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Gov't Contracts Cases To Watch In 2023

By **Daniel Wilson**

Law360 (January 2, 2023, 12:02 PM EST) -- The New Year will see the U.S. Supreme Court deciding limits on the government's ability to dismiss whistleblower False Claims Act cases, while circuit courts are expected to address the limits of procurement law.

Here, Law360 looks at eight cases to watch in 2023 that have the potential to significantly impact government contractors:

Government Authority To Dismiss FCA Cases

The U.S. Department of Justice invoked its authority in 2019 to dismiss an FCA case brought in 2012 by Dr. Jesse Polansky, a physician who previously worked for the federal Centers for Medicare and Medicaid Services before moving to health care billing certification company Executive Health Resources Inc., now known as Optum, where he helped hospitals submit bills to the federal government for services covered by Medicare.

Polansky alleged in Pennsylvania federal court that EHR, a UnitedHealth unit, was helping hospitals overbill federal health care programs by certifying inpatient care for services that should have been done as less expensive outpatient services. The government chose not to intervene in the suit, but later said that the expense of litigating the case outweighed its chances of winning and the potential recovery. It informed Polansky and EHR that it intended to ask the court to toss the case unless Polansky narrowed the scope of his claims to increase his likelihood of success.

Polansky countered that once the government decides not to intervene in a whistleblower FCA case, it effectively gives up its authority to seek dismissal over a relator's objections.

The Pennsylvania court sided with the government and the Third Circuit affirmed that dismissal in 2021, saying the government was allowed to step back in at any time to end the case.

Polansky successfully petitioned the high court in January 2022, and during the oral arguments that were held in December, the majority of justices seemed skeptical about Polansky's reading of the FCA, falling more in line with the government's view that it has broad dismissal authority.

"The relators' counsel took a really bold position," said Crowell & Moring LLP False Claims Act practice co-chair Tully McLaughlin. "And their strategy there is one that I think many in the relators bar probably did not even agree with … And to me, from listening to the argument, [it] was not an effective strategy.

It wasn't coming across — the justices across the board seemed to have a different, contrary view."

The court seemed more open, however, to Polansky's argument that the government should at least have to make a reasonable or rational argument for dismissal at the statutorily required hearing when it seeks to invoke its dismissal authority. Circuit courts have held a variety of different positions on that issue, ranging from requiring the government to show a "rational relationship" between a "valid governmental purpose" and dismissal, to the government having effectively "unfettered discretion" to invoke its dismissal authority.

"As long as the DOJ articulates a basis that's consistent with [a reasonable] criteria, then I think there's great latitude within the statute to allow the government to dismiss the action over the objection of the relator," Sheppard Mullin Richter & Hampton LLP partner Scott Roybal 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.

Proving 'Knowledge' In FCA Cases

Three petitions currently before the Supreme Court have asked the justices to address another prominent False Claims Act-related issue — whether scienter, or knowledge of wrongdoing, exists when an FCA defendant offers an "objectively reasonable" interpretation of a vague law or regulation.

To prove an FCA allegation, the government or whistleblower plaintiff must show that there was scienter, which includes either knowingly submitting a false claim, or acting with "reckless disregard" or "deliberate ignorance" of the truth.

In a trio of recent decisions addressing the scienter requirement, the Seventh Circuit — twice — and Eleventh Circuit have adopted the so-called Safeco standard from the high court's 2007 Safeco Insurance Co. of America v. Burr ruling, a Fair Credit Reporting Act case, drawing it into the FCA context.

In Safeco, the justices found that someone acting under an incorrect interpretation of an unclear rule or law could not have acted knowingly or with reckless disregard if their interpretation of that policy was "objectively reasonable" and there was no "authoritative guidance" cautioning against that interpretation.

But relators who have filed petitions with the high court, dissenting judges in circuit court rulings, and the government itself — which on Dec. 7 urged the Supreme Court to take at least one of the related petitions — have argued that the adoption of the Safeco standard ignores subjective intent in deciding scienter.

Using the Safeco standard for FCA cases will, in effect, allow defendants to wrongly escape liability if they are able to come up with after-the-fact "objectively reasonable" explanations for their behavior, and "could significantly disrupt government programs involving everything from medical insurance to military equipment," the government argued.

But several FCA defense attorneys said that there was still room for considering subjective intent when determining scienter under the Safeco standard, and "there are real due process concerns in permitting liability where the government has failed to clarify or announce its interpretation of an ambiguous

provision until after a lawsuit has been filed or after the conduct in question has occurred," McLaughlin said.

"On the one hand, the government is probably owed deference in the resolution of whose interpretation ultimately controls," he said. "But we on the defense side would say that it's really fundamentally unfair, maybe even unconstitutional, to subject someone to liability under the False Claims Act for failing to meet a standard that hasn't been announced by the government that they fail to disclose until later … [there's] a lot of interesting questions, I think, both ways."

The cases are U.S. ex rel. Schutte et al. v. SuperValu Inc. et al., case number 21-1326; U.S. ex rel. Proctor v. Safeway Inc., case number 22-111; and Olhausen v. Arriva Medical LLC et al., case number 22-374, all in the Supreme Court of the United States.

Scope Of Contractor Immunity For 'Military Combatant Activities'

In a case that could have significant ramifications for military contractors overseas, the high court may also consider how far the derivative immunity granted to those contractors for "combatant activities" extends, including whether it covers an air traffic controller's alleged deadly mistake directing airplanes in Afghanistan.

"It potentially is a case that's going to be very important for contractors working closely with the government, working closely with the military in high-risk operations," said Dan Russell, of counsel at Covington & Burling LLP who frequently represents battlefield contractors in tort suits.

The government is immune from claims stemming from "combatant activities of the military ... during time of war" under a preemption exception in the Federal Tort Claims Act, and that immunity is typically considered to derivatively apply to wartime contractors as well.

But the Second Circuit in August 2021 revived a suit against Midwest Air, a military contractor that provided air traffic control services at Kabul Afghanistan International Airport, over a deadly cargo plane crash in 2010 allegedly caused by an air traffic controller from the company failing to provide necessary instructions about nearby terrain.

There was no specific direction from the government related to the controller's actions, and immunity only arises "when the government specifically authorizes or directs the contractor action, not when the government generally permits the contractor to undertake a range of actions," the Second Circuit found.

Midwest Air in its petition to the high court argued that the Second Circuit had split with several other circuit courts and misapplied a derivative immunity test set out by the high court in its 1988 Boyle v. United Technologies Corp. decision.

Families of the crash victims argued in response that there were no "combatant activities" underpinning the controller's alleged negligence at all, so the related exception simply shouldn't apply. The justices in May asked the government to weigh in on whether they should take the case. The government has yet to respond to that request.

The high court "might see it as an opportunity to shape the law on what the scope of combatant activities are — there are some differing views among the circuits, [although] it's pretty broadly viewed for the most part," Russell said. "The Second Circuit decision, I think, conflicts with Boyle."

The case is Midwest Air Traffic Control Service Inc. v. Badilla et al., case number 21-867, in the Supreme Court of the United States.

Software Licensing's Role In Procurements

Some of the more unusual but often important cases considered by the U.S. Court of Federal Claims, appellate boards and sometimes by the Federal Circuit center on what is, or is at least related to, a procurement contract. The answer may or may give them the jurisdiction to hear a related dispute.

In one of those cases, software developer Avue Technologies Corp. asked the Federal Circuit to revive its case alleging that the U.S. Food and Drug Administration stole proprietary data in violation of the company's software license agreement.

The Civilian Board of Contract Appeals had dismissed the novel $41.4 million case in January 2022, saying that Avue's software was not sold through a direct contract with the FDA, but through a reseller. While the related license agreement, known as the master subscription agreement, or MSA, "appears to contain commercially significant promises that might be deemed contractual," it couldn't be considered a procurement contract under the Contract Disputes Act, or CDA, the board said.

The MSA, for example, didn't obligate Avue to "furnish" any services to an agency, nor obligate the government to pay Avue directly, the board found. And while the CDA also allows claims "related to" a procurement contract, no court or appeals board had ever ruled anyone other than a prime contractor could establish CDA jurisdiction based on a separate agreement that relates to a procurement contract, and "we will not be the first," the board said.

Avue appealed in August, saying the board had wrongly considered the license agreement in isolation.

"Outside terms incorporated into a contract become part of the contract itself and they cannot be disaggregated as the board did here," the company told the circuit court.

The case is Avue Technologies Corp. v. HHS, case number 22-1784, in the U.S. Court of Appeals for the Federal Circuit.

Role Of Procurement Act For Recreational Firms On Federal Lands

In one of several recent cases challenging the limits of the Procurement Act, a bedrock statute that underpins significant portions of federal contracting policy, a group of outdoor recreational firms have argued the administration wrongly applied a $15-per-hour minimum wage requirement to their operations.

The companies have argued that although they signed deals to operate on federal lands, they shouldn't be considered contractors like those who supply products or services to the government.

Many aspects of federal acquisition policy are derived from the authority granted to the executive branch to administer an "economical and efficient system" for federal procurement under the 1949 Procurement Act, and after the D.C. Circuit in 1979 established the so-called close nexus test, that authority has largely been viewed by federal courts as allowing the government to implement a wide variety of policies that affect federal contractors.

But the government has been hit with a number of challenges alleging it has stepped outside that authority in recent years, both in the recreational firms' case, and also in cases challenging the federal COVID-19 vaccine mandate for federal contractors, arguing for example that the vaccine mandate is a public health policy that does not fit within the Procurement Act.

Courts have so far been receptive to those vaccine mandate challenges, issuing several related injunctions, with the Eleventh and Fifth circuits rejecting the application of the nexus test as they upheld injunctions against the mandate, showing there is a potential for the recreational groups to win their case.

Those injunction decisions have also opened the door to future challenges to rules promulgated under the Procurement Act, particularly as recent administrations have used their executive authority more frequently "to try to effectuate change they can't accomplish with legislation" in a politically polarized environment, said Venable LLP partner Diz Locaria.

"They're trying to glom onto existing legislation and put new twists on it," he said. "And what we're seeing is the courts pushing back on that when some of those executive orders are challenged … And I think what this may be a harbinger for is that some other long-instilled policies that are based upon executive order could potentially be challenged."

Oral argument in the recreational groups' case was held on Sep. 28 and a decision from the appeals court is currently pending.

The case is 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.

How Does The Service Contract Act Cover Cooperative Agreements?

In another case asking a court to define the limits of contracting law, BCFS Health and Human Services has asked the Fifth Circuit to revive its dispute over whether the Service Contract Act, which sets certain minimum benefit and wage requirements for federal service contractors, covers cooperative agreements.

The crux of the appeal is whether BCFS, which holds agreements with the U.S. Department of Health and Human Services' Office of Refugee Resettlement to operate shelters for unaccompanied migrant children, prematurely challenged a change in policy by the U.S. Department of Labor to enforce SCA wage requirements on such agreements before there was a relevant "final agency action."

The broader underlying issue is whether the SCA should apply to cooperative agreements, with BCBS having argued the government made a "legally unsupported expansion" of SCA jurisdiction when it applied the statute to BCBS' agreements.

The SCA is meant to cover procurement contracts, and BCBS said in a July brief that under the Federal Grants and Cooperative Agreements Act, cooperative agreements are not contracts, but instead a "direct descendant" of grants.

By expanding the SCA to cover its agreements with HHS, the government has "exposed BCFS to federal debarment and massive financial liability," putting its continued existence at threat, BCFS said.

The case once again brings to light "an age-old issue" that cooperative agreements are in most circumstances more akin to grants than contracts, covered under the same regulatory scheme as grants, but — whether by design or by "sloppy drafting" — are also subject to some of the same requirements as contracts in certain areas, Locaria said.

"We do see it from time to time, where there are situations where cooperative agreements are dealt with more like contracts, even though regulatorily they're much closer to a grant than they are a [Federal Acquisition Regulation]-based contract," he said.

Oral argument in the case is scheduled for Jan. 3.

The case is BCFS Hlth and Human Svcs v. LABR, case number 22-50361, in the U.S. Court of Appeals for the Fifth Circuit.

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