



Please [click here](#) to view our archives

CIVIL FALSE CLAIMS ACT: Justice Department Urges Supreme Court to Deny Certiorari on Original Source and Rule 9(b) Questions in *Duxbury*, but Suggests that the Court Should Grant Certiorari in *Hopper* Where Rule 9(b) Issue is “Squarely Presented”

Even as it acknowledged a circuit split on two major issues affecting the False Claims Act, the Solicitor General informed the Supreme Court, via an *amicus* brief in *Ortho Biotech Products, L.P. v. United States ex rel. Duxbury*, No. 09-654, that the United States’s preference is that these disparities remain unresolved – at least for now. Indeed, if the Court accepts the Justice Department’s position, the Court would never resolve an important “original source” circuit split, while the question of how Rule 9(b) applies to certain FCA claims will be addressed in a separate case awaiting Supreme Court review.

The Original Source Issue in *Duxbury*

DOJ’s willingness to leave the “original source” circuit split unresolved forever is particularly disturbing. The issue is whether, under FCA Section 3730(e)(4)(B), the term “voluntarily provided” means that, in order to qualify as an “original source,” relators must provide their information to the government before the “public disclosure” or whether they simply must provide their information to the government before filing suit. In the lower court proceedings in *Duxbury*, and elsewhere, DOJ has repeatedly argued against allowing relators to qualify as original sources where they provided their information to the government *after* the public disclosure, because this would lead to the unintended result of permitting relators to share in the government’s recovery without providing anything to the government’s investigation beyond the information in the publicly disclosed allegations. See [FraudMail Alert No. 09-08-19](#). In fact, in *Duxbury*, DOJ strenuously disagreed with the district court’s interpretation of the “voluntarily provided” requirement since it allowed the relator to share in the government’s recovery after a longstanding government investigation on inflated average wholesale pricing and kickback allegations in multi-district litigation had been publicly disclosed on multiple occasions. See *United States ex rel. Duxbury v. Ortho Biotech Products, L.P.*, 579 F.3d 13, 22 (1st Cir. 2009).

Moreover, in its amicus brief, DOJ reiterated this position and noted that the proper interpretation of this FCA provision means that relators must share their information with the government prior to any public disclosure: “[R]equiring a relator to provide his information to the government in advance of any public disclosure serves the FCA’s purpose of alerting the government to potential fraud. A relator who gives his information to the government after a public disclosure has already occurred does little or nothing to further that central objective.” *United States Br.* at 12. Yet, even as it recognizes the circuit split and clearly believes that many cases have been wrongly decided on this jurisdictional question, DOJ nevertheless urges the Court to bypass the issue on the grounds that the recent amendments to the “original source” provision in the Patient Protection and Affordable Care Act (“PPACA”) mean that the circuit split has a limited shelf life, and therefore the issue does not have sufficient “continuing importance” to warrant review.

It is true that the PPACA amendment specifies that the relator’s disclosure to the government must be made prior to the public disclosure, or that the relator must have knowledge that is independent of and materially adds to the publicly disclosed allegations. But PPACA was signed into law on March 23, 2010, and because of its silence on the issue of retroactive application to pending cases, there is no credible argument to be made in favor of its retroactivity. As a result, the amendments have no application to the hundreds of pending cases that could be affected by this ongoing circuit court split. And, because the FCA’s statute of limitations can be as long as 10 years, the limited shelf life concept is stretched to an almost absurd degree in these circumstances. In other words, if the Court denies certiorari as DOJ urges, courts –as well as relators and defendants – will have to grapple with this issue for years to come and, under DOJ’s own rationale, some relators will reap an unwarranted bonus as a result of the continued circuit split, since those relators will have done “little or nothing” to advance the central objective of the Act.

The Rule 9(b) Issue

The second issue DOJ addressed in its *amicus* brief is whether Rule 9(b) requires specific false claims to be identified in FCA complaints. Although Rule 9(b)’s requirement for specificity in pleading fraud is a longstanding requirement in FCA cases, recent circuit court decisions, including *Duxbury*, have relaxed the requirement that specific false claims for payment submitted to the government must be identified in the complaint in certain cases. See [FraudMail Alert No. 09-08-27](#).

In *Duxbury*, the First Circuit found that the district court interpreted Rule 9(b) too strictly by mandating that relators provide details identifying particular false claims for payment that were submitted to the government. 579 F.3d at 29. The general allegation was that the drug company allegedly provided kickbacks to health care providers who, in turn, submitted false claims to Medicare. Although the complaint did not identify specific claims that were submitted, the appellate court found that it alleged a detailed scheme with specificity—identifying eight providers, providing details about the illegal kickbacks as to each provider, and supplying the approximate dates, amounts, and locations of the claims. The court found that these specific allegations about the fraudulent *scheme*, under the facts of the case, warranted a strong inference – for pleading purposes – that false claims were submitted. Accordingly, the court held that the complaint satisfied Rule 9(b) under the “more flexible standard.”

DOJ agreed with the First Circuit on this issue and observed that the decision in *Duxbury* contrasted with decisions of other courts of appeals that have dismissed complaints on Rule 9(b) grounds for failure to identify specific false claims for payment submitted to the government. In one of these, *Hopper v. Solvay Pharmaceuticals, Inc.*, 588 F.3d 1318 (11th Cir. 2009), the Eleventh Circuit ruled that the complaint failed to allege that any false claims were submitted for off-label uses, that the defendant intended to influence the government's decision to pay the claims, or that the government did pay any such claims. The result in *Hopper* is consistent with the purpose of Rule 9(b) as applied in FCA cases, since it prevents cases from going forward based on mere speculation that false claims were submitted.

Rather than address the issue in *Duxbury*, however, the DOJ suggests that the Court decline to resolve the issue in that case, because, in order to reach the issue, the Court would first have to resolve the "original source" issue (addressed above), which DOJ does not want the Court to address. Instead, DOJ observed that, in its view, the same Rule 9(b) issue is "squarely presented" in *Hopper*, and the petition for certiorari is now pending in that case. By making this observation, DOJ has now greatly increased the likelihood that certiorari will be granted and that this Rule 9(b) conflict will be addressed next Term.

If so, DOJ has advanced the argument in *Duxbury* that requiring relators to identify false claims for payment "attaches elevated significance to the relator's awareness of facts that in most instances are already known to the government." *United States Br.* at 17. If the Court decides to review this issue, its focus should not be on what the government may or may not already know about an alleged fraud, but on what Rule 9(b) requires in the context of the FCA's unique requirements for liability.

* * *

Authors

For more information regarding this client alert, please contact your usual Fried Frank attorney or any of the attorneys listed below:

Washington, DC

[John T. Boese](#)
+1.202.639.7220

[Douglas W. Baruch](#)
+1.202.639.7052

Fried, Frank, Harris, Shriver & Jacobson LLP

New York

One New York Plaza
New York, NY 10004-1980
Tel: +1.212.859.8000
Fax: +1.212.859.4000

Washington, DC

1001 Pennsylvania Avenue, NW
Washington, DC 20004-2505
Tel: +1.202.639.7000
Fax: +1.202.639.7003

Frankfurt

Taunusanlage 18
60325 Frankfurt am Main
Tel: +49.69.870.030.00
Fax: +49.69.870.030.555

Shanghai

40th Floor, Park Place
1601 Nanjing Road West
Shanghai 200040
Tel: +86.21.6122.5500
Fax: +86.21.6122.5588

Fried, Frank, Harris, Shriver & Jacobson (London) LLP

London

99 City Road
London EC1Y 1AX
Tel: +44.20.7972.9600
Fax: +44.20.7972.9602

Fried, Frank, Harris, Shriver & Jacobson (Europe)

Paris

65-67, avenue des Champs
Elysées
75008 Paris
Tel: +33.140.62.22.00
Fax: +33.140.62.22.29

Fried, Frank, Harris, Shriver & Jacobson

Hong Kong

9th Floor, Gloucester Tower
The Landmark
15 Queen's Road Central
Hong Kong
Tel: +852.3760.3600
Fax: +852.3760.3611

A Delaware Limited Liability Partnership

FraudMail Alert® is published by the Qui Tam Practice Group of, and is a registered trademark and servicemark of Fried, Frank, Harris, Shriver & Jacobson LLP.

FraudMail Alert® is provided free of charge to subscribers. If you would like to subscribe to this E-mail service, please send an E-mail message to FraudMail@friedfrank.com and include your name, title, organization or company, mail address, telephone and fax numbers, and E-mail address.

To view copies of previous FraudMail Alerts, please visit our [FraudMail Alert® archives](#) on the Fried Frank website.

To view copies of previous Qui tam To Our Client Memoranda, please visit our [archives](#) on the Fried Frank website.

To unsubscribe from all Fried Frank Email Alerts and electronic mailings send a blank email to unsubscribe@friedfrank.com.