CLIENT ALERT

Rise in Cases Emerging at Intersection of Unfair Competition, Trademark, and FCA Causes of Action

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On October 2, 2018, a screw manufacturer filed suit against a competitor in the U.S. District Court for the Northern District of Illinois in a lawsuit that suggests an increasingly blurry line between trademark infringement, unfair competition, and False Claims Act (FCA) causes of action.

***Safety Socket LLC v. Relli Technology Inc*.**

The complaint alleges that Relli Technology purchased Safety Socket's commercial-grade socket screws, re-coated them, and sold them as military-grade fasteners. According to Safety Socket, this false upgrading of a fastener's certification from commercial-grade to military-grade is referred to as "up-certing" within the industry.

Although the suit alleges trademark infringement, unfair competition, and false designation of origin under the Lanham Act, a casual observer might think they were reading an FCA complaint. Safety Socket's allegations focus on the potential harm to the government including the fact that up-certed fasteners are not fabricated, processed, or tested to withstand the range of conditions encountered in military or aerospace applications.

Turning the Screws on Competitors

The FCA's *qui tam* provisions allow for whistleblowers (referred to as "relators" under the statute) to file suit on behalf of the government. Historically, *qui tam* suits have been filed by company "insiders" with knowledge of the alleged fraud. However, there have been growing number of *qui tam* suits filed by companies against their competitors in suits that combine theories of unfair competition with allegations of fraud on the government. *See, e.g.*, *Amphastar Pharm. Inc. v. Aventis Pharma SA*, 856 F.3d 696 (9th Cir. 2017) (generic pharmaceutical brought *qui tam* action alleging that proprietary drug manufacturer committed fraud against Patent and Trademark Office and obtained illegal monopoly over blood thinner); *United States ex rel. Harman v. Trinity Indus. Inc.*, 872 F.3d 645 (5th Cir. 2017) (owner of manufacturing company accused competitor guardrail company of failing to inform government about design changes after guardrail); *United States ex rel Bunk v. Gosselin World Wide Moving,* 842 F.3d 261 (4th Cir. 2016) (shipping companies brought *qui tam* against competitor for entering into price-fixing agreement and territory allocations with other potential bidders to fix prices of subcontracts). In fact, the largest FCA settlement in 2017 emerged from the *qui tam* lawsuit suit filed by pharmaceutical manufacturer, Sanofi-Aventis against competitor Mylan in connection with EpiPen payments.

In this instance, it appears that Safety Socket could have brought a suit making essentially the same allegations against Relli under the FCA. The mislabeling of a product's quality or origin has long been recognized as grounds for liability under the FCA. *See, e.g. United States v. Aerodex*, 469 F.2d 1003, 1008 (5th Cir. 1972) (ruling that "the deliberate mislabeling in the case at bar, coupled with the fact that the parts delivered did not actually meet the specifications of the contract, compels a finding of liability under the Act"). Therefore, Safety Socket's allegations, if true, would amount to a violation of the FCA notwithstanding

whether or not they constitute a violation of the Lanham Act as well. This case suggests that when a company believes that a competitor is engaged in unfair practices to win government business, it can consider evaluating whether those practices also constitute a violation of the FCA in conjunction with antitrust, Lanham Act, and deceptive trade practices causes of action. By adding an FCA count, the company seeking relief would obtain the potential benefit of government intervention in the action and of receiving a portion of treble the damages sustained by the government and a portion of the statutory penalties associated with the false claims or statements made to the government.

Looking Ahead

Going forward, when a company believes that a competitor is engaged in unfair practices to win government business, the FCA will likely be considered with greater frequency as an option in the business litigator's toolbox to be used in conjunction with antitrust, Lanham Act, and deceptive trade practices causes of action.

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