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Lack Of Clarity On FCA Pleading May Prompt Venue Shopping

By **Daniel Wilson**

Law360 (October 18, 2022, 10:13 PM EDT) -- The U.S. Supreme Court's refusal to address just how much detail is needed in whistleblowers' pleadings in False Claims Act cases leaves a circuit split that defendants say encourages gamesmanship from relators seeking the most lenient standard.

The justices on Monday rejected three petitions asking the court to address the level of "particularity" required under Federal Rule of Civil Procedure 9(b) for FCA relators' allegations of fraud against their employers to survive a motion to dismiss. The government had urged the high court to skip the cases, with the U.S. solicitor general arguing that circuit courts had "largely converged" on a "fact-driven and flexible" approach to the rule.

Despite the government's stance, both whistleblowers and defendants argued that Rule 9(b) requirements are part of a significant, long-running circuit split between more lenient and stricter pleading standards, and both had sought a clear standard from the high court.

A key consequence of the justices declining to decide on a uniform FCA particularity standard is the tacit encouragement of whistleblowers to look around for the most favorable venue with the least burdensome requirements to file suit, according to Venable LLP partner Diz Locaria, who defends federal contractors in FCA cases.

"Candidly, I think what [the Supreme Court's denials] mean is you're going to see qui tam whistleblowers looking for ways to get into the less onerous circuits," he said. "When you have these varying standards, inevitably, it creates forum shopping for one party or the other."

Circuit courts that have addressed Rule 9(b) have, with various nuances, fallen broadly into two camps, either requiring specific examples of fraudulent billing from relators from the outset of their cases, or allowing cases to move forward with less specific, but otherwise reliable descriptions of potential fraud on the government.

Between the jurisdictions with more flexible and stricter standards, cases with otherwise similar alleged fact patterns can have "dramatically different results," said Morgan Lewis & Bockius LLP partner Katie McDermott, who also represents FCA defendants.

Locaria said relators in many FCA cases may be able to find a potential nexus in more than one circuit, and it doesn't necessarily have to be an obvious nexus like a defendant's office being located in a particular state.

With the current prevalence of working from home, relators could, for example, look to establish a nexus to the Ninth Circuit — which has one of the most lenient pleading standards — though an accounts payable clerk involved in processing allegedly false claims who worked remotely from California while the employer was another state, he said.

Even if a defendant ultimately succeeds on summary judgment in a case initially allowed to move forward under a more lenient approach to Rule 9(b), a company can still face "enormous costs and expenditures of time and money related to what are essentially fishing expeditions," said Vorys Sater Seymour and Pease LLP partner Jacob Mahle.

And the concerns about a lack of a clear nationwide standard for Rule 9(b) aren't limited to defendants, even if the specific particularity standard that relators and defendants want courts to use is different, said Roger Lewis, a principal in Goldberg Kohn Ltd.'s litigation group who regularly represents FCA whistleblowers.

While relators can in some instances choose between various forums and try to avoid "inhospitable" courts, sometimes a case has to be filed in a specific venue because of the circumstances involved, according to Lewis. That can mean relators' ability to pursue what they believe is a legitimate case is effectively stonewalled by a court's rigid initial pleading standard, he said.

"If there's no choice, then good cases can get thrown out where a circuit has deemed the 9(b) standard to be a very, very high bar," Lewis said.

The high court didn't explain why it turned down the three recent petitions, but beyond the justices abiding by the government's request not to take the cases — as the government had **also requested** in a similar 2014 case — other potential factors may have included the specific facts involved.

Rule 9(b) determinations generally involve addressing a unique set of facts, which may not support a broad ruling, whereas the court is in a better position to rule on more clear-cut issues such as the extent of the government's authority to dismiss whistleblower FCA cases, an issue the justices will determine this term.

"You're very rarely going to have two truly analogous cases, especially at the pleading stage," said Mahle of Vorys.

The high court's agreement to take the dismissal authority case, U.S. ex rel. Polansky v. Executive Health Resources Inc., was also likely a factor behind it turning down the 9(b) petitions, said Tirzah Lollar, co-chair of Arnold & Porter's False Claims Act practice. Although the court does not have a specific quota for FCA cases, it is rare for the justices to take more than one FCA case per term, she said.

"The fact that they've already granted [certiorari] in Polansky was pretty much the death knell for the 9(b) petitions," she said.

That means that despite the long-simmering concerns about differing Rule 9(b) standards across different jurisdictions, it is unlikely that the justices will consider taking up a similar petition at least until their next term, if not longer into the future, several attorneys said.

"I think our best hope [for clarity] is additional development of case law," Lollar said. "I wouldn't hold out hope that the solicitor general is going to change his or her view, no matter who's in the seat."

--Editing by Jill Coffey and Emily Kokoll.
