

## THE D.C. CIRCUIT DRAWS THE LINE AT “POTENTIAL” PENALTIES BEING CONSIDERED OBLIGATIONS UNDER THE FALSE CLAIMS ACT

In *United States ex rel. Schneider v. JPMorgan Chase Bank, Nat'l Ass'n* [1], the D.C. Circuit re-affirms its position that contingent penalties are not obligations under the False Claims Act ("FCA").

### BACKGROUND

In the initial suit[2], Relator brought a *qui tam* action under the FCA against mortgage loan servicer JPMorgan Chase ("Chase"), alleging, in part, that Chase falsely claimed compliance with a settlement ("Settlement") that Chase (and certain other large banks) reached with the United States and various state governments.[3] Under the terms of the Settlement, Chase was obligated to comply with certain servicing standards, and a monitor was appointed to ensure that Chase complied with such standards. The Relator argued that the monitor's determination that Chase had complied with the servicing standards was incorrect because Chase falsely certified such compliance. As a result, the Relator claimed that damages were due to the United States and the applicable state governments based on potential penalties for lender violations as set forth in the Settlement. The United States District Court for the District of Columbia granted Chase's motion to dismiss as to the Settlement's claims on the basis that Relator could not bring these claims without first exhausting the Settlement's dispute resolution procedures. The D.C. Circuit affirmed the district court's decision.[4]

### ANALYSIS

Although the circuit court rejected the district court's reasoning as to the Settlement claims, it affirmed the district court's decision on the basis that "potential" exposure to penalties for alleged noncompliance with the Settlement's servicing standards is not an *obligation* within the meaning of the FCA.

As noted by the D.C. Circuit, the FCA requires a fraud claim that is "material to an obligation to pay or transmit money or property to the Government." According to the court, such an obligation arises when there is "an established duty, whether or not fixed, arising from an express or implied contractual ... or similar relationship." However, in this instance, the Settlement contains a series of steps before Chase could be assessed any penalties, including a citation from the monitor, failure to cure, failure of informal dispute resolution, the filing of a suit in the district court and the district court judge exercising his or her enforcement discretion to award monetary penalties.[5]

In light of the foregoing, the D.C. Circuit firmly held, citing its 2008 decision in *Hoyte v. American National Red Cross* [6] and several other sister circuits, that "contingent exposure to penalties which may or may not ultimately materialize does not qualify as an 'obligation' under the [FCA]."

### PRACTICAL TAKEAWAYS

The D.C. Circuit's decision here is, yet, another example of federal circuit courts drawing the line at "potential" penalties being considered *obligations* under the FCA.

Therefore, if a provider can show that an alleged monetary penalty is merely a contingent possibility and not an established duty to the government, such potential penalty may not qualify as an obligation under the FCA and, thus, may not form the basis of a relator's *qui tam* action.

If you have any questions, please contact:

- Laetitia Cheltenham at [Icheltenham@hallrender.com](mailto:Icheltenham@hallrender.com) or (919) 447-4968;
- David Honig at [dhonig@hallrender.com](mailto:dhonig@hallrender.com) or (317) 977-1447; or
- Your regular Hall Render attorney.

[1] See *United States ex rel. Schneider v. J.P. Morgan Chase Bank, Nat'l Ass'n*, 878 F.3d 309, 311 (D.C. Cir. 2017).

[2] See *United States ex rel Schneider v. J.P. Morgan Chase Bank, N.A.*, 224 F. Supp. 3d 48, 51 (D.D.C. 2016), aff'd and remanded sub nom. *United States ex rel. Schneider v. J.P. Morgan Chase Bank, Nat'l Ass'n*, 878 F.3d 309 (D.C. Cir. 2017).

[3] Relator also alleged that Chase falsely claimed compliance with the Home Affordable Modification Program ("HAMP"). The district court dismissed this claims without prejudice finding that Relator did not sufficiently allege material noncompliance with HAMP in the complaint.

[4] The circuit court disagreed with the district court's exhaustion conclusion but affirmed its dismissal of the Settlement claims on a related basis. The circuit court did, however, agree with the district court's analysis of the HAMP claim.

[5] Under the terms of the Settlement, the "relief available in such an action could be either non-monetary equitable relief or other nonmonetary corrective action or civil penalties."

[6] See *Hoyte v. Am. Nat. Red Cross*, 518 F.3d 61 (D.C. Cir. 2008).