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D.C. Circuit: No FCA Liability for Unassessed Regulatory Penalties

Kasowitz *decision precludes use of the False Claims Act to usurp regulators' role and collect bounties for never-adjudicated violations.*

The United States Court of Appeals for the D.C. Circuit issued a decision in *United States ex rel. Kasowitz v. BASF et al.*, No. 18-7123, on July 5, 2019, rejecting relator Kasowitz Benson Torres LLP's (Kasowitz), two "novel" theories of False Claims Act (FCA) liability premised on defendants' alleged reporting violations under the Toxic Substances Control Act (TSCA).[1] It was "undisputed" that the Environmental Protection Agency (EPA), which administers TSCA, had never assessed penalties for the alleged violations. Accordingly, Kasowitz could not use the FCA as a vehicle to usurp EPA's role and establish that defendants owed the penalties and further that defendants defrauded the government by failing to pay the penalties.[2]

The D.C. Circuit's decision powerfully rebukes attempts by FCA relators to circumvent regulators by filing whistleblower lawsuits in an attempt to police perceived regulatory violations and receive an FCA windfall. Companies doing business with the government should be mindful, however, that there remain certain contexts — both regulatory and contractual — in which FCA liability may attach for failing to remit penalties to the government.

United States ex rel. Kasowitz v. BASF et al.

The law firm Kasowitz filed an FCA suit in its own name, entitling the firm to keep up to 30% of any recoveries. The firm alleged that several large chemical manufacturers defrauded the government by failing to report substantial risk information under TSCA and by neglecting to pay penalties arising out of that failure. Kasowitz pressed several theories but focused on two claims under the FCA's so-called "reverse false claims" provision:[3] First, Kasowitz claimed that under TSCA the alleged failure to provide EPA "information which reasonably supports the conclusion that [a] substance or mixture presents a substantial risk of injury to health or the environment"[4] subjected defendants to automatic and immediate liability for TSCA civil penalties.[5] Because defendants had never paid these penalties, they were allegedly "concealing" or "avoiding" their obligation to transmit money to the government within the meaning of the reverse false claims provision. Second, Kasowitz claimed that the information concerning "substantial risk" to health or the environment constitutes *property* and that defendants were liable for "avoiding" the obligation to transmit property to the government within the meaning of the reverse false claims provision.

Latham & Watkins, together with co-counsel, successfully obtained dismissal on behalf of the chemical manufacturers.[6] Following the district court's denial of the relator's motion for reconsideration, Kasowitz appealed to the D.C. Circuit.

The D.C. Circuit's opinion resoundingly affirmed the dismissal, opening with the rebuke: "'Pecunia non satiat avaritiam, sed inritat'" translates from Latin to English as 'money doesn't satisfy greed; it stimulates it.' This case teaches that money also stimulates legal artifice."[7] The court then proceeded to conclusively reject both of Kasowitz's theories of reverse FCA liability. First, the court held that because TSCA "does not create an obligation to pay a civil penalty at the moment of a statutory violation," there was no "obligation" for the defendants to conceal or avoid.[8] Second, the property-transmission theory failed because Kasowitz identified "no precedent that recognizes as a property right a government agency's statutory entitlement to receive information from a regulated party."[9] "Accordingly, TSCA's command to 'inform' the EPA of substantial risk information is not an obligation to 'transmit' an interest in 'property.'"[10]

The court also noted that adopting Kasowitz's property-based theory "would make any violation of countless reporting requirements actionable under the FCA" in a way that impermissibly and "fundamentally changes the relationship between the FCA and garden variety regulatory violations."[11]

Takeaways

The D.C. Circuit's rejection of Kasowitz's expansive theories leads to several notable implications:

- First, had Kasowitz's theories succeeded, the floodgates would have opened to myriad FCA lawsuits similarly predicated on the failure to pay regulatory penalties or remit information to the government. Litigating these issues in the context of an FCA suit would have encroached on the administrative discretion that has existed for EPA and other agencies to assess penalties.

- Second, the D.C. Circuit's strong rebuke and comprehensive reasoning will provide defendants a strong defense to future attempts by relators to use government reporting requirements or regulatory penalty provisions as bases for FCA suits. The court, in fact, suggested Kazowitz's theories bordered on frivolous by noting that the FCA's "substantial bounty" for prevailing private parties "stimulates legal artifice." With this case, the D.C. Circuit joins three other Circuits — the Third, Fifth, and Tenth — that have rejected similar FCA theories for unassessed legal violations.[12]

- Third, this case may prove meaningful outside the context of government penalty provisions and reporting requirements. Similar reverse FCA theories have been successful in other contexts, such as for failure to pay customs duties or comply with settlement agreements. For example, in *United States ex rel. Customs Fraud Investigations, LLC v. Victaulic Co.,* the Third Circuit concluded that failure to pay customs duties on mismarked goods can give rise to an FCA claim.[13] This conclusion turned on the statutory language providing that payment for the relevant violation "shall not be remitted wholly or in part nor shall payment thereof be avoidable for any cause."[14] Courts have also wrestled with whether failing to pay a fine under a Corporate Integrity Agreement (CIA) or settlement agreement constitutes an "obligation" under the reverse FCA.[15] The *Kasowitz* reasoning can be used to counter FCA claims based on discretionary penalties or information reporting in these contexts as well.

- Fourth, the *Kasowitz* court's observation that there is "no precedent that recognizes as a property right a government agency's statutory entitlement to receive information from a regulated party"[16] may have implications beyond the FCA. For example, this holding may provide a defense to government enforcement actions under the mail and wire fraud statutes and other legal frameworks.

Latham & Watkins will continue to monitor developments pertaining to FCA liability and whistleblower claims.

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Endnotes

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[1] *See United States ex rel. Kasowitz v. BASF et al.*, 929 F.3d 721 (D.C. Cir. 2019).

[2] *Id.* at 725.

[3] This provision establishes liability for "any person who . . . knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly

and improperly avoids or decreases an obligation to pay or transmit money or property to the Government." 31 U.S.C. § 3729(a)(1)(G).

[4] 15 U.S.C. § 2607(e).

[5] *Id.* § 2615.

[6] *See United States ex rel. Kasowitz Benson Torres LLP v. BASF Corporation et al.*, 285 F. Supp. 3d 44 (D.D.C. 2017).

[7] 929 F.3d at 723.

[8] *Id.* at 726.

[9] *Id.* at 727.

[10] *Id.*

[11] *Id.* at 728 (alterations omitted).

[12] *See United States ex rel. Petras v. Simparel*, 857 F.3d 497, 507 (3d Cir. 2017) (concluding no FCA liability for failure to pay dividends to government under loan agreement); *United States ex rel. Barrick v. Parker-Migliorini*, 878 F.3d 1224, 1233 (10th Cir. 2017) (concluding no FCA liability for failure to pay regulatory export fee); *United States ex rel. Simoneaux v. E.I. DuPont de Nemours*, 843 F.3d 1033, 1040 (5th Cir. 2016) (concluding no FCA liability for failure to pay unassessed TSCA penalties arising out of same conduct as in *Kasowitz*).

[13] 839 F.3d 242 (3d Cir 2016).

[14] *Id.* at 246.

[15] *Compare United States ex rel. Boise v. Cephalon, Inc*., No. 08-287, 2015 WL 4461793, at *4–7 (E.D. Pa. July 21, 2015) (violation of CIA can give rise to FCA liability), *with United States ex rel. Booker v. Pfizer, Inc.*, 9 F. Supp. 3d 34 (D. Mass. 2014) (similarly worded CIA cannot give rise to FCA liability due to agency discretion in demanding penalties).

[16] 929 F.3d at 727.