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Top Gov't Contracting Cases To Watch In 2nd Half Of 2022

By **Daniel Wilson**

Law360 (July 15, 2022, 8:39 PM EDT) -- Federal courts will consider several cases in the second half of 2022 that could have major impacts on government contractors, addressing issues such as the limits of the government's procurement authority and ability to dismiss whistleblower False Claims Act cases.

Here, Law360 looks at several of the most important cases and litigation trends with potential impacts for contractors in the second half of the year.

Justices to Explore Limits on the DOJ's FCA Dismissal Power

Many of the important cases for federal contractors to watch for the rest of 2022 involve the False Claims Act, including a case that the U.S. Supreme Court agreed to take in June, examining whether the government lost its authority to dismiss a whistleblower's False Claims Act suit by waiting too long to jump in.

Relator Jesse Polansky, a former consultant for Executive Health Resources Inc. — a UnitedHealth unit and health care billing certification company, now known as Optum — had accused EHR of helping hospitals overbill federal health care programs by certifying inpatient care for services that should have been done as cheaper outpatient services.

He sued in 2012 and the government declined to intervene two years later, before jumping back into the case in 2019 to seek dismissal, citing the alleged expense of the litigation and low likelihood of it succeeding. That motion was granted by the district court and affirmed by the Third Circuit.

Qui tam FCA suits are brought by whistleblowers on behalf of the government, and as such the U.S. Department of Justice has broad authority to seek to dismiss those suits. Previously rarely used, the authority has been invoked more frequently since the DOJ issued the so-called Granston memo in 2018, reminding its attorneys of the authority and laying out potential circumstances for its use, such as if they believe a case lacks merit.

Polansky has argued that the DOJ effectively gave up the authority to seek dismissal of his case when it initially declined to intervene, asking the high court to address that issue and saying circuit courts were "sharply divided." He has also asked the justices to clarify more broadly the standard that should apply when courts consider motions from the government to dismiss whistleblower cases.

The DOJ, for its part, argued in opposition to Polansky's petition that it continues to retain all its rights in

a qui tam suit, including the right to seek dismissal at any time, even if it doesn't seek to intervene early on.

For whistleblowers in particular, the case has the potential to clear up a "troubling" trend from some circuit courts that have "indicated that the government need not even intervene in the case and need not provide any reason for dismissing," said Roger Lewis, a principal in Goldberg Kohn Ltd.'s litigation group who regularly represents FCA relators.

"To us, forcing the government to seek intervention permission and to at least state a reason [for dismissal] is not an intrusion into the government's control of the case," he said.

But clarity on when the government can intervene in FCA cases to seek dismissal could also be beneficial for defendants, said McDermott Will & Emery LLP partner Tara Ward, giving them a clearer indication of what they can expect as cases progress.

"A little bit more clarity around that would probably benefit everyone — I don't mean to take a position one way or the other, pro-whistleblower or pro-company — it's just an area where there's a lot of uncertainty," she said.

The case is U.S. ex rel. Polansky v. Executive Health Resources, case number 21-1052, in the Supreme Court of the United States.

High Court Could Tackle FCA 'Particularity' Standard

Another high-profile FCA issue before the Supreme Court — although yet to be taken up by the justices — involves the pleading standard required under Federal Rule of Civil Procedure 9(b), which says FCA plaintiffs must "state with particularity the circumstances constituting fraud."

The issue, relevant to every FCA case, boils down to how specific relators need to be in their complaints regarding the details of alleged false claims at the motion to dismiss stage. There are three Rule 9(b)-related petitions pending before the high court, all involving alleged fraud against federal health care programs, and all arguing there is a significant circuit split on the issue.

Circuit courts have long been divided on Rule 9(b), essentially splitting into two camps — one that requires specific examples of fraudulent billing from the outset, the other allowing cases to move forward without those examples if there are otherwise reliable descriptions of potential fraud.

The justices have asked the government to weigh in on two of those petitions, both asking whether FCA complaints are required to contain specific details of false claims. They had last asked the DOJ to weigh in on 9(b) in 2013, in a case the high court ultimately declined to take up, after the DOJ said there were signs of the circuit split resolving itself.

The solicitor general's office has so far filed one of those briefs, in May, arguing that circuit courts have indeed "largely converged" on a comparable approach to Rule 9(b), relaxing their demands for specific examples of false claims at the pleading stage.

"The government's position was very, very interesting and consistent with the position it took 10 years ago on the same subject," Goldberg Kohn's Lewis said. "It tried to make the argument, I thought pretty cogently, that the circuit split is at minimum greatly exaggerated. But certainly the circuits themselves,

some of them, believe there's a split. [And] some of these parties that are petitioning the Supreme Court believe there's a split."

In a June response to the DOJ's brief, relator Jolie Johnson argued that the government's claim of a circuit court convergence was "pure ipse dixit," not backed by sufficient evidence.

And there is significant support for that view from FCA defendants, who — as with the issue involved in the Polansky case — would benefit from guidance from the justices, said Tirzah Lollar, co-chair of Arnold & Porter's False Claims Act practice.

"With all due respect to the solicitor general … I think there definitely is a circuit split," she said. "You take, on the one hand, the Fifth Circuit, where the standard is all you have to plead is a reliable indicia and a reason to believe false claims were submitted, versus one of the other circuits like the Eleventh Circuit or Sixth Circuit — those courts dismissed complaints for failing to allege with specificity aspects of false claims."

The cases are Johnson et al. v. Bethany Hospice and Palliative Care LLC, case number 21-462; U.S. ex rel. Owsley v. Fazzi Associates Inc. et al., case number 21-936; and Molina Healthcare of Illinois Inc. et al. v. Thomas Prose, case number 21-1145, all in the Supreme Court of the United States.

Unusual FCA Case Rests on Alleged Violation of 'Revolving Door' Obligation

In a lower-profile but novel FCA suit, the DOJ sued a consulting firm in May for allegedly helping a former U.S. Department of Homeland Security official to violate his post-employment ethical obligations to the agency.

The DOJ accused Intelligent Fiscal Optimal Solutions LLC and its owner of submitting false invoices to DHS hiding the work of subcontractor Kenneth Buck, the retired executive director of the DHS' office of management integration, while still in his "cooling off" period.

Under federal conflict-of-interest rules, Buck — who settled with the DOJ in April over his alleged breach — was supposed to sit out of working with his former agency for at least a year.

According to the DOJ, the firm had actively covered up Buck's work on the contract, for example by using personal accounts to communicate with him, removing his name from documents he had written, and billing his time under the name of an employee.

The company sought to dismiss the case on July 5, arguing that Buck's settlement effectively blocked the DOJ from taking any further action arising from his conduct.

The unusual FCA case and the settlement with Buck are part of a broader trend of the government putting more focus on monitoring compliance with, and enforcing, "revolving door" restrictions against former government employees, said Crowell & Moring LLP counsel Yuan Zhou.

That trend "should make it all the more important for contractors to have these processes in place when engaging in hiring activities," she said. "That includes screening for potential restrictions really early on, to avoid potential traps. And then if there are restrictions, having proper policies or firewalls in place to prevent violations."

The case is U.S. v. Intelligent Fiscal Optimal Solutions LLC et al., case number 1:22-cv-01053, in the U.S. District Court for the District of Maryland.

More Cybersecurity-Related FCA Cases Expected With Civil Cyber-Fraud Initiative

Attorneys are also expecting a broader glut of FCA litigation in the coming months and years, following major federal spending programs like the CARES Act responding to the COVID-19 pandemic, 2021's massive infrastructure bill and the DOJ launching several FCA-related initiatives in recent years.

That includes the 2019 launch of its Procurement Collusion Strike Force, aimed at bid-rigging and other anti-competitive behavior in federal procurements, and the October 2021 launch of its Civil Cyber-Fraud Initiative.

Deputy U.S. Attorney General Lisa Monaco said when announcing the initiative that the DOJ would use the False Claims Act to pursue cybersecurity-related fraud claims against federal contractors for putting "U.S. information or systems at risk," with the department also calling for whistleblowers to bring their own cybersecurity-related FCA cases.

Cybersecurity has been seen as a potential area of FCA liability since cybersecurity requirements started to be rolled out by the U.S. Department of Defense in the early 2010s. It then drew even more attention when a California federal judge in 2019 refused to dismiss a whistleblower suit alleging Aerojet Rocketdyne Holdings Inc. misled the DOD and NASA about its cybersecurity.

That marked the first time a court had found that an alleged failure to meet cybersecurity regulations could form the basis of an FCA suit, and the case was eventually settled in April, amid trial, for $9 million.

Although cybersecurity-related FCA cases are still relatively rare, at least in the public eye — qui tam FCA cases are filed under seal and usually take a few years to be unsealed — many more such cases are expected to come to light in the coming years, given factors such as the increased focus from the DOJ, increasingly expansive federal cybersecurity requirements like the DOD's pending Cybersecurity Maturity Model Certification program, and broad growth in the number and sophistication of cyberattacks by bad actors.

"I do think [the Aerojet case] really is the tip of the iceberg, and we'll be seeing a lot more cases in this area," said Hogan Lovells counsel Stacy Hadeka.

Circuit Courts to Address Limits of the Procurement Act

Alongside various FCA issues, another important area of litigation for contractors to watch in the second half of the year involves challenges to the government's authority under the 1949 Federal Property and Administrative Services Act, or Procurement Act.

Much of federal acquisition policy is derived from the authority granted through that legislation, giving the executive branch the ability to administer an "economical and efficient system" for federal procurement.

But in a series of cases challenging policies such as the $15-per-hour minimum wage requirement and COVID-19 vaccine mandate for employees of federal contractors, plaintiffs including a number of

Republican-led states have argued that the Biden administration has gone beyond the authority delegated to it by Congress.

The administration used the Procurement Act to try to implement public health policies well outside of its procurement authority, states challenging the vaccination requirement argued, winning an injunction that the government has challenged at the Eighth Circuit.

And outdoor recreational firms have argued that the administration wrongly imposed the contractor minimum wage requirement on them and other companies who have signed deals to operate on federal lands, saying they shouldn't be considered contractors like those who supply products or services to the government. A district court denied an injunction, but the Tenth Circuit later issued one, pending appeal.

The cases continue a trend beginning during the Obama administration of increased questioning of executive authority and raise the broader issue of whether other long-standing executive orders and rules might also face challenges, Venable LLP partner Diz Locaria said.

"One of the potentially unintended consequences of this administration is [showing] that there's chinks in the armor, because there's a lot of other things that government contractors have to follow based upon executive order, that one may say, 'Hmm, do we need to do these things? Should we challenge?'" he said. "So that'll be interesting to see how these ultimately unfold."

Oral argument in the minimum wage case has been set for Sept. 28; an argument date is still pending in the vaccine mandate appeal.

The cases are State of Missouri et al. v. Biden et al., case number 22-1104, in the U.S. Court of Appeals for the Eighth Circuit; and Bradford et al. v. U.S. Department of Labor et al., case number 22-1023, in the U.S. Court of Appeals for the Tenth Circuit.

--Additional reporting by Jeff Overley. Editing by Kelly Duncan.
