Solicitor General Recognizes Conflict, but Recommends that Supreme Court Deny Review of False Claims Act Case Involving Rule 9(b) Pleading Standards

The United States Solicitor General has recommended that the Supreme Court deny certiorari in *United States ex rel. Nathan v. Takeda Pharmaceuticals N.A. Inc., et al.* (No. 12-1349), a False Claims Act ("FCA") case involving the question whether a relator must identify specific false claims submitted for payment in order to plead fraud with sufficient particularity under Federal Rule of Civil Procedure 9(b). The Solicitor General acknowledges a split among the circuit courts but nonetheless recommends against the Supreme Court resolving the conflict in the present case.

In *Nathan*, the relator's complaint alleged that the defendant pharmaceutical company caused false claims for payment to be presented to the federal government by marketing one of its drugs for off-label uses. The relator alleged that promotion of the drug to specialists who did not typically treat patients with on-label conditions and the promotion of higher-than labeled doses caused false claims to be submitted for government payment. The district court dismissed the complaint on several grounds and the Fourth Circuit affirmed, concluding that the complaint lacked sufficient particularity to satisfy Rule 9(b).[1] In May 2013, the relator filed a petition for certiorari with the Supreme Court, and in October 2013 the Court invited the Solicitor General to weigh in on whether review should be granted.

The Solicitor General's brief argues that the federal appellate courts fall into one of two groups with respect to pleading standards under Rule 9(b). According to the brief, the First, Fourth, Fifth, Seventh, and Ninth Circuits have held that a relator's FCA complaint satisfies Rule 9(b) "if it contains detailed allegations supporting a plausible inference that false claims were submitted to the government, even if the complaint does not identify specific requests for payment." Decisions from the Sixth, Eighth, Tenth, and Eleventh Circuits, however, "have articulated a per se rule that a relator must plead the details of particular false claims—that is, the dates and contents of bills or other demands for payments—to overcome a [Rule 9(b)] motion to dismiss." The brief expressed a preference for the first approach, but noted that even the four circuits in the second group have had recent cases "that appear to adopt a more nuanced approach." It concluded by urging that the apparent circuit split may not be as pronounced as it appears at first glance, and that the appellate courts may resolve this disparity on their own as the law continues to evolve in the area.

The Solicitor General also recommended that the Supreme Court deny certiorari because the *Nathan* case "is not a suitable vehicle for resolving the question presented" because the relator's complaint inadequately pleads fraud under either Rule 9(b) standard.

Ropes & Gray will continue to monitor developments in this area. If you have any questions or would like to discuss the foregoing or any related matter, please contact the Ropes & Gray attorney with whom you regularly work, or any other attorney in our false claims act practice.

[1] For further analysis of the issue, see Ropes & Gray's previous False Claims Act client alert, available here.