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FEATURE COMMENT: The Top FCA Developments Of 2022

2022 was a busy year for the False Claims Act. While recoveries were down, new cases reached a record mark, and settlements addressed multiple important and developing enforcement areas, from cybersecurity to small business fraud, bid rigging, Trade Agreements Act (TAA) compliance, pandemic fraud, and more. Of particular note, 2022 saw the U.S. Supreme Court hold argument concerning the Government's authority to dismiss qui tam actions and the filing of petitions for certiorari as to the critical element of scienter that will be argued before the high court this spring. In addition, the circuit courts issued decisions in multiple key areas. As always, this Feature Comment discusses these and other top FCA developments and looks ahead to what's to come for Government contractors in 2023.

Recovery Statistics and Notable Settlements—Department of Justice recoveries and settlements in FCA matters in fiscal year 2022 topped $2.2 billion. There is no question that this total is a disappointment for the Government—it is the lowest haul that DOJ has reported since 2008. On the other hand, recent years have often seen total recoveries inflated by one or more landmark settlements unlikely to be repeated. For instance, FY 2021's $5.7 billion recovery (the second highest annual recovery total ever), was largely attributed to blockbuster settlements related to the opioid crisis, including a $2.8 billion general unsecured bankruptcy claim against Purdue Pharma. While one could suggest a downward trend in DOJ's recoveries on this basis, the same cannot be said as to its enforcement efforts and priorities.

Indeed, although recoveries were down, FY 2022 saw a record amount of activity, with 948 new FCA matters initiated—the most new matters in a single year—and 351 settlements and judgments, the second-highest number recorded, including in burgeoning enforcement areas.

As they have been for many years, qui tam cases represented DOJ's primary referral source for new FCA matters. The 652 whistleblower suits filed in FY 2022 is largely consistent with volume in recent years. At the same time, last year continued the recent trend of the rise of new non-qui tam actions, with more than 30 percent of new cases initiated directly by the Government. This trend can likely be attributed in part to pandemic-related enforcement and the Government's increased focus on proactively pursuing fraud by using data analysis tools to uncover fraudulent activity. For matters involving Department of Defense funds, the majority of the new cases over the past three years were opened for reasons other than the filing of a qui tam complaint.

DOJ highlighted significant settlements in several key enforcement areas this year. Small business fraud was front and center, with the TriMark USA, LLC settlement setting the record for the largest FCA recovery ever related to allegations of small business set-aside contracting fraud. As part of the settlement, the defendant agreed to pay $48.5 million to resolve allegations that its subsidiaries—providers of kitchen and food service equipment—improperly manipulated set-aside contracts by using small businesses to obtain the contracts, when the small business was merely a face and the non-eligible large business performed virtually all of the work. The sweeping allegations covered a period of 10 years and numerous contracts nationwide. The settlement also included an additional $100,000 civil penalty for a former company executive. In another small business fraud settlement, VE Source LLC paid $7.6 million to resolve allegations that it falsely represented its status as a set-aside eligible service-disabled veteran-owned small business (SDVOSB) in obtaining several Government contracts.

Procurement fraud settlements covered a range of contracts and theories of fraud last year. For example, Kellogg Brown and Root Inc. (KBR) agreed to pay over $13.6 million to resolve allegations of bid-rigging by KBR employees who received kickbacks for improperly favoring certain contractors in subcontract awards, as well as allegations of submitting inflated prices for reimbursement to the Government under the subcontracts. Airbus U.S. Space & Defense Inc. agreed to pay to the U.S. $1.04 million to resolve allegations that it billed impermissible fees to the Government. YRC Freight Inc., Roadway Express Inc. and Yellow Transportation Inc. paid $6.85 million after allegedly overcharging DOD for freight carrier services and making false statements to hide their misconduct. In another bid-rigging action, seven South Korea-based companies paid $3.1 million to resolve allegations that they conspired to suppress and eliminate competition during the bidding process for contracts involving construction and engineering work on U.S. military bases in South Korea.

FY 2022 also saw notable settlements related to the Department of Veterans Affairs, several of which involve regulations applicable to many Government contractors. On Dec. 12, 2022, DOJ announced a $14 million FCA settlement with Coloplast, a medical product manufacturer, after Coloplast self-disclosed violations of the TAA and Price Reduction Clause under a contract with the VA. Coloplast disclosed that it misapplied the substantial-transformation standard, causing it to report incorrect countries of origin for products and to improperly retain certain products on contract after manufacturing moved to non-designated countries. It is unclear whether Coloplast received any monetary credit for its self-disclosure and cooperation efforts. In another matter involving violations of the TAA, Novo Nordisk Inc. paid $6.3 million to resolve allegations that it submitted false claims to the VA for medical devices that were manufactured in non-designated countries. And in a false certification qui tam action, Universal Helicopters Inc. and Dodge City Community College agreed to pay $7.5 million to resolve allegations that they lied to the VA regarding their helicopter flight instructor training program and their compliance with the 85/15 Rule, which requires schools requesting Post-9/11 GI Bill funding to certify that no more than 85 percent of the students for any particular course are receiving VA benefits to help ensure the VA is paying fair market value tuition rates.

Other significant settlements last year came in the areas of insurance, customs, and cybersecurity. State Farm Fire and Casualty Co. agreed to pay $100 million (the entirety of which the district court found was restitution) to settle a long-running qui tam action alleging that the insurance giant doctored engineering reports and submitted fraudulent flood claims to the Federal Emergency Management Agency flood program following Hurricane Katrina in 2005. RGE Motor Direct Inc., an importer and reseller of home goods, agreed to pay $3.25 million to settle a non-intervened qui tam action related to customs fraud allegations that it evaded tariffs on imported merchandise from China. Lastly, there were two settlements involving alleged cybersecurity fraud, each of which are discussed below.

Pending Amendments to the FCA— As reported in our article last year, in July 2021, a bipartisan group of senators, led by Sen. Chuck Grassley (R-Iowa), introduced a bill entitled "False Claims Amendments Act of 2021" (S. 2428) aimed at "beef[ing] up the government's most potent tool to fight fraud." The proposed amendments included revised and/or new provisions about a broad swath of FCA topics, including materiality, the Government's dismissal authority under 31 USCA § 3730(c)(2)(A), discovery upon the Government, retaliation against former employees, and retroactivity. After broad criticism, the amendments stalled in Congress.

Sen. Grassley then re-introduced a pared down version of the proposed amendments in October 2021. The October version cleared the Senate Judiciary Committee, but was not brought to a full vote on the Senate floor before the end of the congressional session that year. 2022 came and went with no material change.

The failure to pass the 2021 amendments has not deterred Grassley's vehement defense of the FCA, as he envisions it. In May 2022, he filed an amicus brief in the Supreme Court case *U.S. ex rel. Schutte v. SuperValu, Inc.*, urging the Court to grant certiorari and overturn the Seventh Circuit's "radical departure" from the FCA, and stop the "lamentable tradition of some courts interpreting the FCA in an unduly restrictive fashion." Additional discussion of *Schutte* is below.

Most recently, on Feb. 16, 2023, Grassley gave a keynote speech at the Federal Bar Association's annual qui tam conference in which he reaffirmed his commitment to re-introducing the proposed FCA amendments this year. According to Grassley, the need for legislative action has become even more dire as what he termed "activist judges" have performed "mental gymnastics" to effectively rewrite the FCA. Grassley emphasized that he will "ensure" that when his amendments are proposed and clear the Judiciary Committee, they will be brought to a vote and passed by the full Senate.

For the time being, it is unknown whether Grassley will reintroduce one of the 2021 versions of the amendments or introduce new changes based on other case law developments. With the Supreme Court set to issue opinions this term on (1) the scope of the Government's dismissal authority and (2) the intersection of ambiguous regulations and the FCA's scienter requirement, Grassley may very well be waiting to see how the high court weighs in before pushing forward. Either way, proposed amendments to the FCA are a key issue to watch in 2023.

COVID-19 Fraud and Enforcement—DOJ maintained its promised focus on COVID-19 related fraud in FY 2022, shown by both new FCA matters and settlements. As to new matters, cases involving allegations of fraud related to the Paycheck Protection Program (PPP) contributed significantly to the rise in the number of non-qui tam matters initiated last fiscal year. One U.S. Attorney's Office (the Northern District of Mississippi) filed nearly 50 FCA actions involving COVID-19-related fraud in FY 2022 and shows no signs of slowing down anytime soon. While many such suits are likely still under seal, there can be little doubt that relators are actively looking for opportunities to file. Last year, a lawyer in Utah announced that he had filed more than 30 qui tam cases alleging PPP fraud based on his review of small businesses in public databases. Another pro se relator filed 47 PPP fraud qui tam actions last year, all of which were summarily dismissed by the District of Alaska for lack of standing.

Notwithstanding the frenzy of filings by opportunistic plaintiffs, the Government's focus on PPP fraud did contribute to the high volume of settlements last year. Of the 351 cases that were resolved through settlement or judgment in FY 2022, 35 of these involved pandemic-related fraud. And numerous PPP loan fraud settlements have continued to be announced so far in FY 2023. In light of these numbers, the dollars at stake, and DOJ's stated focus on pandemic-related fraud enforcement, there are almost certainly more cases in the queue that will be unsealed or initiated in the coming months. In March 2022, DOJ stated that it had opened more than 240 civil investigations into some 1,800 individuals and entities for alleged misconduct in connection with pandemic relief loans. The recoveries associated with these investigations may not have yielded exorbitant recoveries, but that trend could change in the years ahead as DOJ investigates larger and more complex schemes, such as instances in which ineligibility is predicated on a loan recipient's affiliation with a large or otherwise ineligible business.

DOJ's pandemic-related fraud enforcement efforts may also move beyond targeting individuals and small businesses and, instead, focus on those businesses' service providers or lenders. In fact, in September, DOJ announced its first FCA settlement with a PPP lender when Prosperity Bank agreed to pay $18,673 to resolve allegations it improperly processed a PPP loan on behalf of an ineligible customer. While the settlement amount was modest, this matter could signal broader FCA enforcement efforts against lenders who were involved in the distribution of pandemic relief funds to multiple ineligible recipients.

Cybersecurity Compliance—More than three years ago, we discussed a settlement that we flagged as a "wake-up call for Government contractors" with respect to cybersecurity compliance and the likelihood that the Government and relators alike would pursue cybersecurity certifications as a new avenue for FCA claims. 62 GC ¶ 21. Three years later, cybersecurity and the FCA are two terms now regularly found in the same breath, although the theories being pursued remain largely untested in the courts.

On March 8, 2022, DOJ announced the first settlement under the Civil Cyber-Fraud Initiative, launched in October 2021 to hold Government contractors accountable for knowingly providing deficient cybersecurity products or services, misrepresenting their cybersecurity practices or protocols, or violating obligations to monitor and report cybersecurity incidents and breaches. The settlement resolved two cases brought under the whistleblower provisions of the FCA: *U.S. ex rel. Lawler v. Comprehensive Health Servs., Inc. et al.*, No. 20-cv-698 (E.D.N.Y.), and *U.S. ex rel. Watkins et al. v. CHS Middle East, LLC*, No. 17-cv-4319 (E.D.N.Y.). Under the settlement, Comprehensive Health Services LLC (CHS) agreed to pay $930,000 to resolve allegations that it violated the FCA by falsely representing to the State Department and Air Force that it complied with contract requirements relating to the secure storage of medical records under its contracts to provide medical services at Government facilities overseas. DOJ alleged that CHS failed to disclose that staff left medical records on an internal network drive that was not secure and failed to take adequate steps to store the information after staff raised concerns about the privacy of the identifying information.

In a more prominent case, on July 8, 2022 DOJ announced that the defendant in *U.S. ex rel. Markus v. Aerojet Rocketdyne Holdings Inc., et al.,* No. 2:15-cv-02245-WBS-AC (E.D. Cal.) agreed to pay $9 million to resolve FCA allegations that it fraudulently induced the award of contracts with DOD and NASA by misrepresenting its compliance with cybersecurity requirements. The relator, the defendant's former cybersecurity director, alleged that Aerojet made false representations as to its compliance with minimum cybersecurity standards set forth in the Defense Federal Acquisition Regulation Supplement clause 252.204-7012 and NASA FAR Supplement clause 1852.204-76. On Feb. 1, 2022, the Eastern District of California denied the defendant's motion for summary judgment, rejecting the argument that the Government had awarded the contracts at issue with knowledge that Aerojet was not fully compliant with the relevant cybersecurity provisions. The district court ruled that there were genuine issues of material fact as to whether the defendant's disclosures were fulsome enough to preclude a jury from finding materiality, setting the case for trial before a jury with respect to the promissory fraud claim. On the separate false certification claim, however, the court granted summary judgment to Aerojet because that claim applied only to contracts that the court had dismissed on other grounds. On the second day of trial, which began April 28, 2022, the parties settled.

These settlements underscore the potential risk of misrepresenting compliance with cybersecurity requirements. This is particularly significant in light of the growing and complex cybersecurity regime that Government contractors are subject to. In addition to the new cybersecurity requirements that will be implemented as part of DOD's Cybersecurity Maturity Model Certification program, the VA recently introduced new cybersecurity provisions that require certain contractors with access to VA information or VA information systems to implement over 150 security controls and submit breach notifications within one hour of security incidents. The Department of Homeland Security will soon issue its own set of regulations that require contractors to comply with specific standards for the protection of controlled unclassified information and to follow strict incident reporting timelines. Additionally, the Office of Management and Budget is finalizing a proposed rule that would require compliance with National Institute of Standards and Technology standards across civilian agencies.

The Government stated publicly in 2022 that it is conducting multiple FCA investigations involving allegations of cybersecurity noncompliance, including by way of qui tam suits. In light of the Government's renewed emphasis on enforcement, the emerging and broad landscape of cybersecurity and information security provisions, 2023 will likely result in more actions, settlements and, potentially, litigation, in this area.

FCA at the Supreme Court—The FCA had an unusually active year at the Supreme Court in 2022, with the Justices agreeing to hear cases involving two critical FCA issues: (1) the Government's dismissal authority under § 3730(c)(2)(A), and (2) the application of the *Safeco* scienter standard to FCA cases. At the same time, the Supreme Court also declined—again—to take up the specificity with which FCA allegations must be articulated at the pleading stage, leaving that circuit split intact.

Government Dismissal Authority (§ 3730(c)(2)(A))—The standard of review to be applied to Government motions to dismiss qui tam actions is poised for decision by the highest court in the land. On Dec. 6, 2022, the Supreme Court heard arguments in *Polansky v. Executive Health Res. Inc.*, 17 F.4th 376 (3d Cir. 2021); 63 GC ¶ 348, an appeal from the U.S. Court of Appeals for the Third Circuit. In *Polansky*, the Third Circuit weighed in on the circuit split regarding the Government's authority to dismiss qui tam actions pursuant to 31 USCA § 3730(c)(2)(A). Siding with the Seventh Circuit's approach articulated in *U.S. ex rel. CIMZNHCA, LLC v. UCB, Inc.*, 970 F.3d 835 (7th Cir. 2020); 63 GC ¶ 202, the Third Circuit held that Fed. R. Civ. P. 41(a) applies to Government dismissals in FCA qui tam actions the same as it would in any other suit. In doing so, the Third Circuit cemented what is now a three-way split regarding the standard the Government must meet to exercise its dismissal authority, rejecting both the D.C. Circuit's approach, that the Government's dismissal power is unfettered, and the Ninth Circuit's approach that the motion to dismiss must have a "rational relation" to a valid Government purpose. As we reported last year, 64 GC ¶ 43, nearly half the circuits have now weighed in on this area of FCA case law that is one of the few in which the Government and defendants tend to be aligned.

The questions presented by the relator in *Polansky* were (1) whether the Government has the authority to dismiss an FCA suit after initially declining to intervene, and (2) if the Government has that authority, what standard of review applies to a motion to dismiss a qui tam action. At oral argument, the Justices seemed inclined to reject the relator's position that once DOJ declines to intervene in a qui tam, it no longer has any authority to move to dismiss. Notably, the Government was diametrically opposed to the relator's argument and so, too, it seemed, was the Court, as there appeared to be consensus that DOJ has broad discretion under the plain language of the FCA to dismiss FCA actions, even after declining to intervene.

As to the review standard that governs, however, it was not entirely clear where the Court will end up. Historically, such a review has been governed by two standards: unfettered discretion and rational basis. The Government argued for an unfettered discretion standard, which would mean that the only check on its decision to request a dismissal would be a constitutional one—in effect, that dismissal should be rejected only where the stated reasons are arbitrary and capricious. In contrast, the rational basis test allows for dismissal so long as the Government can provide a rational connection between dismissal and a legitimate Government interest. The Third Circuit's Rule 41(a) standard articulated in *Polansky* adds a third option of sorts, but received little attention from the Justices during oral argument. While several Justices seemed unpersuaded by the Government's argument for unfettered discretion, there appeared to be consensus growing that the Government not be required to do anything more than articulate a legitimate rationale. Several questions from the Court were focused on what would qualify as an acceptable rationale for dismissal and whether the trial court should be permitted to consider or assess the accuracy and sincerity of that rationale.

Ultimately, it seems likely that the Supreme Court will adopt a broad, deferential view of DOJ's dismissal authority under § 3730(c)(2)(A). The Government's ability to dismiss frivolous qui tam actions is a necessary check on runaway whistleblower litigation and a constitutional prerequisite to ensure the qui tam provision does not violate the constitutional limitations of the executive branch's ability to delegate its authority.

Regardless of how the Court resolves *Polansky*, however, the outcome is unlikely to have a widespread impact on the mine run of FCA actions. While the topic of the Government's dismissal authority has gained significant attention in recent years, it has not been used in more than a handful of cases—statistically fewer than two percent of cases per year. A favorable ruling from the Supreme Court might lead DOJ to wield its dismissal power more going forward, but the Government will invariably have to balance that power against its interest in whistleblowers filing qui tam actions and in the relator bar pursuing such actions where the Government declines to intervene.

***Safeco* Scienter Standard**—On Jan. 13, 2023, the Supreme Court granted certiorari to hear two consolidated appeals from the Seventh Circuit in *U.S. ex rel. Schutte v. SuperValu Inc.*, 9 F.4th 455 (7th Cir. 2021); 64 GC ¶ 43, and *U.S. ex rel. Proctor v. Safeway, Inc.*, 30 F.4th 649 (7th Cir. 2022); 64 GC ¶ 118. In *Schutte* and *Proctor*, the Seventh Circuit joined several of its sister circuits in applying the scienter standard articulated by the Supreme Court in *Safeco Ins. Co. v. Burr*, 551 U.S. 47 (2007), to the FCA, finding that a defendant's conduct is not reckless when (1) defendant acted under an objectively reasonable, albeit erroneous, interpretation of an ambiguous regulation or provision; and (2) no authoritative guidance would have warned the defendant away from that interpretation. The relator's petition for certiorari urged the Justices to resolve what it characterized as a circuit split on the proper scienter standard under the FCA, including whether a defendant should be entitled to rely in litigation on an interpretation that it may not have actually held when it submitted the claims. The Supreme Court is scheduled to hear oral arguments next month on April 18, 2023.

A month after the petition for certiorari was filed in April 2022, Sen. Grassley urged the Supreme Court to grant certiorari and vacate the decisions of the Seventh Circuit. In his amicus brief, Grassley argues that the Seventh Circuit's standard "makes a hash of the law of fraud," noting that it "places the burden on the Government to anticipate every possible fraud" and endlessly issue "definitive guidance" to proscribe that fraud. What results, according to Grassley, is a scenario in which a defendant who "*correctly* knows an act is unlawful is immunized from FCA liability if its lawyer, years later, can cook up an interpretation of the law under which the act was arguably permissible—even if that interpretation is *wrong* and the defendant did not have that interpretation at the time."

The solicitor general also urged the Supreme Court to grant certiorari, arguing against *Safeco* that the FCA's scienter standard is fulfilled where a defendant (i) subjectively believes that a claim is false, (ii) recognizes a substantial risk that the claim is false but deliberately avoids taking readily available steps to obtain clarification, or (iii) knows or should know that the claim is probably false but acts with reckless disregard of that danger.

In their respective briefs in opposition to the relators' petition, the respondents contended that *Safeco* does not lower the bar for compliance; rather, it recognizes that it is impossible to have "actual knowledge" of the correct interpretation of an ambiguous legal obligation before the obligation has been authoritatively interpreted. The respondents further argued that "*Safeco* does not give a free pass to cheats and fraudsters, nor make ignorance of the law a defense. It merely protects those that 'cannot know that [their] claim is false' because 'the requirements for that claim are unknown.' "

These consolidated cases concern the reporting of usual and customary prices for the purposes of Medicare and Medicaid reimbursements by pharmacies. But they present an issue that is fundamental to FCA cases across industries, whether a defendant acts knowingly when the Government fails to announce its interpretation of an ambiguous regulation, contract provision, or rule, and there is a competing reasonable interpretation that supports the defendant's conduct. Contrary to the suggestion of a circuit split, there has been uniform agreement over the years that *Safeco*'s standard is properly applied to the FCA in cases involving ambiguity. And while the question presented to the Supreme Court in *Schutte* involves a defendant presenting an interpretation to defend itself in litigation, the failure of the Government to announce its own interpretation of an ambiguous provision presents concerns that extend far beyond scienter. Questions of due process abound where a defendant is to be subjected to liability for damages and penalties for fraud only after the Government announces *its* interpretation of an ambiguous provision. Demonstrating an objective falsehood is also problematic in such a circumstance. These questions should be a part of a fair debate before the Supreme Court this coming April, even if the Court limits its ruling to the scienter element, as the circuits have tended to do, such as in *U.S. ex rel. Purcell v. MWI Corp.*, 807 F.3d 281 (D.C. Cir. 2015), reh'g en banc denied, cert. denied, 137 S.Ct. 625 (2017); 57 GC ¶ 393, in which the D.C. Circuit overturned a jury verdict based upon a straightforward application of *Safeco*, with then-Judge Kavanaugh sitting on the unanimous panel.

While the *Schutte/Proctor* cases are pending, numerous other FCA cases are waiting in the wings, and any number of investigations and future cases will be impacted once the Supreme Court announces its ruling. And litigants are not the only ones anticipating a decision. Sen. Grassley's proposed amendments might see further additions depending on the outcome in *Schutte/Proctor*.

Materiality—The sixth year since the Supreme Court's decision in *Universal Health Servs., Inc. v. U.S. ex rel. Escobar*, 579 U.S. 176 (2016); 58 GC ¶ 219, continued the trend of courts assessing the materiality of purported FCA violations at the pleading and merits stages. As was the case the year before, 2022 saw courts analyzing the multiple factors set forth in *Escobar* but with mixed results for both plaintiffs and defendants. Several noteworthy examples are discussed below.

In *U.S. ex rel. Taylor v. Boyko*, 39 F.4th 177 (4th Cir. 2022), the Fourth Circuit affirmed a grant of summary judgment for one defendant and dismissal for the seven others based on failures to plead materiality, scienter, or presentment. In *Taylor*, the relator brought a qui tam complaint against two doctors, five medical companies, and an accounting firm on two primary theories of FCA liability: (1) that any claims submitted to Medicare on behalf of one of the corporate defendants after 2011 were fraudulent because that entity had its corporate charter and certificate of authorization revoked by the West Virginia secretary of state, which were required licensure and certification documents necessary to be in an "active enrollment status"; and (2) that the defendant engaged in a fraudulent scheme to upcode treatments to bill Medicare at inflated rates. The district court dismissed the claims as to all defendants save one on grounds of materiality, scienter, and presentment.

Addressing the administrative-revocation claim, that defendants continuing to submit claims to Medicare was a false claim under an implied certification theory, the Fourth Circuit affirmed on the basis that the relator failed to plead materiality under the *Escobar* framework. The court emphasized that even at the pleading stage a relator must allege "specific facts" as to how the fraudulent conduct influenced the Government's decision to pay in order to meet the "rigorous" and "demanding" materiality standard.

Citing to administrative decisions of suspensions and revocations of medical licenses, the relator argued that the Government refused to pay claims when faced with similar failures to maintain licenses or certifications, but the Fourth Circuit was not convinced. It noted that the relator conflated decisions involving personal medical licenses with corporate authorizations, finding that only one of the cases she cited involved the loss of a corporate charter and certificate of authority. Even that case was distinguishable and, even so, "an allegation that a single decision reflects 'routine' practice [to demonstrate the Government consistently refuses to pay similar claims] is highly implausible." The court also found insufficient relator's "commonsense appeal to notions of materiality," which amounted to nothing more than bald and conclusory allegations that the corporate charter and certificate of authorization were material to payment.

Turning to the alleged upcoding scheme, the Fourth Circuit found the presentment element lacking under its precedent requiring a relator to either (1) plead with particularity that specific false claims actually were presented to the Government for payment, or (2) allege a pattern of conduct under which false claims would *necessarily* be submitted. Taylor did not allege any actual false invoices submitted, and her "inherently speculative" assertion that false claims were submitted because the company allegedly directed doctors to sign something for a fraudulent purpose did not connect the dots. The court also found Taylor's scienter arguments implausible because the company's alleged direction to sign the medical charts did not equate to a representation that they were the attending physician. In reaching this conclusion, the Fourth Circuit emphasized that even the lower plausibility standard of Fed. R. Civ. P. 8 does not require a court to credit conclusory statements.

In *U.S. ex rel. Sorenson v. Wadsworth Bros. Construction Co.*, 48 F.4th 1146 (10th Cir. 2022), the Tenth Circuit affirmed a district court dismissal for lack of materiality. In *Sorenson*, the relator filed a qui tam complaint against his former employer alleging that the company falsely certified compliance with the prevailing wage requirements of the Davis-Bacon Act on a federally funded construction contract. The relator alleged that because certification of compliance with the Davis-Bacon Act was a prerequisite for payment, the defendant's false certification was material.

The district court granted the defendant's motion to dismiss because alleging that compliance was a condition of payment was insufficient to show materiality, and the Tenth Circuit affirmed. Interestingly, the court began its analysis by stating that it did not need to make "grand pronouncements" about the materiality of Davis-Bacon violations because Sorenson's complaint was so "bereft" of critical facts as to the alleged violation and limited to a "naked assertion" that certification of compliance with the Davis-Bacon was a prerequisite for payment. Focusing on the details missing from Sorenson's complaint, including allegations about the specific project or jobsite for the construction work or even where specifically Sorenson worked, the court noted that, at most, Sorenson's allegations supported an inference that the defendant failed to pay Sorenson Davis-Bacon Act wages but certified compliance with the Act regardless. Because the FCA was not designed to punish garden-variety breaches of contract or regulatory violations, this was not sufficient to demonstrate that the alleged violation went to the very essence of the bargain or was only minor or insubstantial under *Escobar*'s holistic materiality inquiry. The court's conclusion was buttressed by the fact that Sorenson failed to address the other factors in the *Escobar* analysis, providing no information about (1) the quantum of the alleged underpayments such that the court could determine if the noncompliance was substantial, or (2) how the Government typically handles David-Bacon noncompliance in the mine run of cases. The court concluded that permitting such a complaint to go forward would make a "mockery" of *Escobar*'s materiality analysis.

These decisions offer guidance to both defendants and plaintiffs alike, with both the Fourth and Tenth Circuits emphasizing the holistic nature of the materiality inquiry and holding relators to their burden to plead facts demonstrating materiality under the factors set forth in *Escobar* with both particularity and plausibility.

But it was not all good news for defendants. For example, in *U.S. ex rel. USN4U, LLC v. Wolf Creek Fed. Servs., Inc.*, 34 F.4th 507 (6th Cir. 2022), the Sixth Circuit evaluated the district court's dismissal of relator's complaint, which alleged that NASA agreed to entering into fixed-price contracts with Wolf Creek based on fraudulently inflated estimates for facilities maintenance work.

The Sixth Circuit held the complaint adequately pleaded a fraudulent inducement claim and reversed. First, it found that Wolf Creek's falsely inflated estimates could create fraudulent inducement liability because the allegations were sufficient to support that the inflated estimates would have had the "tendency to influence" NASA's decision to award Wolf Creek projects at higher prices rather than lower ones. Notably, the Sixth Circuit found plausible that NASA trusted and relied "exclusively" upon Wolf Creek's estimates, and that NASA ultimately paid Wolf Creek based on its induced belief that the quoted prices were reasonably accurate. However, a concurring opinion authored by Judge Murphy clarified that the court did not consider (and the parties did not raise) whether Wolf Creek's estimate—essentially a "statement of opinion"—of a project's expected cost would qualify as false simply because the project's actual hours turned out to be lower or higher. Judge Murphy noted that ultimately the relator might have a difficult time proving that the Government justifiably relied on a false statement of opinion (and not a false statement of fact) in making its procurement decision.

Second, the Sixth Circuit rejected the district court's reliance on the Government's decision to continue contracting with Wolf Creek to find a lack of materiality, highlighting other valid reasons to continue contracting with Wolf Creek including lack of other procurement options and not wanting to end a contractual relationship based on unproven allegations of fraud. Citing *Escobar*, the court found that the alleged conduct—gross overcharging for unperformed work—goes inherently "to the very essence of the bargain," unlike regulatory noncompliances which can be "minor or insubstantial." In such a situation, the Government's decision to continue contracting, even if it had knowledge of the alleged conduct, may not weigh against the materiality of the alleged conduct, the court ruled. The Sixth Circuit also rejected the district court's consideration of the Government's decision not to intervene as evidence of a lack of materiality, given that the FCA allows private relators to continue a suit without Government intervention.

In *U.S. ex rel. Hartpence v. Kinetic Concepts, Inc.*, 44 F.4th 838 (9th Cir. 2022); 64 GC ¶ 259, the Ninth Circuit reversed a district court's granting of summary judgment for defendant and its subsidiary, holding that genuine issues of material fact existed as to whether the manufacturer's use of a modifier on claim forms, which indicated compliance with Medicare coverage requirements, was material to its claims for reimbursement. Relators alleged that defendants falsely certified compliance with requirements of local coverage determinations (LCD), which establish Medicare reimbursement criteria, by using a KX modifier to reflect "measurable wound healing" when in reality, wound healing was stalled. The district court rejected an inference of materiality because the evidence in the record showed that defendants' use of the KX modifier did not result in automatic payments and that some claims submitted with that modifier were ultimately not paid. The Ninth Circuit took a different approach, focusing instead on the results of avoiding *case-specific scrutiny* by use of the modifier. In particular, it agreed that the Government's consistent payment of stalled-cycle claims without the KX modifier would mean that its addition (and avoidance of case-specific scrutiny) would not be material to the payment decision. But the court nevertheless disagreed that the record evidence supported a finding that false certification of compliance with the LCDs was not material as a matter of law. The Ninth Circuit's reasoning considered the Government's payment decisions at all levels of the Medicare reimbursement appeals process (e.g., administrative law judges, Medicare Appeals Council) which sometimes approved and sometimes rejected payment for "stalled" healing claims. While the district court had determined that the Government's approval of certain "stalled" claims meant that the use of the modifier was immaterial as a matter of law, the Ninth Circuit determined that the ability to avoid the case-specific review—in which the presence of a stalled cycle was not always dispositive—could be material.

Scienter—While the *Schutte/Proctor* cases before the Supreme Court represent the primary highlight with respect to the key element of scienter, there were other notable decisions among the circuits, too. As discussed above, the Fourth Circuit in *Taylor* affirmed the dismissal of a complaint for failure to meet Rule 8's requirement to plead factual allegations supporting an inference of scienter.

On the other hand, in *Hartpence*, described above, the Ninth Circuit found that the district court erred in holding that there was insufficient evidence that defendants acted with the requisite scienter in using the KX modifier inappropriately on claims. The district court had interpreted *Escobar* as requiring both knowledge that a representation was false and also knowledge that the representation was material. Without deciding whether this interpretation was correct, the Ninth Circuit reevaluated scienter in light of its own materiality analysis. Given the evidence of defendants' internal communications that the billing codes were used to avoid the review and appeals process that would sometimes result in rejection of the claim, as well as internal concerns that the use of the KX modifier would be a false statement, the Ninth Circuit found that the record viewed in the light most favorable to relator established a triable issue regarding defendants' knowledge of their inappropriate billing practice.

Rule 9(b) Pleading—One area the Supreme Court (again) chose not to enter the fray in 2022 was as to the appropriate pleading standard under Fed. R. Civ. P. 9(b), as it followed the solicitor general's recommendation and declined certiorari in *Johnson v. Bethany Hospice & Palliative Care LLC*, 853 F. App'x 496, 501 (11th Cir. 2021), *Molina Healthcare of Ill., Inc. v. Prose*, 17 F.4th 732, 736–39 (7th Cir. 2021); 63 GC ¶ 365, and *U.S. ex rel. Owsley v. Fazzi Assocs., Inc.*, 16 F.4th 192, 194 (6th Cir. 2021); 64 GC ¶ 43.

These recent cases illustrate the circuit split, with the Eleventh Circuit holding in *Bethany Hospice* that to satisfy Rule 9(b) "a complaint must allege actual submission of a false claim, and ... it must do so with some indicia of reliability," while the Seventh Circuit in *Molina* held that a plaintiff can fulfill 9(b) if they "provide[d] information that plausibly support[ed] the inference that" the defendant submitted a false claim, even without the details of the specific false claim. Of the other circuits that have also weighed in on this issue, the Sixth Circuit sided with the Eleventh Circuit specificity requirements while the Third, Fifth, Ninth, Tenth, and D.C. Circuits have sided with the Seventh Circuit's leaner requirements.

Without input from the Supreme Court, the circuits have continued to apply their own approaches to Rule 9(b) particularity. In *U.S. ex rel. Nicholson v. MedCom Carolinas, Inc.*, 42 F.4th 185 (4th Cir. 2022), the Fourth Circuit affirmed the dismissal of a complaint that failed to allege either a representative false claim with particularity or, alternatively, a pattern of conduct that would necessarily have led to submission of false claims. Central to the court's holding were the many "unknowns" as to the "who, what, when, where, and how" of the alleged false claims and, instead, "classic conclusory language" that in essence restated the legal standards that applied. The Fourth Circuit's emphasis that "the particularity standard is steep" is a welcome addition to its precedent with respect to relators bringing claims based on general allegations for which they lack substantial prediscovery evidence.

Similarly, in *U.S. ex rel. Sibley v. Univ. of Chicago Med. Ctr.*, 44 F.4th 646 (7th Cir. 2022), the Seventh Circuit affirmed dismissal of the relators' claims against two out of three defendants for failure to adequately state a claim under Rule 9(b). The relators alleged that defendants Medical Business Office Corp. (MBO) and Trustmark Recovery Services Inc., which conducted bad debt collection efforts on behalf of clients, including from the Centers for Medicare and Medicaid Services, had not made "reasonable collection efforts" as required by regulation, and therefore caused the submission of false claims to the Government. They also asserted a reverse false claims action against the third defendant, University of Chicago Medical Center (UCMC) who was a provider client of MBO, for knowingly avoiding an obligation to repay the Government after it learned that it had been reimbursed for noncompliant debts.

The Seventh Circuit affirmed dismissal as to UCMC and MBO for failure to allege "specific representative examples" of false submissions, but reversed dismissal for Trustmark, finding that the complaint included specific examples of patient debts that were written off as Medicare bad debts without being subject to reasonable collection efforts. Notably, the court's analysis appeared to move away from its recent decision in *Molina Healthcare*, where it declined to require the identification of a specific false claim in reversing the district court's dismissal of an FCA complaint. Instead, the Seventh Circuit in *Sibley* applied the reasoning of *U.S. ex rel. Mamalakis v. Anesthetix Mgmt. LLC*, 20 F.4th 295, 301 (7th Cir. 2021), that specific examples of precise medical procedures that failed to meet regulatory requirements were necessary to defeat dismissal of the relator's complaint.

The Seventh Circuit also found that the complaint failed to allege that UCMC had knowledge of the alleged excessive reimbursements and therefore could not have acted knowingly in avoiding any obligation to repay the Government. Specifically, the complaint's allegations as to knowledge focused entirely on an audit that revealed that MBO/Trademark understaffed its Medicare/Medicaid collections. The court held that to find that UCMC knew that it had an obligation to repay the Government required the court "to stack inference upon inference" based on the "core premise—that staffing only two employees automatically equates to the absence of reasonable collection efforts—[which] is unsound." Thus, relators' generalized allegations of understaffing could not suffice under Rule 9(b)'s heightened pleading standard.

Third-Party Liability—While efforts by relators and the Government to extend the FCA to third parties are on the rise, one decision offered some respite for defendants surprised to find themselves named in an FCA suit. In *Scollick ex rel. U.S. v. Narula*, 2022 WL 3020936 (D.D.C. July 29, 2022), the district court granted summary judgment to a group of sureties in a long-running dispute involving allegations of small business fraud with respect to the award of construction contracts.

The facts in *Scollick* are complex, but as relevant here, the relator alleged that a subgroup of defendants entered into a conspiracy to create an SDVOSB that could compete for Government set-aside contracts even though it did not meet the applicable criteria. The construction defendants secured required bonds for these contracts from a subgroup of defendants that the court called the "insurance defendants," including insurance companies and an underwriter. The relator alleged that the insurance defendants' due diligence before issuing the bonds should have alerted them that the construction defendants were fraudulently holding themselves out as SDVOSBs. The relator's claims against the insurance defendants survived a motion to dismiss.

At summary judgment, however, the insurance defendants' arguments were vindicated. The court determined that the relator provided no evidence that the insurance defendants knew about any specific requirements for the SDVOSB set-aside contracts for which they issued bonds. The court also disagreed with the relator's arguments that the insurance defendants had an obligation to familiarize themselves with the requirements for an SDVOSB set-aside contract. The court found that only participants in federal programs have such a duty, and the relator could not conjure a duty "out of thin air" that would require third party insurers to essentially double-check the requirements on any contract they insure.

While companies similarly situated to the insurance defendants should be careful to not intentionally bury their heads in the sand, *Scollick* should provide some comfort to sureties that they do not have to seek out information about every contract that they insure to avoid potential FCA liability years later.

2023 Vision: The Year Ahead for the FCA—There can be little question that all eyes are on the Supreme Court as 2023 gets underway. With potentially blockbuster decisions forthcoming as to the key element of scienter as well as the standard to be applied to a Government motion to dismiss a qui tam action, parties currently in litigation or in the midst of investigation are anticipating how rulings in both the *Polansky* and *Schutte/Proctor* cases may impact their positions and risk. Future FCA enforcement will be impacted as well, although there looms the possibility of legislative intervention should Congress disagree with either or both of the outcomes from the high court. In addition, both enforcement trends and case law developments suggest contractors should remain vigilant in their compliance efforts in all facets of their Government programs, as DOJ and relators alike continue to press expanded views of the applicability of the FCA and new cases are brought with record frequency. There can be little doubt that 2023 will prove an exciting year for the FCA.

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