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High Court's FCA Showdown Is Already Shaping DOJ Probes

By **Jeff Overley**

Law360 (February 22, 2023, 11:28 PM EST) -- Months before the U.S. Supreme Court is set to rule on the viability of False Claims Act cases involving murky compliance obligations, defense attorneys are quietly imploring the U.S. Department of Justice not to bring such cases and publicly signaling confidence that a favorable ruling is forthcoming.

The exhortations from defense counsel are occurring behind the scenes when the DOJ is weighing whether to file suit or join sealed whistleblower cases against companies accused of compliance lapses and suspicious billing in taxpayer-funded programs, sources told Law360 on Wednesday.

It's a trend that started emerging even before the Supreme Court recently agreed to assess the Seventh Circuit's ruling that it "does not matter" whether someone intended to commit fraud, so long as billing reflected "objectively reasonable" views of ambiguous compliance duties and those views weren't foreclosed by authoritative guidance.

Gregory David, who oversees civil litigation at the U.S. Attorney's Office in Philadelphia, told Law360 in a Wednesday interview that defense counsel have pressed the ambiguity argument in several cases within the Eastern District of Pennsylvania — historically a hotbed of FCA enforcement, particularly against drug and device makers. David added that as chairman of the DOJ's Civil Chiefs Working Group, he's heard that other districts are also encountering the argument, and that he's tried to adopt a balanced approach to it.

"We probably shouldn't be pursuing False Claims Act litigation where there's a complex and murky regulatory scheme with some significant ambiguity and a company that proceeded as best as it could in good faith," David said Wednesday. "On the other hand, we shouldn't have a legal regime that exempts the company from False Claims Act liability where the company sought to exploit an inevitable statutory or regulatory ambiguity, and where that company has a lot of reasons to believe that its interpretation is wrong."

Bradley Arant Boult Cummings LLP partner Elisha J. Kobre, a DOJ fraud prosecutor in New York until 2021, told Law360 on Wednesday that FCA defense lawyers — himself included — have "absolutely" been making the ambiguity argument more frequently at the investigative stage and early in litigation.

"We regularly point the government to ambiguity," Kobre said, adding that "the ambiguity argument is akin to playing offense … rather than defensively attempting to analyze the underlying conduct under the government's chosen interpretation of the regulation."

FCA litigants have periodically locked horns over the meaning of laws and regulations for many years, and the central issue at the Supreme Court is whether the FCA is covered by Safeco Insurance Co. v. Burr, a 2007 case in which the high court shielded erroneous yet reasonable compliance views involving the Fair Credit Reporting Act. Several circuit courts have analyzed Safeco in the FCA context, and that lengthy history raises the question of why defense lawyers are suddenly emphasizing ambiguity with greater gusto.

It may be that the Seventh Circuit's ruling in Schutte v. SuperValu Inc. — and its similar ruling in Proctor v. Safeway, which is also before the Supreme Court — made it abundantly clear that defense counsel could try to focus solely on ambiguity without worrying about also proving good intentions. The Seventh Circuit majority found that "nothing in the language of the FCA suggests that a defendant's subjective intent is relevant," prompting a dissent that bemoaned "a safe harbor for deliberate or reckless fraudsters whose lawyers can concoct a post hoc legal rationale that can pass a laugh test."

"SuperValu, and the SuperValu dissent, really brought into sharp relief this idea of a post hoc rationalization that the defendant didn't actually believe at the time," David said Wednesday.

To the extent that defense counsel can concentrate on nebulous legislative language and vague regulatory provisions, and worry less about presenting evidence of good-faith compliance efforts, they might find it easier to derail FCA investigations and litigation. In active litigation, for example, it's often difficult for defendants to win motions to dismiss, because courts must construe certain issues in favor of plaintiffs. But if the facts surrounding a defendant's intent don't matter, then it's a different ballgame.

"An argument based on ambiguity is more likely to succeed on a motion to dismiss because it does not depend on facts, which are often in dispute," Kobre said Wednesday. "So defendants have a better shot at getting claims knocked out [at] the motion to dismiss stage on an ambiguity argument."

Similarly, the Seventh Circuit's ruling contained a relatively in-depth discussion of the Safeco decision, which looked at the Fair Credit Reporting Act's standard for compliance miscues committed "knowingly." Although other circuit courts previously examined Safeco's applicability to the FCA's standard for "knowingly" false claims, they often did so in opinions that were nonprecedential or made sparse references to Safeco. By contrast, the Seventh Circuit's opinion and dissent spanned 55 pages and mentioned Safeco roughly 140 times.

Last year, Sen. Chuck Grassley, R-Iowa, the FCA's modern architect, assailed the Seventh Circuit's ruling, saying it endorsed "post hoc brainstorming" by defense attorneys and created "a robust liability shield for plainly culpable defendants." Last week, the senator reprised that criticism at the Federal Bar Association's annual Qui Tam Conference in Washington, D.C.

Also at the conference, David appeared on a panel about the FCA's standard for scienter, or knowledge of wrongdoing, and he briefly mentioned the uptick in ambiguity arguments from defense lawyers.

"In almost every case, when we are engaging with defense counsel, we're seeing the SuperValu argument. Some of them are credible, and some of them are not," David said last week.

Randy Harwell, an assistant U.S. attorney for the Middle District of Florida, moderated the panel and at one point asked another panelist, Crowell & Moring LLP partner Michael Shaheen, whether he was "focused like a laser on the ambiguity, or lack thereof, in the statute" when defending FCA cases.

"If that argument is available, I'm going to make it as soon as it's available to me, whether that's in the investigation stage or at some point in the litigation," Shaheen replied. He added that it doesn't seem like "a massive sea change" for FCA defenses, and he also sought to distinguish disingenuous defenses from honest assertions about confusing compliance obligations.

"Will lawyers be creative? Yes. Will many of those creative, post hoc rationalizations be shot down? Yes," Shaheen said. But, he added, sometimes judges are simply determining whether someone's conduct reflects a reasonable reading of an ambiguous policy, and "that is not post hoc rationalizations running amok, allowing or correcting for bad behavior."

Colette G. Matzzie, a whistleblower lawyer at Phillips & Cohen LLP, quickly offered a different take at the panel, saying that "it's a pretty extreme position … to preclude looking at the defendant's state of mind because of a reasonable interpretation — one that the defendant may not have held."

It's true that ambiguity is often in the eye of the beholder, and that what seems clear to one person might seem vague to another. But some observers remain skeptical that defendants are truly mystified by compliance responsibilities, and just so happen to follow incorrect interpretations that are more profitable.

At the Federal Bar Association conference, for example, a participant on one panel invoked a famous quote from the muckraking journalist Upton Sinclair, who once wrote, "It is difficult to get a man to understand something, when his salary depends upon his not understanding it!"

In any event, attorneys on both sides of the FCA bar have told Law360 that plaintiffs — including the DOJ and the whistleblowers that it's supporting in the Supreme Court case — will face a tall task at the right-leaning court.

Shaheen, for example, noted that Justice Brett Kavanaugh, as a D.C. Circuit judge in 2015, embraced the Safeco standard in an FCA case that resembles the SuperValu case. Justice Kavanaugh "will be sharing the bench with five people who tend to think like him," and the conservative justices tend to side with "big business" in close cases, Shaheen said.

"That, to me, just to be blunt and straightforward about it, has me thinking that my side will prevail. But I do think there will be nuance to it," Shaheen said. "They don't have to rule ... without any caveats or nuance."

The cases are U.S. ex rel. Proctor v. Safeway Inc., case number 22-111, and U.S. ex rel. Schutte et al. v. SuperValu Inc. et al., case number 21-1326, each before the Supreme Court of the United States.

--Editing by Emily Kokoll and Michael Watanabe.
