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False Claims Act decisions to know from Q3 2024

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Courts have addressed multiple False Claims Act (FCA) issues in the third quarter of this year. Below is a summary of top cases involving the constitutionality of the FCA's *qui tam* provisions, the FCA's scienter requirement, the public disclosure bar, and proof required under the FCA's anti-retaliation provision.

District court rules *qui tam* provision unconstitutional

The FCA's *qui tam* provision empowers any "person" — known as a "relator" (https://bit.ly/3ZdmenE) — to file a lawsuit in the federal government's name to enforce the statute. 31 U.S.C. 3730(b)(1). A relator sues on his/her own initiative, controls the litigation to binding judgment absent government intervention, and earns up to 30% of the government's recovery in a successful suit.

In *U.S. ex rel. Zafirov v. Florida Medical Associates, LLC*, Judge Kathryn Mizelle of the U.S. District Court for the Middle District of Florida dismissed an FCA action by holding the *qui tam* provision unconstitutional.

Building on Justice Scalia's *Vermont Agency* footnote (https://bit.ly/4fzbkgz) and Justice Thomas's *Polansky* dissent (https://bit.ly/3UEalUn), Judge Mizelle found that the charging discretion and enforcement power enjoyed by an FCA relator constitute "significant authority" and a "'continuing' position established by law," rendering the relator an "Officer" of the United States.

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Because the U.S. Constitution's Appointments Clause requires inferior officers to be appointed by the executive branch, the court found that an FCA relator's "self-appointment" violates the Constitution.

Once appealed, *Zafirov* may find its way to the U.S. Supreme Court, where at least three justices (https://bit.ly/3UEalUn) appear sympathetic to Judge Mizelle's Appointments Clause analysis. In the interim, defendants will likely move to amend their pleadings (https://bit.ly/3YCvHTt) and assert this newly legitimized constitutional argument as an affirmative defense.

Outcomes diverge as district courts apply *Schutte*'s subjective scienter test

Two district courts grappled with the Supreme Court's recent decision on the FCA's scienter standard, with different results.

Those decisions follow the Supreme Court's June 1, 2023 opinion (https://bit.ly/4fwxYWX) in *U.S. ex rel. Schutte v. SuperValu*, which held that the FCA's scienter requirement is based on a defendant's "knowledge and subjective beliefs," rather than on "what an objectively reasonable person may have known or believed."

In doing so, the Supreme Court rejected the defendant-friendly *Safeco* defense, raising questions as to how courts would apply the scienter element going forward.

On remand following the Supreme Court's decision vacating its prior grant of summary judgment, the U.S. District Court for the Central District of Illinois denied cross-motions for summary judgment, finding that scienter was an issue for the jury and sending the case to trial. The court also granted summary judgment on materiality for the relator.

Also tasked with re-assessing claims in light of the Supreme Court's *Schutte* decision, the U.S. District Court for the District of Maryland took a different tack.

In *U.S. ex rel. Sheldon v. Forest Labs.*, the relator alleged that Forest Labs defrauded the government by miscalculating its "Best Price" under Centers for Medicare & Medicaid Services' (CMS) regulations for the purpose of reimbursement for prescription drugs. On remand and after being directed to re-analyze scienter after *Schutte v. Supervalu*, the district court once again granted Forest Labs' motion to dismiss for failure to state a claim.

The district court held that the relator's scienter allegations were still inadequate even under *Schutte*'s subjective standard, quoting the Fourth Circuit's decision in *Rehab. Ass'n of Va., Inc. v. Kozlowski*, stating that "Medicaid statutes and regulations 'are among the most completely impenetrable texts within human experience.'"

The district court distinguished the allegations from the evidence in *Schutte*, reasoning that "[i]f described by way of the analogy in *Schutte*, CMS is like a police officer who, in purporting to clarify the meaning of 'reasonable,' says, 'A reasonable speed is a speed that

is reasonable,' and expects the driver to know what speed is too fast."

Finally, the court also held that the relator failed to show that the price reports at issue were false under the FCA. The relator has appealed the district court's order.

In sum, despite the outcome of the summary judgment motions in *Schutte* itself, *Sheldon* lends hope for defendants and suggests that regulatory ambiguity can still provide a basis for dismissal even after *Schutte*.

Blogs are 'news media' for purposes of public disclosure bar

The FCA's public disclosure bar (https://bit.ly/3CelF3g) is intended to prohibit opportunistic relators from filing *qui tam* actions based on information publicly disclosed from, among other things, "news media."

In *U.S. ex rel. Jacobs v. JP Morgan Chase Bank, N.A.*, the U.S. Court of Appeals for the Eleventh Circuit held that blog posts constitute "news media" for public disclosure bar purposes.

The relator, a foreclosure attorney, alleged that JP Morgan Chase, the successor in interest to Washington Mutual, submitted false claims to the government for loan servicing costs by forging loans with the signature stamp of a Washington Mutual employee long after the company's demise.

The U.S. District Court for the Southern District of Florida dismissed the lawsuit, finding that the complaint alleged substantially the same information as three blog posts pre-dating the lawsuit.

The Ninth Circuit affirmed, rejecting the relator's argument that blogs are not within the plain and ordinary meaning of "news media." The court explained that any publicly available website intended to disseminate information counts as news media, but stopped short of declaring that any "private or personal social media page" qualifies.

Ninth Circuit adopts *McDonnell Douglas* burden-shifting for retaliation cases

An FCA retaliation claim (https://bit.ly/3XbzV3O) is available to an employee who suffers adverse action "because of lawful acts done by the employee ... in furtherance of an [FCA] action ... ." To state a claim, an employee must establish the following three criteria:

(1) The employee engaged in conduct protected by the FCA.

(2) The conduct was known to his employer.

(3) The employee was discriminated against because of that conduct.

While the elements of a retaliation claim are settled, how to prove them is an open question. Courts agree that an employee must first make a prima facie showing of the elements but are divided on the burden employers must shoulder and whether it shifts back to employees.

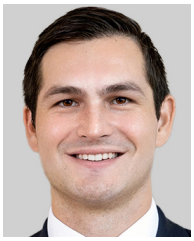
In *Mooney v. Fife*, the U.S. Court of Appeals for the Ninth Circuit adopted the *McDonnell Douglas* burden-shifting framework in an FCA retaliation case.

Under *McDonnell Douglas*, which applies to Title VII retaliation claims, an employee's prima facie showing shifts the burden to the employer to provide a non-discriminatory reason for its adverse action against the employee. If the employer proffers a legitimate explanation, the employee must prove that the employer's reason is pretextual.

The court explained that the FCA's "because of" language implies the but-for causation standard of *McDonnell Douglas* rather than the U.S. Court of Appeals for the Third Circuit's *Mt. Healthy* framework, under which the employee's prima facie showing requires the employer to prove that it would have taken the adverse action regardless of the employee's protected activity.

About the authors





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