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“Claims” Under the FCA, §1983 Claim Denials on Failure-to-Exhaust Grounds, and Limits to FSIA’s Expropriation Exception - SCOTUS Today

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The U.S. Supreme Court decided three cases today, with one of particular interest to many readers of this blog. So, let’s start with that one.

Wisconsin Bell v. United States ex rel. Heath is a suit brought by a *qui tam* relator under the federal False Claims Act (FCA), which imposes civil liability on any person who “knowingly presents, or causes to be presented, a false or fraudulent claim” as statutorily defined. 31 U. S. C. §3729(a)(1)(A). The issue presented is a common one in FCA litigation, namely, what is a claim? More precisely, in the context of the case, the question is what level of participation by the government in the actual payment is required to demonstrate an actionable claim by the United States. The answer, which won’t surprise many FCA practitioners, is “not much.”

The case itself concerned the Schools and Libraries (E-Rate) Program of the Universal Service Fund, established under the Telecommunications Act of 1996, which subsidizes internet and other telecommunication services for schools and libraries throughout the country. The program is financed by payments by telecommunications carriers into a fund that is administered by a private company, which collects and distributes the money pursuant to regulations set forth by the Federal Communications Commission (FCC). Those regulations require that carriers apply a kind of most-favored-nations rule, limiting them to charging the “lowest corresponding price” that would be charged by the carriers to “similarly situated” non-residential customers. Under this regime, a school pays the carrier a discounted price, and the carrier can get reimbursement for the remainder of the base price from the fund. The school could also pay the full, non-discounted price to the carrier itself and be reimbursed by the fund.

The relator, an auditor of telecommunications bills, asserted that Wisconsin Bell defrauded the E-Rate program out of millions of dollars by consistently overcharging schools above the “lowest corresponding price.” He argued that these violations led to reimbursement rates higher than the program should have paid. His contention is that a request for E-Rate reimbursement qualified as a “claim,” a classification that requires the government to have provided some portion of the money sought. Wisconsin Bell moved to dismiss, arguing that there could be no “claim” here because the money at issue all came from private carriers and was administered completely by a private corporation.

Affirming the U.S. District Court for the Eastern District of Wisconsin, the U.S. Court of Appeals for the Seventh Circuit rejected Wisconsin Bell's argument, holding that there was a viable claim because the government provided all the money as part of establishing the fund. Less metaphysically, it also held that the government actually provided some "portion" of E-Rate funding by depositing more than $100 million directly from the U.S. Treasury into the fund.

Justice Kagan delivered the unanimous opinion of the Supreme Court, affirming the Seventh Circuit on the narrower ground that "the E-Rate reimbursement requests at issue are 'claims' under the FCA because the Government 'provided'(at a minimum) a 'portion' of the money applied for by transferring more than $100 million from the Treasury into the Fund." It is important to recognize that this amount was quite separate from the funds involved in the core program at issue. Instead, it constituted delinquent contributions collected by the FCC and the U.S. Department of the Treasury, as well as civil settlements and criminal restitution payments made to the U.S. Department of Justice in response to wrongdoing in the program. This nonpassive role by the government was enough to satisfy the Court that the money was sought through an actionable "claim."

Rather blithely, Justice Kagan analogizes these government transfers to "most Government spending: Money usually comes to the Government from private parties, and it then usually goes out to the broader community to fund programs and activities. That conclusion is enough to enable Heath's FCA suit to proceed."

This conclusion suggests that quibbling about what constitutes a "claim," where government participation in payment is peripheral, is unlikely to provide an effective avenue for defending FCA lawsuits. But wait! Before closing the discussion, we must turn to the concurring opinion of Justice Thomas, who was joined by Justice Kavanaugh and, in part, by Justice Alito. They note that the Court has left open the questions of whether the government actually provides the money that requires private carriers to contribute to the E-Rate program and whether the program's administrator is an agent of the United States. Thomas's suggestion, in attempting to reconcile various Circuit Court opinions as to the fund, is that an FCA claim must be based upon a clear nexus with government involvement. Thomas then goes on to describe a range of cases where, although the arrangements at issue might be prescribed by the government, the absence of government money would be fatal to holding that there was a justiciable FCA claim. In other words, the kind of government payments into the fund that we see in the instant case are the likely minimum that the Court would countenance.

Perhaps a bigger storm warning is the additional concurrence of Justice Kavanaugh, joined by Justice Thomas, in noting that today's opinion is a narrow one. However, the FCA's *qui tam* provisions raise substantial questions under Article II of the Constitution. The Court has never ruled squarely as to Article II, though it has upheld *qui tam* cases as assignments to private parties of claims owned by the government, something like commercial relationships. Two Justices augured that potential unresolved constitutional challenges to the FCA's *qui tam* regime necessarily will mean that any competent counsel will raise the point in any future FCA case not brought by the government alone. But note that Justice Alito did not join Kavanaugh's opinion, though he did in the Thomas concurrence. Nor did any other conservative Justice. It still takes four to grant cert. But the future is a bit hazier, thanks to Justice Kavanaugh.

Justice Kavanaugh finds himself on the opposite side of Justice Thomas in the case of ***Williams v. Reed.*** Writing for himself, the Chief Justice, and Justices Sotomayor, Kagan, and Jackson, Justice Kavanaugh ruled in favor of a group of unemployed workers who contended that the Alabama Department of Labor unlawfully delayed processing their state unemployment benefits claims. They

had sued in state court under 42 U. S. C. §1983, raising due process and federal statutory arguments, attempting to get their claims processed more quickly. The Alabama Secretary of Labor argued that these claims should be dismissed for lack of jurisdiction because the claimants had not satisfied the state exhaustion of remedies requirements.

Holding against the Secretary, the Court's majority opined that where a state court's application of a state exhaustion requirement effectively immunizes state officials from §1983 claims challenging delays in the administrative process, state courts may not deny those §1983 claims on failure-to-exhaust grounds. Citing several analogous precedents, the majority decided what I submit looks like a garden-variety supremacy case. After all, as Kavanaugh notes, the "Court has long held that 'a state law that immunizes government conduct otherwise subject to suit under §1983 is preempted, even where the federal civil rights litigation takes place in state court.'" *See Felder v. Casey*, 487 U. S. 131 (1988).

Justice Thomas and his conservative allies didn't see it that way at all. Quoting himself in dissent in another case, Justice Thomas asserts that "[o]ur federal system gives States 'plenary authority to decide whether their local courts will have subject-matter jurisdiction over federal causes of action.' *Haywood v. Drown*, 556 U. S. 729, 743 (2009) (THOMAS, J., dissenting)." Well, he didn't persuade a majority then, and he didn't do so now in this §1983 case.

Finally, in ***Republic of Hungary v. Simon***, a unanimous Court, per Justice Sotomayor, considered the provision of the Foreign Sovereign Immunities Act of 1976 (FSIA) that provides foreign states with presumptive immunity from suit in the United States. 28 U. S. C. §1604. That provision has an expropriation exception that permits claims when "rights in property taken in violation of international law are in issue" and either the property itself or any property "exchanged for" the expropriated property has a commercial nexus to the United States. 28 U. S. C. §1605(a)(3).

The *Simon* case involved a suit by Jewish survivors of the Hungarian Holocaust and their heirs against Hungary and its national railway, MÁV-csoport, in federal court, seeking damages for property allegedly seized during World War II. They alleged that the expropriated property was liquidated and the proceeds commingled with other government funds that were used in connection with commercial activities in the United States. The lower courts determined that the "commingling theory" satisfied the commercial nexus requirement in §1605(a)(3) and that requiring the plaintiffs to trace the particular funds from the sale of their specific expropriated property to the United States would make the exception a "nullity."

The Supreme Court didn't quite agree, holding that alleging the commingling of funds alone cannot satisfy the commercial nexus requirement of the FSIA's expropriation exception. "Instead, the exception requires plaintiffs to trace either the specific expropriated property itself or 'any property exchanged for such property' to the United States (or to the possession of a foreign state instrumentally engaged in United States commercial activity)."

The three cases decided today bring the total decisions of the term to eight. Stay tuned because a torrent might be on the horizon.

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