FCA Challenge Poses 2 Potential Questions For Justices

By **Laurence Freedman** (May 6, 2019)

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In January 2019, Intermountain Healthcare Inc. sought U.S. Supreme Court review of the U.S. Court of Appeals for the Tenth Circuit decision in Intermountain Healthcare Inc. et al. v. U.S. ex rel. Polukoff, reversing the dismissal of a False Claims Act "medical necessity" case.

The certiorari petition raised two issues: whether the qui tam provisions violate the appointments clause of Article II of the Constitution, and whether courts "may create an exception to Federal Rule of Civil Procedure 9(b)'s particularity requirement when the plaintiff claims that only the defendant possesses the information needed to satisfy that requirement."

Now that the relator and the U.S. Department of Justice have responded, as the court requested of them, it's unlikely the court will consider the constitutional issue. But there is, and should be, intense interest in whether it may decide to grapple with how the FCA applies when "medical necessity" allegations lack any "objective falsity" and lack the specifics required by the letter of Rule 9(b).

Background

Gerald Polukoff, the relator, filed this qui tam suit against a cardiologist, whom he alleged had performed "thousands of unnecessary heart surgeries" while at St. Mark's Hospital and Intermountain, and against that hospital and Intermountain. Notably, he alleged that the hospitals knew or should have known of the cardiologist's conduct but nonetheless continued to bill the government for the unnecessary procedures, and "fraudulently certif[ied] that the surgeries were medically necessary." The DOJ declined to intervene, and the district court dismissed the claims against Intermountain.

The district court held that the relator failed to allege "vital information" including "who knew what and when they knew it," as required by Rule 9(b), and for failure to state a claim under Rule 12(b)(6) on the basis that a claim for payment cannot be "false" under the FCA unless it involves an "objective falsehood." The court concluded that the providers' representations to Medicare that the cardiac procedures at issue "were medically reasonable and necessary" could not "be proven to be objectively false," because statements of medical necessity inherently involve "medical judgments."

The Tenth Circuit reversed the dismissal of claims against Intermountain. It held that a Medicare claim is false if it is not reimbursable; a claim is not reimbursable if the service provided was not medically necessary; and medical necessity can be determined by language in the Medicare Program Integrity Manual.

In my view, absent objective clinical standards regarding reimbursement in a national coverage determination, or local coverage determination, there is not a basis to adjudicate whether a physician's good faith medical necessity determination is false for purposes of the FCA.

Otherwise, the Medicare program, under the statute and the regulations, gives wide berth to physicians' judgments as to medical necessity, and medically necessary procedures are

reimbursable. The Tenth Circuit's analysis of the element of falsity, though ripe for criticism, is not at issue in the certiorari petition or responses.

On the Rule 9(b) issue, the Tenth Circuit acknowledged that Rule 9(b) requires relators to allege "the who, what, when, where and how of the alleged [fraudulent] claims," though, as the rule states, knowledge can be alleged more generally. But it then "excuse[d] [Rule 9(b)] deficiencies that result from the [relator's] inability to obtain information within the defendant's exclusive control."

In its appeal, Intermountain also raised a challenge to the qui tam provisions on the basis that they violate the appointments clause. The Tenth Circuit previously had ruled on that issue, and it was not raised in the district court, so it declined to address it.

Appointments Clause: Back to the Future

Arguments that the qui tam provisions are unconstitutional, which raged in the courts and the halls of the DOJ in earlier years, received a flurry of renewed attention in recent months, due to the Intermountain certiorari petition and the confirmation hearing of Attorney General William Barr, who had expressed strong views that the qui tam provisions are "patently unconstitutional" on appointments clause grounds, and that the issue is "not even a close question."

The Supreme Court has not decided the appointments clause issue, and specifically reserved consideration of it when it determined that relators had constitutional standing to bring claims on behalf of the United States.[1]

The DOJ declined to respond to the certiorari petition, but something about the case prompted the Supreme Court to request the view of the solicitor general. On April 24, 2019, the solicitor general responded, and staked out the position that the qui tam provisions do not violate the appointments clause of Article II of the Constitution.

This position is noteworthy because it is directly contrary to the view of the Office of Legal Counsel, then headed by William Barr, and the Civil Division in 1989 that the "qui tam provisions in the False Claims Act are unconstitutional ... as they violate the Appointments Claims [and] infringe on the President's core Article II authority to execute the law."

Further, after 2000, according to press reports, Attorney General Barr opined that the Stevens opinion was "an abomination." However, in his recent confirmation hearing, Attorney General Barr, when pressed by Sen. Chuck Grassley, R-Iowa, repudiated these views and vowed to defend the False Claims Act (and presumably its qui tam provisions). He noted that the Supreme Court has decided the constitutional issue, but did not note that it addressed only as to the constitutional standing issue.

As of April 24, true to Attorney General Barr's vow to Grassley, the DOJ is defending the constitutionality of the qui tam provisions, notwithstanding his prior view that they are a "potentially devastating threat to the President's constitutional authority." Given the solicitor general's position, and the weak procedural posture of the constitutional challenge, there is a slim chance the Supreme Court will take up this issue in this case.

The DOJ declined to take a position on the pleading standard under Rule 9(b), and in recent years the Supreme Court has declined certiorari in many cases raising the issue of a circuit split on the application of Rule 9(b) in FCA cases. Will Intermountain trigger new interest?

Should Relators Have a Diluted Rule 9(b) Standard?

On the Rule 9(b) issue, the Tenth Circuit's analysis was short, and wrong. It acknowledged that Rule 9(b) requires qui tam relators to allege "the who, what, when, where and how of the alleged claims," though, as the rule states, knowledge can be alleged more generally. But it then "excuse[d] deficiencies that result from the [relator's] inability to obtain information within the defendant's exclusive control."

As Intermountain and the American Hospital Association point out, there is no special Rule 9(b) for relators, nor should there be, given the powerful impact that FCA allegations — most of which are declined by DOJ and unfounded — have on hospitals, other health care providers and other defendants. There is no basis to dilute the stringent Rule 9(b) pleading standard for alleging fraud, which serves as an essential gatekeeper and notice provision for fraud allegations.

The DOJ, the alleged victim of every FCA allegation, has extensive authority to gather that information in cases that actually involve fraudulent conduct, and the DOJ is held to the strict Rule 9(b) standards. There is no reason relators, under the same statute and same rules, and standing in the shoes of the United States, should be treated any differently.

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[1] Vermont Agency of Natural Resources v. United States ex rel. Stevens (2000) ("we express no view on the question whether qui tam suits violate Article II, in particular the Appointments Clause of § 2 and the "take Care" Clause of § 3").