JONES DAY

COMMENTARY

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D.C. Circuit Rejects Novel Theory of Reverse False Claims Liability for Reporting Violations

IN SHORT

The Situation: In *U.S. ex rel. Kasowitz Benson Torres LLP v. BASF Corporation*, the relator alleged reverse false claims liability under the False Claims Act ("FCA") for the defendants' purported failure to comply with reporting obligations under the Toxic Substances Control Act ("TSCA").

The Result: The D.C. Circuit held that the reporting violations alone could not support FCA liability through a reverse false claims theory—because the government had discretion over whether to impose financial penalties for the violations and, moreover, lacked a property interest in the unreported information.

Looking Ahead: The court's holding provides FCA defendants—whether in connection with the TSCA or otherwise—with additional support for limiting the scope of the FCA's reverse false claims provision, particularly as applied to government reporting requirements.

The prospect of a substantial bounty often motivates enterprising relators to assert novel theories of recovery under the FCA—including, increasingly, under the FCA's reverse false claims provision, which targets defendants who improperly retain government funds or property. Specifically, 31 U.S.C. § 3729(a)(1)(G) can impose liability on any defendant who "knowingly conceals or improperly avoids … an obligation to pay or transmit money or property to the Government." In *U.S. ex rel. Kasowitz Benson Torres LLP v. BASF Corporation*, the D.C. Circuit set forth important limits on the scope of this provision when affirming the dismissal of an FCA complaint.

In *Kasowitz*, the relator alleged that the defendants (four chemical manufacturers) violated the FCA by not disclosing information about certain chemicals' health risks to the Environmental Protection Agency ("EPA"). The nondisclosure allegedly breached reporting requirements under the TSCA, which the relator argued triggered civil penalties—and, in turn, reverse false claims liability for the avoidance of such penalties. The relator also argued for such liability on the different basis that the defendants' reporting infractions were breaches of "an obligation to … transmit … property to the Government." And the relator alleged that the defendants violated the FCA's conversion provision, which similarly prohibits retaining money or property due to the government. Recognizing all this to be a "novel theory of FCA liability," the D.C. Circuit rejected it emphatically.

Kasowitz should be a helpful case to FCA defendants facing reverse false claims theories. It gives defendants a strong defense to attempts to enforce government reporting requirements through the FCA.

First, the court held that it was a "non-starter" to hold the defendants liable under the FCA for having improperly avoided civil penalties. The court explained the penalties at issue were not mandatory and instead merely *could* have been—but, in fact, were not—imposed in the EPA's discretion. As the D.C. Circuit held, agreeing with other courts, "an unassessed potential

penalty for regulatory noncompliance does not constitute an obligation that gives rise to a viable FCA claim" for reverse false claims liability. Although the relator insisted that the TSCA's penalties were automatic, the D.C. Circuit disagreed. The court explained that the TSCA authorizes the EPA to "remit" any penalty—in other words, to "pardon or forgive it"—and also that the statute allows for a fine or imprisonment to be assessed "in addition to or *in lieu of any civil penalty*." In light of this, the court reasoned, even if reporting violations might have made the defendants "*liable* for a TSCA penalty," they were not "obligated to *pay* a TSCA penalty" until the EPA took action, and only the latter can give rise to reverse false claims liability.

Next, the D.C. Circuit considered whether a reporting violation could be actionable on reverse false claims grounds as a failure to transmit "property" due to the government. Again, the court held no. The court acknowledged that information can constitute property and, moreover, that the defendants' reporting obligations were indeed mandatory. But the court held that the government had only a *regulatory* interest—not a *property* interest—in the information at issue, because the government "does not acquire [this] information for its own economic benefit but to carry out its regulatory mission" (namely, regulating chemicals that present health or environmental risks). Holding otherwise, the D.C. Circuit explained, "would make any violation of countless reporting requirements actionable under the FCA," even though the FCA is not "a vehicle for punishing garden-variety … regulatory violations."

The D.C. Circuit also rejected the relator's conversion claim. The court explained that this claim could not stand without an obligation either (i) to pay money to the government or (ii) to "transmit any property interest" to the government. As noted, neither was present here.

Kasowitz should be a helpful case to FCA defendants facing reverse false claims theories. It gives defendants a strong defense to attempts to enforce government reporting requirements through the FCA. But the case may prove meaningful more broadly as well. For example, district courts have disagreed on when reverse false claims liability can attach to the breach of a Corporate Integrity Agreement ("CIA") with the Department of Health and Human Services Office of the Inspector General ("OIG"). *See, e.g.*, *U.S. ex rel. Boise v. Cephalon, Inc.*, No. 08-287, 2015 WL 4461793, at *4–7 (E.D. Pa. July 21, 2015). *Kasowitz* could support an argument that the OIG must choose to impose penalties for a CIA violation before FCA liability can arise. More generally, although creative relators will surely continue to craft new attempts to leverage the FCA, *Kasowitz* shows how courts are and should be mindful of the FCA's limits.

TWO KEY TAKEAWAYS

1. Reverse false claims liability is not appropriate for regulatory breaches that carry only discretionary penalties.
2. Violating a federal reporting requirement does not violate the FCA as a failure to transmit "property" due to the government.

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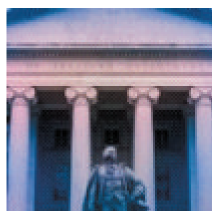
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