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FALSE CLAIMS ACT CIRCUIT SPLITS PROLIFERATE AS SUPREME COURT DECLINES TO RESOLVE SPLIT CONCERNING KEY ELEMENT OF FCA CLAIMS

To Our Clients and Friends:

On Monday, February 22, 2021, the United States Supreme Court declined to resolve a prominent split between federal Courts of Appeal regarding the False Claims Act ("FCA").[1] In denying petitions for writs of *certiorari* in *Care Alternatives v. United States*[2] and *RollinsNelson LTC Corp. v. U.S. ex rel. Winters*,[3] the Court left unresolved whether FCA liability must be predicated on a claim that is objectively false based on verifiable facts, or whether dueling expert opinions based on judgment can suffice to establish falsity. Unfortunately, this issue now joins a host of other questions on which the federal courts have been unable to provide uniform answers in connection with this powerful law enforcement tool. Accordingly, companies doing business with, or seeking payment from, the government must continue awaiting further clarification on a number of crucial issues concerning the enforcement of FCA claims, an ongoing source of legal uncertainty that provides good reason to engage experienced counsel at an early stage of disputes over government contracts and payments.

The False Claims Act

Enacted in 1863 in response to fraud by government contractors during the Civil War, the FCA imposes civil liability on "any person who . . . knowingly presents, or causes to be presented, a false or fraudulent claim for payment" to the federal government or who "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim."[4] Violators are liable for *treble damages* plus per-violation penalties linked to inflation.[5] The FCA incentivizes private citizens to file suits on behalf of the government in so-called *qui tam* actions by allowing these private plaintiffs, known as "relators," to receive a portion of the government's recovery.[6] The FCA also provides protections for whistleblowers who report a violation under the statute.[7]

The number of FCA actions filed has increased substantially in recent years, with more than 4,100 new cases opened since 2015.[8] In 2020 alone, the government and *qui tam* relators opened 922 new FCA matters, the largest single-year total ever by a substantial margin, and obtained more than $2.2 billion in payments.[9] And looking forward, the Department of Justice has publicly announced it will focus on investigating and prosecuting fraud against the United States in connection with various COVID-19 recovery-related programs.[10]

***Denial of Certiorari in* Care Alternatives *and* Winter**

To prevail on an FCA claim, the plaintiff generally must prove the elements of a claim for government payment, falsity, knowledge (*scienter*), and materiality.[11] Crucially, there are different ways in which claims can be deemed false or fraudulent, however. The Supreme Court's denials of certiorari in *Care Alternatives* and *RollinsNelson* make it difficult for businesses to predict what conduct might result in FCA liability in light of ongoing uncertainty as to whether expert opinion testimony stating that an FCA defendant's claims were false can itself produce a genuine dispute of material fact as to the element of falsity. The United States Courts of Appeal have now issued conflicting answers to this pressing question.

In 2019, in *United States v. AsercaCare, Inc.*, the Court of Appeals for the Eleventh Circuit held, in a dispute concerning certifications that patients were eligible for hospice care, that claims cannot be "deemed false" under the FCA based solely on "a reasonable disagreement between medical experts" as to a medical provider's clinical judgment because the FCA requires proof of an "objective falsehood" in a claim for payment.[12] The Third Circuit Court of Appeals subsequently rejected *AsercaCare*'s objective falsity standard in *Care Alternatives*, however, concluding that it improperly conflated the elements of falsity and *scienter*.[13] There, as in *AseraCare*, the hospice care provider Care Alternatives was alleged to have submitted false hospice-reimbursement claims for ineligible patients to Medicare and Medicaid in violation of the FCA. During discovery, the parties produced extensive evidence addressing whether Care Alternatives admitted ineligible patients, including conflicting expert reports. In light of that battle of the experts, the Third Circuit held that "medical opinions may be 'false' and an expert's testimony challenging a physician's medical opinion can be appropriate evidence for the jury to consider on the question of falsity" for purposes of the FCA.[14]

The Ninth Circuit reached a similar result in *Winter*, in which the health care management company RollinsNelson was alleged to have submitted Medicare claims falsely certifying that certain inpatient hospitalizations were medically necessary.[15] The Ninth Circuit concluded that "the FCA does not require a plaintiff to plead an 'objective falsehood'" because a "physician's certification . . . can be false or fraudulent for the same reasons any opinion can be false or fraudulent," including "if the opinion is not honestly held."[16] Both Care Alternatives and RollinsNelson petitioned the Supreme Court for writs of *certiorari*.

The circuit split is problematic because it creates confusion about the types of conduct for which businesses could face liability under the FCA. As Care Alternatives explained in its petition for a writ of *certiorari*, rejecting an "objective falsehood" standard potentially implicates good-faith professional judgments that are "notoriously difficult and inexact."[17] This uncertainty could deter certain businesses from contracting with the government and participating in government funding programs, such as Medicaid and Medicare,[18] and it is likely having a chilling effect causing certain defendants to settle unmeritorious FCA claims to avoid litigation risk—particularly in light of the FCA's severe penalty provisions. The U.S. Chamber of Commerce and the Pharmaceutical Research and Manufacturers of America jointly submitted an *amicus* brief highlighting the potentially wide-ranging implications of the Third Circuit's ruling, similarly arguing that an "objective falsity" standard is the appropriate approach. They argued that the "objective falsity" standard cabins liability by providing a

bright line rule and warned of the risks businesses face whenever "self-interested relators with a hired 'expert' second-guesses a subjective judgment or offers a different interpretation of a provision subject to several reasonable interpretations."[19]

Other Circuit Splits

What must be shown to establish falsity under the FCA is hardly the only area of uncertainty that government contractors must navigate. Over the years, the FCA has generated several other circuit splits that still remain unresolved.

For instance, there is no nationwide standard for dismissal of an FCA claim by the government. Pursuant to § 3730(c)(2)(A), the government may dismiss what it believes to be an unmeritorious action over the objections of the relator bringing suit. Because the FCA does not provide a standard of review for such motions to dismiss, somewhat similar albeit conflicting rules have emerged between an "unfettered right" approach of granting absolute deference to the government,[20] and a "rational relation" approach under which the government must show some rational relation between dismissal and a valid government purpose, such as protecting classified information from disclosure,[21] after which the burden shifts to the relator to show that the dismissal is "fraudulent, arbitrary and capricious, or illegal."[22] The Supreme Court denied a petition for *certiorari* requesting an answer to this question in April 2020,[23] shortly before the Seventh Circuit articulated a third approach that falls between those two.[24]

Another circuit split concerns the specificity of the pleadings necessary to establish a false claim. While some circuits do not require that a complaint allege particular details concerning a submitted false claim,[25] finding it sufficient that "particular details of a scheme to submit false claims [be] paired with reliable indicia that lead to a strong inference that claims were actually submitted,"[26] others impose a stricter standard under which plaintiffs must "plead representative samples of false claims."[27] The Supreme Court declined to resolve whether a relator must plead the factual details of specific false claims in order to survive a motion to dismiss on several occasions, including, most recently, when it denied *certiorari* in *United States ex rel. Strubbe v. Crawford County Memorial Hospi*tal in November 2019.[28]

There are also conflicting decisions regarding the first-to-file rule, which bars the filing of related actions based on the same facts underlying a pending, previously filed FCA action.[29] At issue is whether this provision presents a jurisdictional bar, under which the first to file rule can be raised at any time to defeat a later lawsuit, or whether it is a defense to an FCA claim that is waived if not properly raised at an early stage in the litigation. The First, Second, Third and D.C. Circuit Courts of Appeal have concluded that the first to file rule is not jurisdictional and therefore must be raised in a motion to dismiss,[30] while the Fourth, Fifth, Sixth, Ninth and Tenth Circuit Courts of Appeal have held that the first to file rule is not a waivable defense.[31]

Another split concerns whether the relator bringing suit must have actually participated in or observed the alleged conduct,[32] for purposes of application of the FCA's public disclosure bar, or whether the relator need only know "of the information on which the allegations are based."[33] In addition, there are also differing opinions regarding how strongly the anti-retaliation provision under § 3730(h) protects

whistleblowers who are fired for reporting a false claim under the statute. The Eleventh Circuit held that an employee must satisfy a "but-for" causation standard, whereby the employee must show that the claimed retaliation would not have occurred absent the employee's protected action.[34] In so doing, it rejected the less stringent "motivating factor" standard followed by the Sixth, Seventh, and D.C. Circuits.[35]

Takeaways

The persistence of numerous conflicts among the federal Courts of Appeals on key questions of FCA liability frustrates the uniform application of a national statute. The absence of nationwide rules introduces uncertainty for businesses that contract with, or request payment from, the government because they cannot know ahead of time which standards will be applied to their allegedly liable conduct, particularly if they do business across multiple jurisdictions where the elements of the FCA are applied differently. Moreover, these conflicts encourage opportunistic *qui tam* actions and forum-shopping, as relators strategically file their lawsuits in jurisdictions with more plaintiff-friendly rules on the weakest aspects of their cases. The prospect of having to accommodate different rules in different jurisdictions, and to prepare for potential litigation in multiple forums, can impose significant costs on businesses. These issues will hopefully be resolved in time, either by Supreme Court or Congressional action, providing much needed clarity to this powerful statute. Until then, businesses should engage experienced counsel at an early stage to advise on disputes over government contracts and payments.

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[1] 31 U.S.C. § 3729–3733.

[2] --- S. Ct. ---, 2021 WL 666386 (Feb. 22, 2021).

[3] --- S. Ct. ---, 2021 WL 666435 (Feb. 22, 2021).

[4] 31 U.S.C. § 3729(a)(1)(A)–(B).

[5] *Id*.

[6] *Id*. at § 3730(c)-(d).

[7] *Id*. at § 3730(h).

[8] *See, e.g.*, *2020 Year-End False Claims Act Update*, Gibson Dunn (Jan. 27, 2021), https://www.gibsondunn.com/wp-content/uploads/2021/01/2020-year-end-false-claims-act-update.pdf.

[9] *Id.*

[10] *See, e.g.*, *Eastern District of California Obtains Nation's First Civil Settlement for Fraud on Cares Act Paycheck Protection Program*, Dep't of Justice (Jan, 12, 2021),

https://www.justice.gov/usao-edca/pr/eastern-district-california-obtains-nation-s-first-civil-settlement-fraud-cares-act.

[11] *See, e.g.*, *United States v. Care Alternatives*, 952 F.3d 89, 94 (3d Cir. 2020), *cert. denied*, No. 20-371, 2021 WL 666386 (U.S. Feb. 22, 2021).

[12] 938 F.3d 1278, 1281 (11th Cir. 2019).

[13] *Care Alternatives*, 952 F.3d at 94. FCA claims generally must be pleaded under the heightened pleading standard of Federal Rule of Civil Procedure 9(b), but the element of *scienter* can be pleaded under the liberal pleading standard of Federal Rule of Civil Procedure 8(a). *See, e.g.*, *Adomitis ex. rel. United States v. San Bernardino Mountains Cmty. Hosp. Dist.*, 816 F. App'x 64, 66 (9th Cir. 2020).

[14] *Id*. at 98.

[15] *Winter ex rel. United States v. Gardens Regional Hosp. & Med. Ctr., Inc.*, 953 F.3d 1108 (9th Cir. 2020), *cert. denied sub nom. Rollinsnelson LTC Corp. v. U.S. ex rel. Winters*, No. 20-805, 2021 WL 666435 (U.S. Feb. 22, 2021).

[16] *Id*. It bears noting that certain of these cases were at distinct procedural postures. *Care Alternatives* was decided on a motion for summary judgment, 952 F.3d at 94, and *Asera Care* was decided on a summary judgment after a part of a bifurcated trial had already been completed, 938 F.3d at 1289-90, while *Winter* was decided on a motion to dismiss, 953 F.3d at 1116.

[17] Petition for Writ of Certiorari at 2, *Care Alternatives v. United States, et al. ex rel. Druding, et al.*, No. 20-371 (Sept. 16, 2020).

[18] *Id*. 33

[19] Brief of the Chamber of Commerce of the United States of America and the Pharmaceutical Research and Manufacturers of America (PhRMA) as *Amici Curiae* in Support of Petitioner at 10, *Care Alternatives v. United States, et al. ex rel. Druding, et al.*, No. 20-371 (Oct. 23, 2020).

[20] *See, e.g.*, *Hoyt v. Am. Nat'l Red Cross*, 518 F.3d 61 (D.C. Cir. 2008).

[21] *Ridenour v. Kaiser-Hill Co.*, 397 F.3d 925, 936 (10th Cir. 2005).

[22] *U.S. ex rel., Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139, 1145 (9th Cir. 1998); *see also*, *e.g.*, *Ridenour*, 397 F.3d at 936.

[23] *United States ex rel. Schneider v. JPMorgan Chase Bank*, N.A., 2019 WL 4566462 (D.C. Cir. Aug. 22, 2019), *cert. denied* Case. No. 19-678 (April 6, 2020).

[24] *United States v. UCB, Inc.*, 970 F.3d 835, 839 (7th Cir. 2020).

[25] *See, e.g.*, *United States ex rel. Heath v. AT&T*, 791 F.3d 112, 126 (D.C. Cir. 2015); *Ebeid ex rel. U.S. v. Lungwitz*, 616 F.3d 993, 998-99 (9th Cir. 2010).

[26] *United States ex rel. Chorches for Bankr. Estate of Fabula v. Am. Med. Response*, 865 F.3d 71, 89 (2d Cir. 2017).

[27] *United States ex rel. Strubbe v Crawford County Mem. Hosp.*, 915 F.3d 1158 (8th Cir. 2019); *see also United States ex rel. Grant v. United Airlines*, 912 F.3d 190 (4th Cir. 2018); *United States ex rel. Clausen v. Lab. Corp. of Am.*, 290 F.3d 1301 (11th Cir. 2002).

[28] 140 S. Ct. 553, 205 L. Ed. 2d 356 (2019). Notably, the respondents in *Crawford* argued that there is, in fact, no circuit split on this issue. *See* Brief of Crawford County Memorial Hospital & Bill Bruce, *Strubbe*, No. 19-225 (Oct. 23, 2019).

[29] 31 U.S.C. § 3730(b)(5).

[30] *United States v. Millennium Labs., Inc.*, 923 F.3d 240, 249 (1st Cir. 2019); *United States ex rel. Hayes v. Allstate Ins. Co.*, 853 F.3d 80 (2d Cir. 2017); *In re Plavix Mktg., Sales Practices & Prod. Liab. Litig. (No. II)*, 974 F.3d 228, 231 (3d Cir. 2020); *United States ex rel. Heath v. AT&T, Inc.*, 791 F.3d 112 (D.C. Cir. 2015).

[31] *See United States ex rel. Carter v. Halliburton Co.*, 710 F.3d 171, 181 (4th Cir. 2013); *United States ex rel. Branch Consultants v. Allstate Ins. Co.*, 560 F.3d 371, 376–77 (5th Cir. 2009); *Walburn v. Lockheed Martin Corp.*, 431 F.3d 966, 970 (6th Cir. 2005); *United States ex rel. Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181, 1187–89 (9th Cir. 2001); *Grynberg v. Koch Gateway Pipeline Co.*, 390 F.3d 1276, 1278 (10th Cir. 2004).

[32] *See, e.g.*, *United States ex rel. Schumann v. Astrazeneca Pharm. L.P.*, 769 F.3d 837, 847 (3d Cir. 2014) ("[K]nowledge of a scheme is not direct when it is gained by reviewing files and discussing the documents therein with individuals who actually participated in the memorialized events."); *United States ex rel. Newell v. City of St. Paul, Minn.*, 728 F.3d 791, 797 (8th Cir. 2013) ("[A] person who obtains secondhand information from an individual who has direct knowledge of the alleged fraud does not himself possess direct knowledge and therefore is not an original source under the [FCA]." (quoting *United States ex rel. Barth v. Ridgedale Elec., Inc.*, 44 F.3d 699, 703 (8th Cir. 1995)).

[33] *United States ex rel. Banigan v. PharMerica, Inc.*, 950 F.3d 134 (1st Cir. 2020).

[34] *Nesbitt v. Candler Cty.*, 945 F.3d 1355 (11th Cir. 2020).

[35] *See McKenzie v. BellSouth Telecomms., Inc.*, 219 F.3d 508, 518 (6th Cir. 2000); *United States ex rel. Ziebell v. Fox Valley Workforce Dev. Bd., Inc.*, 806 F.3d 946, 953 (7th Cir. 2015); *Singletary v. Howard Univ.*, 939 F.3d 287, 293 (D.C. Cir. 2019).

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