An Unconstitutional FCA Provision Lurking In PPACA?

Related Services

False Claims Act and Qui Tam

Litigation

AUTHORED ARTICLE | May 2012

Law360

Michael Bronson and Patrick Hagan, attorneys in the Vorys Cincinnati office, co-authored a column entitled "An Unconstitutional FCA Provision Lurking In PPACA?" The column was originally posted in the May 30, 2012 editions of *Government Contracts Law360, Health Law360* and *Public Policy Law360*.

--

An Unconstitutional FCA Provision Lurking In PPACA?

While the news coverage of the upcoming U.S. Supreme Court decision on the Patient Protection and Affordable Care Act has been focused on the constitutionality of the individual health insurance mandate, attorneys and companies that deal with the False Claims Act should also follow this case closely because of a lesser known provision that threatens to diminish the defenses available against relators under the FCA.

A provision inserted in PPACA modified the FCA's "public disclosure" bar by (1) eliminating the jurisdictional nature of the bar; (2) allowing the government to veto a public disclosure defense; (3) eliminating sources of potential public disclosures; and (4) expanding the definition of "original source," thus creating additional exceptions to the prohibition against qui tam FCA cases based on publicly disclosed information.

The most interesting — and suspect — of these revisions gives the U.S. Department of Justice the unilateral power to reject a public disclosure defense. Because it appears to grant the executive branch the authority to decide a ripe matter pending before the judiciary, this provision raises serious constitutional questions regarding separation of powers and due process. As a result, even if the Supreme Court upholds PPACA, the law may face yet another round of constitutional challenges in connection with FCA cases.

The FCA's Public Disclosure Bar

Throughout the history of the FCA, Congress has struggled to strike a balance between the competing goals of encouraging whistleblowers to come forward while preventing frivolous or "parasitic" qui tam actions. On several occasions, Congress has responded to circuit and Supreme Court decisions by amending the FCA's public disclosure rule to correct a perceived imbalance between these two objectives.

The original FCA, which was enacted in 1863, did not include any requirement that the relator have independent knowledge of the alleged fraud. The problems associated with the absence of any limitation on parasitic lawsuits did not become obvious until the New Deal and World War II, which resulted in an explosion in government spending and a corresponding increase in the number of FCA cases. In the best known of these cases, U.S. ex rel. Marcus v. Hess, 317 U.S. 537 (1943), the Supreme Court allowed a relator to recover based on allegations copied from the prior criminal indictments of the defendants.

Congress responded swiftly by amending the FCA to include a "government knowledge" bar. The amendment provided that courts "shall have no jurisdiction" over any qui tam suit "based upon evidence or information in the possession of the United States." This drastically reduced the number of qui tam suits, and prevented some relators from pursuing FCA actions even though they were the first to uncover and report a fraud.

Things changed in 1986. Concerned about having tipped the scales too far toward chilling qui tam actions, Congress again amended the statute. As part of a comprehensive overhaul of the FCA, Congress replaced the "government knowledge" bar with the provision that came to be known as the "public disclosure" bar. This rule provided that "[n]o court shall have jurisdiction" over actions that were based on public information unless the relator was an original source of the information.

The addition of the original source exception allowed relators who had "direct and independent knowledge" of the information underlying the alleged fraud to recover even if the allegations were publicly disclosed. Along with the other 1986 amendments, the revised public disclosure bar helped to usher in the largest boom in FCA litigation in the history of the statute.

Courts grappled with the meaning of the public disclosure rule. Most held that the bar was jurisdictional, while some interpreted the provision as a withdrawal of standing from relators within its scope. In 2007, the Supreme Court stepped in to resolve the dispute. In Rockwell International v. United States ex rel. Stone, the court held that the public disclosure bar represented "a clear and explicit withdrawal of jurisdiction" over every publicly disclosed claim brought by a relator who was not an original source.

Recent Attempts to Amend the Public Disclosure Bar

In 2007 and 2009, members of Congress who were upset with the Rockwell decision proposed granting the DOJ the sole power to seek dismissal of a relator's qui tam action on public disclosure grounds. Although those bills (H.R. 1788 and S.B. 458) were never put to a vote, the passage of PPACA codified these revisions to the public disclosure rule, albeit with a new — and potentially unconstitutional — wrinkle.

The text of the new public disclosure rule provides that "[t]he court shall dismiss an action or claim under this section, unless opposed by the Government," if the allegations have been publicly disclosed and the

relator is not an original source. In other words, unlike the former public disclosure bar (which provided any party with the ability to move to dismiss — and permitted the court to dismiss sua sponte — on jurisdictional grounds), and unlike the previously proposed amendments to the public disclosure rule (which would have given the government alone the right to move to dismiss), the new public disclosure rule provides a defendant with the ability to assert a public disclosure challenge to a relator's case, but gives the DOJ the unilateral power to veto that defense.

The rule thus appears to give rise to the prospect of an FCA defendant filing a motion seeking dismissal under the public disclosure rule, only to have DOJ announce its opposition to the motion, thereby precluding the court from considering it.

Constitutional Problems With the New Public Disclosure Bar

Because it allows the executive branch to effectively decide matters pending before the judiciary without any mechanism for review, the new public disclosure provision may violate both the doctrine of separation of powers and principles of due process. The core principle of the separation of powers doctrine requires that one branch of government not impair another in the performance of its constitutional duties.

Traditionally, the courts have interpreted this to mean that the executive has exclusive authority and absolute discretion concerning the prosecution of a case, and the judiciary has the sole and exclusive power to decide cases and controversies. The framers believed this distinction to be essential, stating that "there is no liberty if the power of judging be not separated from the legislative and executive powers."

By empowering the government — the real plaintiff in interest in every FCA case — with the unilateral power to reject a defense, the new public disclosure provision appears to threaten these principles. The FCA has always granted the government the ability to control the standing of the relator — an assignee of the government's claim — including the power to settle or dismiss cases over the relator's objection.

Like these traditional FCA provisions, the previously proposed amendments to the public disclosure rule, which provided the DOJ alone with the ability to move to dismiss a relator, were consistent with the executive's absolute discretion with respect to the prosecution of FCA cases. By contrast, the new rule vests in the defendant the initial ability to assert a public disclosure defense and then allows the executive to remove a ripe and pending matter from the court's docket by opposing the defense and essentially rendering it nonjusticiable. This sort of cross-branch veto power has been struck down before.

For similar reasons, the new public disclosure provision could potentially violate defendants' due process rights. In non-intervened cases, the public disclosure rule can be a complete defense, and defendants often expend substantial resources conducting discovery to support a public disclosure challenge. The DOJ's apparent power to render that effort moot raises issues of fundamental fairness.

Procedurally, the provision seemingly strips the courts of any ability to review the executive's decision to invoke the veto. And substantively, the provision removes a potentially dispositive defense at the whim of the plaintiff, leaving the defendant subject to treble damages and penalties of up to $11,000 per false claim — provisions that have led the Supreme Court to characterize the FCA as essentially punitive in nature.

What To Watch For

The new public disclosure bar applies only to cases filed after its enactment. Because FCA cases remain under seal for some time after filing, there have not yet been any court decisions considering the impact of PPACA's revisions. It is unclear what the new provision requires of the government in terms of "opposing" a public disclosure challenge, as neither the statutory text nor the legislative history indicates whether the government's opposition must provide a factual or legal basis for its decision, or whether a simple notice of opposition would suffice. A requirement of only a notice of opposition would seem to cement the fact that the DOJ's "veto" power is absolute and unreviewable.

The government's use of this "veto" power also bears watching. In 2008, in response to the proposed legislation granting the government alone the power to file a public disclosure motion to dismiss, the principal deputy attorney general stated that, "in practice," the DOJ would exercise that power infrequently because "it does not have the resources or inclination" to dismiss non-intervened FCA cases.

It remains to be seen whether these resource constraints might impact the DOJ's approach to the "veto" provision, or whether the government's financial interest in these cases might make it inclined to oppose — and thus squash — defendants' public disclosure challenges.

Finally, these issues relating to the new public disclosure bar would not be the first among recent FCA amendments to create constitutional concerns. In U.S. ex rel. Sanders v. Allison Engine Co. and similar cases, defendants have challenged the constitutionality of retroactive application of FCA amendments on the grounds that the FCA is a punitive civil statute, and that retroactivity therefore violates the ex post facto clause. A conclusion that the FCA is punitive would only heighten the due process concerns attendant to the new public disclosure provision.