EPSTEIN BECKER GREEN
health care & life sciences
CLIENT ALERT

Eighth Circuit Adopts Novel False Claims Act Fraud-in-the-Inducement Theory Long Espoused by Government

by Stuart M. Gerson, Natasha F. Thoren, and Benjamin M. Zegarelli

November 2013

On October 15, 2013, a divided three-judge panel of the United States Court of Appeals for the Eighth Circuit rendered a federal False Claims Act ("FCA") judgment against Bayer Healthcare Pharmaceuticals ("Bayer"), based on a *qui tam* relator's allegation that the company had fraudulently induced the Department of Defense ("DoD") to enter contracts under which a drug known as Baycol subsequently was purchased for the use of members of the armed services. *United States ex rel. Simpson v. Bayer Healthcare*, No. 12-2979 (8th Cir. Oct. 15, 2013). For the full opinion, see http://media.ca8.uscourts.gov/opndir/13/10/122979P.pdf.

The relator had claimed that the company fraudulently caused the government to make reimbursements for Baycol prescriptions and also that, by making false representations about the drug's safety, Bayer fraudulently *induced* DoD into contracting for the inclusion of the drug for payment under federally financed health care programs. The District Court had rejected both claims. The majority of the Eighth Circuit panel affirmed the dismissal of the first claim but reversed as to the second, holding that fraudulent inducement was actionable even if there is no provable economic loss to the government.

The Majority's View Is Unique and Troubling

As is widely known, the FCA allows private citizens—known as *qui tam* relators—to bring claims in the name of the United States seeking to hold persons liable for improperly receiving from or avoiding payment to the federal government through the presentation of fraudulent claims, records, or statements. Whether or not the government intervenes in such a case or, instead, the case is maintained by the relator alone, an actionable claim must be stated with sufficient particularity to demonstrate that a fraudulent statement or action in claiming payment of specifically identified claims led directly to the government suffering quantifiable actual or potential economic damages in connection with the statement or action. This level of specificity is required not only under the FCA but pursuant to Fed. R. Civ. P. 9(b) as well.

In a case where a good or service actually is delivered, injury is usually determined by subtracting the value of what was received from the price charged. That was not the case here, however.

The court of appeals was unanimous in affirming the District Court's rejection of the relator's initial contention that the reimbursements of prescriptions for Baycol were false claims for the simple reason that there was nothing false about them. The orders actually were made and filled with an approved drug and paid for at the approved price. The conflict came with respect to the fraudulent inducement claim.

In a nutshell, echoing an argument long, but generally unsuccessfully, advanced by attorneys for the government, the majority endorsed the theory that actionable false claims were sufficiently pleaded as the result of the government being induced to enter supply contracts concerning a drug for which it would not have contracted for reimbursement if it had been truthfully and sufficiently informed of its dangerousness (evidence having been alleged that the drug created a rare, but serious, side effect). The majority reached this conclusion irrespective of the fact that no individual claim for reimbursement was false in the sense that the drug was not delivered as specified or that the government paid too much for it. Indeed, without reference to any specific claim for reimbursement, the majority sanctioned a trial on the merits based on the theory that, while no specific claim for reimbursement was objectively false, or indeed needed to be identified with particularity, *all* claims related to Baycol were "false" because DoD would not have agreed to contract for it if it had been truthfully and completely advised of the risks, even though the government suffered no identifiable economic loss.

In sum, at least in the Eighth Circuit, when a relator alleges liability under a fraud-in-the-inducement theory, claims for payment subsequently submitted under a contract initially induced by fraud do not have to be false or fraudulent in and of themselves in order to state a cause of action under the FCA. As a result, Bayer is now at risk for treble damages based on the contracted value of each and every reimbursement claim made to the government for Baycol.

As the dissenting judge was quick to note, there is nothing radical or groundbreaking about recognizing a claim for fraudulent inducement in the FCA setting. Indeed, recognition of the theory goes back at least to the Supreme Court's seminal FCA opinion in *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943). What is unique, as the dissenting judge explained, is that the particularity requirement ingrained in the statute and Federal Rules has been waived by the majority for inducement claims. Where fraud in the inducement has been held to be actionable under the FCA, it has never before been allowed where it cannot be alleged that, in specifically identified cases, the government has paid inflated prices, incurred additional costs, or suffered any actual or potential economic harm. In other words, the majority's setting aside the deeply ingrained principle that damages for fraud in the inducement must result from an injury proximately caused by fraud.

Takeaways

- This decision is only binding in the Eighth Circuit, but it is troubling evidence of the fact that both courts and legislators increasingly have been expanding the reach of the FCA in an era of increasingly unsustainable health care spending.
- The plaintiffs' lawyers who represent relators are energetic and avaricious. Expect more cases like this one, as the pleadings bar continues to be lowered.
- There now is a split in the circuits on the issue of whether fraud in the inducement, absent economic injury, is actionable. Supreme Court review is possible and could be assisted by company, trade association, and other interest group presentations on the subject.

The best protection against expansive claims is not to get sued at all. Comprehensive compliance programs are the best preventive medicine.

* * *

This Client Alert was authored by **Stuart M. Gerson, Natasha F. Thoren,** *and* **Benjamin M. Zegarelli**. *For additional information about the issues discussed in this Client Alert, please contact one of the authors or the Epstein Becker Green attorney who regularly handles your legal matters.*

If you would like to be added to our mailing list or need to update your contact information, please contact Lisa C. Blackburn at lblackburn@ebglaw.com or 202-861-1887.