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Profile

# The Sidley Atty Battling FCA Scienter Standard At High Court



By [Daniel Wilson](#) · [Listen to article](#)

Law360 (April 14, 2023, 9:28 PM EDT) -- Carter Phillips of Sidley Austin LLP is set to argue for the 90th time before the U.S. Supreme Court on Tuesday, in a case that will be his first False Claims Act dispute at the court and the most high-profile FCA clash since 2016.



Carter Phillips

Going up against Sparacino PLLC's Tejinder Singh, a trailblazing lawyer for whistleblowers in the case, Phillips' goal is to convince the justices to adopt a new definition of scienter, or what counts as acting knowingly under the FCA, for his clients Safeway Inc. and SuperValu Inc. The retailers are accused of overcharging Medicare and Medicaid for generic drugs; the Seventh Circuit previously found, in a pair of novel rulings, that they had made an "objectively reasonable" interpretation of an ambiguous regulation.

Having to get quickly up to speed on a previously unknown topic is frequent challenge for appellate advocates, and Phillips' approach in this case is a combination of intense study of the relevant underlying materials and leaning on the dozens of FCA lawyers at his firm, especially those with expertise in the health care regulatory issues that underpin the case, he said.

"As much as my practice is extremely broad, the expertise in the firm is equally broad ... it's extremely helpful to spend time talking to them. They understand and can answer the questions as you go along," he said. "The flip side is, I still have to know [the issues] at least as well as the justices, so it comes with a lot of reading."

Phillips was unable to discuss the specifics of the case, but he spoke with Law360 about his broader views on the importance of oral argument in getting a favorable outcome for a client, how his approach to the process has changed throughout his career and how he has juggled his appellate work with a leadership role at his firm.

## The Importance of Oral Argument

The justices over the years have shown varying degrees of apparent, or some cases stated, belief in the importance of oral argument in deciding cases.

Justice Clarence Thomas, who famously maintained his silence in oral arguments for more than a decade before becoming more talkative in recent years, has said multiple times at public events that he believed his colleagues talked too much and that most of what he needed to know about cases came through briefing. Oral argument was only useful for "a few questions around the edges," he said at a University of Kentucky event in 2012.

But for Phillips, oral argument being part of every case before the high court means "you have to assume it's extremely important and go forward on that assumption," he said.

While it is "pretty unrealistic" to think that an oral argument will flip the vote of a fifth justice who goes into a tight case inclined to vote the other way, an effective argument can still make a difference in terms of helping shape the scope and direction of the opinion that ultimately comes out of the court, Phillips said.

"I've always thought that oral argument helps the court in trying to figure out the limits of the rules that it's working with. ... You can either make them more comfortable, or less comfortable, with going in one direction or the other, depending on how you argue," Phillips said. "Sometimes there are losses where the client is actually in much better shape as a consequence of how the opinion was written."

Mark Rosenbaum, director of the Opportunity Under Law program at pro bono firm Public Counsel, has also argued several times before the high court. He touted the significance of Phillips' oral advocacy in helping to secure a landmark Sixth Circuit ruling in a case, Gary B. v. Snyder, that Phillips took on pro bono on behalf of Detroit public school students, working alongside Rosenbaum and several other attorneys.

In that case, challenging poor conditions at Detroit schools, the circuit court in April 2020 recognized for the first time a constitutional right of access to literacy under the due process clause, ultimately leading to a related settlement with the state of Michigan a month later.

Phillips treated the case "as if there were no other case on his docket," devoting an "enormous amount of time" and bringing "a brilliance and a vision that respected the rights of these Detroit school kids," presenting "a narrative that I think was irresistible to the court," Rosenbaum told Law360.

"The arguments we put forward, they could not have been more thoughtfully and elegantly presented," Rosenbaum said. "He's ... among the very, very, very best lawyers in this country, and he treated this case like a seasoned civil rights pro. He completely mastered the record, and the novel constitutional theories that we were presenting, and by the time he completed his argument, you would have had no idea that he came in just for the Sixth Circuit argument."

## Changing His Approach

Phillips, who clerked for then-Chief Justice Warren Burger before starting his appellate career with the U.S. Solicitor General's Office, first argued before the high court in 1982, representing the government several times before helping to establish Sidley's then-novel Supreme Court and appellate practice in 1985. He has since gone on to argue dozens of cases, appearing before every circuit court in the U.S.

In the early days of Phillips' career, questions from the high court bench were "pretty sporadic." Pre-argument moot courts weren't encouraged by the solicitor general's office, so mootings was not part of his routine when preparing for oral argument, and he didn't pick up the practice when he moved to Sidley.

"By the time I was in private practice and started arguing cases, I'd already argued nine cases without doing a moot court, so it didn't seem all that natural to change the style of preparation for me," Phillips said.

But questioning at the high court has gotten more intense over the years, culminating in the court's recent practice where nominally half-hour oral arguments have been frequently stretched out much longer, until the justices exhaust their questions.

As a result, Phillips recently brought moot court into his preparation process for oral argument, both to simulate the potential questions he may face and also to "take question after question after question, just as a matter of endurance," he said.

The longer recent argument sessions haven't necessarily led to more unusual questions, but they have given the justices the ability to "drill down" on the questions they are interested in, a "significant change" that needs to be accounted for, according to Phillips.

"Where you might have [previously] been able ... to provide an answer and move on, just because the time wouldn't allow you that much else to do or wouldn't allow the justices to come back at you, now, if they're not satisfied with the answer -- and even if the argument itself moves in a particular way -- there's still the opportunity at the back end for each of the justices to ask whatever question they want, so they can always come back to that point," he said.

## Juggling Management and Legal Roles

For six years between 2012 and 2018, Phillips led Sidley Austin's executive committee, putting him at the top of a firm with roughly \$2 billion in annual revenues, hundreds of attorneys and thousands of professional staff while continuing to maintain an active appellate practice.

The only way to make that dual role work was to be comfortable in delegating work to other managers, as well as encouraging colleagues to make sure that any issues brought to him were already teed up "more effectively than they might otherwise feel the need to," Phillips said.

"On the flip side, the good news for my Supreme Court practice is that the firm has long had a very deep bench of extremely talented and experienced Supreme Court lawyers," he said. "So it's not nearly as difficult to get ready [for oral argument], because the quality of the briefing is invariably extremely good. I think there are 16 former Supreme Court clerks on my floor, so it's pretty easy to go find somebody to chat about a case with and work through any questions that I have as I'm getting ready."

Larry Barden, a recently retired Sidley partner who previously chaired its management committee, told Law360 that Phillips brought his advocacy skills into his leadership role. As a leader, he keenly understood the talents of people at the firm and worked to lead by both example and persuasion, Barden said.

"Carter is a person who people find it easy to follow," Barden said. "And that's because he's got a persuasive style about him, obviously fine-tuned standing in front of the justices of the Supreme Court. But he is a man who is very pragmatic, very thoughtful, very well-prepared, and is one who can state a position and a view, and do it in a way that people find hard to argue with."

"He's someone, I think, people have incredible, deep respect for," Barden added.

The cases are U.S. ex rel. Proctor v. Safeway Inc., case number 22-111, and U.S. ex rel. Schutte et al. v. SuperValu Inc. et al., case number 21-1326, each before the Supreme Court of the United States.

--Editing by Alanna Weissman.

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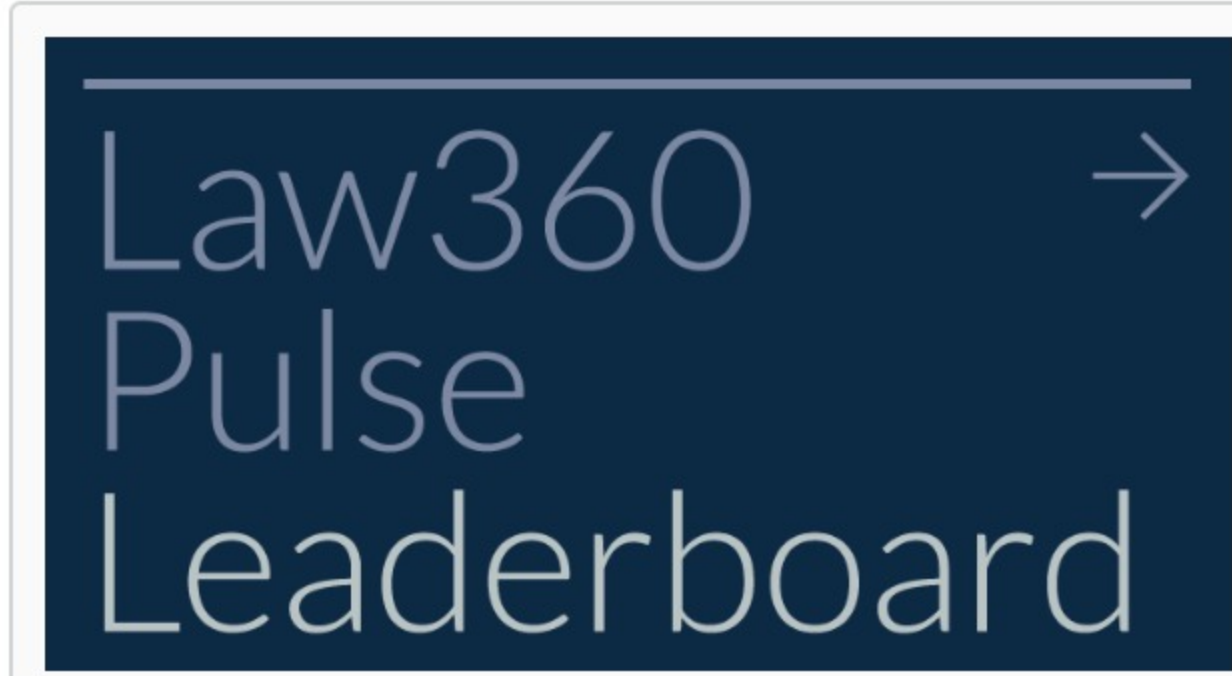
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