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WHAT'S INSIDE

SPECIAL FRAUD SECTION

HEALTH CARE FRAUD INVESTIGATIONS AND LITIGATION OFFER UNEXPECTED LESSONS FOR BANKRUPTCY COUNSEL

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As many readers are likely aware, health care fraud investigations and related litigation pose substantial risks for health care and life sciences companies for a variety of reasons. Total annual settlements and judgments reached with the federal government in these cases over the last several years have consistently exceeded the $2 billion mark (which in turn incentivizes governmental agencies and private whistleblowers to continue filing these cases).[2] Such substantial judgments and settlements often cause financial strain for the companies paying these amounts. In addition, investigations and litigation can (and often do) last for several years and the costs of these prolonged proceedings can also lead to financial distress and potential bankruptcy for companies at issue.[3] However, beyond the bankruptcy-related risks posed by these cases, many readers may not have considered the important lessons that health care fraud cases may offer for bankruptcy counsel. For example, substantive issues decided in these cases, such as whether an exception exists to the requirement that allegations of fraud be pled with particularity, could prove to be important tools in the bankruptcy context.

Many of the investigations that have resulted in such enormous government recoveries against health care and life sciences companies were originally filed by private individuals (referred to as "whistleblowers" or "relators") under the *qui tam* provisions of the False Claims Act ("FCA").[4] These provisions award relators up to 30 percent of the proceeds of any action or settlement of the claims at issue (depending on whether the government decides to "intervene" in the matter and take over the litigation or "decline" the case and permit the relator(s) to proceed with the case on behalf of the government).[5] Because of

1 The author wishes to thank Brian Dunphy (https://www.mintz.com/our-people/brian-p-dunphy) and Adrienne Walker (https://www.mintz.com/our-people/adrienne-k-walker) for their guidance regarding and contributions to this article.

2 *See* Dep't of Justice, *Justice Department Recovers Over $2.8 Billion from False Claims Act Cases in Fiscal Year 2018* (Dec. 21, 2018), https://www.justice.gov/opa/pr/justice-department-recovers-over-28-billion-false-claims-act-cases-fiscal-year-2018 (reporting that in the fiscal year ending September 30, 2018, the U.S. Department of Justice "obtained more than $2.8 billion in settlements and judgments from civil cases involving fraud and false claims against the government," $2.5 billion of which involved the health care industry and that 2018 was the ninth consecutive year in which DOJ's health care fraud settlements and judgments surpassed the $2 billion mark). *See* also Dep't of Justice and U.S. Dep't of Health and Human Services, *Annual Report of the Departments of Health and Human Services and Justice, Health Care Fraud and Abuse Control Program FY 2014*, available at https://oig.hhs.gov/publications/docs/hcfac/FY2014-hcfac.pdf (reporting that in 2014, the federal government recovered, on average, $7.70 for every dollar it spent on health care fraud enforcement activities).

3 For example, Health Diagnostic Laboratory, Inc. made headlines over the past few years after its initial financial success was followed by a DOJ investigation (sparked by a *qui tam* False Claims Act suit) and settlement that eventually led the company to file for chapter 11 bankruptcy. *See, e.g.*, Larry Husten, Embattled Laboratory Files for Bankruptcy, Forbes (June 8, 2015), *available at* https://www.forbes.com/sites/larryhusten/2015/06/08/embattled-laboratory-files-for-bankruptcy/#313012281378. Other health care companies have shared a similar fate.

4 *See* 31 U.S.C. § 3730(b).

5 *See* 31 U.S.C. § 3730(d).

Continued from p.19

the potentially huge financial rewards, over the last few decades, the number of FCA cases filed by whistleblowers has skyrocketed.[6] Moreover, relators are increasingly pressing ahead and litigating FCA cases, even when the government declines to intervene.

Over the past few years, numerous FCA *qui tam* cases have made headlines in the health care industry as the parties have engaged in prolonged litigation. One such case, *United States ex rel. Polukoff v. St. Mark's Hospita*l, has been particularly interesting to follow, both because of the legal issues it raises in the health care enforcement defense arena and the potential lessons it has to offer. We are not aware of any current bankruptcy issues or financial distress at issue in this case, but the procedural history serves as a good example of extended investigations and litigation in FCA cases, and the substantive issues raised also offer potential strategic lessons about the use of Federal Rule of Civil Procedure 9(b) ("Rule 9(b)") in the FCA context to defeat or bolster claims in the bankruptcy context.

The *Polukoff* case has been pending for over six years, and shows no signs of reaching resolution in the near future, as one of the defendants recently filed a Petition for a Writ of Certiorari before the U.S. Supreme Court.[7] This case began in December 2012 when Dr. Gerald Polukoff filed an FCA *qui tam* suit alleging that another cardiologist, Dr. Polukoff's colleague, performed medically unnecessary cardiac procedures, which were then fraudulently billed to federal health care programs.[8] Allegations that certain procedures are not medically necessary are fairly common FCA claims. In addition to naming the other cardiologist as a defendant in the case, Dr. Polukoff also named two hospitals as defendants.

In June 2015, nearly two and one-half years after the case was filed, DOJ filed a Notice of Election to Decline Intervention in the case and the relator decided to proceed with litigation.[9] Since that time the case has proceeded through extensive motions practice:

- Between October 2015 and January 2017, the defendants filed motions to dismiss and the parties engaged in extensive motions practice addressing whether the relator's complaint met federal pleading standards for an FCA case. One issue was the question of whether Dr. Polukoff, as the relator, had satisfied the requirement of Rule 9(b), which mandates that allegations of fraud, including FCA violations, be pled with particularity.
- In January 2017, the U.S. District Court for the District of Utah found, in part, that while the relator had satisfied Rule 9(b)'s requirements as to certain claims, his FCA claims failed as a matter of law because he had not shown that the defendants "knowingly made an objectively false representation to the government

6 *See* Jordan T. Cohen & Kevin M. McGinty, Health Care Enforcement Year in Review & 2019 Outlook: Analysis of Health Care FCA Litigation Trends (Jan. 8, 2019), https://www.mintz.com/insights-center/viewpoints/2019-01-health-care-enforcement-year-review-2019-outlook-analysis-health.

7 *See* Petition for a Writ of Certiorari, *Intermountain Health Care Inc. v. United States ex rel. Gerald Polukoff, M.D.*, No. 18-911 (Jan. 14, 2019), *available at* https://www.supremecourt.gov/DocketPDF/18/18-911/80446/20190114152041921_Intermountain%20Cert%20Petition.pdf.

8 Complaint, *United States ex rel. Polukoff v. St. Mark's Hospital*, No. 16-cv-00304 (M.D. Tenn. Dec. 6, 2012) (transferred to the United States District Court for the District of Utah on April 14, 2016).

9 United States' Notice of Election to Decline Intervention, *United States ex rel. Polukoff v. St. Mark's Hospital*, No. 16-cv-00304 (M.D. Tenn. June 15, 2015).

that caused the government to remit payment."[10] The district court granted the defendants' Motion to Dismiss.[11]

- In February 2017, the relator appealed the district court's decision to the U.S. Court of Appeals for the Tenth Circuit.[12]In July 2018, 17 months after the relator filed his appeal, the Tenth Circuit reversed the district court's decision.[13]

One of the most recent developments in this case took place in November 2018, when defendants filed a Motion to Stay Proceedings Pending Certiorari Petition, indicating that they planned to file a Petition for Certiorari to the U.S. Supreme Court in January 2019.[14] As of the date of publication, it remains to be seen whether the Supreme Court will agree to hear this case and, what, if any, impact the Supreme Court's determination will have on the duration of the remainder of the case.

Polukoff defendants filed their Petition for a Writ of Certiorari on January 14, 2019 and raised two issues, one of which is potentially instructive in the bankruptcy and restructuring context.[15] Namely, the defendants raised the question of whether a court may create an exception to Rule 9(b)'s particularity requirement (i.e., that fraud suits include particular allegations of fraud) when the plaintiff claims that only the defendant possesses the information needed to satisfy that requirement.[16] They also asked the Supreme Court to resolve a circuit split over Rule 9(b) and allege that the Tenth Circuit joined many other circuits in erroneously excusing a lack of detail when such detail is exclusively in the control of the defendant accused of FCA violations.[17]

The Supreme Court's decision on this issue, if it decides to take the case, could raise important strategic considerations in the bankruptcy context. For example, if the Supreme Court were to decide that no exception should be granted to Rule 9(b)'s particularity requirement, trustees of a defendant in a *qui tam* case could potentially use this decision to preclude relators from recovering from the debtor's estate. For example, if a health care fraud case has not been determined (either by a judgment or settlement with the government or, in declined cases, a *qui tam* relator with the government's approval), and the company files for bankruptcy, the relator generally does not have access to sufficient evidence to allege fraud with particularity. In such a situation, the bankruptcy trustee, standing in the shoes of the defendant debtor, could file a motion to dismiss the relator's claim under Rule 9(b), arguing that the relator has failed to allege fraud with sufficient specificity and thus should be precluded from recovering from the company.

Given the many substantive and strategic lessons to be learned from this and other FCA investigations and litigations, bankruptcy counsel advising the various constituents impacted by an FCA case should be mindful of these potential lessons, as they may raise issues relevant to the bankruptcy estate.

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Samantha Kingsbury is an associate in the Health Law practice of Mintz, Levin, Cohn, Ferris, Glovsky, and Popeo, P.C.(https://www.mintz.com/our-people/samantha-p-kingsbury). Her legal practice focuses on health care enforcement defense matters, which typically involve criminal, civil, and administrative actions brought against health care providers and companies by state and federal governmental and regulatory agencies. Many such actions result from *qui tam* cases filed by whistleblowers under the False Claims Act, and Samantha has experience representing clients in investigating and defending such cases. In addition, she regularly assists clients with internal investigations of potential violations of, and advises clients regarding compliance with, the federal Anti-Kickback Statute, the Stark law, and the False Claims Act.

10 Memorandum Decision and Order Granting Motions to Dismiss, *United States ex rel. Polukoff v. St. Mark's Hospital*, No. 16-cv-00304 (D. Utah Jan. 19, 2017).

11 *Id*. In reaching this decision, the court noted that the crux of the relator's case was that the "defendants represented to the government that the [procedures] performed… were medically reasonable and necessary and that this representation was objectively false," but that such representations could not be proven to be "objectively false" because "opinions, medical judgments, and 'conclusions about which reasonable minds may differ cannot be false'" for purposes of an FCA claim. This decision was a welcome development to the defense bar handling FCA cases premised on allegations related to lack of medical necessity.

12 *See* Plaintiff/Relator Gerald Polukoff's Notice of Appeal, *United States ex rel. Polukoff v. St. Mark's Hospital*, No. 16-cv-00304 (D. Utah Feb. 2, 2017).

13 *United States ex rel. Polukoff v. St. Mark's Hospital*, No. 17-4014 (10th Cir. July 9, 2018) (order reversing district court's decision to grant motion to dismiss). In reaching this decision, the Tenth Circuit Court of Appeals found that it is possible "for a medical judgment to be 'false or fraudulent' as proscribed" by the FCA.

14 Motion to Stay Proceedings Pending Certiorari Petition, *United States ex rel. Polukoff v. St. Mark's Hospital*, No. 16-cv-00304 (D. Utah Nov. 15, 2018).

15 Petition for a Writ of Certiorari, *Intermountain Health Care Inc. v. United States ex rel. Gerald Polukoff, M.D.*, No. 18-911 (Jan. 14, 2019), *available at* https://www.supremecourt.gov/DocketPDF/18/18-911/80446/20190114152041921_Intermountain%20Cert%20Petition.pdf.

16 The other question raised in the Petition for a Writ of Certiorari was whether the False Claims Act's *qui tam* provisions violate the Appointments Clause of Article II of the Constitution. *See id.*

17 *Id.*