March 31, 2014

U.S. Supreme Court Sidesteps Important False Claims Act Issue

By James F. Segroves

The Supreme Court of the United States announced today that it had once again declined to answer an important legal question of significance to the health care industry: namely, how much detail must a complaint under the federal False Claims Act (FCA) include to avoid dismissal prior to the commencement of discovery? The answer to that seemingly simple question has divided lower federal courts for years. In light of the Supreme Court’s decision not to resolve that conflict for the time being, members of the health care industry should take care to ensure that the issue is preserved for potential resolution in current and future cases.

The origins of this particular legal dispute are deceptively simple. Federal Rule of Civil Procedure 9(b) provides that “[i]n alleging fraud,” a “party must state with particularity the circumstances constituting fraud.” Federal appellate courts have disagreed as to what level of detail Rule 9(b) requires in the FCA context. For example, some courts have indicated that bounty hunters seeking to prosecute a case on behalf of the United States—in FCA parlance, “qui tam relators”—must plead the specifics of at least one false payment claim in order to survive a motion to dismiss. Other courts have applied a more lenient standard favorable to relators that permits them access to the discovery process, often resulting in years of costly litigation or settlement to avoid such litigation.

Filed in early 2013 by a relator whose FCA suit had been dismissed for failing to plead fraud with particularity, the petition for Supreme Court review in United States ex rel. Nathan v. Takeda Pharmaceuticals N.A., Inc. (Nathan), No. 12-1349, asked the Court to decide the following question:

Whether Rule 9(b) requires that a complaint under the False Claims Act “allege with particularity that specific false claims actually were presented to the government for payment,” as required by the Fourth, Sixth, Eighth, and Eleventh Circuits, or whether it is instead sufficient to allege the “particular details of” the “scheme to submit false claims” together with sufficient indicia that false claims were submitted, as held by the First, Fifth, Seventh, and Ninth Circuits.

In a move taken in very few cases each Term, the Supreme Court issued an order several months later asking the Solicitor General of the United States to submit a friend-of-the-court brief to advise the Court whether review should be granted. This was not the first time the Court had asked for the Solicitor General’s views on the Rule 9(b) issue, however. The
Court had done so three years earlier in another FCA case in which a disappointed defendant had asked the Court to resolve the issue (Ortho Biotech Products, L.P. v. United States ex rel. Duxbury, No. 09-654).

As it had done in Ortho Biotech, the Solicitor General’s brief in Nathan agreed that the Rule 9(b) issue was important and potentially worthy of Supreme Court review. The Solicitor General nonetheless recommended that the Court deny review in Nathan because, in the Solicitor General’s opinion, the relator’s complaint did not even satisfy the more lenient “plausibility” standard that applies to federal civil complaints generally. Earlier today, the Supreme Court agreed with the Solicitor General’s recommendation and declined to resolve the Rule 9(b) issue for the time being.

There are at least two takeaways from today’s decision. First, the legal uncertainty caused by the split in the circuits will remain unresolved for at least another year. While it is possible that Congress could act to resolve this issue through legislation, there is little probability of that occurring in the near future. The same is true with respect to Rule 9(b) being amended to address this issue.

Second, members of the health care industry defending FCA cases at the district court level should endeavor to preserve the Rule 9(b) issue even if they are litigating in circuits with liberal Rule 9(b) precedent or with no circuit precedent directly on point. For example, while a district court’s denial of a motion to dismiss on Rule 9(b) grounds cannot be immediately appealed as a matter of right in most instances, federal law provides a mechanism by which a party can seek permission to appeal a district court’s order if it involves a controlling question of law as to which there is a substantial ground for difference of opinion.

Hooper, Lundy & Bookman, P.C. advises members of the health care industry throughout the United States on issues arising under the FCA and similar state statutes. For more information regarding the Rule 9(b) issue, please contact James Segroves in Washington, D.C. at 202.580.7710; or Patric Hooper and John Hellow in Los Angeles at 310.551.8111.