

Supreme Court Declines to Weigh In on Latest Dispute Over Pleading Standard for Causes of Action Brought Under the False Claims Act

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The Supreme Court recently denied three petitions for writs of certiorari, opting not to clarify the heightened pleading requirements for allegations of fraud under the False Claims Act ("FCA"). The cases for which certiorari was denied are *Molina Healthcare of Illinois v. Prose*, No. 21-1145; *United States ex rel. Owsley v. Fazzi Associates, Inc.*, No. 21-936; and *Johnson v. Bethany Hospice LLC*, No. 21-462.

For allegations of fraud, which includes allegations under the FCA, the heightened pleading requirements of Federal Rule of Civil Procedure 9(b) require that a party state "with particularity the circumstances constituting fraud or mistake." The party alleging "false claims" must allege that the defendant submitted false claims or caused false claims to be submitted to the government.

To gain clarity as to the requirements of Rule 9(b), three petitioners sought certiorari, asking the Supreme Court to weigh in and clarify the detail required to meet the heightened Rule 9(b) standard at the outset of an FCA dispute: more specifically, the petitioners asked the courts to clarify whether relators must allege specific details of false claims allegedly submitted to the government for payment.

In applying Rule 9(b) to FCA claims at the pleading stage, federal courts have adopted a variety of standards interpreting the level of detail necessary to adequately plead such claims. This disparity is exemplified by the circuit split between the Ninth and Sixth Circuits. The Ninth Circuit takes a relatively broad view of Rule 9(b), allowing relators to plead particular details of a scheme to submit false claims paired with reliable indicia that false claims were in fact submitted as a result of the scheme. In contrast, the Sixth Circuit enforces a more stringent standard, placing a greater emphasis on the specificity required to plead FCA claims, requiring pleading either specific false claims or specific facts that lead to a strong inference that a false claim was submitted, based on a relator's personal billing-related knowledge.

But instead of addressing the merits of the three petitions, the United States Supreme

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Court denied certiorari across the board, adopting the Solicitor General's recommendation that the Court refrain from weighing in. According to the Solicitor General, the various circuit courts' approaches have "largely converged on an approach that allows relators *either* to identify specific false claims *or* to plead other sufficiently reliable indicia supporting a strong reference that false claims were submitted to the government." (Emphasis in original). The Solicitor General rebutted the contention that the courts are inconsistently applying Rule 9(b), noting that any difference "simply reflect[s] courts' application of a fact-intensive standard to a range of different types of allegations." The Solicitor General's recommendation, and the Court's adoption thereof, does not provide the clarity petitioners sought and arguably encourages "forum shopping" in which relators seek out jurisdictions in which Rule 9(b) is interpreted less rigorously – but the denial may also have operated to avoid the possibility that Court, should it have granted certiorari, would have propounded a relatively strict pleading standard for all federal courts.

Whether the Supreme Court will ultimately address Rule 9(b)'s requirements for FCA claims remains an open question. For now, the pleading standard will continue to fluctuate based on the court before which such a claim is made.