THE
NATIONAL LAW REVIEW

FCA Relator and U.S. Weigh in on Defendants' Argument that the FCA is Unconstitutional

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Health Care Advisory

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Thursday, May 9, 2019

As part of our ongoing discussion of the *Polukoff* False Claims Act (FCA) *qui tam* case (involving allegations that certain heart procedures performed by a cardiologist, and billed for by two hospital defendants, were not medically necessary), we reported in February that some defendants filed a petition for a writ of *certiorari* with the United States Supreme Court. In their Petition, Intermountain Health Care, Inc. and IHC Health Services, Inc. d/b/a Intermountain Medical Center (Intermountain) raised two issues:

1. Whether a court may create an exception to Federal Rule of Civil Procedure 9(b)'s particularity requirement when the plaintiff claims that only the defendant possesses the information needed to satisfy that requirement; and

2. Whether the FCA's *qui tam* provisions violate the Appointments Clause of

Article II of the Constitution.

Following Intermountain's filing in January, the Supreme Court issued a Request for Response in February. Two weeks ago, both the relator, Dr. Gerald Polukoff, and the United States filed Briefs in Opposition, urging the high court to reject Intermountain's Petition.

In his brief, the relator addresses both issues raised by Intermountain's Petition, arguing that:

1. Circuit courts are not clearly split on the interpretation of Rule 9(b) and that this issue is "not especially important" in part because "[t]he mere fact that defendants sometimes have to proceed to discovery is not an issue of national importance"; and

2. The Appointments Clause question does not warrant the Supreme Court's review because "[t]here is not even an arguable circuit split and none is asserted;" moreover, because this "question will arise in literally every FCA case in which the government does not intervene, Intermountain should have to present a compelling argument for why this case is a uniquely good vehicle to consider it" and fails to do so.

In its brief, the United States addresses only the Appointments Clause issue, as it intervened in this case for the limited purpose of defending the constitutionality of the FCA's *qui tam* provisions. The United States argues that all courts of appeal that have considered Appointments Clause challenges to the FCA have rejected these challenges and also contends that this case is an unsuitable vehicle for this challenge because Intermountain "failed to raise the argument in district court, and the court of appeals accordingly declined to address it." The United States argues that Intermountain, therefore, has forfeited this argument.

The United States also argues that the case on which Intermountain relies to formulate its Appointments Clause argument, *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, does not even address the Appointments Clause. Instead, in *Stevens*, the Supreme Court held that *qui tam* relators have Article III standing to pursue actions under the FCA, but did not decide whether the *qui tam* provisions comport with the Appointments Clause. The United States also asserts that in *Stevens*, the Court "expressly declined to rely on the theory that a private relator sues as 'an agent of the United States'" and instead observes that a relator's entitlement to share of any recovery creates a personal stake in the outcome and that the FCA essentially assigns a portion of the Government's damages claim to the relator. The *Stevens* Court also states that actions pursued by relators are "'private suit[s]' brought by 'private parties.'"

In addition to distinguishing the *Stevens* case, the United States also contends that *qui tam* relators do not possess "the practical indicia of federal officers," including tenure, duration, emolument, and duties, but instead of private parties pursuing civil litigation in their own personal interest.

As always, we will continue to follow this case with interest and report on any additional updates. It will be particularly interesting to see whether the Supreme

Court takes this case, given that the high court recently denied a petition for *certiorari* in another FCA case, as we described last month.