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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

High Court Outlook For False Claims Act Cases In 2019

By **Douglas Baruch, John Boese and Jennifer Wollenberg**
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Douglas Baruch

John Boese

Jennifer Wollenberg

The U.S. Supreme Court's recent interest in civil False Claims Act cases, particularly those involving qui tam relators, is reflected in the court's nine decisions in qui tam cases in the last 13 years. In nearly all of those decisions, the court delineated important limits on relator theories and claims. The most recent example is the court's decision in Universal Health Services v. United States ex rel. Escobar,[1] which validated the implied false certification theory's application to FCA cases, but limited the scope of that theory by mandating that its "demanding" materiality and scienter requirements be rigorously enforced.

In spite of this apparent interest, the court's actions in the current term so far indicate that it is not yet ready to address some of the more pressing FCA issues in the lower courts. The Supreme Court denied three petitions for certiorari in qui tam cases in its first actions of 2019.

While those denials in cases involving pleading requirements, the materiality standard, and scienter will extend the period of uncertainty regarding those topics, followers of the FCA are not left without anything to watch in 2019. There remains at least one pending certiorari petition in a qui tam case and there is the petition recently granted by the court in Cochise Consultancy Inc. v. United States ex rel. Hunt.[2] Moreover, another potentially important development for FCA litigants is the Supreme Court's decision to hear a case which does not arise under the FCA but nevertheless has the potential to impact certain FCA cases. The issues raised in the granted, pending and denied certiorari petitions are discussed below.

Petitions Recently Granted

Cochise Consultancy Inc. v. United States ex rel. Hunt

The grant of the petition in Cochise Consultancy Inc. v. United States ex rel. Hunt on Nov. 16, 2018, means that the court will resolve the conflict among federal appeals courts over the application of the FCA's statute of limitations in certain declined qui tam cases. The court's decision on this question, while needed, is not expected to have broad impact, since the circumstances in which the issue arises are infrequent. The statute of limitations in most FCA

cases is straightforward: The action must be brought within six years of the FCA violation.[3] However, the FCA provides for an extended limitations period — as long as 10 years — if the action is filed within three years of the date when the appropriate government official knew or should have known the material facts. Specifically, Section 3731(b)(2) provides that a civil action under Section 3730 may not be brought "more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed."

The lower court conflict that the court will resolve in Cochise is whether the extended limitations period is available in declined qui tam actions. The U.S. Court of Appeals for the Fourth Circuit and the U.S. Court of Appeals for the Tenth Circuit, along with the majority of lower courts, have said no, holding that Section 3731(b)(2) is available only where the government is a direct party to the FCA suit.[4] However, the U.S. Court of Appeals for the Eleventh Circuit held otherwise in United States ex rel. Hunt v. Cochise Consultancy Inc.,[5] aligning itself with the U.S. Court of Appeals for the Ninth Circuit in ruling that relators may take advantage of the tolling provision in non-intervened cases.[6] Nevertheless, the Eleventh Circuit parted company with the Ninth Circuit on the natural follow-up question: Whose knowledge — the relator's or the government's — triggers the three-year clock in such situations?

The statutory language and legislative history support the view held by the Fourth and Tenth Circuits. The text of Section 3731(b)(2) focuses on the knowledge of the government official. If Congress had intended that the relator's first knowledge of the material facts also could extend the limitations period beyond six years, the statute would not have used the limiting language that it did. In addition, it makes little sense to allow a relator to satisfy the conditions of Section 3731(b)(2) by pointing to the timing of the government official's knowledge, particularly in an action in which the government declines to intervene.[7]

Kisor v. Wilkie

In Kisor v. Wilkie, a non-FCA action, the U.S. Department of Veterans Affairs initially denied post-traumatic stress disorder disability benefits to a Vietnam veteran. Years later, the VA granted the benefits pursuant to a regulation allowing the VA to reopen the claim upon the submission of new evidence. However, under that regulation, the grant of benefits was not retroactive. On appeal, the veteran argued that he should have been granted benefits retroactively based on a regulation requiring the VA to reconsider a claim based on relevant service records that existed and were not associated with the claim file the first time the VA decided the claim. The U.S. Court of Appeals for the Federal Circuit, finding the term "relevant" to be ambiguous, applied Auer deference and upheld the VA's interpretation of its own regulations in the absence of evidence that the interpretation was plainly erroneous or inconsistent with the regulation.[8]

Auer deference has been the target of significant judicial criticism, including that it (a) incentivizes agencies to promulgate vague, broad regulations that agencies later can "clarify" in an adversarial proceeding without using notice and comment procedures and (b) erodes the judicial role to be a check on the political branches of government and to perform an independent analysis of the interpretive issue. While the ambiguity in Kisor did not involve an FCA claim, deference to an agency's interpretation of an ambiguous regulation — Auer deference — or an ambiguous statute — Chevron deference — often comes into play in FCA cases.[9] Thus, the Supreme Court's decision in Kisor could impact enforcement of ambiguous regulations in the FCA context.

Pending Petitions

Brookdale Senior Living Communities Inc. v. United States ex rel. Prather

The petition for certiorari in Brookdale Senior Living Communities Inc. v. United States ex rel. Prather raises a question related to the issue in United States ex rel. Campie v. Gilead Sciences Inc.[10], discussed below, which is whether a relator can withstand a motion to dismiss where the qui tam complaint fails to plead facts as to past government practices with respect to the alleged conduct at issue. A divided panel of the U.S. Court of Appeals for the Sixth Circuit ruled that the relator sufficiently alleged materiality despite failing to set forth facts regarding the government's past practices with respect to the type of noncompliance alleged in the complaint.[11]

The Supreme Court has emphasized in Escobar that "False Claims Act plaintiffs must also plead their claims with plausibility and particularity under Federal Rules of Civil Procedure 8 and 9(b) by . . . pleading facts to support allegations of materiality."[12] Granting this petition would enable the court to flesh out these pleading requirements and provide a meaningful bright line for dismissing qui tam suits that fail to allege materiality.

United States ex rel. Wood v. Allergan Inc.

In United States ex rel. Wood v. Allergan Inc., where the petition was due to be filed on Jan. 4, 2019, the U.S. Court of Appeals for the Second Circuit held that a qui tam relator cannot cure a violation of the first-to-file bar by amending or supplementing the complaint after the earlier action is no longer pending.[13] There is a clear circuit split on this issue. Some circuits hold, as did the Second Circuit in Wood, that a violation of the first-to-file bar cannot be cured under these circumstances because: The first-to-file provision mandates dismissal if a person brought a related action during the pendency of the earlier-filed action, there is no provision for a stay until the prior action is resolved and amending the complaint cannot cure the fact that the action was brought while another action was pending.[14] On the other hand, the U.S. Court of Appeals for the First Circuit has endorsed supplementation.[15]

Petitions Recently Denied

While the Supreme Court may tread beyond the narrow statute of limitations issue in Cochise and issue an opinion that has broader impact in the FCA arena, and the court may yet, through the pending Prather case, wade into some of the FCA pleading issues that are of paramount importance in most qui tam cases, the larger story so far this term flows from the denial of certiorari petitions.

Gilead Sciences Inc. v. United States ex rel. Campie

The petition denied in Gilead Sciences Inc. v. United States ex rel. Campie raised the question of whether a qui tam complaint must offer a basis for overcoming the strong inference of immateriality arising from the government's continued approval and payment for products after learning of regulatory noncompliance. The Ninth Circuit allowed the relators' implied false certification and misbranding claims to survive the motion to dismiss notwithstanding the FDA's continued approval of the defendant's drug after the agency was aware of the regulatory compliance. The Ninth Circuit's rationale was that the materiality dispute as to what and when the government knew raised "matters of proof" that were "not legal grounds" for dismissal.[16] However, the Ninth Circuit determined only that the relators' claims met Rule 8's plausibility standard by alleging sufficient facts to state a claim that was plausible on its face, without addressing whether the claims met Rule 9(b)'s heightened pleading requirements.

The U.S. solicitor general's amicus brief in Campie agreed with the Ninth Circuit's conclusion that continued government payments/approvals did not require dismissal at the pleading stage because of potential scenarios in which the government might continue to pay for — or approve — these drugs after learning of the allegations. Perhaps most significantly, the solicitor general also notified the court — and the parties — that the government would move to dismiss the case if it was remanded. The Supreme Court's denial of certiorari, while understandable in light of the government's representation that it intended to dismiss the complaint, means that the Ninth Circuit's decision stands and there is no full resolution of the question of what must be pled concerning the government's knowledge and past practice. Indeed, the Campie petition cited many conflicting decisions on that issue, and more are issued every week, highlighting the need for clarification of this pleading requirement and the grounds for dismissing qui tam complaints where the government has continued making payment with knowledge of the underlying allegations.

United States ex rel. Harman v. Trinity Industries Inc.

The central question in United States ex rel. Harman v. Trinity Industries Inc. was whether continued payment by the government is "a factor" or "a determinative factor that would cause the claim to be immaterial as a matter of law." The qui tam relator claimed that the defendant produced and sold defective highway guardrails reimbursed by the Federal Highway Administration without disclosing to the FHWA certain information about guardrail modifications. The relator — a competitor and prior litigation adversary of the defendant — pressed the case through trials and appeals despite the FHWA's finding that its safety standards were met, the FHWA's repeated rejection of the relator's fraud allegations and the FHWA's continuous payment for the defendant's product. Ultimately, applying Escobar's materiality analysis, the U.S. Court of Appeals for the Fifth Circuit found that there was "very strong evidence" of the FHWA's awareness of the FCA allegations and, consequently, that the defendant's omission of information about the guardrail modifications was immaterial.[17]

The denial of certiorari in this case allows the Fifth Circuit's application of Escobar's materiality standard and its focus on the government's payment decision to stand.

United States ex rel. Harper v. Muskingum Watershed Conservancy District

The question presented in United States ex rel. Harper v. Muskingum Watershed Conservancy District was whether a relator must plead subjective knowledge of a violation of law to show a "knowing" FCA violation. In the decision resulting in the certiorari petition, the Sixth Circuit dismissed the claim because it did not plausibly allege that the defendant knew, when it entered into fracking leases with companies to extract resources from land deeded to the defendant by the United States, that the leases violated an obligation incurred in 1939.[18] The Sixth Circuit concluded that this failure to identify the basis for the defendant's knowledge warranted dismissal. This decision underscores the important distinction between pleading a contract violation and pleading an FCA violation. The relator's assertion that pleading the defendant's mistake of law met the FCA's scienter requirement failed to recognize this distinction. Denial of the petition leaves the Sixth Circuit's important distinction intact.

Douglas Baruch is a partner, John Boese is of counsel and Jennifer Wollenberg is special counsel at Fried Frank Harris Shriver & Jacobson LLP.

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[1] 136 S.Ct.1989 (2016).

[2] Cochise Consultancy Inc. v. United States ex rel. Hunt, No. 18- 315.

[3] 31 U.S.C. § 3731(b)(1).

[4] See, e.g., United States ex rel. Sanders v. North American Bus Industries Inc., 546 F.3d 288, 294 (4th Cir. 2008); United States ex rel. Sikkenga v. Regence BlueCross BlueShield of Utah, 472 F.3d 702, 724-25 (10th Cir. 2006).

[5] 887 F.3d 1081 (11th Cir. 2018).

[6] See United States ex rel. Hyatt v. Northrop Corp., 91 F.3d 1211 (9th Cir. 1996).

[7] See FraudMail Alert No. 18-04-17., https://www.friedfrank.com/siteFiles/Publications/FFFraudMailHuntvCochise041718.pdf.

[8] See Kisor v. Shulkin, 869 F.3d 1360, 1367 (Fed. Cir. 2017) (citing Auer v. Robbins, 519 U.S. 452, 461 (1997)).

[9] Cf. United States ex rel. Streck v. Allergan Inc., No. 17-1014, 2018 WL 3949031 (3d Cir. Aug. 16, 2018) (applying the "objectively reasonable interpretation" test for FCA scienter); United States ex rel. Purcell v. MWI Corp., 807 F.3d 281 (D.C. Cir. 2015) (same).

[10] 862 F.3d 890 (9th Cir. 2017).

[11] See United States ex rel. Prather v. Brookdale Senior Living Communities, 892 F.3d 822 (6th Cir. 2018).

[12] Escobar, 136 S.Ct.1998, 2004 n.6 (2016).

[13] See United States ex rel. Wood v. Allergan Inc., 899 F.3d 163 (2d Cir. 2018).

[14] See, e.g., United States ex rel. Shea v. Cellco Partnership Inc., 863 F.3d 923 (D.C. Cir. 2017); United States ex rel. Chovanec v. Apria Healthcare Grp. Inc., 606 F.3d 361 (7th Cir. 2010). Cf. United States ex rel. Carter v. Halliburton Co., 866 F.3d 199 (4th Cir. 2017) (holding that the bar requires dismissal even if the first-filed action is dismissed while the later-filed action is pending, without deciding whether amendment or supplementation after dismissal allows the later-filed action to proceed).

[15] See United States ex rel. Gadbois v. PharMerica Corp., 809 F.3d 1, 4-5 (1st Cir. 2015) (finding "untenable" defendant's argument that supplementation cannot cure the first-to-file defect).

[16] Gilead Scis., Inc. v. United States ex rel. Campie, 862 F.3d 890, 907 (9th Cir. 2017).

[17] United States ex rel. Harman v. Trinity Industries, 872 F.3d 645, 665 (5th Cir. 2017).

[18] See United States ex rel. Harper v. Muskingum Watershed Conservancy District, 739 F. App'x 330 (6th Cir. 2018).