THE FCA IN THE COURTS OF APPEAL - 2004-2005

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Attorney Fees. Court has authority to award attorney fees to defendant in frivolous *qui tam* action. *U.S. ex rel. Grynberg v. Praxair, Inc.*, 389 F.3d 1038 (10th Cir. 2004).

Causing. Allegation that defendant developed a marketing program that it knew would violate the Anti-Kickback Act and the Stark Act is sufficient to state a cause of action under the FCA even though defendant did not submit or review any claims. *U.S. ex rel. Schmidt v. Zimmer, Inc.*, 386 F.3d 235 (3d Cir. 2004).

Dismissal. Requirement that FCA suits may be dismissed only with the written consent of the Attorney General does not apply to involuntary dismissal for failure to prosecute. *U.S. ex rel. Drake v. Norden Systems, Inc.*, 375 F.3d 248 (2d Cir. 2004).

Government may dismiss action over relator's objection to protect classified information and permit timely closing of former nuclear weapons facility. *Ridenour ex rel. U.S. v. Kaiser-Hill Company, L.L.C.*, 397 F.3d 925 (10th Cir. 2005).

Court dismisses appeal *sua sponte* for relator's failure to comply with procedural rules and orders. *U.S. ex rel. Jimenez v. Health Net, Inc.*, 400 F.3d 853 (10th Cir. 2005).

Falsity. Where pharmacy billed for medicine delivered, claim was not false even though medicine was returned. Valid claim cannot be transformed into false claim by subsequent events. *U.S. ex rel. Quinn v. Omnicare, Inc.*, 382 F.3d 432 (3d Cir. 2004); *In*

re: Genesis Health Ventures, Inc., 112 Fed.Appx. 140, 2004 WL 2296093 (3d Cir. 2004) (Unpublished).

First to File. Where complaint raises a related claim based in large part on the core fact or general conduct relied on in a previous *qui tam* action, it is barred. *Grynberg ex rel. U.S. v. Koch Gateway Pipeline Co.*, 390 F.3d 1276 (10th Cir. 2004).

Fraudulent Inducement. Under the fraud-in-the-inducement theory of FCA liability, every claim submitted under a fraudulently induced contract constitutes a "false claim" even without proof that the claims themselves were false. The court declined to rule whether the theory will apply to a fraudulent low bid but found the evidence insufficient even if the theory is applicable. *U.S. ex rel. Bettis v. Odebrecht Contractors of California, Inc.*, 393 F.3d 1321 (D.C. Cir. 2005).

Implied Certification. The implied certification theory of FCA liability, *i.e.*, that submission of a claim under a contract results in an implied certification that the contractor has complied with all terms of the contract (and applicable statutes and regulations), requires proof that compliance with the terms would be a material prerequisite to the government's decision to pay the claim. See *U.S. ex rel. Herrera v. Danka Office Imaging Co.*, 91 Fed.Appx. 862, 2004 WL 491053 (4th Cir. 2004) (Unpublished).

The implied certification theory has not been adopted by the Fifth Circuit. *U.S. ex rel. Graves v. ITT Educational Services, Inc., 111 Fed.Appx. 296*, 2004 WL 2376217 (5th Cir. 2004) (Unpublished).

Inmate v. Inmate. An inmate in a Texas prison brought a *qui tam* suit pro se against a fellow inmate alleging that he had defrauded the VA by collecting benefits while incarcerated. He won summary judgment. *U.S. ex rel. Davis v. Litalien, 88 Fed.Appx. 778*, 2004 WL 326765 (5th Cir. 2004) (Unpublished).

Jurisdiction. Court of International Trade has exclusive jurisdiction over FCA suit by government alleging the transshipment of goods to avoid antidumping duties. *U.S. v. Universal Fruits and Vegetables Corp.*, 370 F.3d 829 (9th Cir. 2004).

Materiality. Defendant's failure to disclose its foregone commercial opportunities could not have been material to the decision to sole-source the SSN-23. *U.S. ex rel. Gillian v. General Dynamics Corp.*, 111 Fed.Appx. 143, 2004 WL 1542764 (4th Cir. 2004) (Unpublished).

Materiality is an element of an FCA action. A statement is material if it has a "natural tendency" to influence the government's decision. The court rejects the "outcome materiality" test used by the Eighth Circuit. *U.S. ex rel. At Homecare, Inc.*, 400 F.3d 428 (6th Cir. 2005).

Pre-suit Disclosure. The FCA, 31 U.S.C. § 3730(e)(4)(B) requires a *qui tam* relator that seeks status as an "original source" to voluntarily provide her information to the Government before filing suit. See, *e.g.*, *U.S. ex rel. Stone v. Rockwell Intern. Corp.*, 92 Fed.Appx. 708, 2004 WL 433235 (10th Cir. 2004) (Unpublished).

Presented. A false claim is actionable under the FCA only if it is presented to an officer or employee of the United States Government. Amtrak is not a governmental

entity, thus false claims presented to it are not actionable under the FCA. *U.S. ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488 (D.C. Cir. 2004) (rehearing en banc denied).

Primary Jurisdiction. Medicare Act does not preempt district court of jurisdiction under FCA. *U.S. v. Lahey Clinic Hospital, Inc.*, 399 F.3d 1 (1st Cir. 2005).

Pro Se *Qui Tam* Actions. A whistleblower may not prosecute a *qui tam* suit pro se, *i.e.*, without a lawyer. *U.S. ex rel. Lu v. Ou*, 368 F.3d 773 (7th Cir. 2004).

Procedure. Administratively closed case when district court was advised it had been settled could be reopened and set for trial three years later. *Penn West Associates, Inc. v. Cohen*, 371 F.3d 118 (3d Cir. 2004).

Public Disclosure. A *qui tam* relator's complaint is "based upon" publicly disclosed information where there is substantial identity between the publicly disclosed allegations and the *qui tam* complaint. *Kenard v. Comstock Resources, Inc.*, 363 F.3d 1039 (10th Cir. 2004).

Information disclosed in civil litigation, in audits conducted by a fiscal intermediary, and in response to a FOIA request are all public disclosure within the meaning of the FCA. *U.S. ex rel. Reagan v. East Texas Medical Center Regional Healthcare System, 384 F.3d 168 (5th Cir. 2004);* see also, *Dingle v. Bioport Corp.*, 388 F.3d 209 (6th Cir. 2004); *U.S. ex rel. Grynberg v. Praxair, Inc*., 389 F.3d 1038, 2004 WL 2580925 (10th Cir. 2004).

Specific disclosure of fraud is not required to find public disclosure so long as the information is sufficient to put the government on notice of the likelihood of related fraudulent activity. *U.S. ex rel. Gilligan v. Medtronic, Inc.*, 400 F.3d 386 (6th Cir. 2005).

Reopening. Supreme Court's decision in *Cook* that counties are subject to suit under the FCA was insufficient ground to reopen prior final judgment that school board was not subject to such an action. *U.S. ex rel. Garibaldi v. Orleans Parish School Board*, 397 F.3d 334 (5th Cir. 2005).

Reverse False Claim. Allegation that defendant concealed the fact that it had falsified emissions records in an effort to avoid a monetary penalty that the government might have imposed if it had known of the illegal emissions does not state a cause of action under the FCA. *U.S. ex rel. Bain v. Georgia Gulf Corp.*, 386 F.3d 648, 2004 WL 2152360 (5th Cir. 2004).

Rule 9(b). Rule 9(b), Fed.R.Civ.P., requires that fraud be alleged with particularity, *i.e.*, the complaint must set forth in reasonable detail the who, what, when, where and how of the alleged fraud. Many *qui tam* relators have proven unable to do this. Their suits are dismissed. See, *e.g., U.S. ex rel. Karvelas v. Melrose-Wakefield Hosp.*, 360 F.3d 220 (1st Cir. 2004); *U.S. ex rel. Adrian v. Regents of Univ. of Calif.*, 363 F.3d 398 (5th Cir. 2004).

A whistleblower retaliation claim need not comply with Rule 9(b). *U.S. ex rel. Williams v. Martin-Baker Aircraft Co., 389 F.3d 1251*, 2004 WL 2680694 (D.C. Cir. 2004).

States and State Agencies. The Regents of the University of California Lawrence Livermore National Laboratory, and their employees acting in their official capacities, are state agencies, as distinguished from municipalities, and are not subject to

a *qui tam* suit under the FCA. *U.S. ex rel. Adrian v. Regents of Univ. of Calif.*, 363 F.3d 398 (5th Cir. 2004). The Fifth Circuit uses a six-factor test to determine whether an entity is a state agency immune to an FCA suit. *U.S. ex rel. Barron v. Deloitte & Touche, L.L.P.*, 381 F.3d 438 (5th Cir. 2004).

Tax Bar. The FCA does not apply to tax issues. A yield burning scheme involving municipal bonds was held covered by the tax bar. *Lissack v. Sakura Global Capital Markets, Inc.*, 377 F.3d 145 (2d Cir. 2004).

Voluntary Provision. Information provided to the government pursuant to a subpoena and thereafter was not voluntarily provided preventing the relator from being an original source of publicly disclosed information. *U.S. ex rel. Paranich v. Sorgnard*, 396 F.3d 326 (3d Cir. 2005).

Whistleblower Retaliation. The six-year statute of limitations applies to whistleblower retaliation claims. *United States ex rel. Wilson v. Graham County Soil*, 367 F.3d 245 (4th Cir. 2004).

In order to obtain the benefit of the anti-retaliation provisions of the FCA, a relator must demonstrate that his protected conduct put his employer on notice of the distinct possibility of a *qui tam* action. *Fanslow v. Chicago Mfg. Center, Inc.*, 384 F.3d 469, 2004 WL 2085511 (7th Cir. 2004).

The protected activity element of a retaliation claim does not require the plaintiff to have filed an FCA lawsuit or to have developed a winning claim at the time of the alleged retaliation. *Schuhardt v. Washington University*, 390 F.3d 563, 2004 WL 2754758 (8th Cir. 2004).