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The Supreme Court Signals It Will Resolve FCA Original Source and Rule 9(b) Issues

Where is the line between a legitimate False Claims Act whistleblower and an opportunistic parasite? How detailed do a whistleblower's allegations have to be to survive a motion to dismiss and subject a defendant to expensive discovery? These questions have split the federal courts. The Supreme Court recently invited the Solicitor General to offer the government's opinions on a petition for *certiorari* raising these questions. This is a strong signal that the Supreme Court will address these issues and hopefully bring more clarity to False Claims Act litigation.

The Original Source Exception

The False Claims Act(FCA) allows whistleblowers (known as relators) to file lawsuits on behalf of the government and share in the government's financial recovery. Congress understood that granting a bounty to private citizens could result in frivolous lawsuits. One type of frivolous lawsuit is an action filed by a relator after learning about an alleged fraud from a third party, such as from the news media or an already filed lawsuit. Congress attempted to eliminate these suits by disallowing FCA actions if they are based on prior public disclosures. This is referred to as the "public disclosure bar."

One important exception to the public disclosure bar is that a relator may bring a lawsuit based on a previous public disclosure if the person bringing the lawsuit is "an original source of the information."An original source is a person who has "direct and independent knowledge" of the information and "has voluntarily provided the information to the Government before filing an action." This known as the "original source exception."

In the prototypical case, a whistleblower tells the government about an alleged fraud. The government investigates the allegations and the news media report on the situation. The whistleblower then files an FCA lawsuit. Although the lawsuit is based on the government's and the media's reports, the whistleblower satisfies the original source exception. What happens, however, if the relator had enough information to be a whistleblower but somebody else reported the allegations to the government? The courts have split on how to treat this situation.

In the case seeking Supreme Court review, Ortho Biotech Products (OBP) and other drug

companies were defendants in a highly publicized, multi-district lawsuit concerning the companies' average wholesale price reporting practices.*United States ex rel. Duxbury v. Ortho Biotech Products, L.P.*, 579 F.3d 13 (1st Cir. 2009). The relator, Mark Duxbury, subsequently filed an FCA action against OBP. Duxbury, a former OBP sales representative, admitted that his FCA complaint was based on the earlier lawsuit. He also admitted that he had not informed the government of his allegations prior to the earlier lawsuit.

OBP argued that Duxbury could not qualify as an original source because he did not provide information to the government before the first public disclosure (*i.e.*, the multi-district lawsuit). The United States government agreed with OBP and filed an *amicus curiae* brief to oppose Duxbury, who ostensibly represented the government's interests. The First Circuit disagreed with OBP and the government. Instead, the First Circuit divorced the information underlying the public disclosure from the information an original source provides to the government. According to the First Circuit, relators qualify as original sources if they inform the government on the eve of filing their complaint; relators need not have any relationship to the prior public disclosure.

The circuit courts are now split between three opinions. At one end of the spectrum, the First, Fourth, and Eighth Circuits do not require any relationship between an original source's disclosure and the initial public disclosure. At the other end, the Second and Ninth Circuits require an original source to have been a direct or indirect source of the public disclosure. Between those extremes, the Sixth and D.C. Circuits require the original source to provide information before the public disclosure, but the relator does not need to be a source of the public disclosure. Based on its arguments below, the government is expected to ask the Court to reject the First Circuit's approach and, instead, to adopt a rule that requires original sources to have contributed to the initial public disclosures and thus to have benefited the government as true "whistleblowers," not *post hoc* profiteers.

Pleading with Particularity

Because the FCA is a fraud statute, Federal Rule of Civil Procedure 9(b) protects FCA defendants by requiring relators to plead their allegations "with particularity." Duxbury's complaint against OBP failed to identify a single claim. In fact, his complaint did not allege the date, content, amount, or any other identifying characteristic of an alleged false claim. The First Circuit decided that Rule 9(b) applies differently depending on the type of misconduct. When the defendant allegedly made false claims directly to the government, then the relator must identify particular false claims. But, when the defendant allegedly induced third parties to make false claims to the government, then the relator only needs to provide "factual or statistical evidence to strengthen the inference of fraud beyond possibility without necessarily providing details as to each false claim." Duxbury's complaint against OBP falls into this second category, and his general allegation of the alleged scheme satisfied this weakened standard. (It is quite ironic that Duxbury qualified as a person with "direct and independent knowledge" of an FCA violation but could not identify a single false claim.)

The First Circuit's conclusion conflicts with those of the Sixth, Eighth, and Eleventh Circuits. As OBP argues in its petition for *certiorari*, the First Circuit's decision renders Rule 9(b) meaningless because this is the same standard that applies in non-fraud cases, *i.e.*, when Rule

9(b) does not apply. In a telling omission, Duxbury's opposition to Supreme Court review does not defend the First Circuit's dichotomy, instead arguing that the complaint satisfies the ordinary interpretation of Rule 9(b). The proper, strict interpretation of Rule 9(b) is crucial to defendants, because requiring relators to present solid evidence of a violation at the initiation of a lawsuit protects defendants against expensive fishing expeditions disguised as discovery.

Impact of Supreme Court Review

As long as these splits persist, relators may engage in forum-shopping to ensure the vitality of their lawsuits. The False Claims Act allows suits to be filed wherever the defendant does business; the location of the alleged misconduct is irrelevant. Relators attempting to piggy-back on previous public disclosures can be expected to take advantage of the more permissive circuits. For example, Duxbury alleged that OBP caused false claims in Washington (in the Ninth Circuit), yet he filed his FCA lawsuit in Massachusetts (in the First Circuit). The Supreme Court's resolution of the original source and Rule 9(b) issues will make liability depend more on legal principles and less on geography.

Authored by:

Robbie Hurwitz
(213) 617-5476
rhurwitz@sheppardmullin.com