

Returning Crowell Atty Talks 'Existential' Threat Of FCA Wave

By Ken Downey Jr.

Law360 (November 9, 2023, 4:52 PM EST) -- Michael Shaheen, a former U.S. Department of Justice trial attorney, has returned to his former law firm, Crowell & Moring LLP, where he'll draw on his long experience in False Claims Act work amid fears of a new wave of post-pandemic fraud claims.

Shaheen returned recently as a partner in Crowell & Moring's health care group in D.C., following his departure from Quinn Emanuel Urquhart & Sullivan LLP after just seven months. He credited the "respect and the culture" of his colleagues at Crowell, as well as the quality of Crowell's health care practice.



Michael Shaheen

"The holistic approach of the health care practice group at Crowell is really beneficial for my practice," Shaheen told Law360 on Thursday.

Shaheen said his Crowell colleagues such as Troy Barsky and Jodi Daniel, leaders of the firm's health solutions group — who assisted in writing some of the laws he investigates — also helped lure him back.

"To be able to call [Barsky and Daniel] and access their knowledge at the moment's notice, I think is really helpful to me and really helpful to my clients, and I like that approach to my work," he said. "That was an easy selling point for me coming back, not to mention the fact that I just genuinely like the people here."

Shaheen led dozens of investigations while working at the DOJ from 2014 to 2020, many of them touching on FCA violations in health care, the Anti-Kickback Statute and the Stark Law.

FCA-related settlements and judgments accumulated over \$2.2 billion last fiscal year, with \$1.7 billion coming from the health care industry, the DOJ reported. Given the increase in federal spending during the COVID-19 pandemic, some expect even more FCA cases are on the horizon.

Shaheen spoke with Law360 about how his practice has changed, a major FCA liability ruling at the U.S. Supreme Court this year, and why he chose to return to Crowell. This interview has been edited for length and clarity.

Following that U.S. Supreme Court ruling in *Schutte v. SuperValu* in June, can you tell me about the current climate of FCA claims?

I actually don't think that has changed much. I know there was a lot of talk out there that that would be a sea change in the business and I think, if [the ruling] had gone the other way, there would have been a change.

The fact that the Supreme Court came out the way they did, I think, has essentially maintained the status quo, such that I don't think it's changed how [attorneys] plead cases. I don't think it's changed how the government investigates cases. I think the same defenses are still available to defendants, it's just a matter of when they have the capacity to use those defenses.

Compared to this time last year, are clients concerned that FCA claims are different?

I think it's existential. It's always been an existential premise for so many clients. I imagine there are some Fortune 500 companies that can and have survived large FCA investigations.

Even so, whenever you're playing in a space where, not only are you paying for the claims that you've submitted that are allegedly false, plus upwards of \$25,000 in penalties, plus exclusion or debarment — that's a company's entire asset portfolio, not to mention their entire future on the line. So I haven't seen a change in the concerns that clients have when they receive a civil investigative demand.

There is an expected boom in FCA claims, given the amount of federal spending. Would you say that's beneficial for the U.S.?

I do think the more the government spends, the more fraud there is. I do think that the spending related to the pandemic created an entire new category of fraud.

I am, quite frankly, surprised that the [proceeds from FCA cases the DOJ accrued] wasn't bigger last year because of some of that working its way through the system. So I do expect higher recovery amounts going forward.

Are there concerns for compliance programs in general?

Yes, I think, and this goes a little bit back to the SuperValu [ruling]. I do think it's problematic that we live in a world — and I'll use the pandemic again as an example — where legislation was passed in a matter of weeks that created the flow of trillions of dollars of government funds going out the door. In fact, during that time, I think the incentive was to get money out there; that was a higher priority than making sure the money did not go to fraudsters.

And so, that kind of ambiguous legislation creates a problem if you are not applying an objective standard to the mental state of a potential fraud allegation. So if it's objectively reasonable for someone in that environment to accept money or to submit a claim for payment and receive money on that claim, to then come back three years later and say, "No, you should have known better," I think is really problematic.

So I had hoped that the SuperValu decision would go the other way. It didn't. I still think that defense is available to my clients and that they can say, "I was acting in an objectively reasonable way." But it's not an instant silver bullet.

You have been in the FCA space for a while now. What has been the biggest change you have seen?

The biggest change has probably been in the approach between what I'll call the Michael Granston, Michael Hertz-era of the civil fraud section and the current approach adopted by the current director, Jamie Yavelberg.

I think they have a very different approach to how they engage with defendants or targets of an investigation.

Just to change pace a bit, you have been in the FCA field for over a decade now. If you were to change your practice area today, what would that be?

Yeah, I love FCPA work — Foreign Corrupt Practices Act work. I think it's similar, in the sense that in many ways when you're performing a government investigation, if you're doing a good job, you want everything working, cooperating with the government as opposed to adversarial. It becomes adversarial eventually, oftentimes. But I like being in that space where I am trying to find either wrongdoing or establish that no wrongdoing occurred. The FCPA and the FCA are very similar in terms of that sort of skill set.

--Editing by Robert Rudinger.