Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Gov't Contracts Cases To Watch In 2019

By **Daniel Wilson**

Law360 (January 1, 2019, 12:03 PM EST) -- A U.S. Supreme Court case involving statutes of limitations on False Claims Act allegations, one of a number of important FCA issues the high court may soon tackle, will join a high-profile challenge to a $10 billion U.S. Department of Defense cloud deal as one of several prominent cases for government contractors to watch in 2019.

While 2017 was relatively quiet, 2018 saw a number of high-profile decisions related to government contracting, covering issues ranging from jurisdictional questions to corrective action on flawed procurements to statutory preference requirements.

Another key question throughout 2018 was where and how the FCA applies, including whether particular types of alleged wrongdoing should actually be considered fraud and how the high court's landmark 2016 Escobar decision should be applied.

The high-profile cases currently percolating through the courts show that 2019 will be another big year for FCA-related legal decisions. Here are some of those disputes, alongside another big contracts case to watch in 2019.

Justices To Weigh 'Government Knowledge' Statute of Limitations

In November, the U.S. Supreme Court agreed to return to the FCA realm once more to address a narrow yet important area that has split the circuit courts: when specifically does the "government knowledge" statute of limitations apply?

Under the FCA, there are effectively two statutes of limitations, with cases required to be filed either within six years of the alleged FCA violation or three years after material facts "are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances," whichever is later.

The Fourth and Tenth circuits had taken the position that the latter "government knowledge" statute applies only when the government actually intervenes in a relator's case, but the Eleventh Circuit in April specifically rejected that stance.

Instead, the Eleventh Circuit found that the government knowledge limitation applies even in non-intervened cases, effectively giving relators in the circuit up to a decade — the hard limit for FCA claims

— to file cases in the right circumstances.

The ruling came in the context of relator Billy Joe Hunt's accusations that Parsons Corp. defrauded the DOD on a contract to round up and dispose of excess and abandoned munitions in Iraq. Hunt's case had been filed in 2013, seven years after the alleged fraud but within three years of telling FBI agents about the alleged kickback scheme.

Parsons and its co-defendant Cochise Consultancy Inc. quickly took the dispute to the high court, which now must weigh the Fourth, Tenth and Eleventh circuits' positions, as well as that taken by the Ninth Circuit, which uses the relator's knowledge of an alleged violation as the trigger for the clock to begin running, effectively treating a relator as a "government agent." The justices must decide how the text and intent of the FCA is best served.

While the issue may be a technical one, it has the potential to significantly impact when and where FCA cases are filed, Crowell & Moring LLP partner David Robbins noted.

"It's a standard-setting case. … Either defendants have an excuse to dismiss a complaint, or it opens additional avenues for relators," he said.

The case is Cochise Consultancy Inc. et al. v. U.S. ex rel. Hunt, case number 18-315, in the Supreme Court of the United States.

Parties Push for Clarity on Materiality Under Escobar

The Supreme Court in Escobar settled one prominent issue of False Claims Act law by backing the implied certification doctrine, whereby parties can be held liable for falsely implying they have complied with all relevant laws, regulations and contractual requirements when submitting claims for government reimbursement, even if those requirements aren't directly tied to payment.

But the decision has opened up new questions regarding FCA liability, none more prominent than the issue of materiality, with the high court noting that any alleged false claim must be "material" to the government's decision to pay and that the materiality requirement is a "demanding" standard.

District and circuit courts have wrestled with the materiality question dozens of times since, looking into issues such as whether the government has continued to pay claims in similar circumstances and whether that continued payment alone is indicative of materiality, or whether the alleged false claim touches on the "essence of the bargain" between the government and payee.

And since Escobar, the Supreme Court has been asked several times to take up the issue again, with a growing chorus claiming the issue needs to be clarified.

Perhaps the most prominent petition before the high court to examine materiality involves a case accusing biopharmaceutical company Gilead Sciences of concealing information about sourcing and contamination of HIV drugs. The justices asked the government to weigh in. Yet the materiality issue has since been buried, as the case has become a high-profile example of the U.S. Department of Justice's recent efforts to dismiss FCA cases it deems unworthy or harmful to the government.

Even if the Gilead case is ultimately turned down, other pending petitions ask the justices to resolve ambiguities around materiality. One example is senior living community chain Brookdale's

November request for the Supreme Court to review a nurse's allegations that the company filed certifications of medical necessity, required for reimbursement for care, outside of the specified window.

In its petition, Brookdale pointed to a growing circuit split on how to address materiality, with McCarter & English LLP government contracts practice group co-leader Alexander Major describing the current situation at the circuit court level and below as a confused "logjam."

Whether the Brookdale dispute is the appropriate opportunity for the high court to revisit materiality, "the simple fact that the questions are out there demands there be answers" at some point soon, he said.

The cases are Brookdale Senior Living Communities Inc. et al. v. U.S. ex rel. Prather, case number 18-699, and Gilead Sciences Inc. v. U.S. ex rel. Jeffrey Campie et al., case number 17-936, in the Supreme Court of the United States.

Circuits Are Split on FCA First-to-File Bar

Another FCA issue that has cropped up several times before different courts, with various outcomes, involves an important aspect of the law's first-to-file bar.

On the surface, the bar is simple: A relator cannot file an FCA suit when a similar suit based on the same essential facts is already pending. Given that FCA suits are filed under seal, it is not uncommon for multiple suits to be filed over the same alleged conduct or scheme, and the later-filed suits are usually dismissed.

Several relators, however, have attempted in recent years to get around the issue by filing amended complaints, arguing that although similar cases may have already been pending when their own case was first filed, those earlier cases were no longer pending when their amended complaint was filed, and therefore the first-to-file bar no longer applies.

The Second Circuit was blunt on the issue in its August ruling in a case accusing drugmaker Allergan Inc. of providing kickbacks to doctors who prescribed its cataract treatments that relator John Wood. The court found a relator could not avoid the bar through an amended complaint.

"The statutory command is not ambiguous: A claim is barred by the first-to-file bar if at the time the lawsuit was brought a related action was pending," the Second Circuit said at the time.

But the First Circuit had previously reached the opposite conclusion, allowing relators to get around the bar with an amended complaint.

Adding to the confusion is the fact the government, which weighed in on Wood's case, switched positions between oral arguments and a later brief, going from backing his stance that the first-to-file bar allowed him to file an amended complaint to saying the bar required his case to be dismissed. Wood is set to file a petition with the high court in early January asking it to address the dispute.

If the Supreme Court takes the Allergan case, it will likely serve as a gauge of whether the justices think the FCA is being used for its specified purpose or being stretched in unintended ways, Major said. In this way, it resembles the Cochise case.

“[The law's] purpose is to root out fraud, not to make people winners,” he said. “The concept is, you inform the government there’s some problem, an issue it needs to vet. … If it proceeds to litigation, you may get some extra cash, but if it doesn’t make it, the purpose of the FCA will still be effected.”

The case is U.S. ex rel. Wood et al. v. Allergan Inc. et al., case number yet to be assigned, in the Supreme Court of the United States.

Attorneys See Open Question on Fraud Liability Under FCA

As Major said, the intended purpose of the FCA is, in theory, simple: to help protect the government from fraud.

But exactly what can be considered fraud, how how the extent of a fraud should be determined and who can be held liable are not rigidly prescribed. Both the government and relators often introduce new and novel theories on those issues in FCA cases.

A high-profile example came early in 2018 when the government intervened in a case and filed a complaint-in-intervention not only against the compounding pharmacy the relators had accused of Tricare fraud, but also — apparently for the first time — the pharmacy's private equity owner. Although a magistrate judge recently recommended that the case be trimmed, the government's move rang alarm bells for the some in the private equity industry.

But although the case's involvement of private equity was unusual, the idea of parent companies being dragged into lawsuits involving their subsidiaries is not, attorneys said. Significant filings have recently been made in another, even more unusual, ongoing case involving an unexpected type of FCA defendant.

In that case, relator Andrew Scollick has accused several construction companies of setting up shell companies to act as faux-small businesses to win small business set-aside contracts. This itself is not an uncommon basis for an FCA suit.

But Scollick has also filed suit against the companies responsible for providing payment and performance bonds for those contracts. Bonding is required for all but the smallest federal construction deals. Scollick argues that the bonding companies should have known about the alleged fraud through the information they gleaned during their underwriting process.

Robbins said that a ruling in favor of Scollick would effectively put bonding companies in the position of being “gatekeepers of compliance” with contracting law and regulations — well outside their current role of ensuring a construction job is completed and involved parties are paid. This would effectively serve as a “rewriting of obligations after the fact,” Robbins said.

“In my mind, it goes to [an issue of] fundamental fairness. … You can’t be the gatekeeper for the government unless you’re told,” he said.

The case could lead some surety companies to avoid bonding federal work in future, which could hurt the ability of federal construction contracts to move forward, or could lead to the government having to take on the risk itself, attorneys claimed.

And outside of the construction context, such a ruling could also lead relators to look to “deep pockets” peripherally involved in other types of federal contracts as potential defendants, Robbins said.

The cases are U.S. ex rel. Medrano and Lopez v. Diabetic Care Rx LLC dba. Patient Care America et al., case number 0:15-cv-62617, in the U.S. District Court for the Southern District of Florida, and U.S. ex rel. Scollick v. Narula et al., case number 1:14-cv-01339, in the U.S. District Court for the District of Columbia.

Legal Questions Remain on the $10B JEDI Contract

The DOD’s Joint Enterprise Defense Infrastructure contract, a $10 billion and potentially decade-long deal to move much of the department's existing information technology infrastructure to the cloud, has been controversial from the start.

The commercial cloud industry has regularly criticized the DOD over various issues with JEDI, such as the rapid speed at which the DOD has tried to move forward with the solicitation, the length of the contract, the planned single-award model, and a perceived tilt of the solicitation terms toward Amazon Web Services Inc., the cloud arm of the online retail giant and the largest single commercial cloud provider.

Those grumbles came to a head with both Oracle and IBM filing pre-award protests with the U.S. Government Accountability Office, and Oracle ultimately sued in the Court of Federal Claims in December when its GAO case was unsuccessful.

According to Oracle, the DOD’s decision to use just one vendor under JEDI — which the department has argued carries benefits such as avoiding compatibility clashes — violates multiple federal procurement laws that mandate multiple contract awards in similar circumstances, unless a single vendor is specifically justified. The DOD had not properly justified the move, Oracle said.

Oracle has also taken aim at “gate criteria,” or clauses in the solicitation that purportedly restrict which companies are even in the running for the deal. Oracle also claims that two "heavily conflicted individuals" with ties to Amazon Web Services helped to shape the procurement when they should have stepped aside.

While Amazon Web Services had been largely silent in public through the JEDI process, it intervened in the dispute in mid-December, pointing both to its economic interests as a JEDI bidder and its reputational interests related to “Oracle’s meritless conflict of interest allegations.”

The case is noteworthy not only for the legal issues involved, but the amount of money at stake and the household names involved, which have brought it attention outside of the government contracting community, attorneys claimed.

“You don’t usually see pre-award bid protests that are this high-profile, this noteworthy, that are getting so much attention,” Bradley Arant Boult Cummings LLP partner Aron Beezley said.

The case is Oracle America Inc. v. U.S., case number 1:18-cv-01880, in the U.S. Court of Federal Claims.

--Additional reporting by Jeff Overley and Carolina Bolado. Editing by Philip Shea.