THE FCA IN THE COURTS OF APPEAL - 2004

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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 (3rd 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 (2nd Cir. 2004).

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F.3d 432 (3rd Cir. 2004); *In re: Genesis Health Ventures, Inc., 112 Fed.Appx. 140*, 2004 WL 2296093 (3rd Cir. 2004) (Unpublished).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).

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 Herrera v. Danka Office Imaging Co.,* 91 Fed.Appx. 862, 2004 WL 491053 (4th Cir. 2004) (Unpublished).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 Graves v. ITT Educational Services, Inc., 111 Fed.Appx. 296,* 2004 WL 2376217 (5th Cir. 2004) (Unpublished).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 Davis v. Litalien, 88 Fed.Appx. 778,* 2004 WL 326765 (5th Cir. 2004) (Unpublished).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).

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).

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 (3rd 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).

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 (2nd Cir. 2004).

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).