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GUEST COLUMN

A litigious first half of the year for the False Claims Act

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The False Claims Act (FCA) is the government's principal modern-day instrument for addressing fraud in relation to government programs and funding. A remnant of the Civil War used to recoup funds from contractors who sold faulty supplies to the Union Army, the statute today boasts a broad reach, impacting a diverse array of industries involved in government contracting and procurement. This includes areas such as defense, infrastructure and healthcare. In the first half of 2023, FCA litigation witnessed significant developments, marked by two Supreme Court decisions and ongoing circuit court splits on the interpretation of the statute's provisions, and over $450 million in government recoveries.

At its core, the FCA prohibits the intentional submission of false or fraudulent claims for payment to government entities. While the FCA includes scienter and materiality requirements that afford some level of defense to accused parties, those found in violation of the FCA face severe consequences. Penalties under the statute and collateral consequences are substantial, including treble damages, potential fines exceeding $20,000 per false claim, and potential future restrictions on participating in government contracting and procurement programs. There is also a criminal FCA, which can levy punitive measures such as imprisonment upon individuals, in addition to civil penalties.

Unique to the FCA's structure is the right of private citizens – often referred to as "relators" or "whistleblowers" – to pursue FCA claims on behalf of the government through *qui tam* actions. Relators file these suits because they can receive a bounty – up to 30% – of what is recovered on the government's behalf. These actions are initially filed under seal while the government evaluates whether to intervene and assume control of the lawsuit or decline involvement, allowing the relator to independently pursue the case. While most recoveries in FCA actions come from cases that involve government intervention, there can be substantial recoveries in non-intervened cases as well.

In the first half of 2023, the Supreme Court twice addressed the FCA. In *United States ex. rel. Polansky v. Executive Health Resources, Inc.*, 143 S. Ct. 1720 (2023), the Supreme Court was asked to clarify the extent of government authority to move to dismiss a *qui tam* action against the relator's objection, despite the government having declined intervening during the designated timeframe. In an 8-1 decision, the Court ruled that "the Government may seek dismissal of an FCA action over relator's objection so long as it intervened sometime in the litigation, whether at the outset or afterward." This decision establishes an important potential check on relator-driven lawsuits, giving the government the opportunity to dismiss them if the government finds that is in its best interest.

In *United States ex rel. Schutte v. SuperValu Inc.*, 143 S. Ct. 1391 (2023), the Court faced a different question – whether the scienter standard in the FCA, requiring the "knowing" submission of a false or fraudulent claim, is a subjective or objective one. Specifically, the Court was asked whether a claim against a defendant should be dismissed at the initial stages of litigation assuming the defendant subjectively believed the claim was false, but utilized an objectively reasonable interpretation of the law. A unanimous Court held that "[w]hat matters for an FCA case is whether the defendant knew the claim was false." In other words, if the claim is false, and the defendant has a subjective belief that the claim is false, the case can proceed past the initial phase even though the interpretation defendant utilized was objectively reasonable.

The Circuit Courts were also busy, particularly in determining the standard to apply in Anti-Kickback (AKS) FCA claims. The AKS makes it a crime for someone to knowingly and willfully give or receive rewards in exchange for referrals or orders of items or services paid by federal health programs. In 2010, Congress amended the AKS, deeming claims involving items or services resulting from AKS violations as false or fraudulent. Courts, however, have struggled with the degree of causation required to show a false claim resulted from an AKS violation. The Sixth Circuit, in *United States ex rel. Martin v. Hathaway*, adopted a "but-for" causation standard, aligning with the Eighth Circuit's *Cairns* case, meaning causation may be shown only if a claim for pay-

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ment to the government would not have been submitted *but for* the AKA violation at issue. This contrasts with the Third Circuit's stance that something less than "but-for" causation suffices, particularly some link connecting an alleged kickback scheme to a subsequence reimbursement claim. In August, a Massachusetts district court certified an interlocutory appeal to the First Circuit in an AKA-based FCA case to consider the causation requirement as well. This may be the next subject of Supreme Court review.

Finally, in the first half of 2023, DOJ continued flexing its muscles under the FCA, announcing 36 FCA resolutions totaling more than $485 million. By comparison, in the first half of 2022, there were 29 resolutions totaling over $500 million—by year end, DOJ had collected over $2.2 billion. Resolutions have involved claims ranging from doctors and laboratories upcoding when billing for testing and treatment of patients, to alleged false certification of eligibility for COVID-19 relief funds, to government contractors purportedly transmitting certain intellectual property to China without appropriate license or authorization. Given the government's appetite for FCA enforcement, and the recent developments in FCA litigation, FCA cases will continue to be a hot topic for the remainder of 2023.