleading Standard

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An issue that plagues False Claims Act practitioners and their clients is the circuit split on the degree of particularity as to the alleged falsity of the claims that relator plaintiffs must plead. Several circuits have adopted a strict pleading standard, while the majority of circuits have adopted a much more lenient pleading standard.

This divergence across circuit court pleading standards has caused uncertainty, which has been further exacerbated by the fact that each circuit appears to have a slightly different approach to the level of specificity required to comply with that circuit's own interpretation of the pleading requirements for alleging fraud, set forth in Federal Rule of Civil Procedure 9(b).

The U.S. Supreme Court has been reluctant to resolve the circuit split, but later this year it will hear U.S. v. Safeway Inc. and U.S. v. SuperValu Inc., two cases that involve the viability of FCA claims where the knowledge component involves an ambiguous compliance obligation. While this will not directly address the pleading standard, it will surely shed light on what the Supreme Court believes constitutes a claim under the FCA.

Regardless, the continued lack of uniformity in pleading requirements poses problems for companies that face increased risk of finding themselves subject to FCA lawsuits and concomitant federal investigations.

Given the Supreme Court's apparent unwillingness to directly address this circuit split, it appears unlikely that this problem will go away any time soon. As a result, companies must contend with this pleading circuit split and plan accordingly.

**False Claims Act Pleading Standards by Circuit**

With respect to the standard for pleading specificity under the FCA, the U.S. Court of Appeals for the Second Circuit, U.S. Court of Appeals for the Third Circuit, U.S. Court of Appeals for the Fifth Circuit, U.S. Court of Appeals for the Seventh Circuit, U.S. Court of Appeals for the Eighth Circuit, U.S. Court of Appeals for the Ninth Circuit and U.S. Court of Appeals for the Tenth Circuit have adopted a lenient pleading standard that permits a relator to proceed with an FCA claim if the submission of the false claim can reasonably be inferred from other well-pleaded facts in the complaint.

While these circuits allow the falsity of the claim to be inferred, each has slightly different pleading requirements that must be met before a relator can take advantage of this pleading leniency.

In contrast, the U.S. Court of Appeals for the First Circuit, U.S. Court of Appeals for the Sixth Circuit and U.S. Court of Appeals for the Eleventh Circuit have generally held the submission of claims cannot be inferred from circumstances, and that unless the relator pleads specific details of the false claims themselves, the complaint must be dismissed.

Two circuits — the U.S. Court of Appeals for the Fourth Circuit and U.S. Court of Appeals for the D.C. Circuit — sit somewhere in the middle and blend the lenient and strict pleading approaches described above.

**The Supreme Court Is Set to Rule on Two FCA Cases**

Notwithstanding the Supreme Court's denial of certiorari in three cases — Johnson v. Bethany Hospice and Palliative Care LLC, U.S. v. Fazzi Associates Inc. and Molina Healthcare of Illinois Inc. v. Prose — it is not philosophically against taking FCA-focused cases, as evidenced by this year's docket.

Coming from the Seventh Circuit, Safeway and SuperValu both pose a similar question: Does it matter whether a company or individual intended to commit fraud when the attempted compliance was objectively reasonable, and when compliance duties are ambiguous and those viewpoints were not foreclosed by previous authoritative guidance?

While it is unlikely the Supreme Court will directly address the pleading standard in either of these cases, the scienter requirement, and therefore a key aspect of the pleading requirements, could become clearer with the high court's ruling.

**Risks Posed to Companies by Current Circuit Split**

Despite clear factual differences in the cases mentioned above, there is a powerful common thread: the fact that the divergent pleading standards across the various circuit courts can and does lead to different results on motions to dismiss depending upon the circuit in which the case is brought. A case may be dismissed in one circuit whereas it would survive in another.

Put another way, the implications of having disparate pleading standards across circuits is not merely theoretical. The uncertainty presents real challenges for companies and individuals that may be subject to an FCA investigation or lawsuit, including forum shopping, prosecutorial focus on companies located in lenient circuits, and similar — or even identical — fact-patterns resulting in varying outcomes based solely on the circuit in which they are filed.

These risks make it challenging for companies to develop and implement robust FCA compliance policies, and they make it even more challenging to anticipate and prepare a defense in the event of FCA litigation.

**Forum Shopping**

Forum shopping, arguably the most prevalent concern arising from the lack of uniformity among circuits, encourages relators to bring FCA claims in the circuits with lenient pleading standards, while avoiding bringing claims in the most inhospitable circuits with stricter pleading standards. Though frowned upon, this practice is all

too common because it serves to decrease the likelihood of their claim being dismissed.

For example, a relator filing an FCA lawsuit in the Ninth Circuit need not plead allegations with absolute particularity or provide a recital of the evidence. The Ninth Circuit, of course, includes California, home to many of the country's largest corporations. Under the Federal Rules of Civil Procedure and long-established case law, such companies frequently find themselves subject to jurisdiction in California's federal courts regardless of where the relator is located.

Forum shopping can also increase the litigation costs for companies defending claims if they are pulled into a venue outside their principal place of business simply because it is more favorable to the relator. By engaging in interstate commerce, a company that does business in multiple states across multiple circuits will often subject itself to jurisdiction of the federal courts in the more lenient circuits.

This situation is exacerbated in a post-pandemic world where we have seen a huge increase in the number of employees working remotely, providing new avenues for relators to establish a nexus to a more lenient circuit.

**Increased Self-Reporting and Government Scrutiny for Companies in Lenient Circuits**

In light of the very real danger of forum shopping, companies located in relator-friendly circuits face a heightened risk of government scrutiny. As a result, such companies have a higher incentive to self-report potential FCA violations to position themselves to reduce potential damages.

Those companies, as a matter of pure risk mitigation, also may be more inclined to have more robust internal FCA compliance programs and reporting procedures to identify potential violations early and take immediate preventative or remedial actions. Such actions, which can include regular internal audits and investigations, may require significant expenditures of a company's resources and the retention of outside investigators, accountants and attorneys.

While these compliance programs are necessary, legal exposure and increased costs could cause a company to reconsider its principal place of business or reevaluate where the company chooses to operate. We have already seen this with several notable companies choosing to leave California for Texas due to tax-related considerations.

It would not be surprising to see other companies follow suit by moving from a more lenient to a stricter federal judicial circuit as a strategy for reducing FCA-related risks. If this trend continues, it could have a chilling effect on the economies of states in circuits with lenient pleading standards.

These considerations will disproportionally impact heavily regulated industries such as health care and government contracts, which are prime targets for U.S. Department of Justice and other state or federal regulators, while also being subject to lawsuits filed by relators. Indeed, the health care industry accounts for over 80% of damages collected by DOJ.[1]

**Inconsistent Results**

Perhaps the most dangerous risk posed by the circuit split on FCA pleading standards is the risk of inconsistent

and even conflicting judicial decisions. This places an enormous burden on appellate courts, which will inevitably see an increase in appeals from parties seeking a clearer understanding of the FCA's pleading standard.

This issue is demonstrated by looking at two recent cases, one coming from the Eleventh Circuit and the other from the Ninth Circuit.

In its 2019 ruling in U.S. v. AseraCare Inc., the Eleventh Circuit found that a reasonable difference of medical opinion, without more, is not sufficient to plead a false claim.[2] However, a 2020 Ninth Circuit case, U.S. v. Gardens Regional Hospital & Medical Center Inc., suggested the exact opposite, i.e., that a mere difference of medical opinion may be enough to satisfy the falsity element of the FCA.[3]

Surprisingly, the Supreme Court denied certiorari, thereby declining the opportunity to create uniformity. Such inconsistency creates confusion across the legal system at all levels, requiring courts and litigants alike to navigate the lack of clarity in preparing their legal strategy.

Inconsistent rulings like this make it nearly impossible for companies to understand the law and to create — much less implement — consistent compliance policies. Inconsistent rulings also make it virtually impossible for companies and their counsel to anticipate how FCA case law is likely to evolve. This forces companies to adopt a reactionary approach instead of a proactive approach to FCA claims and risk mitigation.

**Future of FCA Claims**

Unless and until the Supreme Court chooses to directly address this circuit split, companies will continue to face forum shopping, disparate reporting and compliance requirements, and vastly inconsistent judicial decisions. The circuit split will continue to obstruct the creation of uniform FCA compliance and litigation strategies, and will force companies that face potential FCA investigation and litigation to constantly review their FCA-related policies and compliance procedures, including training.

Beyond that, companies operating in industries likely to face heightened levels of scrutiny — e.g., health care, government contracting, etc. — must take the additional step of weighing the risks of noncompliance and the burden it could have on a company's bottom line. Without strict compliance procedures in place these companies face the prospect of losing lucrative contracts or failing to be reimbursed for medical procedures, in addition to the risk of substantial FCA-related fines, penalties and settlements.

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[1] See U.S. Dept' of Justice, Justice Department Recovers over $2.2 Billion from False Claims Act Cases in Fiscal Year 2020 (Jan. 14, 2021), https://www.justice.gov/opa/pr/justice-department-recovers-over-22-billion-false-claims-act-cases-fiscal-year-2020.

[2] See U.S. v. AseraCare Inc. , 938 F.3d 1278 (11th Cir. 2019).

[3] Winter ex rel. U.S. v. Gardens Reg'l Hosp. & Med. Ctr. Inc. , 953 F.3d, 1108, 1120 (9th Cir. 2020).

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