THE FCA IN THE COURTS OF APPEAL - 2005

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Anti-Kickback Statute. Violations of the criminal, medical anti-kickback statute, 42 U.S.C. § 1320a7(b)(2)(A), disqualify an entity from receiving Medicare payments, and provide a basis for action under the FCA. *McNutt ex rel. United States v. Haleyville Med. Supplies, Inc.*, 423 F.3d 1256 (11th Cir. 2005).

Claim. There must be a claim against the United States as defined in the Act. *Fleming v. Giles*, No. 03-17219, 2005 WL 1182358 (9th Cir. May 19, 2005) (Unpublished).

Dismissal. The government may dismiss a *qui tam* action over the objection of the relator and without intervening so long as the government's reasons are not fraudulent, arbitrary, capricious or illegal. *Ridenour ex rel. United States v. Kaiser-Hill Co., L.L.C.*, 397 F.3d 925 (10th Cir. 2005).

Appeal may be dismissed *sui sponte* for appellant's failure to prosecute. Sanctions may be awarded. *United States ex rel. Jimenez v. Health Net, Inc.*, 400 F.3d 853 (10th Cir. 2005).

However, even when the government does not intervene and the relator's complaint is dismissed for failure to comply with the rules, the government's claims may not be dismissed with prejudice. *United States ex rel. Williams v. Bell Helicopter Textron Inc.*, 417 F.3d 450 (5th Cir. 2005).

"The district court properly dismissed Agyeman's qui tam action because the government investigated his claims, and determined that they lacked merit, and notified Agyeman of its motion to dismiss, and the court gave Agyeman an opportunity to be heard." *Agyeman v. Corrections Corp. of Am.*, No. 04-16672, 2005 WL 1847033 (9th Cir. Aug. 5, 2005) (Unpublished).

"The district court properly dismissed Schwartz's qui tam action because the United States determined that the prosecution of this action threatened to interfere with its federal interest in protecting military and state secrets, and Schwartz fails to demonstrate that the parties can litigate this case without access to privileged sensitive material." *Schwartz v. Raytheon Co., Long Beach v. United States ex rel. Seal 1*, No. 03-55571, 2005 WL 2341286 (9th Cir. Sept. 12, 2005) (Unpublished).

Falsity. Falsity under the FCA does not mean scientifically untrue; it means a lie. Expressions of opinion, scientific judgments, or statements as to conclusions about which reasonable minds may differ cannot be false. Expression of a legal opinion, in this case depending, as it does, on the resolution of two sets of inherently ambiguous determinations by

defendants, cannot form the basis for an FCA claim. *United States ex rel. Morton v. A Plus Benefits, Inc.*, No. 04-4148, 2005 WL 1672221 (10th Cir. July 19, 2005).

An ambiguous regulation can form the basis for an action under the FCA if other evidence establishes that the government's interpretation was understood by the defendant. *United States ex rel. Walker v. R&F Props. of Lake County, Inc.*, No. 04-15283, 2005 WL 3557420 (11th Cir. Dec. 30, 2005).

First to File. The first-to-file bar, § 3730(b)(5), does not prohibit the filing of a second related case when the first complaint is rendered jurisdictionally defective because the first relator was not an original source of the publicly disclosed allegations. *Campbell ex rel. United States v. Redding Med. Center*, 421 F.3d 817 (9th Cir. 2005). *See also, Walburn v. Lockheed Martin Corp.*, No. 04-3458, 2005 WL 3466528 (6th Cir. Dec. 20, 2005).

Fraudulent Inducement. Generally, there is no inference of fraudulent intent not to perform a promise made in bidding on a contract from the mere fact that the promise is not performed. *United States ex rel. Bettis v. Odebrecht Contractors of Cal., Inc.*, 393 F.3d 1321 (D.C. Cir. 2005).

Genuine Issues of Fact. Factual issues precluded summary judgment for defendants on allegation that charging Medicare for an entire multi-dose vial of anesthesia medication when only portions of the vial were administered to the patient. The dissent held that it was clear there had been no overcharge because ultimately the defendant charged only its actual annual costs. *United States ex rel. Schell v. Battle Creek Health Sys.*, 419 F.3d 535 (6th Cir. 2005).

Jurisdiction. Court of Federal Claims has no jurisdiction over claims under the Act. *Wolf v. United States*, No. 05-5009, 2005 WL 681996 (Fed. Cir. Mar. 4, 2005) (Unpublished).

Materiality. False statements or conduct are required to be material to the false or fraudulent claim to hold a person liable under the Act. Pension expense submitted on Medicare cost reports was material as a matter of law. *United States ex rel. A+ Homecare, Inc. v. Medshares Mgmt. Group, Inc.*, 400 F.3d 428 (6th Cir. 2005).

Persons Liable. A school board is not a "person" subject to liability under the Act. *United States ex rel. Garibaldi v. Orleans Parish School Board*, 397 F.3d 334 (5th Cir. 2005). *See also, Braham v. Alameda County Superintendent of Schools*, No. 02-56780, 2005 WL 1906389 (9th Cir. Aug. 4, 2005) (Unpublished).

Primary Jurisdiction. Provisions in the Medicare Act do not prevent district court jurisdiction over False Claims Act allegations. *United States v. Lahey Clinic Hosp., Inc.*, 399 F.3d 1 (1st Cir. 2005).

Public Disclosure Bar. Information in a report obtained in an FOIA request and contained in civil lawsuits is publicly disclosed. *United States ex rel. Paranich v. Sorgnard*, 396 F.3d 326 (3d Cir. 2005).

Prior product liability lawsuits against manufacturer of heart pacemaker leads, alleging leads were not safe, precludes FCA suit. The government could have reasonably inferred fraud from the complaints. *United States ex rel. Gilligan v. Medtronic, Inc.,* 403 F.3d 386 (6th Cir. 2005). *See also, Walburn v. Lockheed Martin Corp.*, No. 04-3458, 2005 WL 3466528 (6th Cir. Dec. 20, 2005).

Rule 9(b). Rule 9(b), F.R. Civ. P., requires that allegations under the FCA be pleaded with particularity, *i.e.,*, the who, what, when and how must be specified. This rule results in the majority of initial dismissals of *qui tam* complaints where the government does not intervene. *See, e.g., United States ex rel. Gross v. Aids Research Alliance-Chicago*, 415 F.3d 601 (7th Cir. 2005); *see also, United States ex rel. Williams v. Bell Helicopter Textron, Inc.*, 417 F.3d 450 (5th Cir. 2005); *Corsello v. Lincare, Inc.*, 428 F.3d 1008 (11th Cir. 2005). The *Corsello* opinion is particularly important for its discussion of the "indicia of reliability" required by Rule 9(b).

Sovereign Immunity. Sovereign immunity bars FCA suit against federal officers "if the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the Government from acting, or compel it to act." *Doe v. Doe*, No. 04-6232, 2005 WL 1097322 (10th Cir. May 10, 2005) (Unpublished).

Statute of Limitations. The six-year statute of limitations in the FCA does not apply to retaliation action brought pursuant to § 3730(h). The most closely analogous state limitations period controls. *Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 125 S. Ct. 2444 (2005). *See also, Foster v. Savannah Commc'n*, No. 04-10876, 2005 WL 1719221 (11th Cir. July 25, 2005).

Sufficiency. Allegation that university certified it would comply with regulations despite intent to continue paying recruiters for enrolling students in violation of regulation states a claim under the FCA. A promise generally cannot be false, but it can be if at the time you make it you do not intend to keep it. *United States ex rel. Main v. Oakland City Univ.,* 426 F.3d 914 (7th Cir. 2005). This opinion opens the door to a variety of FCA claims under the Higher Education Act.

Voluntarily Disclosed. A relator does not "voluntarily" provide information to the government where the government has identified the relator as being involved in the fraudulent activity and issued a subpoena. *United States ex rel. Paranich v. Sorgnard*, 396 F.3d 326 (3d Cir. 2005).

Whistleblower Protection. A showing of irreparable harm is required for preliminary injunctive relief under the Act. Termination of employment would not constitute

irreparable harm since damages are available if the termination is found to have been unlawful. *Bedrossian v. Northwestern Memorial Hosp.*, 409 F.3d 840 (7th Cir. 2005).

In order to obtain protection, an employee must demonstrate that he was engaged in a protected activity, *e.g.,* gathering information to file an FCA action, that his employer was aware of these activities, and that the retaliation was motivated by the protected activities; internal complaints are not sufficient. *Shekoyan v. Sibley Int'l*, 409 F.3d 414 (D.C. Cir. 2005); *see also, Maturi v. McLaughlin Research Corp.*, 413 F.3d 166 (1st Cir. 2005); *Mack v. Augusta-Richmond County, Ga.*, No. 05-12747, 2005 WL 2270518 (11th Cir. Sept. 19, 2005) (Unpublished).