

False Claims Act Cases Are Piled Up at SCOTUS: What to Watch

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Legal fees, pleading requirements and disputes over timing—the False Claims Act is providing the U.S. Supreme Court with myriad issues as companies and whistleblowers pitch the justices on cases to take for the new term. Time will tell if the justices are willing to bite.

At least four False Claims Act disputes are pending before the high court—creating a good chance the law will generate a case or two for the justices, who start their fall term on Oct. 2. The court **has shown an interest** in exploring the contours of the False Claims Act, a decades-old law through which the U.S. Justice Department **annually recovers** billions of dollars in settlements and judgments.

The False Claim Act’s financial penalties for company violations are stiff. In August 2016, the **civil penalties nearly doubled** to between \$10,781.40 and \$21,562.80 per claim, plus three times the amount of damages that the federal government sustains because of the false claim. The pending petitions each have important implications for companies doing business with the government.

Here’s a snapshot of a handful of pending FCA cases and a significant, but different type of **whistleblower issue** under the Dodd-Frank Act that the justices have already agreed to decide.

In U.S. ex rel. Harper v. Muskingum Watershed Conservancy District, a “reverse false claim” is center stage. The whistleblower asks whether he had to plead that the water district subjectively knew that it was violating the terms of a land deed from the government and had not committed a mistake of law. Thomas Connors of Black McCuskey Souers & Arbaugh in Canton, Ohio, represents Leatra Harper; Jennifer Armstrong of Cleveland’s McDonald Hopkins is counsel to the water district.

Victaulic Co. v. United States ex rel. Customs Fraud Investigations challenges the U.S. Court of Appeals for the Third Circuit’s interpretation of a civil procedure rule that requires a whistleblower’s complaint to “state with particularity the circumstances constituting fraud.” Victaulic’s counsel is Thomas Hill of Pillsbury Winthrop Shaw Pittman. Customs Fraud is represented by Jonathan Tycko of Washington’s Tycko & Zavareei. The National Association of Manufacturers and the American Association of Exporters and Importers filed amicus briefs for Victaulic. “NAM has a particular concern about the proliferation of unfounded qui tam FCA cases, the number of which has increased dramatically over just the past few years,” Douglas

Baruch of Fried, Frank, Harris, Shriver & Jacobson **wrote in the brief for** the manufacturer trade association.

The statute of limitations under the act is the focus of U.S. ex rel. Jackson v. University of North Texas. The whistleblower here—a former student athlete—asks whether, in cases where the United States has not intervened, he can take advantage of a provision that extends the limitations period for certain suits brought within three years after material facts are or should have been discovered by “by the official of the United States charged with responsibility to act in the circumstances.” Roland Jackson’s high court counsel is Virginia Hammerle of Hammerle Finley Law Firm in Lewisville, Texas. The university is represented by Kyle Wolfe of the Texas Attorney General’s Office, and John Boland of McGuireWoods represents JP Morgan Chase Bank.

U.S. ex rel. Grynberg v. Agave Energy Co. arrives at the high court after two decades of litigation. The issue before the justices is whether the lower court had authority to award \$17 million in legal fees to the defendant after deciding that the whistleblower’s claims were barred by a certain provision that can block a suit from someone who was not the first to bring the claims. Ronald Barkley of Denver’s Anderson Barkley represents Jack Grynberg. Michael Beatty of Denver’s Beatty & Wozniak is counsel to Agave.

There’s another closely watched whistleblower case, this one coming under the Dodd-Frank Act. *Digital Realty Trust v. Somers* **asks the high court** whether the anti-retaliation provision in the act applies to individuals who have not reported alleged misconduct to the U.S. Securities and Exchange Commission. Business advocates contend that such a person falls outside the Dodd-Frank Act’s definition of “whistleblower.” The case does not yet have an argument date. Digital Realty is represented by Kannon Shanmugam of Williams & Connolly. Daniel Geysler of Los Angeles’ Stris & Maher is counsel for Paul Somers. The U.S. Chamber of Commerce and the Cato Institute are among other pro-business groups supporting Digital Realty. “The language of the act is clear that only a ‘whistleblower’—defined in the statute as an individual who provides information “to the commission”—is protected by the anti-retaliation provisions of the act,” Proskauer Rose’s Steven Pearlman **wrote in the Chamber’s amicus brief.**