New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 256—NO. 93
MONDAY, NOVEMBER 14, 2016

Federal Civil Enforcement

Expert Analysis

False Claims Act Round Up: Attacking Claims Post-'Escobar'

By **Richard Strassberg**

And **William Harrington**

False Claims Act cases are increasingly seeing the courtroom in active litigation, especially in cases where relators press their fraud theories on their own after the Department of Justice declines to intervene. With more cases requiring courts to adjudicate disputes, it is not surprising that we have seen an increased willingness by courts to dismiss cases on dispositive motions.

Decisions in the last six months provide several new grounds for defendants to challenge the viability of False Claims Act suits. These include a potential strengthening of the FCA materiality requirement, the need for particularity in describing why a claim was objectively false, and greater scrutiny of statistical sampling evidence.

Is False Statement Material?

Recent cases suggest the possibility that courts will in practice apply a more rigorous materiality standard to claims by relators and the government when considering False Claims Act liability. Historically, courts required that the false statement at issue have "a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property," as defined in the statute, often finding a defendant's failure to fulfill express conditions of payment, such as compliance with certain statutory, regulatory or contractual provisions to be material.

Recent cases suggest the possibility that courts will in practice apply a more rigorous materiality standard to claims by relators and the government when considering False Claims Act liability.

This past June, the Supreme Court's decision in *Universal Health Servs. v. Escobar*, 136 S. Ct. 1989 (2016), permitted so-called "implied false certification" cases. With regard to "implied false certification" liability, the court confirmed that liability can attach where a defendant submits a claim for payment that makes specific representations about the goods or services provided, but knowingly fails to disclose noncompliance with a statutory, regulatory, or contractual requirement. *Escobar* at 1995. However, these requirements do not need to be express conditions of payment—instead, the question turns on whether they are material to the government's decision to pay. In order to determine whether such requirement is material, one "looks to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation," (internal quotes omitted). Id. at 2002. In other words, the relator must show some likelihood that the government would in fact—as opposed to in theory—decline payment but for the omitted information.

The court described this materiality standard as "demanding," applying no bright-line rules, but suggesting certain factors to consider. Specifically, "proof of materiality can include, but is not necessarily limited to, evidence that the defendant knows the Government consistently refuses to pay claims" based on noncompliance with particular requirements. But if the government pays a claim in full despite its actual knowledge that certain requirements were violated—specific to the matter at hand or generally—that is very strong evidence that those requirements are not material. The court also deemed relevant, but not dispositive, whether a provision is expressly labeled a condition of payment. And it is not sufficient for a

RICHARD STRASSBERG *and* WILLIAM HARRINGTON *are partners at Goodwin.* JESSICA ADAMS, *an associate at the firm, assisted in the preparation of this article.*

finding of materiality "that the Government would have the option to decline to pay if it knew of the defendant's noncompliance" or "where the noncompliance is minor or insubstantial."

The U.S. Court of Appeals for the Seventh Circuit recently issued a decision in *U.S. v. Sanford-Brown*, 2016 WL 6205746 (7th Cir. Oct. 24, 2016), on remand from the Supreme Court, applying *Escobar's* "demanding" materiality standard. Specifically, the court dismissed relator's implied false certification claims in part because they offered no evidence that the government's decision to pay Sanford-Brown College (SBC) would likely or actually have been different had it known of SBC's alleged noncompliance with Title IV regulations.

Instead, the relevant government agencies "examined SBC multiple times over and concluded that neither administrative penalties nor termination was warranted." At most, the relator showed that SBC's noncompliance would have entitled the government to decline payment—but under *Escobar*, the court stated that this is not enough to prove materiality.

Several district court opinions also suggest that courts are inclined to take a more demanding view of materiality. For instance, in *U.S. ex rel. Scharff v. Camelot Counseling*, 2016 WL 5416494 (S.D.N.Y. Sept. 28, 2016), the relator alleged that the operator of several substance abuse and rehabilitation centers violated Office of Alcoholism and Substance Abuse Services and Medicaid provisions, where counselors failed to keep adequate notes about patients, billed time incorrectly, and maintained records that contained discrepancies between patient signatures.

The court ultimately dismissed the FCA claims in part because the complaint failed to cite any express condition for reimbursement applicable to the defendant, or allege whether the government has refused to reimburse clinics that have engaged in conduct similar to the defendant's. *Camelot* at *8-9.

In *City of Chicago v. Purdue Pharma*, 2016 WL 5477522 (N.D. Ill. Sept. 29, 2016), the government alleged that defendant pharmaceutical companies' direct marketing caused doctors and pharmacies to incorrectly prescribe opioids to treat chronic pain, and thus submit false claims for opioid prescriptions to the city's health plans. The court held that the FCA claims did not meet the materiality standard as defined in *Escobar*, where defendant offered evidence that the city continued paying for the claims at issue even after the lawsuit was filed. *Purdue* at *15.

Under Federal Rule of Civil Procedure 9(b), a plaintiff "alleging fraud or mistake… must state with particularity the circumstances constituting fraud or mistake." Recent cases suggest some pathways where defendants may still prevail in challenging FCA claims for insufficient particularity.

Has a Fraud Been Alleged?

Defendants have had limited success seeking to challenge FCA claims on the grounds that they do not meet the heightened pleading requirements for claims of fraud. Under Federal Rule of Civil Procedure 9(b), a plaintiff "alleging fraud or mistake…must state with particularity the circumstances constituting fraud or mistake." Recent cases suggest some pathways where defendants may still prevail in challenging FCA claims for insufficient particularity.

The general rule is that a relator's pleading is "insufficient if he provided the who, what, where, when, and how of improper practices, but he failed to allege the who, what, where, when, and how of fraudulent submissions to the government." *Corsello v. Lincare*, 428 F.3d 1008, 1014 (11th Cir. 2005). However, cases have held that the relator is not required to tie the alleged scheme to claims for payments made to the government with specificity during the motion to dismiss stage. Instead, a "strong inference" that a claim was submitted is generally sufficient. See *United States ex rel. Prather v. Brookdale Senior Living Communities*, 2016 WL 5539860, at *13-15 (6th Cir. Sept. 30, 2016) (citing cases); *U.S. v. United Healthcare Insurance Company*, 2016 WL 4205941, at *13 (9th Cir. Aug. 10, 2016).

Despite the relaxed specificity requirements described above, the Seventh Circuit recently affirmed dismissal of certain claims for pleading with insufficient particularity as required under Rule 9(b) in *Presser v. Acacia Mental Health Clinic*, 2016 WL 4555648 (Sept. 1, 2016). Here, the relator made several allegations of FCA violations against the defendant "based on her personal knowledge and experience" working as both a nurse and nurse practitioner. For instance, she claimed that several patient assessment protocols mandated by Acacia Mental Health Clinic were not medically necessary.

The court found that the false claims were not presented with sufficient particularity because she "provide[d] no medical, technical, or scientific context which would enable a reader of the complaint to understand why Acacia's alleged actions amount to unnecessary care forbidden by the statute." The court reasoned that without this added context, it is plausible

that the "policies could have entirely innocent explanations." *Acacia* at *7-8. This is contrary to the one claim that the court revived, where the relator alleged "clearly and specifically" that she was told to use an incorrect billing code despite not conducting medical assessments required thereunder—i.e., an objectively false statement.

In this same vein, if claims survive a motion to dismiss, courts have also found personal opinion to be inadequate proof of falsity at summary judgment. In *U.S. ex rel. Wall v. Vista Hospice Care*, 2016 WL 3449833 (N.D. Tex., June 20, 2016), the relator offered medical expert opinion on evidence of a corporate scheme to show falsity as to eligibility for hospice care. *Vista Hospice Care* at *17. On summary judgment, the Northern District of Texas determined this evidence was insufficient because determination of eligibility for hospice is dependent on subjective clinical analysis. And "[b]ecause a physician must use his or her clinical judgment to determine hospice eligibility, an FCA claim about the exercise of that judgment must be predicated on the presence of an objectively verifiable fact at odds with the exercise of that judgment, not a matter of questioning subjective clinical analysis." For example, a relator could present evidence that a certifying physician was not, in fact, exercising clinical judgment because they never saw the patient. Id.

Earlier this year, the court in *U.S. v. AseraCare*, 2016 WL 1270521 (N.D. Ala. March 31, 2016), similarly dismissed FCA claims during summary judgment because the case "boil[ed] down to conflicting views of physicians about whether the medical records support AseraCare's certifications that patients at issue were eligible for hospice care." *AseraCare* at *1. The claims were without merit because the relator offered no objective evidence of falsity. Instead, he only offered his own medical expertise, and the difference of opinion among experts was not enough to prove falsity. Id. at *1-2. The government appealed to the U.S. Court of Appeals for the Eleventh Circuit, but oral argument has not yet been scheduled. See *U.S. v. Aseracare*, No. 16-13004 (11th Cir., filed May 27, 2016).

Statistical Sampling Evidence

It is not unusual for courts to allow statistical sampling evidence in FCA cases involving large numbers of patients or claims, as courts are concerned that widespread fraud will otherwise go unpunished. See e.g., *U.S. v. Robinson*, 2015 WL 1479396, at *10-11 (E.D. Ky. March 31, 2015) (citing cases). Recent cases, however, have demonstrated the need for very fact-specific analyses that may allow a defendant to challenge statistical sampling. This is especially the case where the underlying medical determination is inherently subjective, patient-specific, and dependent on the judgment of involved physicians. So while general attacks on statistical sampling will remain challenging, more surgical approaches may prove availing.

In *Vista Hospice Care*, the court granted the motion to strike the statistician's expert report and exclude testimony, finding it unreliable where "one claim does not meet relator's burden of proof regarding other claims involving different patients, different medical conditions, different caregivers, different facilities, different time periods, and different physicians." However, had the expert accounted for these variables in its calculation, the court suggested that the motion to strike may not have been granted. *Vista Hospice Care* at *13.

In *U.S. ex rel. Michaels v. Agape Senior Cmty.*, 2015 WL 3903675 (D.S.C. June 25, 2015), the relator and defendant reached a settlement after the government declined to intervene. The government challenged the settlement as too low based on a statistical sampling analysis. The court rejected the use of statistical sampling and extrapolation to establish damages or liability, reasoning that each of the claims involved was "fact-dependent and wholly unrelated to each and every other claim," and eligibility for "each of the patients involved a highly fact-intensive inquiry involving medical testimony after a thorough review of the detailed medical chart of each individual patent." Id. at *2 and *8. In light of these factors, the court found that the case was not "suited for statistical sampling." Id.

Conclusion

False Claims Act suits remain difficult to attack through dispositive motions on grounds such as particularity or materiality. But these recent cases show that targeted approaches can yield formidable defenses. As more declined cases are pressed by relators' counsel, we can expect that courts will continue to refine their approach to these issues in ways that weed out meritless claims.