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EXPERT ANALYSIS

The Continued Expansion of False Claims Act Enforcement

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In the past two years, the False Claims Act, 31 U.S.C. § 3729, has continued to serve as a critical weapon in the government's fight to protect its funds from fraudulent and false claims. In 2014 alone, the government recovered a record-breaking $5.7 billion in settlements and judgments in FCA cases, following the trend of increasing recoveries under the statute in the last several years.[1]

Of this $5.7 billion in FCA recoveries, $3.1 billion came from the financial industry, $2.3 billion came from programs such as Medicare and Medicaid, and the rest came from federal procurements and other federal programs.

More than half the total recovered resulted from *qui tam* actions filed by whistleblowers, who are also known as relators. Over 700 *qui tam* cases were brought in 2014, producing a total recovery of nearly $3 billion.

The first half of 2015 has followed suit. In just the first six months of the calendar year, FCA actions have generated more than $1.96 billion for the government and relators.[2]

As in 2014, many of this year's recovery efforts have focused on Medicare and Medicaid programs, as well as federal procurement cases. Recoveries from financial institutions have not been featured as prominently thus far. There is, however, further evidence of the government's steadfast commitment to eliminating fraud in federal programs and contracts.

In September 2014 the Department of Justice announced that its criminal division would review all *qui tam* complaints to determine whether to initiate parallel criminal investigations.

Limitations on FCA liability for contractors continued to erode in 2015." The Supreme Court's much anticipated decision in *Kellogg Brown & Root Services Inc. et al. v. United States ex rel. Carter*, 135 S. Ct. 1970 (2015), restored some confidence in the FCA's statute of limitations.

However, the high court and several federal appeals courts also rendered rulings that could lead to an even greater number of lawsuits brought by relators, further chipping away at the bars to recovery and making it easier for individuals to file claims against their employers or former employers.

In addition, this year the Supreme Court has been asked to weigh in on the hotly contested debate over the "implied certification" theory of liability. If blessed by the court, this theory could lead to a dramatic rise in FCA actions.

2 RULINGS MAKE IT EASIER TO BRING FCA ACTIONS

One area where federal appeals courts have rolled back some protections against FCA actions involves the public disclosure bar. The bar protects contractors from FCA allegations that are similar to information that has been disclosed in public sources, unless the relator is an original source of the information.

Specifically, the public disclosure bar strips courts of jurisdiction over FCA cases where the claim is substantially the same as allegations that were publicly disclosed "(i) in a federal criminal, civil, or administrative hearing in which the government or its agent is a party; (ii) in a congressional, Government Accountability Office, or other federal report, hearing, audit, or investigation; or (iii) from the news media, unless the action is brought by the attorney general or the person bringing the action is an original source of the information."[3]

This year, both the 4th and 6th U.S. Circuit Courts of Appeal weighed in on the scope of the public disclosure bar. Both courts rendered decisions that narrowed the protections provided, thereby making it more difficult for contractors to use the bar as a defense against a false claim allegation.

In *United States ex rel. Wilson v. Graham County Soil & Water Conservation District et al.*, 777 F.3d 691 (4th Cir. 2015), Karen T. Wilson, a part-time secretary at a federal contractor, became suspicious of her company's conduct under a federal program for storm relief. Wilson believed that fraud was taking place in the implementation of the program. Based on her suspicions, she reported her allegations to two government officials. The government later released reports that detailed fraudulent conduct by Wilson's company.

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Wilson later filed a *qui tam* action in the U.S. District Court for the Western District of North Carolina. After the matter spent years going from the District Court to the Supreme Court and back down again, the District Court concluded that the public disclosure bar stripped it of jurisdiction. Specifically, the District Court concluded that the government reports constituted public disclosures, that Wilson's claims were based on those reports and that she was not the original source of the information.

On appeal, the 4th Circuit disagreed. In reviewing the District Court's decision, the 4th Circuit concluded that the government reports at issue did not constitute public disclosures because they were not "distributed to, or intended to be distributed to, the public."

Rather, the distribution of the reports was limited to certain government entities and was not made to the public at large. In so holding, the 4th Circuit expressly rejected a prior holding by the 7th Circuit, which had concluded that disclosure to a government official was sufficient to satisfy the public disclosure requirement under the FCA.[4]

Instead, the 4th Circuit held that a "'public disclosure' requires that there be some act of disclosure *outside of the government*." It explained that the government is not equivalent to the public at large, and that disclosure to a government official is simply not the same thing as disclosure that reaches the public domain.

The 6th Circuit reached a similar conclusion in *United States ex rel. Whipple v. Chattanooga-Hamilton County Hospital Authority*, 782 F.3d 260 (2015). As in *Wilson*, the question in *Whipple* was whether information contained in audits and other government reports constituted a public disclosure sufficient to bar a *qui tam* action predicated on the allegations contained in the reports.

In holding that the reports did not qualify as public disclosures under the FCA, the 6th Circuit decided that mere disclosure to a government official is not sufficient to invoke the public disclosure bar. In so doing, it joined the majority of circuits to opine on the issue, rendering the 7th Circuit's prior ruling to the contrary a solitary outlier.

In sum, in 2015 the public disclosure bar has lost some ground as a barrier to FCA claims. By concluding that disclosure to a government entity does not qualify as a "public disclosure" for purposes of barring an FCA claim based on the same set of facts and allegations, the 4th Circuit and 6th Circuit chipped away at one of the defenses contractors have used to protect themselves from FCA claims.

THE SUPREME COURT'S ROLE

In a much anticipated decision, the Supreme Court issued the *Carter* opinion in May. *Carter* was an FCA case addressing two critical limitations on false-claims liability that, depending on the high court's position, had the potential to open the floodgates to a tidal wave of *qui tam* actions.

Carter involved a former KBR employee's allegations that in 2005 his company and others fraudulently billed the government for water purification services in Iraq. At issue before the high court were two questions related to whether the relator was barred from bringing his claims.

First, did the Wartime Suspension of Limitations Act,[5] which suspends the limitations period for "'any offense' involving fraud against the federal government," suspend the six-year limitations period for FCA claims such that the relator's complaint was timely filed?

Second, did the fact that the relator's case was not the first action to be filed based on this set of facts bar his suit under the first-to-file rule?

In response to the first question, a unanimous court held that the WSLA did not toll the FCA limitations period. Specifically, it concluded that the WSLA applies only to criminal charges and is thus inapplicable in the civil false-claims context. In reaching this conclusion, the court relied on the WSLA's plain language regarding "offenses," the act's legislative history and its placement in the U.S. Code under a title for "Crimes and Criminal Procedure."

By limiting the WSLA's applicability to cases involving criminal offenses, the court closed the door on what could have led to an inundation of stale FCA claims arising during wartime — in particular, the war on terror — and brought long after the six-year limitations period had otherwise expired. Based on the court's ruling, the WSLA provides no such protection.

In September 2014 the Department of Justice announced that its criminal division would review all qui tam *complaints to determine whether to initiate parallel criminal investigations.*

While the court's holding provided con-tractors with some protection from stale claims, the decision was far from an unqualified victory from the contracting industry's perspective. Rather, the court's ruling on the second question — whether a previously filed claim bars a subsequent action based on the same set of facts — leaves contractors vulnerable to multiple suits involving the same allegations.

Based on the language of the FCA's first-to-file rule, the court concluded that "an earlier suit bars a later suit while the earlier suit remains undecided but ceases to bar that suit once it is dismissed." In other words, "a *qui tam* suit under the FCA ceases to be 'pending' once it is dismissed," and thus no longer poses a bar to a subsequent lawsuit.

Accordingly, contractors can no longer assume that dismissal of an FCA claim ends the matter for any particular allegation; rather, they may face additional lawsuits stemming from the same conduct, especially if the previous case is not dismissed on substantive grounds and therefore provides no basis for claim preclusion.

In sum, while *Carter* preserves certain protections for contractors facing FCA claims, it also chips away at one of the long-standing bars that previously protected against repetitive or copycat claims. The court thus simultaneously giveth and taketh away, leaving contractors better off in one regard and more vulnerable in another.

A NEW OPPORTUNITY FOR THE SUPREME COURT

Shortly after the decision in *Carter*, federal contractors asked the Supreme Court to weigh in on yet another hotly contested question related to the scope of FCA liability. In a petition for a writ of *certiorari*, Triple Canopy, a federal contractor that provides security services at military bases, asked the court to review a decision by the 4th Circuit.[6]

The decision held that Triple Canopy violated the FCA by seeking payment for security work despite knowing that it did not fulfill all of its contract's performance requirements. In reaching its decision, the 4th Circuit adopted what is known as the "implied certification" theory of liability under the FCA. In doing so, it deepened a divide among the circuits, which are decidedly split on whether implied certification presents a valid basis for an FCA claim.

The facts of *Triple Canopy* make it a seemingly sympathetic case for finding liability for a false claim. The government claimed that the guards the company hired to provide security services at an air base in Iraq were unable to satisfy the qualifying score in marksmanship mandated by the contract. Rather than report those results to the government, the company created scorecards that falsely reported satisfactory scores. It also submitted monthly invoices to the government for the security work performed by the guards, knowing that they did not meet the contractual marksmanship requirements.

The government argued that each submitted invoice constituted a false claim in violation of the FCA. Triple Canopy disagreed, arguing that it never submitted a demand for payment that included a false statement. It further argued that there was no allegation that the government relied on the scorecards.

While the District Court agreed with Triple Canopy, the 4th Circuit agreed with the government. It adopted the position of the District of Columbia U.S. Circuit Court of Appeals, which had decided that "a claim for payment is false when it rests on a false representation of compliance with an applicable … contractual term."[7]

The 4th Circuit has held that a public disclosure under the FCA requires that there be some act of disclosure outside of the government.

The Fourth Circuit held that "the government pleads a false claim when it alleges that the contractor, with the requisite *scienter*, made a request for payment under a contract and withheld information about its noncompliance with material contractual requirements." The relevant inquiry, according to the court, is "whether, through the act of submitting a claim, a payee knowingly and falsely implied that it was entitled to payment."

The 4th Circuit's holding conflicts with decisions by a number of other circuits, deepening an already vast division among the courts as to whether a claim for payment can be false or fraudulent based on a contractor's violation of contractual provisions.

Some circuits have held that where a contractor has violated a contractual or regulatory requirement that is an express condition for payment, the submission of an invoice constitutes a false claim.[8] In this line of cases, a false claim arises from a violation of a statutory, regulatory or contractual provision only when that provision expressly states that compliance is a prerequisite for payment. By submitting a claim for payment, the contractor is certifying compliance with such provisions.

Other circuits — including the 4th Circuit in *Triple Canopy* — have concluded that a contractor violates the FCA if it submits a claim for payment while knowing that it breached a contractual or regulatory requirement that is material to the government's decision to pay — regardless of whether compliance with the requirement comprises an express condition for payment.[9]

In these cases, the falsity need not be directly linked to an express condition for payment. Rather, the relevant inquiry is whether the contractor concealed or otherwise withheld information about its noncompliance with material contractual or regulatory requirements. Where the government can show that compliance with a provision or regulation was material to its decision to pay the contractor, it can establish that submitting an invoice implying compliance with such a provision constitutes a false claim.

Most recently, and after the 4th Circuit reached its decision in *Triple Canopy*, the 7th Circuit declined to adopt an implied-certification theory altogether. The 7th Circuit concluded that it would be "unreasonable" for it "to hold that an institution's continued compliance with the thousands of pages of federal statutes and regulations incorporated by reference into [a contract] are conditions of payment for purposes of liability under the FCA."[10]

The 7th Circuit found that "[t]he FCA is simply not the proper mechanism for the government to enforce violations of conditions of participation contained in — or incorporated by reference into — a" contract with the government. Thus far, the 7th Circuit stands alone in its rejection of the implied-certification theory.

CONCLUSION

In light of the clear circuit split on the question of whether the implied-certification theory provides a valid basis for a false or fraudulent claim under the FCA, it is likely the Supreme Court will weigh in on the issue by granting the currently pending *certiorari* petition.

A ruling from the high court could bring about a flood of new cases wherein it is argued that each and every invoice submitted under a breached government contract constitutes a false claim subject to FCA liability. The implications of such a broad reading of the statute are hard to fathom.

NOTES

[1] *See* Press Release, U.S. Department of Justice, Office of Public Affairs, Justice Department Recovers Nearly $6 Billion from False Claims Act Cases in Fiscal Year 2014 (Nov. 20, 2014), available at http://1.usa.gov/1zNjTed ("In the past three years, we have achieved the three largest annual recoveries ever recorded under the statute.").

[2] *See* Gibson Dunn & Crutcher, 2015 Mid-Year False Claims Act Update (July 8, 2015), *available at* http://bit.ly/1Psd636.

[3] 31 U.S.C. § 3730(e)(4)(A).

[4] *See United States v. Bank of Farmington,* 166 F.3d 853 (7th Cir. 1999), *overruled on other grounds by Glaser v. Wound Care Consultants Inc.,* 570 F.3d 907 (7th Cir. 2009).

[5] 18 U.S.C. § 3287

[6] *Triple Canopy Inc. v. United States ex rel. Badr,* No. 14-1440, *petition for cert. filed,* 2015 WL 3542745 (U.S. June 5, 2015).

[7] *United States ex rel. Badr v. Triple Canopy Inc.,* 775 F.3d 628, 635 (4th Cir. 2014) (*quoting United States v. Sci. Applications Int'l Corp.,* 626 F.3d 1257, 1266 (D.C. Cir. 2010)).

[8] *See Mikes v. Straus,* 274 F.3d 687, 699-700 (2d Cir. 2001); *United States ex rel. Wilkins v. United Health Grp.,* 659 F.3d 295, 305-07 (3d Cir. 2011); *United States ex rel. Steury v. Cardinal Health Inc.,* 735 F.3d 202, 205 (5th Cir. 2013); *Chesbrough v. VPA PC,* 655 F.3d 461, 468 (6th Cir. 2011); *Ebeid ex rel. United States v. Lungwitz,* 616 F.3d 993, 998-99 (9th Cir. 2010); *United States ex rel. Lemmon v. Envirocare of Utah Inc.,* 614 F.3d 1163, 1168-69 (10th Cir. 2010).

[9] *See Science Applications,* 626 F.3d at 1269; *United States ex rel. Hutcheson v. Blackstone Med.,* 647 F.3d 377, 387-88 (1st Cir. 2011).

[10] *United States v. Sanford-Brown Ltd. et al.,* 788 F.3d 696 (7th Cir. 2015).

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