

FALSE CLAIMS ACT UPDATE

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I. IMPORTANT FALSE CLAIMS ACT DECISIONS FROM 2006

1. Statute of Limitations

Baylor University Medical Ctr., 469 F.3d 263 (2d Cir. 2006).

In 1994, the relator filed suit against 132 hospitals in 30 states concerning the alleged improper use of investigational cardiac devices. The government waited for eight years, until 2002, to intervene in the action. The suit was initially filed in the Western District of Washington and that court granted 16 successive requests by the government to extend the seal. In 1999, the government, without intervening, filed an ex parte motion to sever individual hospitals and to transfer the actions to the districts where the hospitals were located. The government settled certain cases and dismissed others. Finally, in 2002 and 2003, the government filed complaints in intervention against certain hospitals. These matters were assigned to the District of Connecticut for coordinated or consolidated pretrial proceedings. The defendant hospitals then sought dismissal pursuant to Rule 9(b) and the statute of limitations. The district court allowed the FCA claims to proceed, holding that the government's claims "related back" to the relator's claims. On appeal, the Second Circuit disagreed, holding that the government's complaint in intervention could not "relate back" to the qui tam complaint. Since the government was raising claims in 2002 that related to claims that were last submitted in 1995, the government was outside of the six year statute of 31 U.S.C. Section 3731(b)(1). Since the government waited eight years after the filing of the original qui tam complaint to intervene, moreover, the three year discovery period of 3731(b)(2) could not save the claims. The government's complaint in intervention did not "relate back" pursuant to Rule 15(c)(2) because the "touchstone" of that rule is that the defendant should have notice of the claims against him. The Second Circuit noted the possibility that the FCA contained its own relation back doctrine without the need for notice, but declined to address the issue since the parties failed to make the argument and since the relator's original complaint was so deficient that the Court questioned whether it could serve as a placeholder for statute of limitations purposes.

2. Off Label Marketing

United States ex rel. McDermott v. Genetech, Inc., 2006 WL 3741920 (D. Me. Dec. 14, 2006)

The relator, a former Genetech employee, alleged that Genetech and Biogen violated the FCA by marketing Rituxan, a chemotherapeutic agent approved by the FDA for non-Hodgkins Lymphoma, to treat Rheumatoid Arthritis (RA). The FDA did not approve Rituxan for RA until 2006. According to the relator, Genetech and Biogen aggressively marketed Rituxan for RA for ten years prior to FDA approval. The defendants identified “key opinion leaders” and entered into “synergy consulting agreements” with them. These opinion leaders were paid \$2,000 to \$2,500 to moderate “RA Roundtable Dinners.” The defendants also wrote articles promoting the use of Rituxan for RA, but listed one or more of the “key opinion leaders” as the author. Rituxan is very expensive, costing up to \$15,000 per administration. From 2000 to 2005, sales of Rituxan increased from \$424 million to \$1.8 billion. Genetech argued that the fact that it had received a HIPAA subpoena in 2004 seeking documents related to the marketing of Rituxan for RA barred the relator’s claims pursuant to 3730(e)(3), which bars claims that are based on allegations or transactions that are already part of a proceeding in which the United States is a party. The court denied the challenge because a subpoena is not a proceeding and it was not clear to the court whether the subpoena was focused on the same issue as the qui tam suit. The court also discounted the defendants’ claims that that the relator’s suit was based on various news reports, holding that “nothing in the documents refers sufficiently specifically to Biogen or the marketing of Rituxan for off-label use to allow the conclusion that the allegations in the first amended complaint are ‘based upon’ any public disclosure.” The court also refused to credit the HIPAA subpoena, Genetech’s press release concerning the subpoena and press reports containing speculation that the government was investigating the off-label marketing of Rituxan for RA as sufficient to constitute public disclosures. The court dismissed the suit, however, pursuant to Rule 9(b) because the complaint alleged a broad scheme but did not include

specifics about any particular false or fraudulent claim. The court also seemed willing to dismiss the FCA claim because, in submitting claims, the physicians properly identified that the Rituxan patients suffered from RA, such that there was nothing false or fraudulent in the claims themselves.

3. Presentment Issue

United States ex rel. Saunders v. Allison Engine Co., Inc., 471 F.3d 610
(6th Cir. 2006)

The relators alleged that third tier subcontractors on the manufacture of Arleigh Burke class Guided Missile Destroyers knowingly billed for faulty parts and workmanship and violated the Truth in Negotiations Act. The government declined intervention and the relator tried the matter to a jury. Before trial, the district court granted summary judgment on the TINA claim. At the close of the relator's case, the district court granted judgment as a matter of law to the defendants, pursuant to Rule 50(c), because the relators had not produced evidence that the subcontractors presented false or fraudulent claims to the government. The Sixth Circuit reversed, holding that presentment of a claim for payment is not necessary under 3730(a)(2) or (3). The Sixth Circuit expressly disagreed with the opinion of the District of Columbia Circuit in United States ex rel. Totten v. Bombardier Corp., 380 F.3d 488 (D.C. Cir. 2004), cert. denied, 544 U.S. 1032 (2005), that imposed a presentment clause on 3730(a)(2) and (3) claims and dismissed a case because allegedly fraudulent claims on Amtrak were not been presented to the government. The scope of Totten presentment requirement is a very important issue. The existence of a Circuit split may result in Supreme Court review of this issue.

4. Fees in Declined Matter

United States ex rel. Lauritzen v. Goodart, 2007 WL 44866 (D. Utah, Jan. 5, 2007)

The relator alleged that the defendant ophthalmologists submitted claims for payment for a non-covered procedure, transpupillary thermotherapy. The defendants, after the government began its investigation, discovered that it had made coding and billing errors over a 9 month period. The government decided that the defendants were without fault and allowed them to refund money to the Utah Medicare carrier as an “administrative overpayment.” The government did not intervene in the case, nor did it waive or release any claims against the defendants. The relator offered to dismiss the suit if the defendants paid his attorney fees plus a consulting fee for the relator’s work in assisting the government investigation. The defendants refused, so the relator filed a Motion for Fees, while simultaneously refusing to serve the complaint. The court denied the motion for fees and dismissed the case, holding “[b]ecause defendants did not execute a waiver evidencing a settlement between the Government and Defendants under the FCA, Relator is not entitled to an award of attorney’s fees and costs....” The court acknowledged that the relator and his counsel “significantly contributed to the Government’s investigation of Defendant’s billing and coding practices and appears to have performed work at the Government’s request.”

5. Government Auditor as Relator

United States ex rel. Maxwell v. Kerr-McGee Chemical Worldwide, LLC, 2006 WL 2869515 (D. Colo., Oct. 6, 2006)

The relator is a former senior auditor with the Mineral Management Service (MMS) of the United States Department of Interior. He alleged that Kerr-McGee cheated the government on gasoline royalties by entering into below market supply contracts with a purchaser who separately agreed to pay Kerr-McGee's marketing expenses. The relator learned of and investigated the fraud while working as an MMS auditor. While in that position he authored a letter demanding that Kerr-McGee pay \$10 million in unpaid royalties. Kerr-McGee never paid the money. It defended the suit initially by arguing that it had no legal obligation to pay the \$10 million because MMS had not issued an order directing such payment. The court disagreed, holding that Kerr-McGee had an obligation under its leasing contract and pursuant to governing regulations to pay appropriate royalties. Thus, a genuine issue of material fact as to whether Kerr-McGee was obligated to pay the \$10 million precluded summary judgment. The court certified for immediate appeal to the Tenth Circuit whether a government auditor can "voluntarily" provide information to the government as contemplated by the FCA in order to qualify as an original source and whether applicable conflict of interest regulations preclude a government auditor from serving as a relator in an FCA action stemming from an audit he or she participated in.

6. False Certification

United States ex rel. Hendow v. University of Phoenix, 461 F.3d 1166 (9th Cir. 2006).

The relators, two former enrollment counselors for the University of Phoenix, alleged that the university annually certified that it did not provide incentive bonuses for enrolling students when, in fact, it regularly made such payments. The district court dismissed the action, holding that the university did not have to certify compliance with the ban on incentive bonuses to obtain government funds and that “promissory fraud” or “fraud in the inducement” were inappropriate because the false certification did not occur in a request for payment from the government. On appeal, the Seventh Circuit held that both “false certification” and “promissory fraud” (or “fraud in the inducement”) claims have four elements: (1) a false statement or fraudulent course of conduct, (2) made with scienter, (3) that was material, causing (4) the government to pay out money or forfeit moneys due. Since the relators had alleged these four elements, the Circuit Court reversed the dismissal.

7. Discovery Issues in Intervened Case

United States, ex rel. Purcell v. MWI Corp., 238 F.R.D. 321 (D.D.C. 2006)

The relator sued his former employer alleging that it falsely certified that it had not paid any irregular commissions or payments in relation to the sale of irrigation pumps to Nigeria in order to obtain nearly \$75 million in funding from the United States Export Import Bank. In fact, the relator alleges, the defendant paid \$28 million in highly irregular payments to its Nigerian sales representative, as well as direct payments to several Nigerian officials. The government intervened in the case. During discovery, the government sought information about the profit earned by the defendant on the Nigerian pumps, as well as the defendant's general financial condition for the period of the Nigerian sales. The defendant sought discovery of materials produced by the relator to the government, including the notes of interviews taken by government lawyers and agents. The district court adopted in full the magistrate judge's determinations that: (1) the government was entitled to discover the profits earned by the defendant on the Nigerian pump sales as it was relevant to its unjust enrichment claim; (2) the government was not entitled to discovery on the defendant's general financial condition, as financial motive was not an element of any of the claims; and, (3) the defendants could not obtain the joint prosecutorial materials because it failed to show substantial need or an inability to get the information from other sources. The defendant argued that the government waived the joint prosecutorial privilege by producing the relator's Statement of Material Facts and that it needed the additional materials to support its statute of limitations argument. The court disagreed, holding that production of the Statement of Material Facts did not constitute a broad subject matter waiver. The defendant's failure to provide the Statement to the court and to demonstrate why it needed the joint prosecutorial materials to make out its statute of limitations defense doomed its attempt to pierce the privilege. The court admonished both sides for seeking review of seemingly every determination by the magistrate and proclaimed that "from this moment forth, pursuant to both Federal Rule 37(a)(4) and Rule 11, the court will consider

sanctioning the losing attorney in all requests for review of the magistrate judge's discovery rulings.”

8. Public Disclosure

United States ex rel. Atkinson v. Pa. Shipbuilding Co., 2007 WL 79483 (3d Cir. Jan. 12, 2007)

The relator alleged that Pennsylvania Shipbuilding, Sun Ship, Inc. and First Fidelity Bank conspired to defraud the United States Navy related to a contract to build four Henry J. Kaiser class oiler ships. The relator first filed the case in 1992, but dismissed that action without prejudice. He refiled in 1994; the government declined intervention in 1998. The district court first dismissed most of the claims and then granted summary judgment as to the final claim. On appeal, the Third Circuit held that the relator had waived any appeal as to certain claims that were dismissed from the second amended complaint because the relator did not include the claims or the defendant in the third amended complaint. The Third Circuit also disagreed with the district court, which had found the relator to be an original source of one portion of his claims. The Third Circuit found that the relator was not an original source of any claim and, therefore, affirmed dismissal of the claims pursuant to the public disclosure bar. The relator included information in his second suit that he had obtained from public sources. He argued that the second suit could not be based upon that information, since he had already filed an earlier suit and demonstrated his knowledge of the subject matter. The court disagreed, holding that the fact that he filed an earlier suit in no way impacted the analysis of whether the subsequent suit was “substantially supported by” public disclosures. The Third Circuit also discounted the relator’s claim that he was an original source, holding that “the extent of reliance on information already in the public domain should be a consideration during the original source inquiry, even if that information is not a public disclosure within the meaning of Section 3730(e)(4)(A).” While some reliance by relator on public information is acceptable, cases may not be based on second hand information or speculation. Since any member of the public could have gone to the Chester County courthouse to determine whether the defendants in this action had recorded an encumbrance against their property (as they had claimed to the Navy), the

relator cannot be determined to have had “direct and independent” knowledge of that fact. In this case, as opposed to other Third Circuit cases interpreting the public disclosure bar, the court took an expansive view of the Springfield Railway formula, $x + y = z$, to determine when allegations or transactions of fraud have been publicly disclosed. Coupled with the new wrinkle that a relator’s reference to or reliance on public information that does not constitute a public disclosure may nevertheless disqualify the relator as an original source, it is fair to say that this opinion may significantly broaden the public disclosure bar in the Third Circuit.

9. Contractor Liability

United States ex rel. Sikkeuga v. Regence Blue Cross Blue Shield of Utah,
2006 WL 3491784 (10th Cir. Dec. 5, 2006)

The relator was a former claims analyst at the Medicare Carrier for Utah. She brought action against that carrier – Regence BlueCross BlueShield of Utah (Regence) – and against a pathology laboratory that was owned by the University of Utah Medical Center (ARUP). The relator claimed that ARUP provided false diagnosis information about patients to justify medical necessity for testing and falsely provided codes for renal failure for patients who in fact had received kidney transplants (and that should have been billed to Medicare Part A and not Medicare Part B). The relator claimed that Regence “caused” the submission of ARUP’s false claims. She also sought relief under 3730(h) claiming that she had been fired as a result of her raising these issues. The district court dismissed Count 1 because it determined that both Regence and the Regence managers were immune from suit and that ARUP was not a “person” under the FCA; Claim 2 because it was barred by the statute of limitations; Claim 3 because it was not alleged with sufficient particularity required by Rule 9(b); and Claim 4 because the relator had not notified Regence of her intent to file an FCA action before she was fired. The Tenth Circuit held that Medicare carriers are immune from liability for processing claims only in the “absence of gross negligence or intent to defraud.” The court noted that FCA liability could not apply to the payment of claims, and dismissed the relator’s claim to the extent that it sought to impose liability for paying the claims. The Circuit Court reversed the dismissal of the relator’s “caused to be submitted” claims against Regence, holding that “Because we must construe these allegations in the light most favorable to [the relator], we cannot conclude that [the relator] could not prove no set of facts in support of her claim that would entitle her to relief against Regence for ‘causing’ ARUP to present the allegedly false claims.” The court applied a lengthy analysis to ARUP’s internal operations and finances in determining that it is not an arm of the state and therefore subject to FCA liability. The court further decided that the three year

discovery rule for FCA statute of limitations does not apply to relators, who must bring their claims within six years of the challenged claims. Finally, the court affirmed dismissal of the 3730(h) claim because the complaint “fails to allege that the Regence defendants had been put on notice that she was acting in furtherance of a private qui tam or government FCA action.”