What A Justice Gorsuch Might Portend For FCA Enforcement

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On Jan. 31, 2017, President Donald Trump nominated Judge Neil Gorsuch to the U.S. Supreme Court. Currently a judge on the United States Court of Appeals for the Tenth Circuit, Judge Gorsuch has been described as an originalist with a judicial philosophy similar to that of Justice Antonin Scalia, whose vacancy in the court he has been nominated to fill. While Judge Gorsuch has participated in only a few appeals of False Claims Act cases, his views regarding the appropriateness of deference to agency interpretations (or lack thereof) suggest that companies and individuals subjected to False Claims Act litigation based on disputed interpretations of agency regulations may find a sympathetic ear.

Judge Gorsuch sat on a panel in appeals of four False Claims Act cases, authoring an opinion in one of them. In U.S. ex rel. Boothe v. Sun Healthcare Group Inc., Judge Gorsuch (writing for the unanimous panel) affirmed the district court's dismissal of certain of the relator's claims under the public disclosure bar on the ground that a relator's claim is deemed to be "based upon" a public disclosure if it is "supported by" and "even partly based" on prior disclosures. Judge Gorsuch noted that this standard was based on "an analysis of the statute's plain language and with our obligation to construe narrowly statutes conferring our jurisdiction firmly in mind."

In Brown v. Sherrod, Judge Gorsuch joined the panel opinion holding that the consent of the attorney general to dismiss a False Claims Act case is required only where the relator seeks voluntary dismissal of an FCA case, and not when a complaint is dismissed involuntarily due to a motion to dismiss. In U.S. ex rel. Wickliffe v. EMC Corp., he joined the panel opinion affirming the dismissal of a qui tam complaint based on the government's motion to dismiss the complaint over the relator's objection. The court upheld the government's dismissal under 31 U.S.C. 3730(c)(2)(A), declining to opine on the relator's alternative argument that the first to file bar did not apply because the prior qui tam complaint did not meet the particularity requirements of Rule 9(b).

Last year, Judge Gorsuch was on the panel that issued the decision in U.S. ex rel. Smith v. The Boeing Company. In Smith, the panel upheld the district court's grant of summary judgment in favor of the defendants because the relators failed to establish that the defendants knowingly submitted false claims to the government in connection with airplanes that they had certified met Federal Aviation Administration regulations. Specifically, the court held that "at best, the evidence shows conflicting opinions" regarding the meaning of the provision under which the defendants allegedly submitted a false certification, and, without more, this was not enough to establish the requisite scienter under the False Claims Act.

Though Judge Gorsuch did not author the panel's opinion in Smith, the opinion has echoes of his now widely reported skepticism of voluminous agency regulations and his suggestion that the Supreme Court's Chevron doctrine, under which courts defer to agency interpretations of statutes so long as they are "reasonable," be revisited.

For example, in Caring Hearts Personal Home Services Inc. v. Burwell, Judge Gorsuch, writing for the panel, criticized a Centers for Medicare and Medicaid Services enforcement action against a provider. In so doing, he voiced concerns that echo those of health care providers subjected to "implied certification" FCA claims based on violation of any myriad of health care regulations: "Medicare is, to say the least, a complicated program. The Centers for Medicare & Medicaid Services (CMS) estimates that it issues literally thousands of new or revised guidance documents (not pages) every single year, guidance providers must follow exactingly if they wish to provide health care services to the elderly and disabled under Medicare's umbrella. Currently, about 37,000 separate guidance documents can be found on CMS's website — and even that doesn't purport to be a complete inventory."

In another recent case, Gutierrez-Brizuela v. Lynch, Judge Gorsuch wrote a lengthy concurring opinion arguing for reconsideration of the Chevron doctrine all together, arguing that "[t]ransferring the job of saying what the law is from the judiciary to the executive unsurprisingly invites the very sort of due process (fair notice) and equal protection concerns the framers knew would arise if the political branches intruded on judicial functions." Among his stated examples of the potentially harmful impacts of Chevron are the significant penalties that agencies can invoke even for civil violations, which are sometimes difficult to distinguish from criminal penalties to which Chevron does not apply.

While these latter opinions do not address the False Claims Act specifically, Judge Gorsuch's concerns about agency interpretations of law, and their impact on regulated entities, may foreshadow a disinclination to extend False Claims Act liability to violations of certain agency regulations. Indeed, as indicated by his opinions in Caring Hearts and Gutierrez-Brizuela, one could expect a Justice Gorsuch to prefer that judges (rather than executive agencies) decide whether violations of certain regulations or contractual provisions would be so significant as to rise to the level of conduct that could violate the False Claims Act.

In last year's Universal Health Services Inc v. United States ex rel. Escobar decision, the Supreme Court expressed concerns in the False Claims Act context similar to those that have been recently articulated by Judge Gorsuch, noting in its opinion the application of "thousands of complex statutory and regulatory provisions" to those who do business with the government. Writing for a unanimous court, Justice Clarence Thomas authored an opinion which declined to rely solely on agency designations of certain regulatory or contractual provisions as "conditions of payment" in order to determine whether knowing violations of those provisions could violate the False Claims Act. As the court stated, "[w]hat matters is not the label the Government attaches to a requirement, but whether the defendant knowingly violated a requirement that the defendant knows is material to the Government's payment decision." Whether a Justice Gorsuch would agree that Escobar sufficiently limits the scope of potential False Claims Act liability for those to whom a myriad of regulations and provisions apply remains to be seen, and his views on these issues will be a subject for further discussion should a Supreme Court containing Justice Gorsuch be presented with a case requiring further clarification of Escobar.

—By Scott Stein and Meredith Toole Reiter, Sidley Austin LLP

Scott Stein is a partner in Sidley Austin's Chicago office. Meredith Toole Reiter is an

associate in the firm's Chicago office and a former trial attorney in the Civil Division, Fraud Section of the United States Department of Justice.

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