Portfolio Media. Inc. | 230 Park Avenue, 7th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Uncharted Waters Ahead For FCA Litigation In 2024

By **Preston Pugh, Lyndsay Gorton and Jessica Chao** (January 17, 2024, 6:03 PM EST)


Preston Pugh


Lyndsay Gorton


Jessica Chao

The False Claims Act continues to be a powerful tool for federal government enforcement actions against alleged fraud.

This past year included significant decisions, including U.S. Supreme Court rulings, settlements, recoveries and proposed amendments that foreshadow a lively 2024 with numerous potential impacts to the FCA landscape.

This article will identify year-end trends and look forward to 2024.

Developments in Case Law Affecting Litigation in 2024

The U.S. Supreme Court issued two consequential decisions on the False Claims Act in 2023 that shed light on what 2024 may bring.

Section 3730(c)(2)(a) Dismissal and the Constitutionality of Qui Tam Litigation

In U.S. ex rel. Polansky v. Executive Health Resources Inc.,[1] an 8-1 opinion, the Supreme Court **found** that the U.S. Department of Justice has broad discretion to move to dismiss a relator-filed case so long as it intervenes in the litigation, either during the initial seal period or any time afterward.

This decision, although not a complete win, was a welcome sign for the defense bar. Going forward, FCA defendants hope that the government may be more willing to move to dismiss qui tam cases with the confirmation of its power to do so.

Justice Clarence Thomas' dissent in the case is also notable as it has already triggered — and will continue to trigger more and more in 2024 — defendants arguing that the whistleblower provisions are unconstitutional under the executive branch's Article II powers.

Experienced FCA lawyers will recall that this argument is not new. In the dissent, Justice Thomas noted that "[t]here are substantial arguments that the qui tam device is inconsistent with Article II and that private relators may not represent the interests of the United States in litigation."

Justice Thomas is not alone in his observations, as Justices Amy Coney Barrett and Brett Kavanaugh

expressed a similar sentiment in their concurrence, thus signaling to the FCA defense bar a potential willingness to hear those constitutionality arguments in future cases. We will likely hear a lot more about this issue in the district courts and potentially appellate courts in 2024.

In fact, arguments questioning the constitutionality of a relator's right to bring a case in which the relator stands in the shoes of the government have already surfaced.

Last month, the U.S. Chamber of Commerce filed an amicus curiae brief in support of Fluor Corporation in U.S. ex rel. Shepherd v. Flour Corp.,[2] arguing that the qui tam provisions of the FCA violate the constitution's separation of powers, citing to Justice Thomas' dissent.

Specifically, the Chamber of Commerce argued that allowing qui tam litigation violates Article II by erroneously vesting authority in the hands of private persons when they are not injured parties seeking to recover for personalized harms, going against the purpose of the FCA as the government's tool to fight fraud.

As the Chamber of Commerce argued, the purpose is not to empower individuals to "commandeer and override the Executive's Enforcement Discretion[.]"[3]

FCA Scienter Incorporates the Subjective Standard

In U.S. ex rel. Schutte v. SuperValu Inc.,[4] the Supreme Court **unanimously determined** that a defendant's own subjective belief at the time the defendant submitted its claims is relevant to scienter under the False Claims Act.

In this case, the relators filed a qui tam action alleging that SuperValu Inc. knowingly filed false reports of their usual and customary price for prescription drugs.

Given the arguably ambiguous definition of "usual and customary," the U.S. Court of Appeals for the Seventh Circuit and district court focused on an objectively reasonable interpretation of the term, ultimately holding that a party acting under an incorrect interpretation that was objectively reasonable could not have acted with knowledge under the statute.

This was ultimately rejected by the Supreme Court and hones the focus on whether the defendant knew the claim was false. The subjective nature of scienter is likely to reduce a defendant's opportunity to obtain early dismissal of FCA cases on the basis of knowledge, and is a reminder to take appropriate steps to request clarification on any ambiguous regulations from the government or contractor.

Like Polansky, SuperValu is likely to lead to more litigation in 2024. While defendants will continue to seek early dismissals from FCA lawsuits, ambiguities in the regulations and what the defendant actually believed at the time will likely make dismissals more difficult.

We project that there will likely also be extensive discovery requests on both sides of the cases: (1) both pre- and post-intervention discovery from the DOJ seeking information about the defendant's subjective understanding of the regulations; and (2) discovery seeking information about the government's internal understanding of the regulations.

Either way, 2024 is likely to see longer and discovery-heavy FCA litigations based on ambiguous regulations, which will increase costs for all parties.

The Split Around Causation

2024 may further the split in authority on causation in kickback cases.

Under the 2010 amendments to the FCA, when a relator alleges a violation of the Anti-Kickback Statute, liability can arise when "a claim that includes items or services resulting from a violation of [the AKS] constitutes a false or fraudulent claim for purposes of [the FCA]."

The issue that continues today is what the phrase "resulting from" means. The U.S. Court of Appeals for the First Circuit is poised to weigh in on the circuit split this year, joining either the U.S. Court of Appeals for the Third Circuit or the Eighth and Sixth Circuits.

In 2018, the Third Circuit held in U.S. ex rel. Greenfield v. Medco Health Solutions that "resulting from" requires only a link, or some connection beyond temporal proximity, between an alleged kickback and subsequent claim for payment.[5]

More recently, in U.S. ex rel. Cairns v. D.S. Medical LLC in 2022, the U.S. Court of Appeals for the Eighth Circuit parted with the Third Circuit and adopted a "but for" causation standard that a plaintiff must prove that the defendant would not have included the item or service in their claim for reimbursement but for the kickbacks.[6]

Last year, the U.S. Court of Appeals for the Sixth Circuit joined the Eighth Circuit in adopting the "but for" causation standard in U.S. ex rel. Martin v. Hathaway.[7]

Since then, the U.S. District Court for the District of Massachusetts issued two decisions within the span of three months that took opposite sides of the split.

First, in U.S. v. Teva Pharmaceuticals USA Inc.,[8] the Massachusetts district court followed the Third Circuit's interpretation that "resulting from" requires only a sufficient causal connection, while in U.S. v. Regeneron Pharmaceuticals Inc.,[9] followed the Sixth and Eighth Circuits' lead in requiring "but for" causation for an AKS violation.

Following the two inconsistent decisions from the District of Massachusetts, the First Circuit issued an order in Teva that "immediate review is in order."

Accordingly, depending on the First Circuit's approach, 2024 may deepen the circuit split related to the causation standard under alleged violations of the AKS or result in more support for a more stringent causation standard. Either way, Supreme Court intervention is likely at some point soon, absent a clarifying amendment to the FCA.

Enforcement Trends

Civil Cyber-Fraud Initiative

In October 2021, the DOJ launched its Civil Cyber-Fraud Initiative to combat cyberthreats and hold government contractors and grant recipients accountable for knowingly providing deficient cybersecurity products or services, misrepresenting cybersecurity practices or protocols, or violating obligations to monitor and report cybersecurity incidents and breaches.[10]

Since the DOJ announced its first settlement under the Civil Cyber-Fraud Initiative in March 2022, there have been several additional settlements illustrating that the DOJ will continue to utilize the FCA to highlight the risks of participants in the federal healthcare program, government contractors and other recipients of government funds misrepresenting compliance with cybersecurity requirements.

This trend is likely to continue this year.

In fact, while they were initially released in 2019, the DOJ has started to publicly memorialize the Section 4-4.112 guidelines in settlement agreements, noting the various ways government contractors are credited for forms of cooperation.

In September 2023, the DOJ announced a settlement with Verizon Business Network Services LLC for allegedly violating the FCA by failing to satisfy cybersecurity requirements under its General Services Administration contracts.

The settlement agreement states that Verizon received credit for taking disclosure, cooperation and remediation, citing Section 4-4.112 of the Justice Manual, and listed several steps Verizon took that presumably affected the amount of the total settlement.[11]

This settlement is one of the relatively few FCA cases, in comparison to criminal cases, that highlight the potential benefits for government contractors that self-disclose, cooperate and implement remedial measures.

The Civil Cyber-Fraud Initiative is likely to gain substantially greater traction after the U.S. Department of Defense's 2023 issuance of the highly anticipated proposed rule for the Cybersecurity Maturity Model Certification Program.[12] This signals potentially greater consequences and scrutiny under the DOJ's Civil Cyber-Fraud Initiative and the FCA.

Pandemic Relief Fraud Enforcement

The DOJ and the Small Business Administration[13] show no signs of slowing down fraud enforcement under the Paycheck Protection Program in 2024.

With billions in suspected fraud, successful results of COVID-19 fraud enforcement sweeps and an extended statute of limitations, the DOJ is poised to focus on pandemic-related fraud enforcement from individuals, small businesses, and business service providers and lenders for years to come. This is particularly the case as the more recent settlements and lawsuits have trended toward larger damages amounts.

2024 already shows signs of continued enforcement, qui tam lawsuits and resolutions, including a recent settlement between a homeowner's association in California and the DOJ to resolve allegations that the HOA obtained approximately $1.5 million in loans through the PPP, though it was ineligible to receive them.[14]

Given the government's clear message that these investigations will not end soon, it is important for individuals and businesses to take steps to mitigate against the risks, including maintaining records that show that they acted in good faith and reviewing applications and statements made to the SBA to ensure compliance with the program's requirements.

Proposed FCA Amendments

In an effort to close so-called loopholes benefiting the FCA defense bar that remain after the Supreme Court's decision in Universal Health Services Inc. v. U.S. ex rel. Escobar in 2016, Sen. Chuck Grassley, R-Iowa, introduced the False Claims Amendments Act of 2023,[15] which continues to await votes in Congress.

This is not the first attempt Grassley has undertaken to propose amendments to the False Claims Act, but the FCAA has bipartisan support and appears less controversial than his prior attempt in 2021.

The language in the FCAA provides: "In determining materiality, the decision of the Government to forego a refund or to pay a claim despite actual knowledge of fraud or falsity shall not be considered dispositive if other reasons exist for the decision of the Government with respect to such refund or payment."

Should the FCAA advance, it will be more difficult for FCA defendants to prove lack of materiality. It will also lead to additional litigation and extensive discovery into what other reasons may exist for the government to continue payments with knowledge of alleged noncompliance on federal government contracts.

Conclusion

With the U.S. Supreme Court issuing two crucial FCA-related opinions in 2023, participants in the federal healthcare program and government contractors will need to proactively prepare for the impacts of such decisions and how those impacts may affect their positions and risks in the FCA landscape.

Moreover, the enforcement trends will continue to remind recipients of government funds to remain vigilant in their compliance efforts as the DOJ continues to focus on using the FCA as an enforcement tool to ensure compliance with regulations and government programs. 2024 is shaping up to be another significant year that will hopefully provide more clarity as FCA jurisprudence evolves.

Preston L. Pugh is a partner at Crowell & Moring LLP, and the co-chair of the firm's False Claims Act practice.

Lyndsay A. Gorton is counsel at the firm.

Jessica R. Chao is an associate at the firm.

Crowell & Moring partner Aaron C. Cummings and counsel Payal Nanavati contributed to this article.

[1] 599 U.S. 419, 143 S. Ct. 1720 (2023).

[2] 6:13-cv-02428-JD (D.S.C.).

[3] Brief for Fluor Corporation as Amici Curiae Supporting Defendants, U.S. ex. rel. Shepherd v. Flour Corp., 6:13-cv-02428-JD (D.S.C.) (No. 398-1).

[4] 598 U.S. 739 (2023).

[5] U.S. ex rel. Greenfield v. Medco Health Sol'ns, 880 F.3d 89, 98-100 (3d Cir. 2018).

[6] U.S. ex rel. Cairns v. D.S. Med., LLC, 42 F. 4th 828, 834-36 (8th Cir. 2022).

[7] U.S. ex rel. Martin v. Hathaway, 63 F. 4th 1043, 1052-53 (6th Cir. 2023).

[8] -- F. Supp. 3d --, 2023 U.S. Dist. LEXIS 122272 (D. Mass. July 14, 2023) (Gorton, J.).

[9] 2023 U.S. Dist. LEXIS 172618 (D. Mass. Sept. 27, 2023) (Saylor, C.J.).

[10] U.S. Dep't of Justice, Press Release, Deputy Attorney General Lisa O. Monaco Announces Civil Cyber-Fraud Initiative (October 6, 2021), Office of Public Affairs | Deputy Attorney General Lisa O. Monaco Announces New Civil Cyber-Fraud Initiative | United States Department of Justice.

[11] U.S. Dept. of Justice, Press Release, Cooperating Federal Contractor Resolves Liability for Alleged False Claims Caused by Failure to Fully Implement Cybersecurity Controls(September 5, 2023) available at https://www.justice.gov/opa/pr/cooperating-federal-contractor-resolves-liability-alleged-false-claims-caused-failure-fully.

[12] Cybersecurity Maturity Model Certification (CMMC) Program, 88 Fed. Reg. 89,058 (Dec. 26, 2023), Federal Register :: Cybersecurity Maturity Model Certification (CMMC) Program.

[13] See U.S. Small Business Administration, COVID-19 Pandemic EIDL and PPP Loan Fraud Landscape, White Paper Report 23-09 (Jun. 27, 2023), COVID-19 Pandemic EIDL and PPP Loan Fraud Landscape (sba.gov).

[14] McDonald, J., Rancho Santa Fe homeowners group illegally collected $1.5M in COVID-19 relief, The San Diego Union-Tribune, (Dec. 1, 2023), Rancho Santa Fe HOA illegally got $1.5M in COVID aid via PPP - The San Diego Union-Tribune (sandiegouniontribune.com).

[15] S. 2466, 118th Cong., False Claims Amendments Act of 2023, Text - S.2466 - 118th Congress (2023-2024): False Claims Amendments Act of 2023 | Congress.gov | Library of Congress.