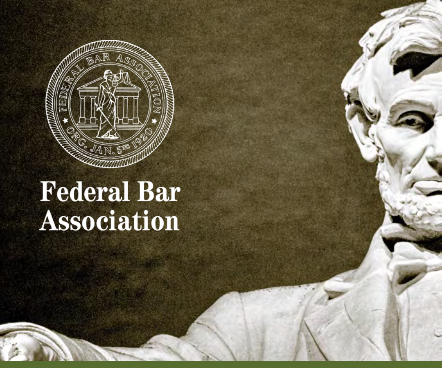

Turning Square Corners

The Newsletter of the Federal Bar Association Qui Tam Section

Summer 2024

Leadership Lane

By Giselle J. Joffre & Jake M. Shields

As Co-Chairs of the Federal Bar Association's 2024 Qui Tam Conference, we are honored to present highlights from the conference in this issue of Leadership Lane. When planning the conference, Jake envisioned the conference as an in-depth walk through of the twists and turns of a qui tam case, starting with the whistleblower allegations and ending with trial. In keeping with past conferences, we also endeavored to have thought leaders from the whistle blower bar, defense bar, and government attorneys well represented on the panels. On February 22-23, 2024, we welcomed nearly 400 attendees to a sold-out conference hosted at the Hilton Washington DC Capitol Hill. The quality of the panels, the dynamic speakers, attendee engagement and networking events surpassed our expectations.

While all of the panels were well received, we would like to highlight two that introduced new perspectives to the Qui Tam Conference. "The USAO Perspective: A Chat with USAO Civil Chiefs and ACE Coordinates" with representatives from U.S. Attorney's Offices in Georgia, Ohio, Florida, Massachusetts and Colorado. Attendees appreciated the inside perspective from the panelists as well as the comparison of approaches across offices. Immediately following this panel was "The Agency Perspective: The Role Of Inspectors General in FCA Investigations" in which the Fraud Section, Civil Division, U.S. Department of Justice led panelists in a discussion of the ways in which OIGs collaborate and coordinate with the Department of Justice, from the inception of a case, through investigation, litigation, and resolution.

We are grateful to so many for their leadership and hard work that contributed to a successful conference. Thank you to R. Scott Oswald, Programming Committee Chair, Qui Tam Section, Megan Mocho, Chair, Qui Tam Section, and our moderators, panelists and firm sponsors. Special thanks to our speakers Brian M. Boynton, Principal Deputy Assistant Attorney General, Civil Division, U.S. Department of Justice; Robert Storch, Inspector General, U.S. Department of Defense; and Rob DeConti, Chief Counsel to the Inspector General, Office of Inspector General, U.S. Department of Health and Human Services.

We are excited to have passed the baton to next year's co-chairs Danielle Pelot and Diana Cieslak and look forward to the 2025 conference!

Also in This Issue

John Thomas: FBA Member Spotlight

By Rachel V. Rose

As the Founder of the Federal Bar Association Qui Tam Section, tell us about yourself and the evolution of your fascinating legal career.

My legal career has taken a somewhat unconventional path. I joined the Marine Corps during law school, during which I also interned in the US Attorney's Office in Atlanta. My clerkship at the U.S. Attorney's Office was my first exposure to the False Claims Act. My five years of active duty in the Marine Corps included a wide array of experiences – I served as a defense attorney and prosecutor, but I also deployed to Afghanistan and served as a lawyer for a Marine Corps battalion in combat, which included everything from coordinating drone strikes, managing all the battalion's detainees, coordinating civil reconstruction projects, and meeting with local elders. After my Marine Corps active duty time, I joined a private practice law firm and had the opportunity to begin working on some False Claims Act matters and became reacquainted with the statute at that time.

What led you to form the FBA's Qui Tam Section and did you imagine that it would achieve across-the-aisle collaboration an become "the" Qui Tam Annual Conference that practitioners attend?

My goal in founding the FBA Qui Tam Section was to provide a place for practitioners in all areas of FCA practice – relators counsel, defense counsel, government attorneys, corporate counsel, and judges and clerks – to collaborate and develop our respective practices in a collegial environment. At the time, I saw a need for it; there are other excellent groups that focus on particular areas, such as Taxpayers Against Fraud for relator counsel, but it appeared to me that we needed a forum for everyone to get together. I've been completely blown away by the success of the section, and most of it has to do with the excellent leaders that have followed after me.

What is the most memorable case that you have been involved in?

I think my most memorable case at this point is the Duke University grant fraud case - we reached a settlement in 2019 for $112.5 million. It was memorable from a personal perspective for several reasons - the case spanned six years and as a declined case, our legal team was involved in every aspect of the factual and legal development of the case. It was also memorable for me because I had the unique experience of representing a family member (my brother) as a relator. I think the case was notable for other reasons as well - it remains the largest grant fraud case in US history, and some of the groundwork laid in this case should hopefully spur further action on research integrity in future cases.

How has your military background benefitted you in relation to False Claims Act cases and litigation?

My military service has been interwoven in my legal career from the beginning - I am still a Lieutenant Colonel in the Marines and in addition to our False Claims Act practice, my law firm specializes in national security and international law. (As I write this, I am returning from meeting clients in Nepal.) Aside from the substantive experience I have gained in the military that is beneficial to certain cases, I think my military service has taught me to approach cases and issues from a different perspective.

Any suggestions for practitioners in this area?

I think my biggest suggestion for counsel on both the relator and defense sides of the aisle is to get into the weeds of your cases, both factually and legally. The Department of Justice has so much on its plate and has so many different priorities that outside counsel (whichever side you represent) has a true opportunity to move the needle in their client's favor by mastering the factual and legal terrain of the case. In our current FCA environment, agencies are given tremendous power and sometimes they need to be challenged – that can only be done from a position of strength.

Rachel V. Rose, JD, MBA (Houston, Texas), advises clients on compliance, transactions, government administrative actions, and litigation involving healthcare, cybersecurity, corporate and securities law, as well as False Claims Act and Dodd-Frank whistleblower cases. She also teaches bioethics at Baylor College of Medicine in Houston. Rachel holds a variety of leadership positions within the FBA, including serving on its National Board of Directors and can be reached through her website, www.rvrose.com.

Interview with Assistant U.S. Attorney Colleen Kennedy, Eastern District of California, Affirmative Civil Enforcement Unit Chief

By Lynzi J. Archibald

Colleen Kennedy has served as an Assistant United States Attorney in the United States Attorney's Office for the Eastern District of California in Sacramento, California since 2012 and as the Chief of the District's Affirmative Civil Enforcement (ACE) Unit since 2018. She earned her bachelor's degree from Duke University and her juris doctorate from Yale Law School. Prior to serving as an AUSA, Ms. Kennedy practiced civil litigation in the private sector with a focus on white collar criminal defense.

What are your job duties as Unit Chief of the Eastern District of California's ACE Unit?

We usually have around twenty-five AUSAs in our civil division. I supervise the eight AUSAs in our ACE unit, which covers all district False Claims Act ("FCA") work, as well as civil rights and Controlled Substances Act enforcement, and our wildfire cost recovery program, through which we pursue recovery of damages caused by those who start forest fires (this is an important program given our location). That being said, I would estimate that about 60% of the Unit's time is spent on FCA work. I usually have about six qui tams on my own case list at any given time, but it varies.

What types of FCA cases does your division handle most frequently?

Like most districts, we see a large number of healthcare cases. Because we are a large district both geographically and by population, we have a number of large healthcare providers. We also have a number of military bases, so procurement cases are also fairly frequent, as well as PPP/COVID-related claims, and therefore a substantial proportion of health-care related claims.

What are the most notable changes to qui tam practice that you've observed since you started as an AUSA in 2012?

The types of cases are always evolving over time; we often see the same specific type of fraud over and over again, but then that scheme will fade away after a few years of active enforcement, and a new one will emerge. Overall, however, I think the most notable change has been that the relators' bar has continued to become more active and more creative since I started, and relator's counsel has demonstrated an increased level of experience and attention to detail. It also seems that relators have become more willing to proceed after declination. Generally, both the relators' bar and the defense bar seem to have become more organized and more effective at sharing information, which has raised the level of practice across the board.

What is your favorite part of handling qui tam cases?

Well, it's actually my favorite thing about my practice in general: we are charged with pursuing cases that are just and that serve the public interest, and being able to select the cases we pursue is a privilege that not everyone enjoys. With respect to qui tam cases specifically though, I enjoy working with relators to assemble the evidence and tell the story of the wrongdoing. Also, qui tam cases are challenging and complex, so working on them is a rewarding intellectual challenge, which I greatly appreciate.

What is your least favorite part of handling qui tam cases?

The amount of time it often takes to actually obtain a resolution once the parties have reached a settlement in principle. While this happens for various reasons, it can be frustrating, as all of the parties are ready to move on once settlement occurs, but there is often still a lot to do in order to truly reach an endpoint.

How has the exponential increase in electronic communications affected your practice?

As we all know, nearly all evidence is ESI now, and cases that do not involve large volumes of ESI are very rare. The newest challenge in this practice, as in almost all cases, has been the increase in the number of different electronic communication channels. ESI essentially used to mean emails, but there are so many different messaging and data storage apps now, all with different preservation policies and timelines. As a result, we have to think much more carefully about how different people and entities communicate, particularly in fraud cases, where bad actors may intentionally avoid using email.

What is the greatest challenge your district is currently facing?

While we always have to be selective about which cases we pursue (not only because it is the right thing to do, but also because we have limited resources), federal budget uncertainty makes this even more challenging. Committing funds for the future can be difficult during years of uncertainty and when we are frequently under threat of government shutdowns.

Did you handle qui tam cases when you worked in the private sector?

No, I actually never did. I handled mostly white collar criminal defense and general civil litigation. This subject matter was new for me (which is pretty common for AUSAs), but I have found that the FCA is a fascinating statute. Also, this area is quite specialized, so the qui tam bar is a small world, and it is nice that there is such a high level of interest in the actual subject matter across the relators' and defense bars.

Is there anything you miss about private practice?

The main thing I miss is the comradery of working on large teams. DOJ teams are generally leanly staffed, even on large cases, and we usually work alone or with just one other attorney. We only rarely get the chance to share the ups and downs of a case with a group of people who are equally invested. One of the reasons I became an AUSA was to have more independence and autonomy, but it can be a double-edged sword.

What information do you find most helpful in a disclosure statement?

It is extremely helpful when a relator not only discusses the underlying facts, but also provides us with insights into the types of evidence we may be able to gather, where they might be stored, and what relevant documents may be called. I also greatly appreciate information regarding who key witnesses might be and where their allegiances are likely to lie. We expect all relators to describe the facts, but it's particularly helpful when they also give us a head start on where to go next.

What factors do you consider when making an intervention decision?

While no factor is determinative, we certainly consider the strength of the evidence, whether we can satisfy all the required elements, the egregiousness of the conduct and level of harm to the public, and the presence of recoverable assets. We also consider how successful the relator and his or her counsel could be in taking the case forward if we decline—essentially, we consider whether there could still be an adequate remedy absent intervention if Government resources are more needed elsewhere.

If you could give relator's counsel one piece of advice, what would it be?

We understand that it can be frustrating dealing with the Government's institutional constraints, and we are just as eager for these investigations to be completed as you are.

If you could give defense counsel one piece of advice, what would it be?

Consider sharing information with DOJ to the extent possible, as doing so early in the process helps us to streamline our investigation and get the information we need. Cooperation beyond the bare minimum and timely and full production of documents would often allow us to move forward with our investigation more quickly, thereby shortening the seal period.

Do you have any advice for someone just starting his or her career as an AUSA?

I would advise people to seek out opportunities to stretch and say yes whenever possible when opportunities arise to get courtroom experience or work on bigger, more challenging cases. There are many real opportunities to distinguish yourself in this practice if you are willing to do so.

What do you like to do in your spare time?

I have two young children, so spare time is rare, but I really enjoy baking, and getting out and being active (running or yoga) to counteract all the baked goods.

Now for the hard questions: What is your favorite flavor of ice cream?

Coffee.

What was your favorite band in high school?

Fleetwood Mac.

Are you a dog person or a cat person?

Dog person.

Lynzi J. Archibald is a litigation partner at Miller & Martin PLLC in Chattanooga, Tennessee. She handles qui tam and general commercial litigation disputes through trial and also focuses on complex e-discovery matters. She has significant experience representing both whistleblowers and defendants in False Claims Act, Stark Law, and Anti-Kickback Act litigation, as well as representing a wide range of healthcare providers in contractual, employment, regulatory, and billing disputes.

Noteworthy Case Summaries

By Alexander O. Canizares

Relator Settlements

State Farm Mut. Auto. Ins. Co. v. Angelo, 95 F.4th 419 (6th Cir. 2024) – At issue in this case was whether the district court erred when it required the relator to dismiss his False Claims Act ("FCA") claim against the defendant pursuant to a release in a previous settlement agreement. The relator alleged in his qui tam action that the defendant fraudulently refused to pay medical benefits for auto accidents that forced the government to pick up the tab. The defendant moved to dismiss, arguing that the relator had released his claims under a prior settlement agreement with the defendant resolving a RICO suit that required the relator to take "all steps necessary" to release certain claims against the defendant. Agreeing with the defendant, the district court directed the relator to file a proposed motion for voluntary dismissal of his qui tam action. The relator appealed.

Rejecting the relator's arguments, the Sixth Circuit held that the scope of the release in his settlement agreement ("any lawsuits, arbitrations, appeals, claims, and other proceedings") extended to his qui tam suit and thus his FCA claims were released. The court also sustained the district court's order directing that the relator "solicit the government's consent" to dismiss his qui tam action. Noting that under section 3730 of the FCA, a relator cannot unilaterally settle FCA claims without the government's consent, the Sixth Circuit found nothing in the case law that "prevents a relator from seeking the required consent" or that "prohibits a district court from ordering a relator to seek such consent." The court also held that enforcing the settlement agreement against the relator would not contravene the primary goals of the FCA.

Public Disclosure Bar

Silbersher v. Valeant Pharmaceuticals Int'l, Inc., 89 F.4th 1154 (9th Cir. 2024) – Public disclosures related to a qui tam defendant's patents did not trigger the public disclosure bar because they did not reveal anything from which fraud could be inferred, the Ninth Circuit held.

The district court dismissed the qui tam relator's complaint against a pharmaceutical manufacturer alleging that the defendant had fraudulently obtained patents related to an anti-inflammatory drug. The court found that because the relator's allegations had been disclosed in an inter partes review ("IPR") proceeding related to one of its patents, they were barred under the public disclosure rule. The Ninth Circuit reversed. The Ninth Circuit then denied the defendant's petitions for rehearings by the panel and en banc, but it issued an amended opinion that revised certain language in its initial opinion regarding the public disclosure bar.

As amended in 2010, the FCA precludes a qui tam action if "substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed" in one of three channels unless the relator is an "original source" of the information. 31 U.S.C. § 3730(e)(4). Among other things, the Court's opinion focused on an issue of first impression: the meaning of the phrase "substantially the same allegations or transactions." The Court noted that under the pre-2010 version, the public disclosure bar applied when a relator's allegations were "based upon" a prior public disclosure. Noting that ordinarily, Congress's decision to replace "based upon" with "substantially the same allegations or transactions" would indicate an intent to impart a different meaning, the Court reasoned that Congress merely "re-enacted its prior law in clearer terms" in 2010, and thus case law interpreting the pre-2010 public disclosure bar was instructive.

Applying this standard, the Ninth Circuit held that the qualifying disclosures—information revealed in patent prosecutions, the IPR proceedings, a Law360 article, and medical studies—did not trigger the public disclosure bar because they were not "substantially the same" as the relator's FCA allegations. The Court's amended opinion revised certain language in its August 2023 opinion stating that the qualifying public disclosures "each contain a piece of the puzzle, but none shows the full picture." The defendant argued in its petition for rehearing that such language was contrary to settled precedent because it suggested that a qui tam claim is only foreclosed by the public disclosure bar if the facts underpinning the claim have been publicly disclosed entirely within a single source. Revising such language, the Court's amended opinion states that the qualifying disclosures at issue did not trigger the public disclosure bar because they "may each contain a piece of the puzzle but when pieced together, they failed to present the full picture of fraud." The Court thus held that, while the disclosures, when viewed together, revealed certain true and misrepresented facts, they did not reveal anything in combination "from which fraud can reasonably be inferred" and reversed and remanded. As of this writing, the defendant's petition for a writ of certiorari to the Supreme Court is pending.

Anti-Kickback Statute Scienter

United State ex rel. Hart v. McKesson Corp., No. 23-726-CV, 2024 WL 1056936 (2d Cir. Mar. 12, 2024) – In this declined qui tam case, Second Circuit examined the pleading standard for alleging a violation of the Anti-Kickback Statute ("AKS"), 42 U.S.C. § 1320a-7b.

The relator alleged that the defendant, a pharmaceutical wholesaler, violated the federal AKS and state-law analogues when it offered its customers free access to business management tools to induce them to purchase drugs. Dismissing the relator's amended complaint, the district court held that the relator failed to plausibly plead that the defendant acted with the requisite scienter and that the remaining state-law claims were all premised on a federal AKS violation.

The Second Circuit affirmed. It explained that, to violate the AKS, a defendant must act "knowing that his conduct was unlawful," even if he is not aware of the AKS specifically or intends to specifically violate the AKS. It is not enough to violate the AKS if the defendant has knowledge of his legal obligations "if he does not also know that his actions violate those obligations." Because the relator's complaint failed to satisfy this standard, it must be dismissed. However, the Seventh Circuit held that the district court erroneously dismissed the relator's remaining state-law claims because they were not premised solely on a violation of the federal AKS. The court noted that many of the state anti-kickback laws have no scienter requirement or a lesser requirement than willfulness. Thus, even though the relator failed to plead a violation of the federal AKS, the state-law claims were remanded for further proceedings.

Counterclaims in a Qui Tam Case

United States ex rel. Cooley v. ERMI, LLC, No. 1:20-cv-4181 (N.D. Ga. Feb. 27, 2024) –This case examined the circumstances in which a qui tam defendant may pursue counterclaims against the relator for alleged breaches of legal obligations owed by the relator to the defendant.

The relator, a former Chief Compliance Officer for the defendant, alleged that the defendant submitted false claims for reimbursement for durable medical equipment and unlawful retaliation. The defendant asserted counterclaims against the relator alleging breach of fiduciary duty and breach of contract arising out of certain conduct she engaged in while employed by the defendant. It also sought litigation expenses. The relator moved to dismiss the counterclaims under Rule 12(b)(6) arguing, among other things, that they were contrary to public policy by discouraging whistleblowers from coming forward and that the breach of contract claim was prohibited by the terms of her confidentiality agreement with the defendant.

The district court noted that several courts have held that at least some counterclaims are barred by the FCA on public policy grounds, such as claims for contribution and indemnification. But the court explained that a qui tam defendant can bring counterclaims if they are based on "independent damages," namely (1) counterclaims in which the conduct at issue is distinct from the conduct underlying the FCA case and (2) counterclaims as to which the defendant can only prevail if it is found not liable in the FCA case. The court declined to dismiss the defendant's counterclaims under this standard, reasoning that at least some of the defendant's allegations were distinct from the conduct underlying the relator's FCA claims. However, the court found that the defendant's allegation that the relator breached her fiduciary duties to the company by using the company's confidential information to file her qui tam suit was barred against public policy.

Anti-Retaliation Claims

United States ex rel. Johnson v. Raytheon Co., 93 F.4th 776 (5th Cir. 2024) – The district court lacked subject matter jurisdiction to review a relator's retaliation claims under the FCA because they implicated the government's authority to revoke his security clearance, the Fifth Circuit held.

The relator, a former employee of a defense contractor, filed a qui tam action against the company claiming that it retaliated against him for allegedly reporting fraudulent misrepresentations made by the contractor to the Navy. Affirming the district court's holding that four of his claims were barred and the remaining claim failed to state a claim, the court explained that under *Department of the Navy v. Egan*, 484 U.S. 518 (1988) and its progeny, courts lack subject matter jurisdiction to review decisions that implicate the government's power to control access to classified national security information. Here, the court held, Egan barred the court from entertaining several of the relator's retaliation claims because they necessarily required the court to review the merits of the Navy's decision to revoke his top-security security clearance. The Fifth Circuit also dismissed the relator's remaining retaliation claim, finding that his allegations were insufficient to state a claim.

Alexander O. Canizares is a partner at Perkins Coie LLP whose practice focuses on representing government contractors and other companies in litigation, investigations, and counseling, including False Claims Act/qui tam matters. He previously served as a Trial Attorney in the U.S. Department of Justice, Civil Division, Commercial Litigation Branch, National Courts Section.

Getting On With It: Proceeding with Discovery in False Claims Act Qui Tam Cases While a Motion to Dismiss is Pending

By Claire M. Sylvia

An issue that arises with some frequency in qui tam actions brought under the federal False Claims Act ("FCA")[1] is whether discovery should proceed before the court rules on a pending motion to dismiss. Of course this issue is not unique to FCA cases. But the unique features of such cases have led to disputes over whether a different standard applies than in other cases.

In general, the question of whether to proceed with discovery when a motion to dismiss is pending presents a potential conundrum for courts. On the one hand, resolution of the motion may result in a narrowing or dismissal of the complaint and waiting for the ruling before engaging in time consuming and expensive discovery may be efficient for both the parties and the court. On the other hand, ruling on a motion to dismiss can take time, and if the motion is not meritorious it can delay conduct of a case and efficient case management. Because few cases are exactly alike along these metrics, a one-size-fits-all approach would not likely produce optimal results. Resolution of this issue is thus left to the sound discretion of the trial court, with the federal rules providing background guideposts. No special FCA standard is necessary as the general standards supply adequate flexibility to address case specific issues.

Background Rules

The Federal Rules of Civil Procedure in general seek the "just, speedy, and inexpensive determination of every action and proceeding.[2] Several rules governing the commencement of litigation help to ensure that by setting a series of tight default deadlines for the parties.[3] Discovery may commence once the parties have met and conferred as required under Fed.R.Civ.P. 26(f).[4]

The Rules do not expressly address a stay of discovery pending resolution of a motion to dismiss, but Rule 26 provides that a district court may for good cause issue an order staying discovery in order to protect a party from annoyance, embarrassment, oppression, or undue burden or expense.[5] A district court also generally has broad discretion to stay proceedings "incident to its power to control its own docket."[6]

FCA qui tam actions involve a few distinct procedural mechanisms that have factored into how courts view motions to stay discovery. First, unlike most federal cases, an FCA qui tam action is initiated by filing a complaint with the court under seal and not serving the complaint on the defendant.[7] The government then has a period of time to investigate the allegations before deciding whether to elect to intervene in the case.[8] Once the government makes that election, the court unseals the complaint and orders service.[9] Thus, by the time the litigation gets started, the case may have been pending for a while. At the same time, depending upon how the investigation proceeded, one or more parties may have already collected and reviewed more information than would ordinarily be the case at the outset of litigation.

Second, when the government does not intervene in a case and the relator proceeds with the litigation, the injured party – the government – is not a party to the case.[10] Although the FCA authorizes the relator to proceed in the name of the government, the relator does not have the same access to some of the relevant information that a plaintiff would ordinarily have. This has been the basis of arguments that it is especially appropriate to postpone discovery in non-intervened FCA qui tam cases until the strength of the relator's allegations can be tested.

Evaluating Motions to Stay Discovery

Against this background, a number of courts have evaluated motions to stay discovery pending the resolution of motions to dismiss in non-intervened FCA qui tam actions. As in other cases, courts recognize that they have broad discretion in deciding whether to stay proceedings. In evaluating each case, courts balance the burdens on the party seeking the stay against the harm to the other party and case management from delay. As part of that balance, courts sometimes take a preliminary peek at the merits to determine if it is clear that the motion will be granted.

Motions to Stay Disfavored

In some districts, motions to stay discovery come to the court with a presumption that they are disfavored. As the district court recently explained in *U.S. ex rel. v. Mosley v. Walgreen*,[11] such motions "'are not favored because when discovery is delayed or prolonged it can create case management problems which impede the Court's responsibility to expedite discovery and cause unnecessary litigation expenses and problems.'"[12] In that non-intervened qui tam case, the court ultimately denied the defendant's motion to stay discovery pending resolution of the motion to dismiss the relator's second amended complaint, where the prior complaint had already been dismissed.

Even when a motion to stay is disfavored, that does not mean it should not be granted in an appropriate case where the court concludes that the burdens outweigh the possible benefits. For example, in *U.S. ex rel. Ernst v. College Park Ancillary LLC*,[13] although the policy in that district was that discovery proceeds despite pending dispositive motions, the parties had already agreed to a stay once, and a third set of motions to dismiss on Rule 9(b) grounds was pending. The magistrate judge concluded that in those circumstances a short stay would not burden the relator and set a tight schedule for submitting a planning report if the case remained pending after the district court judge ruled on the motions to dismiss.

Prejudice and Burden

Regardless of whether a court views a stay motion with disfavor, the party seeking the stay bears the burden of showing that they would be prejudiced if the stay were not granted. It would not be sufficient in most cases to merely assert that a potentially dispositive motion was pending.[14]

For example, in *Mosley*,[15] the defendants argued that discovery in a nationwide case would be expensive and complex. However, as with many qui tam cases the government had already obtained relevant documents from the defendants during the course of the government's investigation of the complaint's allegations. The relators pointed out that the only pending discovery request was for the documents the defendants had already provided to the government regarding one scheme and there would be no undue burden or expense to produce the same documents. The court rejected the argument that hosting fees and culling relevant documents was burdensome where the defendant had not provided the actual costs of hosting or explained how separating documents would be burdensome as opposed to merely inconvenient.[16]

To the extent that discovery requests could impose a burden on a defendant, courts have observed that the parties could use the meet and confer process to work at narrowing discovery pending the outcome of a motion.[17] Discovery need not be all or nothing.[18]

While the burden is on the moving party to justify a stay, courts will also weigh the prejudice to the plaintiff of delaying discovery. General arguments about delay, without specifics may not be sufficient to overcome s strong showing by the moving party.[19]

Finally, courts also may consider the burden on their own ability to control their dockets. For example in *U.S. ex rel. Zafirov v. Florida Medical Associates LLC*,[20] the court had inherited the case with the motions to dismiss already pending for several months. The court concluded that the stay would avoid spending judicial resources on possible discovery disputes while it was deciding the motions to dismiss and would permit the court "to better manage this inherited case."[21]

Preliminary Peek

Because a stay delays the plaintiff's case and can impact case management, granting a motion to stay will not ordinarily be appropriate unless the dismissal motion would likely dispose of the entire complaint.[22] To make that assessment, the district court must often evaluate whether there appears to be a clear possibility the motion will be granted.[23]

In *United States v. INSYS Therapeutics, Inc.*,[24] the court concluded that it was not faced with a case in which the relator clearly would be unable to survive the motion to dismiss, where the claims against one defendant had already proved meritorious. The court also considered the potential for delay. The court had already heard oral argument and if the motion were unsuccessful, the parties would need to submit a revised 26(f) report and the court would need to issue an amended scheduling order, taking up additional judicial resources and attorney time, and leading to further delay in prosecution of the action, which had been pending for five years.

Similarly, in *Mosley*, after taking a preliminary peek at the motion, the court concluded that it "cannot say at this stage that it is a 'sure winner' warranting a stay of discovery at this stage."[25] The court observed that although some of the "additions" to the amended complaint were the same as the previously dismissed complaint, there were some differences in the allegations, which could affect the outcome of the motion to dismiss.[26]

In contrast, in *Fernandez v. Freedom Health Inc.*,[27] the court concluded that a preliminary review "suggested that the pending motions to dismiss may result in dismissal of the Complaint as currently pleaded."[28] As a backdrop to that conclusion, the court had noted that the Eleventh Circuit had expressed concerns about allowing discovery prior to ensuring that a claim has met the particularity requirements of Rule 9(b).[29] Other courts have been persuaded by a similar argument. For example, in *U.S. ex rel. Williams v. Medical Support Los Angeles, Inc.*,[30] the court was persuaded that because FCA cases are subject to Rule 9(b), relators should not be able to take advantage of discovery obtained while a motion to dismiss on 9(b) grounds is pending in order to add facts necessary to meet pleading requirements. At the same time, the court noted delay in that case would be limited as the motion to dismiss was fully briefed and scheduled to be heard in less than two weeks. To limit the potential for delay, the court ordered the parties to contact the court within 14 days of the court's ruling on the motion to dismiss to discuss the impact.

Other courts have rejected the approach that a Rule 9(b) dismissal in an FCA qui tam case is reason to stay discovery.[31] While FCA cases are subject to Rule 9(b), motions to dismiss FCA cases on Rule 9(b) grounds are ubiquitous and not all such motions are on equal footing.[32] Thus, for example, in *U.S. ex rel. Sedona Partners LLC v. Able Moving and Storage Inc.*[33] the court noted that the Eleventh Circuit cases that raised concerns about Rule 9(b) involved cases where there was no evidence that false claims were submitted to the government, which the court considered distinguishable from the case before it. Similarly, in *Mosely*, the court rejected the argument, based on *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1367 (11th Cir. 1997), that challenges to the sufficiency of a complaint should be resolved before discovery, observing that "courts have since clarified that *Chudasama* "does not counsel an automatic stay of discovery upon the filing of a motion to dismiss."[34]

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In sum, FCA qui tam cases have some unique features, but the same general rules that govern stays of discovery apply and no special standard is required. Resolution of such motions rests with the discretion of the trial court, which can evaluate the actual burdens in a particular case as well as the degree of delay and the potential effect on case management.

Claire M. Sylvia is a partner in Phillips & Cohen LLP, which specializes in representing whistleblowers in federal and state False Claims Act cases and in financial fraud programs. She is the author of The False Claims Act: Fraud Against the Government (4th ed. 2023).

Endnotes

[1]31 U.S.C. § 3729, et seq.

[2]Fed.R.Civ.P. 1.

[3]*See, e.g.,* Fed.R.Civ.P. 26(f) (providing that parties must meet and confer as soon as practicable but at least 21 days before a scheduling conference is to be held or Rule 16 scheduling order is due); Fed. R.Civ.P. 16 (requiring parties to exchange initial disclosures and to meet and discuss case management); Fed.R.Civ.P. 16(b)(2) (requiring court to issue the Rule 16 scheduling order within 90 days of service of the complaint on the defendant); Fed.R.Civ.P. 12(a) (motion to dismiss must be filed within 21 days after service or within 60 days after service waiver request).

[4]See Fed.R.Civ.P. 26(d).

[5]Fed.R.Civ.P. 26(c)(1)(A).

[6]*Clinton v. Jones*, 520 U.S. 681, 706 (1997). *See, e.g., U.S. v. INSYS Therapeutics, Inc.*, 2021 WL 4307404, *1 (C.D. Cal. Apr. 14, 2021) (citing cases).

[7]31 U.S.C. § 3730(b)(2).

[8]The statute provides that the case is sealed for 60 days, but the government may seek an extension for good cause. 31 U.S.C. § 3730(b)(3). "[T]he seal requirement was intended in main to protect the Government's interests." *State Farm Fire and Cas. Co. v. U.S. ex rel. Rigsby*, 580 U.S. 26, 34-35 (2016).

[9]31 U.S.C. § 3730(b)(3). The defendant has 20 days to respond after the complaint is served in accordance with Federal Rule Civil Procedure 4.

[10]U.S. ex rel. Eisenstein v. City of New York, 556 U.S. 928, 937 (2009).

[11]U.S. ex rel. v. Mosley v. Walgreen, Co., 2024 WL 1717322 (S.D. Fla. Apr. 22, 2024). Some courts reject such a presumption, particularly where issues of immunity or jurisdiction are involved. See, e.g., Bilal v. Wolf, 2007 WL 1687253 (N.D. Ill. June 6, 2007).

[12]Id. at * 2 (quoting Feldman v. Flood, 176 F.R.D. 651, 652 (M.D. Fla. 1997)).

[13]*U.S. ex rel. Ernst v. College Park Ancillary LLC*, 2021 WL 533830, *2 (D. Kan. Feb. 12, 2021).

[14]*Mosley*, 2024 WL 1717322, at *3.

[15]*Id.*

[16]*See also U.S. ex rel. Sedona Partners LLC v. Able Moving and Storage Inc.*, 2021 WL 4749803, *2 (S.D. Fla. Oct. 12, 2021) (finding defendants had not made a specific showing of prejudice and merely asserted they would suffer "financial and reputational costs"). Cf. *KH, RV v. Virgin Islands Water & Power Authority*, 2024 WL 1313498, at *3 (D.V.I. Jan. 31, 2024) (despite lack of dollar figures, time frame and scope of discovery supported conclusion that burden on moving party outweighed burden on plaintiffs), reconsid. denied, 2024 WL 1313429 (D.V.I. Feb. 16, 2024).

[17]*See, e.g., U.S. v. INSYS Therapeutics, Inc.*, 2021 WL 4307404, at *2 (C.D. Cal. Apr. 14, 2021).

[18]*See, e.g., Mosely*, 2024 WL 1717322 at *3-4 (documents requested had already been produced to government); *U.S. ex rel. Luke v. Healthsouth Corp.*, 2018 WL 11446275, *2 (D.Nev. June 12, 2018) (burden to produce documents already produced to the government is minimal).

[19]*See, e.g., KH, RV*, 2024 WL 1313498, at *2.

[20]*U.S. ex rel. Zafirov v. Florida Medical Associates LLC*, 2021 WL 2401937 (M.D. FL June 11, 2021).

[21]*Id.* at *1.

[22]*Mosley*, 2024 WL 1717322, at *3.

[23]Not all courts adopt this approach. *See, e.g., KH, RV v. Virgin Islands Water & Power Authority*, 2024 WL 1313498, at *2, n.2 (D.V.I. Jan. 31, 2024) (declining to consider merits).

[24]*INSYS Therapeutics, Inc.*, 2021 WL 4307404.

[25]*Mosley*, 2024 WL 1717322, at *5.

[26]*Id.*

[27]*Fernandez v. Freedom Health Inc.*, 2021 WL 2954309 (M.D. Fla. Mar. 25, 2021).

[28]*Id.* at *2.

[29]*Id.* at **1-2.

[30]*U.S. ex rel. Williams v. Medical Support Los Angeles, Inc.*, 2021 WL 4816607 (C.D. Cal. May 7, 2021) (citing cases).

[31]*Sedona Partners LLC v. Able Moving and Storage Inc.*, 2021 WL 4749803, at *3. See also Luke, 2018 WL 11446275, at *1, n.1 (declining to apply a different standard for staying discovery in FCA cases).

[32]Although some relators may have limited information, others have very substantial information. The government decision not to intervene is not a decision on the merits, as the FCA contemplates that meritorious cases will proceed without the government. *U.S. ex rel. Williams v. Bell Helicopter Textron Inc.*, 417 F.3d 450, 455 (5th Cir. 2005).

[33]*Sedona*, 2021 WL 4749803.

[34]*Mosley*, 2024 WL 1717322, at *2 (citation omitted).

Navigating Attorney–Client Privilege Post-*SuperValu*

By Mark Kelley and Caleb Hayes-Deats

In *United States ex rel. Schutte v. SuperValu Inc.*, the Supreme Court held that whether a False Claims Act ("FCA") defendant acts "knowingly" depends on its subjective understanding of a statement's truth or falsity. In many FCA cases, truth or falsity turns on the defendant's compliance with the legal or regulatory requirements. The best evidence of a defendant's subjective understanding of its claims will often be the advice it received from attorneys. *SuperValu* is thus likely to increase the number and importance of privilege disputes to FCA practice. Defendants' assertions about their subjective understanding of legal requirements will provoke assertions of waiver, multiplying high-stakes fights over what is and is not discoverable. This article analyzes *SuperValu*'s implications for privilege disputes and offers some practical tips about how to prepare.

1. The Supreme Court's Decision in *SuperValu*

In *SuperValu*, the Supreme Court held the term "knowingly" requires analysis of the defendant's subjective beliefs, rather than objective reasonableness. The case involved claims for reimbursement to Medicare and Medicaid by retail drug pharmacies. Regulations required those pharmacies to charge the Government for the "usual and customary" price for drugs.[1] However, SuperValu offered a number of discounts, including a "price match" program which matched lower prices offered by competitors like WalMart. The relators alleged that SuperValu offered discounted prices to many customers, which raised a question as to what SuperValu's "usual and customary" price was: Its list price, or the discounted price offered to some of its customers. SuperValu charged the Government for its list price, even if it sold the drug to others at a discounted price.

A relator sued, alleging that SuperValu had defrauded the Government by charging the Government the full price for drugs, when the "usual and customary" price was a discounted price.[2] The district court granted summary judgment to SuperValu and another pharmacy,[3] and the Seventh Circuit affirmed, holding that SuperValu applied an "objectively reasonable" interpretation of the phrase "usual and customary" in concluding that the phrase referred to retail, as opposed to discount, prices.[4] Given the lack of "authoritative guidance" on the question, SuperValu could not have "knowingly" submitted false claims for retail prices, as long as their claims were lawful under a reasonable interpretation of the statute.

The Supreme Court disagreed, reversing and remanding the Seventh Circuit's decision. The term "knowingly," the Court held, refers to a defendant's knowledge and subjective beliefs at the time it submits a claim, not simply what a reasonable person could have known or believed.[5] Accordingly, what matters is whether the person submitting the claim thought, or had reason to think, that a claim was fraudulent, not whether there was a reasonable interpretation of the relevant regulations that was consistent with the claim for payment. The Court also held that a person will be liable if he or she is aware of a *substantial* risk that a claim is unlawful, and either avoids learning whether the claim was lawful or submits the claim anyway.[6]

The Court noted that the three states of mind contained in the FCA – knowledge, deliberate ignorance, and recklessness – track the scienter requirement for common-law fraud. It noted that the three states of mind each focus on what a defendant "thought and believed," just as common-law fraud "'depends on a subjective test' and the defendant's 'culpable state of mind.'"[7] Scienter is thus usually established if a defendant "lack[ed] an honest belief" in the truth of a statement.

The common law's focus on a defendant's state of mind pointed the Court to "what the defendant thought was submitting the false claim," rather than any "*post hoc* interpretations that might have rendered their claims accurate."[8] In *SuperValu*, there was evidence that the defendants had received notice that the phrase "usual and customary" referred to their discounted prices, including through a footnote in a CMS Medicare Prescription Drug Benefit Manual.[9] That evidence at least created a dispute of fact as to whether the defendants subjectively believed in the truth of their claims for payment to the Government, which precluded awarding them summary judgment.[10]

The Court rejected a few other arguments. First, it rejected the argument that, because the regulation was ambiguous, the defendants could not know that they were violating it. Although the phrase "usual and customary" might be ambiguous "in isolation," the Court noted that the defendant could learn what the phrase meant from other sources.[11] It analogized to a driver seeing a sign requiring her to drive a reasonable speed – although that sign may be ambiguous "in isolation," its meaning would be clear based on other signs posting the speed limit. Second, it rejected the argument that, because a misrepresentation of law is not actionable, a claim based on a knowingly incorrect interpretation of statute is not actionable, either. Since the defendant's misrepresentation carried, at least by implication, an assertion of fact to justify the statement, it was actionable.[12]

2. *SuperValu*, Scienter, and Waiver of Attorney-Client Privilege

SuperValu increases the relevance of privileged information to the issue of whether defendants acted knowingly and will likely result in battles over the occurrence and scope of privilege waivers. *SuperValu* emphasizes the importance of a defendant's subjective beliefs and interpretation of governing regulations. In *SuperValu*, the evidence of those beliefs included information provided in a CMS Manual, but in other cases, the relevant material may be covered by attorney-client privilege. Defendants thus may want or need to disclose communications with their attorneys as evidence of what they understood the governing regulations to require. Indeed, *amici* in *SuperValu* raised waiver issues as a reason to reject the relator's interpretation of "knowingly."[13] And the Government has argued that even reliance on *Government* statements can result in waiver whether or not the defendant also relied on advice of counsel relating to those statements.[14]

Of course, a defendant can *intentionally* waive attorney-client privilege, and such waiver is required if a defendant argues that it relied on the advice of counsel to determine what a law or regulation required. An advice-of-counsel defense is a complete defense as long as three elements are satisfied: The defendant must have (1) "honestly and in good faith sought the advice of counsel," (2) "fully and honestly laid all the facts before his counsel," and (3) "in good faith and honestly follow[ed] counsel's advice."[15] But asserting the defense requires waiving privilege over all communications and advice relating to the topic of advice and producing all such materials in discovery.[16] As the well-known phrase goes, a party may not use attorney-client privilege "as a shield and a sword."[17]

But defendants can also *unintentionally* waive the attorney-client privilege by incorporating privileged information into claims and defenses that its opponent, in fairness, must have the opportunity to test. *SuperValu*'s emphasis on a defendant's subjective beliefs may make such waiver more common, since a defendant might put advice of counsel at issue by invoking its subjective understanding of what the law required as a defense. The key question when deciding waiver is whether a party has "assert[ed] a claim that in fairness requires examination of protected communications." For example, in the Second Circuit's seminal *Bilzerian* decision, a defendant in a securities-fraud case wanted to testify that he thought what he did was legal – in essence, that he lacked the *mens rea* to commit securities fraud. The Second Circuit held that such testimony would put the defendant's knowledge of the law – as well as his *basis* for that knowledge – at issue, so he could not fairly invoke that defense without waiving the privilege.

But whether a claim of good faith requires waiver of privilege is a fact-intensive inquiry. The Second Circuit has emphasized that waiver should be decided on a "case-by-case basis" and depends on the "specific context" in which the privilege is asserted.[19] Indeed, other courts have held in other contexts that denial of the requisite *mens rea* for liability – the issue in *Bilzerian* – should not normally result in a waiver of privilege.[20]

In FCA cases, waiver arguments are not uncommon, and the Government has been aggressive in the past about asserting that the privilege has been waived. For example, in one case involving allegedly fraudulent billing practices in the healthcare industry, the defendant denied that it knowingly violated the law. The district court granted the Government's motion to compel production of privileged communications to rebut that claim, holding that the defendant put its good faith at issue and, in order to investigate that good faith, the Government needed access to the privileged material.[21] And in a case involving UnitedHealth's practices billing Medicare, UnitedHealth planned to argue that it relied on HHS guidance to negate scienter. The Government argued that would waive privilege by raising whether such reliance was reasonable "in light of all of the other information available to it, including potentially contradictory or cautionary advice from [UnitedHealth's] attorneys."[22]

Those kinds of arguments are likely to become more common following *SuperValu*. If a defendant seeks to defend itself by arguing that it believed it was submitting a valid claim based on its understanding of the relevant statute or regulation, the Government or relator could argue that the defendant has put its good faith at issue. Accordingly, the Government could make the same argument it made in *Poehling* – that, in order to test that defense, the Government needs discovery into the basis for that subjective belief and whether that belief was held in good faith. That discovery will include, at least in the Government's view, materials relating to advice from attorneys regarding the correct way to interpret the relevant statute or regulation.

3. Litigating Privilege After *SuperValu*

For the Government and relators, *SuperValu* presents an opportunity. They can allege that defendants knowingly violated legal requirements and then evaluate the defendant's responses for potential waivers. For potential defendants, *SuperValu* increases the risk of unintentional waiver of privilege and should lead to reevaluation of how to deal with potentially ambiguous legal requirements. The reevaluation process should include the following:

- First, identifying ambiguous statutes or regulations that create significant legal risk and require a definite interpretation from the company;
- Second, establishing the company's position on what those statutes or regulations mean;
- Third, establishing what obligations the company has arising from that meaning;
- Fourth, promulgating that understanding to the relevant functions at the company; and
- Fifth, monitoring developments in the law so that all of these steps can be updated to accommodate changes.

The company should memorialize these steps and keep a record of its response to ambiguous statutes and regulations that it can use to aid its defense if those interpretations are ever challenged.

One important reminder from *SuperValu* is that the potential for waiver should be considered at each step in this process, before litigation even arises. That potential can affect the way a company communicates with its counsel regarding advice relating to ambiguous statutes or regulations – it can even affect the format of the advice provided. An entity facing risks in this area of the law would be wise to consider whether it will be advantageous to have a written record of advice received in the form of a memorandum outlining its understanding of the relevant statute or regulation.

A company considering these issues can employ a few tools to minimize the risk of waiver. If possible, the company should set forth its interpretations in ***non-privileged*** documents. For example, it could set forth that interpretation in training or manuals prepared for line-level employees, such as contract or billing specialists. Such documents can be produced in litigation as evidence of the company's subjective understanding of requirements, potentially without waiving any applicable privilege.

Waiver is also less likely at the very earliest stages of a potential claim. Before a complaint is filed, representations are made only to the opposing party and not the court. Representations made to opposing counsel alone are less likely to create prejudice or a fairness issue that requires disclosure of privileged communications.[23]

If waiver cannot be avoided entirely, companies can also deploy strategies to limit its scope. Privilege waiver typically extends to all communications on the same subject. So, a company can consider how to cabin the subject on which it waives privilege. The limitations can include, for example, dates (when did the question arise, and when was a final decision made?), personnel (who was involved in the discussion?), and distinctions between business lines or organization (did the question arise in a narrow context or specific to a particular function?).

With these principles in mind, a company facing FCA risk should also consider whether to create a "package" of materials concerning its understanding of legal requirements, which it can provide to a party threatening to sue. That package may or may not include materials that, in a particular context, might trigger a waiver. Either way, materials in the package can explain how the company identified ambiguous statutes and regulations, how it reached an understanding of what those statutes and regulations require, how it plans to make decisions that would implicate the ambiguous statutes and regulations, and how it will stay abreast of relevant legal developments.

In conclusion, privilege battles are likely to intensify following *SuperValu*. At first glance, such battles will give significant leverage to the government and relators, who may be able to seek discovery into defendants' most sensitive communications. But savvy defendants can, with appropriate preparation, mitigate the risk of waiver or reduce its scope.

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Endnotes

[1]*See* 42 C.F.R. §447.512(b)(2).

[2]*United States ex rel. Schutte v. SuperValu Inc.*, 598 U.S. 739, 747 (2023).

[3]*See United States v. Safeway Inc.*, 466 F. Supp. 3d 912, 935 (C.D. Ill. 2020); *United States v. SuperValu, Inc.*, No. 11-3290, 2020 WL 3577996, at *8 (C.D. Ill. July 1, 2020).

[4]*See United States ex rel. Proctor v. Safeway, Inc.*, 30 F.4th 649, 659 (7th Cir. 2022); *United States v. SuperValu Inc.*, 9 F.4th 455, 468 (7th Cir. 2021).

[5]*See SuperValu*, 598 U.S. at 752.

[6]*Id.* at 757.

[7]*Id.* at 752 (quoting Restatement (Third) of Torts §10, Comment a).

[8]*Id.*

[9]*See Safeway, Inc.*, 30 F.4th at 656.

[10]*SuperValu*, 598 U.S. at 754.

[11]*Id.*

[12]*Id.* at 753, 756-57.

[13]*See, e.g., Brief of the Chamber of Commerce of the United States of America, et al. as Amici Curiae in Support of Respondents* at 10, 26-27, *United States ex rel. Schutte v. SuperValu Inc.*, No. 21-1326 (U.S. Mar. 28, 2023).

[14]*See, e.g., Plaintiffs' Mem. Supporting Mot. to Compel* at 22, Dkt. 505-1, *U.S. ex rel. Poehling v. UnitedHealth Group, Inc.*, No. 16 Civ. 08697 (C.D. Cal. June 3, 2022) (arguing that basis for waiver is parties' "assertion of good-faith reliance upon the government, not their reliance upon privileged communications"). Disclosure: MoloLamken represented defendants in this case.

[15]*United States v. Colasuonno*, 697 F.3d 164, 181 (2d Cir. 2012).

[16]*See, e.g., In re Grand Jury Proc.*, 219 F.3d 175, 182 (2d Cir. 2000).

[17]*United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991).

[18]*Bilzerian*, 926 F.2d at 1292.

[19]*In re Grand Jury Proc.*, 219 F.3d at 183.

[20]*See, e.g., United States v. White*, 887 F.2d 267, 270–71 (D.C. Cir. 1989).

[21]*See Barker v. Columbus Reg'l Healthcare Sys., Inc. et al.*, 12-cv-108 (M.D. Ga. Aug. 29, 2014) Doc. No. 67.

[22]*Plaintiffs' Mem. Supporting Mot. to Compel* at 21, Dkt. 505-1, *U.S. ex rel. Poehling v. UnitedHealth Group, Inc.*, No. 16 Civ. 08697 (C.D. Cal. June 3, 2022).

[23]*See In re von Bulow*, 828 F.2d 94, 103 (2d Cir. 1987) (disclosure that occurred "early in the proceedings, was made to opposing counsel rather than to the court, and was not demonstrably prejudicial to other party" was less likely to result in waiver).

The Utilization of Data in False Claims Act Investigations and Litigation

By Denise Barnes and Rachel V. Rose

Over the past decade, the U.S. Department of Justice (the "Department" or "DOJ") has increased its usage of data in its investigations either by utilizing billing data to identify outliers in the healthcare context or using data to demonstrate the relevant *alleged* false statements, claims or other misrepresentations. In either circumstance, data compilation, analysis, and review may be used by attorneys on both sides of the aisle to identify potential fraudulent conduct (in-house), bolster whistleblower cases/complaints (whistleblower attorneys/government), and/or defend against allegations of fraudulent and false statements under the False Claims Act ("FCA") or other relevant fraud statutes.

How to identify there is a problem as a company

For an in-house attorney, one often associates the utilization of data in the FCA context with defending a FCA investigation or case and not from a more preemptive stance. In reality, however, data—whether from medical billing information or information compiled from customer complaints or testing—can be used to proactively identify issues, perform a root cause analysis (if needed) and remediate issues prior to a potential whistleblower case. In fact, by compiling and analyzing the relevant information, an in-house attorney, compliance professional or outside counsel can replicate the same type of analysis that the government would engage in if the company were under investigation. By doing so, the company could, potentially, avoid exposure altogether by remediating the issue or conducting an internal investigation and documenting the company's investigative approach and the suggested remedial action, if any. But, in order accomplish this and effectively dodge a potential qui tam, first, the company must actually have controls and other systems in place which monitor and observe the frequency of certain outliers. In theory, all companies have the capability of monitoring such data because such data exists at all companies—whether hospital or defense contractor—but the fundamental question is whether the company has set up the appropriate processes and systems to identify, monitor, and analyze data related to key areas where risk of fraud is heightened. At base, in order to identify that a problem and remediate it, the company must have the information necessary to appreciate a potential issue exists.

More recently, in March 2023, the Department updated the Justice Manual, a comprehensive publicly-available manual that sets forth internal DOJ policies and procedures, stressing the importance of an effective compliance program. Specifically, the Justice Manual's "Federal Prosecution of Business Organizations" describes specific factors that prosecutors should consider in conducting an investigation of a corporation, determining whether to bring charges, and negotiating plea or other agreements. *See* JM 9-28.300. These factors include, among others, (i) the adequacy and effectiveness of the corporation's compliance program at the time of the offense, and (ii) the corporation's remedial efforts to implement an adequate and effective corporate compliance program. Although this guidance applies to active investigations and charging decisions, it is nonetheless valuable in demonstrating the importance of an effective compliance program and its role in identifying and evaluating risk and the prevalence of misconduct. Specifically, in evaluating the quality and effectiveness of a compliance program, prosecutors consider the following questions:

- What methodology has the company used to identify, analyze, and address the particular risks it faces?
- What information or metrics has the company collected and used to help detect the type of misconduct in question?
- How have the information or metrics informed the company's compliance program?

In other words, the same questions that prosecutors consider in evaluating the quality of a compliance program and charging decisions are relevant when identifying and remediating issues preemptively.

How whistleblowers and the Government utilize data analytics to identify fraudsters

Similarly, the Government is increasingly using data analytics to identify potential fraudsters. At the FBA Qui Tam Conference in February 2021, Acting Assistant Attorney General Brian M. Boyton noted the use of "sophisticated data analytics . . . to identify patterns across different types of health care providers" and "identify trends and extreme outliers."[1] Indeed, the Government can and does routinely utilize data analytics and trends to identify potentially "high risk" physicians and companies and estimate the cost of their outlier conduct to the federal healthcare programs.[2]

The Government's use of data analytics in the healthcare context is widely known in amongst the defense and whistleblower bars, but, notably, the Department has stressed its "plans to rely on the use of this analysis to combat other types of frauds, including COVID-19 related misconduct" where available. As discussed below, in the non-healthcare context, the Government regularly utilizes data analytics in *building* its cases, but its use of data analytics in identifying potential fraudsters has been less widespread outside of healthcare. Particularly, in the procurement and financial fraud context, the Government encounters more barriers to entry and fewer opportunities to obtain meaningful data for the purpose of observing trends and outliers, all of which thwarts the Government's efforts to identify non-healthcare fraudsters. Given these challenges, this is an area where whistleblowers could potentially supplement the Government's efforts and provide additional insight where the Government's access to such data and information is more limited.

For example, in *United States ex rel. Mandel v. Sakr*, 17-cv-907 (W.D. N.Y. 2022), the relator used data analytics to identify what the physician was not doing. In other words, to ferret out "procedures not performed at all or were not documented in patient medical records" but billed to Medicare and Medicaid.[3] As stated in paragraphs 76-80, Relator Mandel used a combination of public data issued by the Centers for Medicare and Medicaid Services ("CMS") and coupled it with his professional knowledge to distill the information and connect the data with the fraudulent billing allegations. This use of public information and private knowledge and/or expertise is also commonly utilized in U.S. Securities and Exchange Commission Whistleblower Program submissions after securities laws violations have been detected.

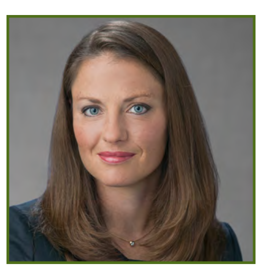
Using Data Analytics in Building/Defending Against a Case

Unsurprisingly, the Government's usage of data analytics in building cases pre-intervention is so prevalent that it is often impossible, if not extremely challenging, to defend a FCA matter without enlisting the use of an expert and engaging in, at least some, data analytics. Whether in the context of healthcare, procurement, or financial fraud cases, data analytics can range from sampling and reviewing medical records to sampling and reviewing testing data for a defense contract. In most instances, statistical sampling is needed to effectively opine on the underlying allegations. In simple terms, sampling allows for the government or the defense to extrapolate or extend an expert's findings to the entirety of the target population.

Post-intervention or at trial, courts have differing views on the efficacy and aptness of sampling in the FCA space. Some courts have allowed "the use of statistical sampling" as a "legally viable mechanism which the Government may employ" when proving FCA claims. *See U.S. v. Life Care Centers of America*, 114 F. Supp.3d 549, 571-72 (E.D. Tenn. 2014); *see also U.S. ex rel. Michaels v. Agape Senior Community, Inc.*, 2015 WL 3903675, at *6 (D.S.C. June 25, 2015) at *8 (noting that there are cases where statistical sampling represented the only way the plaintiffs-relators could prove damages). Whereas other courts have wholeheartedly rejected the use of statistical sampling to prove damages or liability. *See U.S. ex rel Crews v. NCS Healthcare of Illinois, Inc.* 460 F.3d 853, 857 (7th Cir. 2006) (rejecting relator's attempt to establish FCA liability based on percentages rather than proof of actual false claims); *see also U.S. ex rel. El-Amin V, George Washington Univ.*, 533 F.Supp.2d 12, 31 N.9 (D.D.C. 2008) (requiring specific evidence of fraud for each individual claim). Though there are cases on both sides of this issue, the Government faces a great deal of litigation risk given many courts view this question largely as factual inquiry in light of that specific case. Indeed, courts are less likely to allow statistical extrapolation when the question at issue turns on clinical or medical judgment. *See Agape Senior Community,* 2015 WL 3903675, at *8 ("Distilled to its essence, each claim asserted here presents the question of whether certain services furnished to nursing home patients were medically necessary."). Indeed, courts have held that "statistical sampling . . . cannot establish liability for fraud" where the underlying question "is inherently subjective, patient specific, and dependent on the judgment of involved physicians." *See U.S. v. Vista Hospice Care, Inc.*, 2016 WL 3449833, at *11 (N.D. Tex. June 20, 2016). Ironically, despite some courts' reluctance to apply sampling and extrapolation in proving such cases, these are precisely the sort of cases in which the Government frequently utilizes such methods to prove the case.

Indeed, it would prove particularly difficult for the Government demonstrate a consistent proof of misconduct across hundreds, if not thousands, of patients or claims without utilizing these sampling methods. In such instances, the Government or relators might attempt to bolster such claims by increasing the sample size of the review substantially and only pursue cases where the rate of misconduct is decisive. Whereas, counsel may defend against such allegations by continuing to cast doubt on the Government's findings from the review, such as providing a conflicting medical or professional opinion (when appropriate) or providing contemporaneous evidence of the provider's state of mind from her notes, emails or the patient file, when applicable. Doing so will ultimately muddle the waters for the factfinder—as it is after all, the Government's burden of proof to prove fraud under the FCA.

Simply put, although data analytics and review are helpful tools to identify and investigate fraud both within and outside of the healthcare context, ultimately, at trial, depending on the case, the Government may face substantial exposure post-intervention in effectively proving its case. Relators should be thoughtful in alleging cases based solely on data, and, in some circumstances, despite the wealth of resources at the Government's disposal in evaluating data-based claims at the investigative stage, the tides may actually sway in the defense's favor post-intervention and at trial.



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Procedural Eccentricities of the FCA: Service in Declined Qui Tams, and the Role of Courts, Relators, and Defendants

By Max Rodriguez and Michael Shaheen

Unlike standard civil litigation in federal courts where service of process is dictated entirely by the Federal Rules of Civil Procedure, the Second Circuit recently held that the judge assigned to a False Claims Act ("FCA") case must set and start the timer on when a qui tam complaint can be served on a defendant.[1] Relators and defendants alike must consider a number of strategic options when the judge fails to turn on that timer.

Background

The qui tam provisions of the FCA, codified in section 3730, provide a variety of procedures and responsibilities that are distinct from other civil litigation. Relevant here, section 3730(b)(2) mandates that a relator's qui tam complaint "shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders."[2] Separately, section 3730(b)(3) says that a defendant is not "required to respond" to a qui tam complaint "until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure."[3]

Rule 4 requires that a copy of the complaint must be served on a defendant "within 90 days after the complaint is filed" or the court is obligated to "dismiss the action without prejudice against that defendant or order that service be made within a specified time." If the plaintiff can show "good cause" for failure to serve, the court "must extend the time for service for an appropriate period."[4]

Here, a conflict arises between the FCA and the Federal Rules. While the normal triggering event for obligation to serve is the filing of a complaint, a qui tam complaint is filed in camera and under seal. It cannot be unsealed until at least 60 days after filing and is almost always under seal for significantly longer.

In limited circumstances, this also creates tension with Rule 41(b) which permits the dismissal of a complaint with prejudice in "extreme situations"[5] if a plaintiff in a civil case "fails to prosecute" their claims. Courts evaluate dismissal for failure to prosecute based on several factors: "(1) the plaintiff's failure to prosecute caused a delay of significant duration; (2) plaintiff was given notice that further delay would result in dismissal; (3) defendant was likely to be prejudiced by further delay; (4) the need to alleviate court calendar congestion was carefully balanced against plaintiff's right to an opportunity for a day in court; and (5) the trial court adequately assessed the efficacy of lesser sanctions."[6]

When, then, does the obligation to serve begin in a qui tam case? And how much delay is too much delay in prosecuting a qui tam?

United States ex rel. Weiner v. Siemens AG et al.

Last November, the Second Circuit became the first circuit court to address this question directly.[7] The relator filed his qui tam on behalf of the United States and the State of New York in the Southern District of New York in 2012.[8] After nine months, the United States declined to intervene while New York requested seal extensions for nearly two years.[9] Eventually, New York state authorized New York City to proceed with the state-law False Claims Act claims, which proceeded in a parallel action in New York state court.[10] The federal case remained under seal until 2018, when the district court signed an order unsealing the complaint.[11] This order did not include any reference to service.

After the district court requested a joint status report, the defendants noted their intention to — and ultimately did — file a motion to dismiss for insufficient process and failure to prosecute.[12] The district court granted the motion to dismiss for failure to serve under Rule 4(m) and held that "the service period begins immediately at the unsealing of the complaint" and "it is not clear … whether an express order to serve defendants is required for the service period to begin."[13] The district court denied the motion to dismiss for failure to prosecute, explaining that the Relator had not been given sufficient notice of the possibility of such a dismissal.[14]

Relator appealed the dismissal under Rule 4(m), arguing that the ninety-day deadline to serve had not yet begun to run because the district court had not issued an order explicitly authorizing service. The Second Circuit agreed, vacating the dismissal and remanding the case.[15] The Second Circuit, analyzing the text of section 3730(b)(2), held that "Congress unambiguously instructed that relators may not serve process without a court order authorizing service. Given the plain text … and given that the district court here did not issue an order authorizing service, the district court committed legal error by dismissing Relator's complaint for insufficient service of process."[16]

Takeaway 1: The FCA is not just substantively unusual, but also procedurally unusual. Be mindful of your obligations and the court's obligations, and be prepared to flag corrections to the court.

From the relator bar perspective, Relators have procedural limitations on when and how they are supposed to take certain steps they are otherwise free to take in normal civil litigation. For instance, relators cannot publicly disseminate or discuss the complaint until unsealed, cannot serve until ordered, and more. It is crucial that relators carefully follow these obligations.

It is also important to remember that courts sometimes make mistakes. While some judges are well versed in the lore of the False Claims Act, many are not. Relators must be careful to ensure the court has done what it is supposed to do. If it hasn't, counsel must be prepared to flag those issues to the court. In this situation, if an order unsealing the case does not explicitly authorize service, the court should be notified that it needs to separately authorize service.

From the defense bar perspective, although defendant's district court victory in *United States ex rel. Weiner* was short-lived when the Second Circuit vacated the dismissal, the Second Circuit's interpretation of the FCA's service rules nevertheless creates strategic opportunities for defendants who are not bound by these procedural quirks in the same way as relators.

Without service of the qui tam, defendants have no obligation to appear before the court, let alone flag for the court any shortcomings related to the unsealing order. This gives defendants a range of options when a court fails to authorize service as required whereas relators should, at some point, feel compelled to alert the court that further action is needed.

Takeaway 2: There can be benefit to playing for time by delaying service or other stages of FCA litigation, but not without risk.

From the relator bar perspective, plaintiffs are traditionally the ones in litigation who aggressively advance the ball at all costs. While often true in FCA practice, there can sometimes be a benefit to strategic delay from the relator perspective. Examples include waiting for favorable rulings or public revelations in parallel proceedings, public disclosure of parallel settlements to establish benchmarks, or anticipated favorable appellate decisions.

If the court properly issues its notice, the 90 day clock begins to run (as it should). If the court has not properly authorized service, and the relator fails to notify, although dismissal for failure to prosecute was rejected in this case, it may be granted in others.

From the defense bar perspective, Defendants should carefully consider whether, when, and how to push for dismissal when relator has remained silent and inactive for months or even years as occurred in United States ex rel. Weiner. As noted, relator's delinquency at some point could become so egregious that it gives rise to dismissal for failure to prosecute, especially when coupled with strategic prodding from a savvy defendant.

Certainly, lying in wait not only affords defendants an opportunity to see whether relator will proceed on his/her own in a declined case, but also increases the likelihood that the court will not look kindly on a relator who chooses to take advantage of the court's error. Moreover, defendants may calculate and seize upon the inflection point when the court's frustration with relator's perceived gamesmanship could create a more favorable playing field for defendants both for a motion to dismiss as well for other procedural issues that may arise during the litigation.

Takeaway 3: If defendants are on notice of a qui tam but haven't been served, they may still have some obligation to note concerns about failure to prosecute.

From the relator bar perspective, plaintiffs are usually the only party before the court if the defendant has not yet been served. In this circumstance, there may be some gray area to that when the defendant has not yet been served but is aware of the qui tam, through a partial lift of the seal or a CID during the investigation, noticing the public docket after unsealing, etc. By failing to note their objection to the delay (and inspiring the district court to do the same), defendants foreclosed the possibility of dismissal for failure to prosecute.

From the defense bar perspective, this gray area is a far more dangerous space for the relator than for the defendant. More specifically, to the extent an obligation arises on Defendant to object to relator's delinquency, the relator's obligation to act is likely exponentially larger. This is particularly true in FCA cases where the Defendant can point to the reasonable assumption that relator has not taken action because he/she will not be pursuing the case given that relators walk away from most cases in which the government opts not to intervene. That being said, and as noted above, Defendants should remain diligent and seize upon the point at which the judge's frustration with a negligent relator peaks.

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Physician Open Payments June 30th Data Publication to Incorporate New Final Rule Changes

By Mary Kate McDevitt and Marc S. Raspanti

The Physician Payments Sunshine Act (PPSA) took effect in 2013. It requires medical product manufacturers to disclose to the CMS payments or transfers of value made to physicians or teaching hospitals including meals, travel reimbursement, and consulting fees.[1] Payments related to research are reported through a separate reporting system.[2] The act also requires manufacturers and group purchasing organizations to disclose any physician's ownership or financial interest in those companies.[3]

The Process

Data about payments made to covered recipients is collected by reporting entities throughout the year. Data collected during the previous calendar year is submitted to CMS between February 1 and March 31 each year. Covered recipients may review and dispute the data from April 1 until May 15. Reporting entities resolve disputes and correct data from April 1 until May 30. The disclosed data is published by CMS in a publicly searchable database by June 30th each year.[4] The search tool currently has data from January 2016 until December 31, 2022. The 2023 data will be published on June 30, 2024. Between 2016 and 2022, $68.42 billion dollars have been reported through Open Payments.

Penalties

Penalties for failure to comply with the act are broken down into two main categories: violation of the PPSA and knowing violation of the PPSA. The penalties as adjusted annually pursuant to 45 CFR §102. Currently, violations of the PPSA are subject to a civil money penalty of not less than $1,362, but not more than $13,625, for each payment or other transfer of value or ownership or investment interest not reported as required under the act. The total amount of civil monetary penalties imposed under this subsection is limited to $204,384.[5]

Knowing violations are currently penalized at not less than $13,625, but not more than $136,258, for each payment or other transfer of value or ownership or investment interest not reported. The total amount of civil monetary penalties imposed under this section with respect to each annual submission of information by a reporting entity is limited to $1,362,567.[6]

Therefore, the total potential liability of both knowing and unknowing violations under the PPSA can be up to $1,566,951 annually.

Updates to the PPSA

The PPSA continues to evolve in order to effectively discourage fraudulent behavior in the industry.

On June 30, 2024, data from Calendar Year 2023 will reflect updates that were finalized in the Calendar Year 2022 Physician Fee Schedule.[7] In part, this includes the addition of a mandatory payment context field for records attributed to teaching hospitals, and also requires reporting entities to update their contact information. There is an addition of the option for reporting entities to recertify annually, even when no records are being reported. The new rule disallows record deletions without a substantiated reason, as well as publication delays for general payment records. The changes also clarify the exception for short-term loans to state that the exception applies for 90 total days in in a calendar year, regardless of whether the 90 days were consecutive. The changes remove the option to submit and attest to general payment records with an "ownership" nature of payment category. The rules also include an added definition for physician-owned distributorships as a subset of applicable manufacturers and group purchasing organizations, and an updated definition of ownership interest.

Other revisions since the enactment of the PPSA include three additional "nature of payment" categories: acquisitions, debt forgiveness, and long-term medical supply or device loan. Similarly, the previous two education categories were consolidated into one: compensation for serving as faculty or as a speaker for a medical education program. These changes took effect in 2022. Previously, the 2021 Support Act enabled Open Payments to include physician's assistants, nurse practitioners, certified registered nurse anesthetists, and certified nurse midwives in the definition of "covered recipient" in order to address concerns.[8] It also allowed CMS to public NPI numbers within the Open Payments Data.

Covered entities must stay up to date on the evolution of the PPSA in order to remain in compliance with their reporting obligations each year. Despite initial Department of Justice enforcement, there have not been any public enforcement actions since 2021. The three public settlements are discussed below.

Enforcement Summary

The United States Department of Justice settled its first enforcement action in October 2020 against Medtronic USA Inc. The settlement was the result of an investigation by the Civil Division of the Department of Justice, the U.S. Attorney's Office for the District of South Dakota, and the Office of Inspector General. The settlement resolved claims of liability under of the False Claims Act, the Anti-Kickback Statute, and reporting violations under CMS Open Payments Program as required by the PPSA.

Specifically, Medtronic was alleged to have been involved in a scheme with neurosurgeon Wilson Asfora, MD. The government claimed that Medtronic paid for more than one hundred social events with expensive food and drinks attended by Asfora's potential and existing referral sources at a restaurant that Medtronic knew Asfora owned in order to induce Asfora "to use Medtronic's SynchroMed II intrathecal infusion pumps."

In addition to the kickback scheme, the government alleged that Medtronic "violated the Open Payments Program by failing to accurately report payments it made" to Asfora to CMS. The investigation determined that despite Medtronic knowingly making payments to Asfora's restaurant at his request, the company underreported those transfers of value to CMS. According to the government, rather than reporting the total amount paid to Asfora and his restaurant as required by the Sunshine Act at the time, Medtronic only reported the attributed value of the food and drinks that each individual physician at the event consumed, leading to a severely diminished total reported. The current rule requires that applicable manufacturers calculate the value per person by dividing the entire cost of the food or beverage by the total number of individuals who partook in the meal.[9]

Medtronic agreed to pay over $9.2 million: $8.1 million to resolve violations of the False Claims Act and $1.11 million to resolve the violations of the Open Payments Program.[10] At the time, the PPSA limited the total civil monetary penalties for failure to fully report to CMS to a total of $1.15 million annually. In this case, the agreement penalty amount of $1.1 million served as aggressive precedent by nearing the maximum annual penalty.

In May 2021, months after the release of the Medtronic settlement, the Department of Justice released the settlement and penalties for Dr. Wilson Asfora's role in the alleged Medtronic scheme. Asfora and the two medical device distributorships he owned, Medical Designs LLC and Sicage LLC, agreed to pay $4.4 million total in order to resolve False Claims Act and Anti-Kickback Statute allegations. Both companies were also required to pay an additional $100,000 as a penalty for the Open Payments Program violations for failing to report Asfora's ownership interests and payments made by the companies to the neurosurgeon.[11]

On May 19, 2021, the Department of Justice announced another Open Payments Program settlement arising from private qui tam litigation in the Eastern District of Pennsylvania. The settlement was "among the first settlements to resolve allegations under both the False Claims Act and the Open Payments Program" as encouraged by the Senate Finance Committee's March 2019 request to investigate and pursue noncompliance with the PPSA.

The settlement was the result of qui tam allegations that Medicrea, a small French medical device manufacturer, and its United States affiliate, Medicrea USA Inc., violated the Anti-Kickback Statute by hosting United States physicians at a 2013 Scoliosis Research Society's conference in Lyon, France. At this conference, Medicrea allegedly provided value to the physicians "in the form of meals, alcoholic beverages, entertainment, and travel expenses" in order to induce physicians to purchase their spinal devices that was the sole source of revenue for the company.[12] The settlement also resolved the associated Open Payments Program violation allegations that Medicrea failed to fully report these physician entertainment expenses to CMS.

The settlement resolved alleged claims and did not determine any liability of Medicrea or any of its employees. As a result of the agreement, Medicrea paid $1 million to the United States and participating states for resolution of the False Claims Act and the Anti-Kickback Statute allegations as well as an additional $1 million to the United States for alleged violation of the Open Payments Program.[13]

Although there has been a lapse in public settlements since 2021, reporting entities may be audited by CMS. Reporting entities are required to keep all records related to financial transactions with covered recipients for at least five years after publication.

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Endnotes

1 42 CFR § 403.904(c).
2 42 CFR § 403.904(f).
3 42 CFR § 403.906.
4 42 CFR § 403.908; See "Search Open Payments," U.S. Centers for Medicare & Medicaid Services, accessed May 13, 2024, https://openpaymentsdata.cms.gov/.
5 42 CFR § 403.912.
6 *Id.*
7 *See* 86 FR 64996.
8 *See* 42 CFR § 403.902.
9 *See* 42 CFR § 403.904 (g).
10 U.S. Department of Justice, "Medtronic to Pay Over $9.2 Million To Settle Allegations of Improper Payments to South Dakota Neurosurgeon," news release, October 29, 2020, https://www.justice.gov/opa/pr/medtronic-pay-over-92-million-settle-allegations-improper-pay-

Physician Open Payments continued on 21

Beck: A New Appellate Trap in the Fifth Circuit

By Gaines West

I. Overview and Procedural History of *Beck*

In 2016, Dr. Beck filed suit under seal in the Central District of California, alleging that St. Joseph Health System violated the False Claims Act through its unlawful scheme of purchasing client referrals by paying its physicians commercially unreasonable compensation at levels well above fair market value. The case was subsequently transferred to the Northern District of Texas, which granted summary judgment in favor of St. Joseph Health System and dismissed the case.

Dr. Beck then filed a Rule 59(e) motion to reconsider, which the district court denied one business day after it was filed for failure to include a certificate of conference. That same day, Dr. Beck filed a new Rule 59(e) motion to reconsider that included the requested certificate of conference. The district court denied this motion on the merits, and Dr. Beck filed a notice of appeal 28 days later—within the 30-day window. The Fifth Circuit dismissed Dr. Beck's appeal for lack of jurisdiction, relying on its own case-made law that suggested "successive" Rule 59(e) motions to reconsider do not toll the time to file a notice of appeal. Dr. Beck then petitioned the U.S. Supreme Court for review.

On October 2, 2023, the U.S. Supreme Court denied Dr. Beck's writ of certiorari and, in doing so, essentially greenlighted the Fifth Circuit's practice of trumping the plain language of the longstanding Federal Rules of Appellate Procedure with its own case-made law. Attorneys for plaintiffs and defendants alike should be aware of the Fifth Circuit's one-of-a-kind, self-created appellate trap it has set for unwary practitioners.

II. Appellate Deadlines and Circuit Splits

In general, a party in a civil case wishing to appeal from a federal district court judgment or order must file its notice of appeal "within 30 days after the entry of the judgment or order appealed from."[1] This appellate deadline is paused or "tolled," however, when that party timely files any of the motions listed in Rule 4(a)(4)(A)—including a Rule 59(e) motion—and will not begin to run until the date of "the entry of the order disposing of the last such remaining motion."[2] In order to prohibit a losing litigant from extending "the time for appeal virtually indefinitely by filing successive [post-judgment] motions,"[3] the Fifth Circuit created its own "successive motion rule," articulated in its *Charles L.M.* decision.[4] The plaintiff in *Charles L.M.* filed two Rule 59(e) motions to reconsider.[5] However, because the plaintiff's second motion was filed outside the time period allowed for post-judgment motions, the Fifth Circuit held that the motion did not toll the running of the appellate deadline and dismissed the plaintiff's appeal as untimely.[6] Additionally, the Fifth Circuit held that a motion to reconsider an order denying a prior motion to reconsider, on substantially the same grounds, does not interrupt the running of the time for appeal.[7]

While other circuits have similarly held that impermissible successive motions will not toll the appellate deadline, the circuits disagree on what actually constitutes an impermissible successive motion for appellate deadline purposes. Other circuits distinguish untimely-filed subsequent post-judgment motions—such as in *Charles L.M.*—from post-judgment motions that are actually filed timely. In *Robbins*, the Sixth Circuit agreed with the Fifth Circuit and others that untimely-filed subsequent post-judgment motions do not toll the appellate deadline but further noted that a timely-filed subsequent post-judgment motion does not rely on the first motion to establish the timeliness of the second motion, permitting tolling.[8] In *Colon-Santiago*, the First Circuit held that it had jurisdiction because while an untimely-filed post-judgment motion does not toll the appellate deadline, both of the appellant's post-judgment motions were filed timely and thus tolled the appellate deadline.[9] Both the First and Sixth Circuits clearly distinguish timely-filed subsequent post-judgment motions from those that are not filed timely.

III. The Fifth Circuit Agrees with the Defense

In response to Dr. Beck's appeal to the Fifth Circuit, St. Joseph Health System argued that Dr. Beck's second *timely-filed* Rule 59(e) motion runs afoul of Fifth Circuit authority condemning impermissible successive post-judgment motions. St. Joseph Health System pointed to the *Charles L.M.* and *Edwards* decisions, arguing that although both of Dr. Beck's post-judgment motions were filed timely, the Fifth Circuit lacks jurisdiction over Dr. Beck's appeal due to the Fifth Circuit's successive motion rule prohibiting the tolling of the appellate deadline.

The Fifth Circuit panel agreed with St. Joseph Health System, noting that it was bound under its "rule of orderliness" to follow its case-made successive motion rule that "aims to prevent gamesmanship"—despite acknowledging during oral argument that "the situation here does not implicate gamesmanship." As noted in its per curiam opinion in *Beck*, the Fifth Circuit relied on *Edwards*, which extended the *Charles L.M.* holding to a *timely* filed second post-judgment motion.[10] Additionally, the *Edwards* court, citing *Charles L.M.*, mandated that once a post- judgment motion is denied, a second one based on the same grounds will not further delay the appellate deadline.[11] Under *Charles L.M.* and *Edwards*, according to the Fifth Circuit panel, Dr. Beck had 30 days from the date of the district court's disposition of his first Rule 59(e) motion to file his notice of appeal since the circuit's successive motion rule prohibited tolling here. And even though Dr. Beck's actions did "not implicate gamesmanship," the panel dismissed Dr. Beck's appeal for lack of jurisdiction.

IV. Ignoring *Hamer* and Distinguising *Charles L.M.* and *Edwards*

In agreeing with the defense and dismissing Dr. Beck's appeal, the Fifth Circuit relied heavily on its *Charles L.M.* decision. However, *Charles L.M.* is easily distinguishable from *Beck*. In *Charles L.M.*, the plaintiff's second Rule 59(e) motion was not filed within the time required by Rule 59; while in *Beck*, both of Dr. Beck's Rule 59(e) motions were timely filed. Also, the *Charles L.M.* plaintiff's second Rule 59(e) motion was seeking reconsideration of the order denying the first Rule 59(e) motion; while in *Beck*, Dr. Beck did not rely upon the order denying his first motion as a basis for starting a successive time period for filing the new motion, so Dr. Beck's second Rule 59(e) motion should have triggered the tolling period provided by Rule 4(a)(4)(A).

Not only did the Fifth Circuit fail to distinguish *Beck* from *Charles L.M.* and *Edwards*, following the clear approach of other circuits, it utterly ignored U.S. Supreme Court precedent. Until 2020, no Fifth Circuit panel had issued a published opinion applying the holding of *Charles L.M.* to a *timely* filed second post-judgment motion of any kind.[12] And until *Beck*, no published Fifth Circuit opinion had ever applied the successive motion rule provided in *Charles L.M.* to a timely filed second Rule 59(e) motion. The *Edwards* court described Rule 4(a)(1) as jurisdictional, but it failed to articulate whether the Fifth Circuit's successive motion rule is a claim-processing rule rather than jurisdictional in nature.[13] In *Hamer*, the U.S. Supreme Court made clear that an appellate deadline prescribed by statute will be regarded as jurisdictional while one prescribed only by court-made rule is a claim-processing rule and will not deprive the court of jurisdiction.[14] Because the time period in *Charles L.M.* was established by statute, the plaintiff's failure to adhere to the appellate deadline deprived the court of jurisdiction. In *Edwards* and *Beck*, however, because the time periods were set by the court-made successive motion rule, the appellate deadline constitutes a claim-processing rule and should not have deprived the Fifth Circuit of jurisdiction.

V. Conclusion

Despite the Fifth Circuit ignoring the plain language of Rule 4(a)(4)(A) and the U.S. Supreme Court's clear holding in *Hamer*, the U.S. Supreme Court's denial of certiorari in *Beck* greenlights the only circuit in the nation where a court-made rule trumps the Federal Rules of Appellate Procedure. Unlike in other circuits, a timely-filed subsequent post-judgment motion in a federal district court in the Fifth Circuit will not toll the appellate deadline if the motion is based on substantially the same grounds; the time will run from the disposition of the first post-judgment motion. Practitioners in the Fifth Circuit should be aware of the trap that has been set by the Court, and sanctioned by the U.S. Supreme Court. For the unsuspecting practitioner who expects Rule 4(a)(4)(A) to apply—it isn't going to happen because of this new "tricky puzzle." As I responded to Judge Higginson at oral argument, this seems like an unwelcome return to Old English Law and the reliance by the Court on form over substance. Ultimately, what happened in *Beck* was that the Fifth Circuit, aided by the U.S. Supreme Court, denied taxpayers a review of alleged illegal bilking of the Medicare system by wrongdoers. The U.S Supreme Court said that was not OK in *Hamer* – why is it now?

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Endnotes

1 FED. R. APP. P. 4(a)(1)(A); see also 28 U.S.C. § 2107(a).

2 FED. R. APP. P. 4(a)(4)(A).

3 *Dixie Sand & Gravel Co. v. Tenn. Valley Auth.*, 631 F.2d 73, 75 (5th Cir. 1980).

4 *Charles L.M. v. N.E. Indep. Sch. Dist.*, 884, F.2d 869, 870 (5th Cir. 1989).

5 *Id.* at 869-70.

6 *Id.*

7 *Id.*

8 *Id.*

9 *Colon-Santiago v. Rosario*, 438 F.3d 101, 108 (1st Cir. 2006).

10 *See United States ex rel. Beck v. St Joseph Health System*, 22-10137, 2023 WL 1433164, at *1 (5th Cir. 2023) (per curiam); *see also Edwards v. 4LJL, L.L.C.*, 976 F.3d 463, 465 (5th Cir. 2020) (applying the proposition that a second post-judgment motion based on the same grounds as the previously dismissed motion will not further delay the appellate deadline to a timely filed renewed motion for judgment as a matter of law).

11 *Edwards*, 976 F.3d at 465.

12 *See id.*

13 *See Bowles v. Russell*, 551 U.S. 205, 210 (2007) (discussing distinction between jurisdictional rules and claim-processing rules).

14 *Hamer v. Neighborhood Hous. Servs. of Chicago*, 138 S. Ct. 13, 22 (2017).

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administrative actions, and litigation involving healthcare, cybersecurity, corporate and securities law, as well as False Claims Act and Dodd-Frank whistleblower cases. She also teaches bioethics at Baylor College of Medicine in Houston. Rachel holds a variety of leadership positions within the FBA, including serving on its National Board of Directors and can be reached through her website, www.rvrose.com.The authors would like to thank Gabrielle Degelia, an associate at Bass, Berry & Sims, PLC for her assistance with researching cases for this article.

Endnotes

[1]DOJ, *Acting Assistant Attorney General Brian M. Boynton Delivers Remarks at the Federal Bar Association Qui Tam Conference* (Feb. 17, 2021), https://www.justice.gov/opa/speech/acting-assistant-attorney-general-brian-m-boynton-delivers-remarks-federal-bar.

[2]*Id.*

[3]DOJ, *Dansville Physician Agrees To Pay More Than $600,000 To Resolve Allegations That He Fraudulently Billed Medicare and Medicaid* (June 7, 2022), https://www.justice.gov/usao-wdny/pr/dansville-physician-agrees-pay-more-600000-resolve-allegations-he-fraudulently-billed#:~:text=Medicare%20And%20Medicaid-,Dansville%20Physician%20Agrees%20To%20Pay%20More%20Than%20%24600%2C000%20To%20Resolve,Fraudulently%20Billed%20Medicare%20And%20Medicaid&text=BUFFALO%2C%20N.Y.,–%20U.S.%20Attorney%20Trini%20E.

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years where he investigated and litigated FCA and AKS matters, including the United States ex rel. Lutz v. Health Diagnostic Laboratory, Inc. trial that resulted in a $117 million judgment for the United States.

Endnotes

[1]*United States ex rel. Weiner v. Siemens AG*, 87 F.4th 157 (2d Cir. 2023) (per curiam).

[2]31 U.S.C. § 3730(b)(2).

[3]31 U.S.C. § 3730(b)(3).

[4]Fed. R. Civ. P. 4.

[5]*Minnette v. Time Warner*, 997 F.2d 1023, 1027 (2d Cir. 1993).

[6]*U.S. ex rel. Drake v. Norden Sys., Inc.*, 375 F.3d 248, 254 (2d Cir. 2004).

[7]*United States ex rel. Weiner*, 87 F.4th at 157.

[8]*Id.* at 159.

[9]*Id.* at 159–60.

[10]*Id.* at 160.

[11]*Id.*

[12]*Id.*

[13]*Id.* at 160 (quoting United States ex rel. Weiner v. Siemens AG, No. 12-cv-1466, 2021 WL 3544718, at *3 (S.D.N.Y. Aug. 10, 2021)).

[14]*Id.* at 160.

[15]*Id.* at 164.

[16]*Id.* at 163

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[11]U.S. Department of Justice, U.S. Attorney's Office for the District of South Dakota, "Neurosurgeon and Two Affiliated Companies Agree to Pay $4.4 Million to Settle Healthcare Fraud Allegations," news release, May 3, 2021.

[12]See Complaint at 2–3, *United States of America, et al., ex rel. Dory Frain v. Medicrea USA Corporation*, Civil Action No. 16-1986.

[13]U.S. Department of Justice, U.S. Attorney's Office for the Eastern District of Pennsylvania, "French Medical Device Manufacturer to Pay $2 Million to Resolve Alleged Kickbacks to Physicians and Related Medicare Open Payments Program Violations," news release, May 19, 2021, https://www.justice.gov/usao-edpa/pr/french-medical-device-manufacturer-pay-2-million-resolve-alleged-kickbacks-physicians.

Upcoming Section Programs

Sept. 11	**Panel on Qui Tam Actions**
Sept. 18	**FCA Today, Middle District of Louisiana**
Oct. 9	**Litigating Qui Tam Cases Post-Intervention**
Oct. 23	**Civil Cyber-Fraud Initiative—3-Year Anniversary**
Oct. 30	**SuperValu Panel**
Nov. 6	**FCA Today, District of Delaware**

Our Section is excited to announce its latest educational initiative geared towards law students and law clerks - FCA Fundamentals: An Introduction to the Law for Judicial Clerks and Summer Associates. The panel event is scheduled for July 17th in Miami and represents the efforts of the Qui Tam Section Leaders - Judge Ryon McCabe, Megan Mocho, Dee Dee Colson, Rachel Rose, and Pam Brecht - along with collaborating with the SDFL Chapter, Young Lawyers Division, and Judicial Clerks Committee. Stay tuned as more details will be posted on the Qui Tam Section's website.

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Past Section Programs

Cooperation Credit in FCA Settlements - Is the Juice Worth the Squeeze?

Moderator: Adam Katz, Assistant United States Attorney, Northern District of New York
Panel:
Colin Huntley, Deputy Director, Civil Fraud Section, U.S. Department of Justice
Anne Robinson, Latham & Watkins
Greg Demske, Partner, Goodwin

Knowledge, the FCA, and SuperValu

Moderator: Sara Vann, Sr. Assistant Attorney General, Medicaid Fraud Division, Office of the Georgia Attorney General
Panel:
Jennifer Verkamp, Partner, Morgan Verkamp
John Elwood, Arnold & Porter
Jamie Yavelberg, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice

FCA State of the Union Panel

Moderator: Renée Brooker, Partner, Tycko & Zavareei LLP
Panel:
Michael Granston, Deputy Assistant Attorney General, Civil Division, U.S. Department of Justice
Enu A. Mainigi, Williams & Connolly LLP
Kathleen "Kate" Scanlan, Keller Grover LLP

Healthcare Referral Arrangements Under the AKS Updates from Government Attorneys

Moderator: David Finkelstein, Trial Attorney, U.S. Department of Justice
Panel:
Chris Terranova, Senior Trial Counsel, Civil Fraud Section, U.S. Department of Justice
Diana Cieslak, Trial Attorney, Civil Fraud Section, U.S. Department of Justice
Karen Glassman, Office of Counsel to the Inspector General, Department of Health and Human

Pandemic Fraud Update, Part 1: Actions Against Fintechs and Banks

Moderator: Caleb Hayes, MoloLamken LLP
Panel:
Jamie Yavelberg, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice
(Katherine) Katie Katz, Cooley LLP
Derek Adams, Potomac Law Group
Julie Bracker, Bracker & Marcus LLC