Supreme Court, U.S.

A Look at Four FCA Petitions Seeking Supreme Court Input

BY DANIEL SEIDEN

The False Claims Act — a tool used to combat contract fraud — needs a lot of clarification from the U.S. Supreme Court, according to several petitions challenging circuit court rulings.

Petitioners hope their cases are among the few selected for review by the court, which reconvenes Sept. 25.

The petitioners, ranging from a student loan applicant to a pipe parts producer, seek clarity — and favorable rulings — on cases involving:

- whether a valid claim must identify specific misrepresentations a defendant made;
- provisions concerning the timeliness of a false claims complaint filing;
- how much detail a complaint must include; and
- whether a mistake or ignorance may let a defendant off the hook.

These petitions raise the "sort of interpretative questions the court has avoided in favor of letting lower courts sort out the law, even at the risk of preserving disagreements among some circuits," said Mark Troy, a Los Angeles-based partner in Crowell & Moring’s government contracts group.

Supreme Court petitions have poor odds of being heard, whether or not the court has shown interest in a particular statute or issue.

The court grants and hears oral argument in about 80 cases despite receiving 7,000 to 8,000 petitions for a writ of certiorari each term, the court’s website said.

Regardless, the Supreme Court issued important FCA decisions last year, giving lower courts flexibility in punishing violations of the act’s seal provision in State Farm Fire & Cas. Co. v. United States ex rel. Rigsby, and upholding the implied certification theory of liability in Universal Health Services v. United States ex rel. Escobar.

Getting Specific Security contractor Triple Canopy Inc. wants the court to rule that the government’s false claims case — that Triple Canopy used unqualified guards at an airbase in Iraq — must fail because the complaint didn’t identify specific misrepresentations in Triple Canopy Inc. v. United States.

The Fourth Circuit improperly revived the case because Universal Health demands that a valid false claims complaint allege that a defendant made specific misrepresentations about compliance with contract requirements, Triple Canopy said in its petition.

The government’s case would have failed if raised in the Ninth and Third circuits, and therefore, the Supreme Court needs to resolve a circuit split on this issue, Triple Canopy said.

It’s not clear that the facts in Triple Canopy and Universal Health are so different that the court would want to use it to provide more clarity on Universal Health standards, Neil O’Donnell, a shareholder with Rogers & Raft pdf PC in San Francisco, told Bloomberg BNA.

The Supreme Court in Universal Health ducked the question of whether a claim for payment by itself can be enough to qualify as a false claim under the act, he said.

Therefore, the court "may well not want to rush back to it so quickly now. Rather, it may want to leave some more time for the lower courts to work through Universal Health before choosing to tackle that issue directly itself," he said.

The fact that Universal Health is only 15 months old makes it unlikely the court will take on this case, but doing so could “further clarify the contours and bounds of implied certification,” said Justin Ganderson, special counsel with Covington & Burling LLP, Washington.

“Further guidance would help distinguish between alleged facts that give rise to an FCA violation versus a breach of contract,” he said.

The government’s response is due Oct. 15.

Out of Time The court should rule that a tolling provision in the False Claims Act’s statute of limitations can make a whistle-blower’s complaint timely even when the government doesn’t intervene in the case, whistle-blower Roland Wade Jackson said in United States ex rel. Jackson v. University of North Texas.

Claims involving the alleged mishandling of a student loan agreement would have been timely if Jackson had been allowed to invoke the act’s tolling provision, Jackson said in his petition, adding that the Fifth Circuit incorrectly disagreed with his interpretation.

A lawsuit may not be brought more than three years after material facts are known or reasonably should have been known to a government official, but in no event more than 10 years after the date on which the violation occurred, the False Claims Act says.

The Ninth Circuit and several district courts have said whistle-blowers have invoked the tolling provision despite the government declining to join a case, according to the petition.
However, the University of North Texas and other respondents said Supreme Court intervention isn’t necessary because no appeals court has adopted Jackson’s view of the statute of limitations provision.

The assertion of a circuit split is misplaced, Crowell & Moring’s Troy agreed.

A whistle-blower “has to file suit within either six years of the wrongdoing or three years from the time the [whistle-blower] learned of it. Jackson is asking the court to rule differently than the Ninth Circuit by holding that the three-year period begins only when the allegations are known to an actual government official,” Troy said.

Pipe Particularity Pipe parts producer Victaulic Co. wants the court to clarify how specific a False Claims Act complaint needs to be following what it views as the Third Circuit’s erroneous dilution of the fraud pleading standard in Victaulic Co. v. United States ex rel Customs Fraud Investigations LLC.

Submitting pictures on eBay shouldn’t have been sufficient to allow Customs Fraud Investigations LLC to move forward with claims that Victaulic sold pipe parts that violated country-of-origin requirements, Victaulic said in its petition.

The Supreme Court in 2014 declined to address circuit disagreement on fraud pleading specificity, and what it takes to satisfy Federal Rule of Civil Procedure 9(b).

The Third Circuit’s decision makes the divide among circuit courts too great to remain unreviewed, the petition said.

Review isn’t necessary because this case involves a “reverse” false claim — which involves concealment to avoid an obligation to pay — and therefore the circuit split Victaulic cites doesn’t apply, Customs Fraud Investigations LLC responded.

The prospect of a uniform specificity standard makes this petition important, but learning to live with a circuit split may be preferable, said Joel Androphy of Berg & Androphy, a law firm focused on representing whistle-blowers.

Supreme Court input could be “too creative and confusing, taking years to sort out,” he said.

Changing the pleading standard also could slow recovery to the taxpayers, he added.

Something to Hide Three Ohio whistle-blowers want the court to declare that a defendant’s mistake of law — or playing ostrich — doesn’t excuse a defendant from false claims liability in United States ex rel. Harper v. Muskingum Watershed Conservancy Dist.

The Sixth Circuit rejected claims accusing the Muskingum Watershed Conservancy District of knowingly withholding property from the federal government following a land fracking deal.

The whistle-blowers failed to allege that the district knew deed restrictions forbade fracking, or that fracking would trigger the property reversion obligation, the Sixth Circuit concluded.

A subjective knowledge standard that forces whistle-blowers to show that a defendant believed it violated a legal obligation is an unreasonable hurdle, and isn’t consistent with the False Claims Act, the whistle-blowers’ petition said.

The Sixth Circuit’s ruling is consistent with other circuit court decisions that the False Claims Act doesn’t permit liability for innocent mistakes, the district responded.

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