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DOJ Skittish About Supreme Court Review Of FCA Pleading

By **Dietrich Knauth**

Law360, New York (February 27, 2014, 8:03 PM ET) -- The U.S. solicitor general has asked the U.S. Supreme Court to not hear an appeal in a False Claims Act case against Takeda Pharmaceuticals North America Inc., potentially being concerned the high court would enforce stricter FCA pleading standards that would make it tougher for both the government and relators to bring fraud cases.

The Supreme Court sought the government's opinion in U.S. ex rel. Nathan v. Takeda Pharmaceuticals, an appeal that could have wide-ranging effects on the level of detail that relators must include in fraud complaints under the FCA. The Fourth Circuit had dismissed the case, which involved allegations of "off label" promotion of stomach acid drugs, because the relator didn't allege that any particular claim for payment was false, instead making generalized allegations of fraud.

Relator Noah Nathan is trying to revive the suit, but the government asked the Supreme Court not to take the appeal because it is "not a suitable vehicle" for resolving the particularity question, since the complaint was dismissed not only for lack of specificity but also for lack of plausibility.

The government's opposition to the case suggests a concern that a weak case could create stricter pleading standards that apply to all FCA cases, weakening relators' ability to pursue fraud on the government's behalf, according to attorneys.

"It represents a concern that the Supreme Court is going to announce a strict Rule 9(b) standard in a world where 9(b) is enforced in an inconsistent way across jurisdictions," said Laura McLane, a McDermott Will & Emery LLP partner. "If the Supreme Court were to comment on that, and do so in a way that requires a relator to identify a specific false claim for payment, then the ruling would be contrary to a lot of relators' complaints."

While it asked the Supreme Court to let the Fourth Circuit's decision stand, the government's brief embraced the more open-ended interpretation of how Rule 9(b)'s pleading requirements apply to FCA litigation.

"Several courts of appeals have correctly held that a qui tam complaint satisfies Rule 9(b) if it contains detailed allegations supporting a plausible inference that false claims were submitted to the government, even if the complaint does not identify specific requests for payment," the brief said.

Although some circuits have allowed more relaxed pleading standards under the FCA, the Fourth Circuit said that plaintiffs must allege "the 'who, what, when, where and how' as to specific claims submitted to

the government in violation of the FCA," a ruling that defendants welcomed. Currently, there's a 4-4 split in the circuit courts over the issue, with the Fourth, Sixth, Eighth and Eleventh circuits requiring more specific pleading and the First, Fifth, Seventh and Ninth circuits allowing plaintiffs to allege the details of a "scheme to submit false claims" without identifying a specific false claim in the complaint, according to Nathan's petition.

The solicitor general said the split is not quite as clearly defined but acknowledged that lower courts have been inconsistent in their treatment of pleading standards in FCA cases. The government rejected arguments that relators must allege the "dates and contents of bills or other demands for payment" to overcome a motion to dismiss, and said that lower courts may eventually back away from that position without Supreme Court intervention in the Nathan case.

The government further argued that requiring relators to allege specifics about a claim for payment "undermines the FCA's effectiveness as a tool to combat fraud" against the U.S. Requiring relators to identify the specific false claims "is especially unwarranted" because the government already has payment information available to it, and qui tam suits are valuable not for their ability to identify specific claims for payment but because of the evidence that those claims may be fraudulent.

"The government rarely if ever needs a relator's assistance to identify claims for payment that have been submitted to the United States," the brief said. "Rather, relators typically contribute to the government's enforcement efforts by bringing to light other information that shows those claims to be false. Requiring qui tam complaints to identify specific false claims thus would not meaningfully assist the government's enforcement efforts."

That language misreads the purpose of Rule 9(b), which is supposed to protect defendants by giving them fair notice of claims against them, safeguard them against spurious accusations and reputational harm, and reduce the possibility of meritless fraud claims that are based on speculation, said Andy Liu, a partner at Crowell & Moring LLP.

"That presupposes that the purpose of Rule 9(b) is to help the government in its investigation of fraud, but that isn't the purpose of Rule 9(b)," Liu said.

The depth of the inconsistencies in the circuit courts, as well as the Supreme Court's apparently persistent interest in the issue, might persuade the court to take the case. Three years ago, the high court asked for the solicitor general's view in a similar suit, Ortho Biotech Products LP v. U.S. ex rel. Duxbury. The federal government's top litigator — Neal K. Katyal at the time — said the Duxbury suit shouldn't be reviewed for technical reasons, but he advised the high court to answer the underlying question when an appropriate case presented itself.

Donald B. Verrilli Jr., the current solicitor general, said it's still not time and asked the court to wait until a stronger case arises. In the meantime, case law continues to evolve in such a way that "the disagreement among the circuits therefore may be capable of resolution without this court's intervention," Verrilli wrote.

But any definitive resolution will likely need the Supreme Court to step in, according to Liu and McLane.

"It is possible that the court will be persuaded by the government's view, but it seems to me unlikely that this issue will be clarified on its own without the court's assistance," Liu said.

Nathan is represented by Jeffrey A. Lamken and Michael G. Pattillo Jr. of MoloLamken LLP.

The defendants are represented by William F. Cavanaugh Jr., Daniel S. Ruzumna, Sean H. Murray and Aileen M. McGill of Patterson Belknap Webb & Tyler LLP, and the Law Offices of Susan R. Podolsky.

The case is U.S. ex rel. Nathan v. Takeda Pharmaceuticals North America Inc. et al., case number 12-1349, in the Supreme Court of the United States.

--Additional reporting by Jeff Overley. Editing by Jeremy Barker and Edrienne Su.
