FCA Questions That High Court May Address Next Term

By **Michael Waldman and Ralph Mayrell** (May 16, 2018)

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After deciding a False Claims Act case in three straight terms — Carter (2014), Escobar (2015) and Rigsby (2016) — the U.S. Supreme Court skipped the FCA in the 2017 term. But, as the court noted in Carter, the FCA's many parts hardly "operate together smoothly like a finely tuned machine," leading relators and defendants to ask the court to break out the wrenches again. Although the court has denied review on 12 FCA-related petitions this term, at least six petitions raising FCA issues currently remain on the docket. And three of them appear to have already piqued the court's interest.

Does Government Inaction Defeat Materiality?

Escobar, the seminal Supreme Court decision addressing whether an implied certification can form the basis of FCA liability, reinvigorated the FCA's materiality standard. Defendants have sought to dismiss cases in the lower courts relying on Escobar's statement that the government's continued payment where it has knowledge of regulatory or contractual violations is "very strong evidence" that the violations were not material.

Two petitioners ask the court to clarify this materiality standard. The defendant in Gilead Sciences Inc. v. U.S. ex rel. Campie,[1] argues the Ninth Circuit undermined Escobar by reversing a dismissal below even though the government allegedly knew of the alleged violations of U.S. Food and Drug Administration rules but continued to pay the defendant. Meanwhile, the relator in U.S. ex rel. Harman v. Trinity Industries,[2] says the Fifth Circuit erred when it cited government acquiescence as a reason for vacating a $663 million judgment. (Harman also seeks review of whether a state's acquiescence is relevant where the state makes the payment decisions.)

These petitions appear to have caught the court's eye. In late April, the court invited the solicitor general to weigh in on Campie, a request that is correlated with far better odds of a grant. Meanwhile, the court indicated that Harman would be rescheduled for a future conference, suggesting the court might hold Harman pending Campie. Given the timing of the Campie invitation to the solicitor general, the court will likely end up considering Campie after the justices return from their summer break in late September.

Can a First-to-File Defect Be Cured?

The relator in U.S. ex rel. Carter v. Halliburton Co.[3] seeks a sequel to the 2015 Supreme Court FCA decision in the same case. The first-to-file bar prohibits a relator from bringing an action while a related action is pending, protecting defendants from copycat lawsuits. The relator in this case brought his action while two earlier-filed actions were pending, and so his action was barred by first-to-file. After the earlier-filed actions were dismissed, the relator argued that the first-to-file bar was lifted and his case could be revived. The Fourth Circuit disagreed and affirmed dismissal of his action. Carter then filed his pending petition for certiorari.

The court has invited the solicitor general to weigh in on Carter's petition, and it is possible the solicitor general will submit his brief in the next few weeks, in time for the court to decide whether to grant certiorari this term. The U.S. Department of Justice rejected Carter's position in an amicus brief filed in support of the defendant in U.S. ex rel. Wood v. Allergan Inc.,[4] which suggests the DOJ will support affirmance here. Complicating matters, in April, the relator's counsel disclosed to the court that the relator had been dead for two years, and it remains to be seen what effect Carter's death will have on the petition.

Can Billings Be Inferred on the Pleadings?

Every year for the past several years, at least one, and often multiple relators, plus an occasional defendant, files a petition arguing that there is a split about the level of detail with which a relator or the government must plead the elements of the FCA under Rule 9(b). Often, the purported split is characterized as turning on whether the relator must plead the details of a false bill or invoice submitted to the United States for payment, that is, must it plead the actual false claim to the government with particularity. Two petitions by defendants raising this question have already been denied this term, and now two petitions by relators raise the same question to the court: U.S. ex rel. Chase v. Chapters Health System Inc.,[5] coming out the Eleventh Circuit and U.S. ex rel. Ibanez v. Bristol-Meyers Squibb Co.,[6] coming out of the Sixth Circuit.

It is hard to see how these new petitions will fare better than the previous ones, including one several terms ago, U.S. ex rel. Nathan v. Takeda Pharmaceuticals,[7] where the court asked for the views of the solicitor general. Also, the Second Circuit recently insisted in discussing this Rule 9(b) issue that "the reports of a circuit split are, like those prematurely reporting Mark Twain's death, greatly exaggerated."[8]

Other Loose Screws

The Supreme Court also may find itself enticed by the other FCA petitions currently before it or on their way. For example, U.S. ex rel. King v. Solvay Pharmaceuticals Inc.[9] argues that circumstantial evidence should be sufficient on summary judgment to connect alleged off-label drug promotion to billings, and that under the pre-2010 version of the public disclosure bar a relator is an original source even when he lacks direct knowledge of billings. In U.S. ex rel. Bennett v. Biotronik Inc.,[10] the relator has sought an extension of time to file a petition for review of the Ninth Circuit's decision that the FCA's "government action" bar prohibits bringing a case based on the nonintervened portions of a case where the government settled the intervened allegations. And, maybe the best candidate of all for certiorari will likely be filed in the next month or two: The Eleventh Circuit's decision in U.S. ex rel. Hunt v. Cochise Consultancy Inc.,[11] creates a three-way circuit split on how the FCA's statute of limitation applies to a relator's lawsuit when the United States elects not to intervene.

It is impossible to know which of the many problems with the FCA's machinery the Supreme Court will choose to fix, but it is a good bet that the Supreme Court will again be hearing a FCA case next term. And maybe more than one.

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[1] Gilead Sciences, Inc. v. U.S. ex rel. Campie, No. 17-936,

[2] U.S. ex rel. Harman v. Trinity Industries, No. 17-1149,

[3] U.S. ex rel. Carter v. Halliburton Co., No. 17-1060,

[4] U.S. ex rel. Wood v. Allergan, Inc., No. 17-2191 (2d Cir.)

[5] U.S. ex rel. Chase v. Chapters Health System, Inc., No. 17-1477

[6] U.S. ex rel. Ibanez v. Bristol-Meyers Squibb Co., No. 17-1399

[7] U.S. ex rel. Nathan v. Takeda Pharmaceuticals, No. 12-1349

[8] U.S. ex rel. Chorches v. American Medical Response, Inc., No. 15-3930, 2017 WL 3180616 (July 27, 2017).

[9] U.S. ex rel. King v. Solvay Pharmaceuticals, Inc., No. 17-1370

[10] U.S. ex rel. Bennett v. Biotronik, Inc., No. 17A1225

[11] 887 F.3d 1081 (11th Cir. 2018).