Portfolio Media. Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Justices Leave FCA Pleading Dispute To Circuits, For Now

By Jeff Overley

Law360, New York (March 31, 2014, 6:48 PM ET) -- The U.S. Supreme Court's refusal Monday to hear a dispute over how precisely whistleblowers must plead their False Claims Act cases doesn't show a lack of interest among justices and instead merely gives circuit judges one last chance to resolve a split on their own, experts say.

By declining to accept Nathan v. Takeda, the high court bowed to the wishes of U.S. Solicitor General Donald B. Verrilli Jr., who, after being invited to express the administration's views, asserted that circuits are inching toward consensus on what it means to plead an FCA suit with "particularity."

It was the second time in recent years that the justices heeded the solicitor general's opposition after eyeing an FCA case involving an important procedural section called Rule 9(b). That suggests high court intervention hinges in no small part on whether the circuits settle their differences.

"The court appears to be very interested," Kirsten Mayer of Ropes & Gray LLP said Monday. "I think it's hard to predict ultimately whether the court will take a case, and I think that depends in part on how the circuit law develops in coming years."

At issue is how much detail whistleblowers must provide in order to get to discovery — a crucial moment in FCA litigation. Debate centers on whether it's enough to describe a scheme that strongly suggests false claims were submitted, as opposed to identifying actual false claims, and if so, how strong the circumstantial evidence must be.

Attorneys have varied views on whether the circuit courts are split all that deeply. But lawyers Monday agreed that the Takeda complaint — thrown out by the Fourth Circuit, which doesn't require whistleblowers to identify specific false claims before discovery — would have likely failed anywhere, and that as a result, it was a poor vehicle for settling a question that would affect hundreds of lawsuits annually and carry multibillion-dollar implications.

"Bad cases make bad law," said David B. Honig of Hall Render Killian Heath & Lyman PC.

There is little indication of how the high court might rule if it were to eventually explore the Rule 9(b) issue, and experts cautioned against reading anything into the fact that justices let the Fourth Circuit's ruling stand, saying that numerous factors are at play when deciding whether to grant certiorari.

"They can actually deny cert on a case they think is wrong," Honig said. "The only thing you can read from a denial of cert is that they're not hearing the case."

A key dispute in the Takeda matter was whether the administration distorted reality when it claimed that circuits have been coalescing on Rule 9(b) interpretation. For example, the solicitor general noted that the Eighth Circuit recently allowed an FCA complaint to proceed despite an absence of specific false claims, which would loosen its historical stance and bring it more in line with some other circuits.

"Disagreement among the circuits therefore may be capable of resolution without this court's intervention," the solicitor general wrote.

Nathan, however, said that the government had mischaracterized the Eighth Circuit's holding. That case, known as In re: Baycol, involved an unusual theory known as fraud in the inducement — committing fraud to land a contract. Despite reviving part of the case involving defense contracts, the Eighth Circuit didn't restore counts alleging Medicare fraud because the whistleblower failed to plead "at least some representative examples of actual reimbursement claims."

Andy Liu of Crowell & Moring LLP is among those skeptical that circuits will bridge their divides, saying Monday that the high court will eventually have to speak up on the matter. And with so many FCA suits being filed each year — whistleblowers brought 750 complaints in 2013 — it's likely that many opportunities will arise for a Rule 9(b) clash to finally become ripe.

"There won't be any shortage of cases in the future," Liu said. "The Rule 9(b) issue will be raised again."

--Editing by Jeremy Barker and Katherine Rautenberg.