No.

IN THE
Supreme Court of the United States

DIANA JUAN, Relator; ex rel. United States of America,

Petitioner,

v.

STEPHEN HAUSER; et al.,

Respondent,

UNITED STATES OF AMERICA, Real-party-in-interest,

Respondent,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Must a *Qui Tam* Relator in a systemic automated Medicare overbilling case specify more than each Defendant's knowledge that the systemic automated system overbills, the Defendant's authority to order the remediation of the systemic automated overbilling, and Defendant's failure to exercise that power to state a plausible claim for relief.

PARTIES TO THE PROCEEDINGS BELOW

Diana Juan ex rel. United States of America was the Plaintiff/Relator in the district court and appellant in the court of appeals.

Stephen Hauser, Sam Hawgood, Eileen Kahaner, and Board of Regents of the University of California were Defendants in the district court and appellees in the court of appeals.

United States of America was the Real Party In Interest in the district court and appellee in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, Petitioner Diana Juan ex. rel. United States is an individual.

RELATED PROCEEDINGS

There are no related proceedings.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

RULES

OPINIONS BELOW

Both the court of appeal's opinion (App., infra, 1a-3a) and the district court's opinion (App., infra, 4a-10a) are unreported.

STATEMENT OF JURISDICTION

The court of appeals entered judgment on May 26, 2020, App., infra, 1a. On March 19, 2020, by general order, the Court extended the time to file this petition to October 23, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The False Claims Act 31 U.S.C. §3729(a) provides in relevant part:

> (a) *Liability for Certain Acts.*—
> (1) *In general.*—Subject to paragraph (2), any person who—
> (A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;
> . . .
> is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000. . .plus 3 times the amount of damages which the Government sustains because of the act of that person.

Federal Rule of Civil Procedure 9(b) provides in relevant part:

> (b) *Fraud or Mistake; Conditions of Mind.*
> In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.

PRELIMINARY STATEMENT

The decision below creates conflicts over the heightened pleading standard of Fed. R. Civ. P. 9 (b) in the context of False Claims Act cases alleging systemic and automated Medicare overbilling. This is especially true in the case of large, complex automated billing systems utilized by multi-disciplinary healthcare providers such as the University of California San Francisco Medical Center.

As medical billing becomes more complex and more automated, the task of rooting out systemic, institutional Medicare overbilling must rely upon the auditing of systems. When audits reveal that the automated system itself overbills, it is those with the responsibility and authority to remediate the automated systems who must be held accountable under the False Claims Act when the fail to remediate after the False Claims Act Whistleblower puts them on notice of the systemic overbilling.

The Circuits' jurisprudence on the heightened pleading standard of Fed. R. Civ. P. 9(b) is so scattered that direction must be provided by the Court as claims submitted to the federal government become more and more automated. Without direction in the context of automated systems and what a Plaintiff/Relator must plead, billions in automated and systemic false claims will be beyond the reach of the False Claims Act.

STATEMENT

This is a False Claims Act suit brought by an Administrative Director of the University of California San Francisco Medical Center. This entity, part of the University of California System, is immune from False Claims Act cases by virtue the Court's holding in *Vermont Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 787–88 (2000) (state agency not a "person" for purposes of FCA). Accordingly, Plaintiff/Relator brought suit against individual defendants.

The Plaintiff/Relator identified via an audit the particular Medicare overbillings at issue, which were submitted by systemic and automated systems, not by individual actors. The Plaintiff/Relator engaged in whistleblowing, identifying the issues with the systemic and automated overbilling to those in the organization whom she believed had the authority and power to cause changes to the billing systems to remedy the overbilling. When those individuals failed to take actions to remedy the overbilling in all

departments of the Medical Center who used the systems, Plaintiff/Relator brought suit.

The automated billings at issue were submitted for payment to the federal government by an entity that itself cannot be subject to the False Claims Act: The University of California Medical Center. In order for the False Claims Act to have any meaning in the context of automated and systemic Medicare overbilling by an entity immune from the provisions of the Act, it is the individuals with authority and responsibility to remediate systemic automated overbilling that must be subject to suit under the False Claims Act.

The heightened pleading standard of Fed. R. Civ. P. 9(b) as applied by the Circuits, has failed to keep pace with the rapid transition to automated computerized submission of claims for payment to the federal government. When an institution puts a computerized system in place to identify, characterize, and submit to Medicare for payment, services provided to beneficiaries, the "who, what, when, where" of the submission is buried deep within computer software code and algorithms. Extremely few would-be Plaintiff/ Relators have the necessary skill to wade through the computer code to demonstrate which lines of code, which inputs, which calculations caused the overbilling.

Instead, in the age of systemic overbilling by computerized systems, in the context of public entities immune from the False Claims Act itself, it must

be sufficient, to satisfy the heightened pleading standard of Fed. R. Civ. P. 9(b) for a Plaintiff/Relator to (1) identify the systematic automated overbilling (usually through audit), (2) identify the individuals who have the authority and responsibility to take actions to remediate the systemic automated overbilling, (3) the details of the notice to such individuals, and (4) the individuals' failure to take remedial action after such notice, demonstrating requisite *scienter*.

Both the district court and the court of appeals in this matter held that since Plaintiff/Relator could not allege more than the above, she could not meet the heightened pleading standard of Fed. R. Civ. P. 9(b).

REASONS FOR GRANTING THE PETITION

A. The Decision Below Spawns Circuit Conflicts

Although both the district court and court of appeals decisions are unpublished, they are citable and demonstrate the uneven application of Fed. R. Civ. P. 9(b)'s application in False Claims Act cases, especially in Medicare overpayment and false certification cases.

For example, the Eleventh Circuit has held there is no requirement for a *Qui Tam* relator to provide exact billing data. *Clausen v. Lab. Corp. of Am., Inc.*, 290 F.3d 1301, 1312 & n.21 (11th Cir. 2002).

However, the First Circuit held in *United States ex rel. Booker v. Pfizer, Inc.*, 847 F.3d 52, 58 (1st Cir. 2017), that "aggregate [information] reflecting the amount of money expended by Medicaid" on off-label prescriptions was "insufficient on its own to support a [False Claims Act] claim" because it did not show "an actual false claim made to the [G]overnment."

The Fourth Circuit has held that "To satisfy Rule 9(b), a plaintiff asserting a claim under the [False Claims Act] must, at a minimum, describe the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby.'" (*United States ex rel. Wilson v. Kellogg Brown & Root, Inc.*, 525 F.3d 370, 379 (4th Cir. 2008)). However, the Third Circuit has held that in order to satisfy the heightened pleading required by Rule 9(b), the whistleblower "must provide 'particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted'"; "[d]escribing a mere opportunity for fraud will not suffice." *Foglia v. Renal Ventures Mgmt.*, 754 F.3d 153, 157-58 (3d Cir. 2014).

Without guidance, the Circuits will continue to apply very different standards under Fed. R. Civ. P. 9(b) to False Claims Act cases involving systemic automated billing systems, and billions of dollars in overpayments by Medicare may remain beyond the reach of the FCA by virtue of the inability of Plaintiff/Relators to comply with standards of specificity that do not take into account the very nature of the

systemic automation that submits requests for payment of federal tax dollars.

B. The Decision Below Is Wrong

The essential elements of FCA liability under § 3729 (a)(1)(A) or (a)(1)(B) are "(1) a false statement or fraudulent course of conduct, (2) made with scienter, (3) that was material, causing (4) the government to pay out money or forfeit moneys due." *United States v. Univ. of Phx.*, 461 F.3d 1166, 1174 (9th Cir. 2006). Notably, "the [FCA] attaches liability, not to the underlying fraudulent activity or to the government's wrongful payment, but to the 'claim for payment,'" that is, the fraudulent actions that "cause" the government to make a payment. *United States v. Rivera*, 55 F.3d 703, 709 (1st Cir. 1995).

Claims sounding in fraud, including claims under the FCA, are subject to the heightened pleading requirements of Federal Rule of Civil Procedure 9(b). *Bly-Magee v. California*, 236 F.3d 1014, 1018 (9th Cir. 2001) . Under the federal rules, a plaintiff alleging fraud "must state with particularity the circumstances constituting fraud." Fed. R. Civ. P. 9(b). To satisfy this standard, the allegations must be "specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong." *Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1985).

Although a certain level of detail is required, the Ninth Circuit has specified that a complaint need not allege "a precise time frame," "describe in detail a single specific transaction" or identify the "precise method" used to carry out the fraud. *Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir. 1997). Accordingly, in the FCA context, a plaintiff need not "identify representative examples of false claims to support every allegation." *Ebeid ex rel. U.S. v. Lungwitz*, 616 F.3d 993, 998 (9th Cir. 2010). An FCA plaintiff must allege, at the very least, "'particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that [false] claims were actually submitted.'" *Id.* (citation omitted). Specific representative examples of false claims are one, but not the only way, to satisfy Rule 9(b) in the FCA context. *Id.*

There was no dispute in the district court that claims identified in Plaintiff/Relator's operative pleading were actually submitted, and that she alleged "particular details of a scheme" by way of her thorough allegations of wrongdoing, much of it first-hand. *See United States ex rel. Silingo v. WellPoint, Inc.*, 895 F.3d 619, 630 (9th Cir. 2018) (a scheme is properly alleged where the relator alleges "first-hand experience of the scheme unfolding").

The operative pleading makes specific references to the false statements and certifications and there is was dispute that it successfully alleges false statements and a fraudulent course of conduct. Yet, both the circuit court and the district court found

that since Plaintiff/Relator could not state the specific actions taken by the individual defendants, other than they had notice of the systemic automated system and failed to take action:

> knowingly permitted the continued presentation or caused to be presented false claims for payment from the United States government; knowingly made, or caused to be made, false records or statements in order to receive payment from the Government and act together to conspire with the other named Defendants to have the government pay a false or fraudulent claim . . . [and] had direct knowledge of the failure to audit the outside coding, the failure to repay overbillings caused by the systematic failures identified by [Plaintiff-Relator] in the Neurology Department, which were present throughout all parts of the School of Medicine and Medical Center because of systemic failure, and failed to cause USCF to repay the overbilled items.

The operative pleading sufficiently alleged scienter. Scienter requires an allegation "that a defendant knew a claim for payment was false, or that it acted with reckless disregard or deliberate indifference as to the truth or falsity of the claim." *Silingo*, 895 F.3d at 631 (*citing United States v. Corinthian Colleges*, 655 F.3d 984, 998 (9th Cir. 2011)). "Alt-

hough the circumstances of a fraud must be pleaded with particularity, knowledge may be pleaded generally," provided the allegation is plausible. *Id.* (citing Fed. R. Civ. P. 9(b)). The above allegation in the operative pleading sufficiently stated the *scienter* required by Rule 9(b).

Even under the prevailing cases in the Ninth Circuit, the decision below was wrongly decided, and should be corrected by the Court.

C. The Issue Is Important

The standard for specificity of False Claims Act claims for systemic automated overbilling to Medicare must be clarified by the Court. Without direction by the Court, vast numbers potentially valid claims for overpayment will remain beyond the reach of the FCA because Plaintiff/Relators do not have a computer science degree.

False Claims Act cases will only increase with the trillions in funds appropriated by Congress during the COID-19 pandemic. The spread of computerized systemic automated claims submissions will likely continue unabated. Until there are sufficient Artificial Intelligence tools available to root out systemic automated false claims, the only recourse for the United States, acting through Relators is to permit False Claims Act cases involving systemic automated claims for payment to proceed based upon (1) identification of the systems and false claims, (2) the individuals with power and authority to remediate

the systemic automated submission, (3) notice to the individuals, and (4) failure to remediate after notice. Without such guidance, billions and perhaps trillions of potentially valid False Claims Act claims will not go forward, barred by a specificity rule first articulated long before such claims were submitted by systemic automated systems.

CONCLUSION

The False Claims Act's importance as the primary tool of the federal government to root out fraud and abuse in the spending of federal taxpayer monies is well-established. What is not well-established is how the pleading requirements of the Federal Rules of Civil Procedure operate in the present highly-automated environment of computerized healthcare systems. The Court should grant the Petition.

Respectfully submitted,

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