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4th Circ. Sets High Court FCA Agenda For 2014-15 Term

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Since Congress revitalized the False Claims Act in 1986 by amending several of the statute's key provisions, the U.S. Supreme Court has issued 14 opinions concerning the reach of the FCA's fraud provisions. Only one of those opinions arose from a Fourth Circuit decision. That is about to change.

In the last year, the Supreme Court has received no fewer than five petitions seeking review of Fourth Circuit decisions in FCA cases. This surge does not come as a surprise since the Fourth Circuit recently staked out its position on key circuit splits, including the pleading requirements applicable to whistleblowers under Rule 9(b) and the scope of the FCA's first-to-file bar. The Fourth Circuit is also one of the first appellate courts to weigh in on some of the fastest developing aspects of FCA jurisprudence including the constitutional limits of the FCA's draconian penalty provisions under the excessive fines clause and the application of the Wartime Suspension of Limitations Act to the FCA's statute of limitations. A review of the Fourth Circuit's recent FCA decisions thus provides a peek inside six important FCA issues that the Supreme Court has recently thought about.

1) Whether the WSLA Tolls the FCA's Statute of Limitations

The WSLA purports to toll the limitations period for "any offense" involving fraud against the federal government "[w]hen the United States is at war." Following a 2008 amendment, the WSLA also extends the limitations period for five years after the termination of hostilities.

In a 2-1 panel decision rendered on March 18, 2013, in an un-intervened qui tam case arising from a wartime government contract, the Fourth Circuit became the first circuit to consider whether the WSLA tolls the FCA's limitations period. United States ex rel. Carter v. Kellogg Brown & Root Services Inc. The majority panel construed the phrase "any offense" broadly to include civil FCA claims and the phrase "at war" to encompass situations when there is no formal declaration of war. It thus concluded that the WSLA had been tolling the FCA's limitations period since October 2002, when Congress authorized the use of military force in Iraq. The panel did not limit its holding to FCA cases arising in the wartime context and it ignored the FCA's 10-year statute of repose. At least one court has declined to follow the Fourth Circuit's holding on this point.

On July 1, 2014, to the surprise of some FCA practitioners and appellate experts, the Supreme Court agreed to review the decision in Carter. Before it granted certiorari, the court asked the solicitor general for his input. The solicitor general endorsed the Fourth Circuit's reading of the WSLA and argued against Supreme Court's review. Amici, including the Chamber of Commerce, have also jumped into the fray and urged the court to reverse the Carter decision. The lead argument in appellant's opening brief, filed on Aug. 29, is that the WSLA only applies to criminal statutes and thus does not apply to the FCA. The Supreme Court will render its opinion in Carter during its 2014-15 term.

2) Whether the FCA's First-to-File Rule Bars a Later Suit When the First-Filed Suit Has Been Dismissed

The first-to-file rule provides that "[w]hen a person brings an action under" the FCA's qui tam provisions, "no person other than the Government may intervene or bring a related action based on the facts underlying the pending action." The word "pending" has led some courts to hold that the first-to-file rule only bars suits filed while the first-filed suit is "pending." In Carter, the Fourth Circuit became the third appellate court to reach this holding and, as previously stated, the Supreme Court agreed to review the Carter decision on July 1, 2014.

The D.C. Circuit, however, has disagreed with Carter's approach, holding that the first-to-file bar precludes all related suits, even if filed after the first-filed action is dismissed. In United States ex rel. Shea v. Cellco P'ship, the D.C. Circuit explained that the first-to-file bar's plain language, and the policy considerations underlying the statute, demonstrate that the word "pending" serves only to refer to the first-filed action, and not as a temporal limit on the bar. The relator in Shea filed a petition for certiorari in August. It is still pending.

3) Whether the Heightened Pleading Requirements of Rule 9(b) Require Whistleblowers to Plead Actual False Claims

Rule 9(b) provides that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." A circuit split has developed over whether Rule 9(b) requires a whistleblower to plead with particularity the submission of actual false claims to the government, in addition to the alleged fraudulent scheme.

The Fourth Circuit addressed this issue in United States ex rel. Nathan v. Takeda Pharmaceuticals North America Inc. There, it affirmed dismissal of a relator's complaint under Rules 8(a) and 9(b), holding that "when a defendant's actions, as alleged and as reasonably inferred from the allegations could have led, but need not necessarily have led, to the submission of false claims, a relator must allege with particularity that specific false claims actually were presented to the government for payment." In reaching this conclusion, the Fourth Circuit sided with the Sixth, Eighth and Eleventh Circuit in requiring detailed allegations about particular claims for payment in order to plead FCA violations. It rejected holdings from the Fifth, Seventh, Ninth and Tenth Circuits, to the extent that they applied a "more relaxed construction" of Rule 9(b).

Despite this circuit split, the Supreme Court denied the Nathan petition in March 2014. Before it denied certiorari, the Supreme Court invited the solicitor general's input, and the solicitor general argued against certiorari. Although the solicitor general urged against a "per se rule" that would require a plaintiff to plead "the dates and contents of bills or other demands for payment," he suggested that courts were moving towards "a more nuanced approach," and thus "disagreement among the circuits therefore may be capable of resolution without this court's intervention." In any event, the solicitor

general agreed that the relator in Nathan failed to plausibly plead that false claims were submitted to the government.

4) Whether Regulatory Violations of Drug Manufacturing Standards Can Form the Basis of an FCA Suit

The Food, Drug and Cosmetic Act and certain U.S. Food and Drug Administration regulations impose requirements on drug manufacturers designed to prevent the contamination of drugs during the manufacturing process. In United States ex rel. Rostholder v. Omnicare Inc., a relator alleged that the defendant's repackaging facilities allowed the defendant's drugs to become contaminated in violation of these standards, resulting in the submission of false claims. Warning that the FCA should not become "a sweeping mechanism to promote regulatory compliance," the Fourth Circuit ruled that the FDCA and regulatory violations could not give rise to FCA liability because, contaminated or not, the drugs were eligible for payment under Medicare and Medicaid.

In the petition for certiorari, the relator argued that the Fourth Circuit's decision amounted to a "per se rule" that FCA liability for noncompliance with regulations could only exist when compliance was an express condition of payment. By presenting this issue in this fashion, the relator asked the Supreme Court to address a circuit split as to when a claim can be deemed false under the controversial implied certification theory of liability. Courts subscribing to a broad view of this theory allow FCA liability if the government could theoretically deny payment based on noncompliance with a regulation. In contrast, courts adopting a narrow view hold that the implied certification theory only applies if the government program at issue expressly deems compliance with the regulation a prerequisite to payment.

On Oct. 6, following the Supreme Court's first conference of the 2014-15 term, the relator's petition seeking review of the Rostholder decision was denied.

5) Whether a $24 Million Penalty Award Under the FCA Is Unconstitutionally Excessive

In addition to automatic treble damages, courts read the FCA's penalty provision as requiring the imposition of between $5500 and $11,000 of civil penalties for every false "claim for payment" that a defendant submits or causes to be submitted to the government. The excessive fines clause of the Constitution, however, limits the government's power to extract payments as punishment for an offense: Any forfeiture sought by the government must be proportional to the gravity of the offense it is designed to punish.

In United States ex rel. Bunk v. Gosselin World Wide Moving, the Fourth Circuit had to address the application of the excessive fines clause to a penalty award under the FCA. The case involved an intra-European transportation contract for the U.S. Department of Defense that was worth about $3.3 million. After the jury found that the contract was wrongfully obtained, the parties stipulated that the defendants submitted 9136 claims to the government. The relator did not try to prove actual damages and instead only sought penalties for each allegedly false claim.

Because the minimum amount of statutory penalties was over $50 million, the district court refused to award any penalties, finding that such a large award would violate the excessive fines clause in the absence of proof of damages. In reaching this conclusion, the district court rejected the relator's offer to accept a penalty award for less than the statutory minimum, totaling only $24 million. It found that it had no authority to deviate from the FCA's minimum penalty of $5,500 per claim.

The Fourth Circuit reversed and instructed the district court to impose the lower penalty award of $24

million. It ruled that relators can voluntarily limit the penalties because the government, or a whistleblower acting for the government, has "virtually unbounded" discretion to choose a judgment below that mandated by a jury verdict, or by the statute's minimum penalty provision. It then ruled that the reduced penalty award of $24 million was not "excessive" under the excessive fines clause. It cited evidence that "revealed" damages "perhaps in excess of $2 million," and cited intangible factors outside of "the economic realm," that could justify the award. The intangible factors cited included the impact of "the public's faith in the government's competence" and the deterrent effect of the award.

The defendants filed a petition for certiorari which spurred amicus briefs from, among others, the Pharmaceutical Research and Manufacturers of America, urging review. The solicitor general submitted a brief on its own initiative, discouraging review. On Oct. 6, the Supreme Court declined to review the Bunk decision.

6) Whether the Pre-2010 Version of the FCA's Public Disclosure Bar Only Applies When a Relator's Allegations Are Actually Derived From a Public Disclosure.

Before it was amended in 2010, the public disclosure rule provided that "No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations." The majority of courts interpreted the phrase "based upon" to mean that the bar is triggered whenever a relator's allegations are "substantially similar" to publicly disclosed allegations. The Fourth Circuit was the only appellate court to hold that the bar applies only when a relator "actually derived" his or her allegations from a public disclosure. Congress adopted the "substantially similar" test when it amended the public disclosure bar in 2010.

In United States ex rel. May v. Purdue Pharma LP, the Fourth Circuit revisited and reaffirmed its unique "actually derived" holding in a case that involved conduct that occurred before 2010. On March 25, 2014, the defendant filed a petition seeking review of this decision. In addition, the petition sought review of the two issues presented in Carter — application of the WSLA to the FCA and the scope of the first-to-file bar. The petition remains pending.

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