THE FCA IN THE COURTS OF APPEAL - 2003

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Immunity — *U.S. ex rel. Sarasola v. Aetna Life Insurance Co.,* 319 F.3d 1292 (11th Cir., Jan. 28, 2003).

A fiscal intermediary, Aetna, enjoys absolute immunity from *qui tam* liability for false claims submitted by a provider on the theory that it failed to audit records of a Medicare service provider that allegedly presented a false claim for Medicare Part A reimbursement.

The court noted that an intermediary might be liable for fees paid to it to audit providers if it failed to do so.

Costs — *U.S. ex rel. Costner v. URS Consultants, Inc., et al.*, 317 F.3d 889 (8th Cir., Jan. 28, 2003).

Court may award costs against *qui tam* plaintiffs in FCA litigation.

Materiality
Government Knowledge
Rule 9(b) — *U.S. ex rel. Costner v. URS Consultants, Inc., et al.*, 317 F.3d 883 (8th Cir., Jan. 28, 2003).

"We need not decide the precise contours of the materiality requirement . . . because we hold that the plaintiffs have failed to produce evidence raising a genuine issue of material fact as to whether the allegedly withheld information was even relevant to the EPA's payment decision."

"A contractor that is open with the government regarding problems and limitations and engages in a cooperative effort with the government to find a solution lacks the intent required by the Act."

First-to-File — *U.S. ex rel. Hampton v. Columbia/HCA Healthcare Corp., et al.*, 318 F.3d 214 (D.C. Cir., Feb. 7, 2003).

Adding additional defendants and another state did not change the material elements of the fraud alleged in an earlier *qui tam* action. Action barred under the first-to-file rule.

Public Disclosure
Federal Employee — *U.S. ex rel. Holmes v. Consumer Insurance Group, et al.*, 318 F.3d 1199 (10th Cir., Feb. 10, 2003) (en banc).

Neither information provided by government investigators to persons who were not "strangers to the fraud" nor an active government investigation constitutes public disclosure - even though the government contended that they did.

"The fact that a [government] employee learns of fraud in the course of his or her employment and has a duty to report fraud does not bar the government employee's FCA action."

[The court noted that the government "makes several other perplexing, and at times disingenuous, arguments . . ."]

Dismissal — *Swift v. U.S., 318 F.3d 250* (D.C. Cir., Feb. 11, 2003).

Government not required to intervene in order to move for dismissal. Dismissal granted over relator's objection. Hearing is solely to provide opportunity for relator to convince the government not to dismiss the case.

Falsity — *U.S. ex rel. Local 342 Plumbers and Steamfitters v. Dan Caputo Co., et al.*, 321 F.3d 926 (9th Cir., Mar. 5, 2003).

Suit against contractors alleging failure to pay prevailing wage rates could not succeed because no prevailing wage rates had been established under Davis-Bacon Act.

Public Disclosure
Original Source — *U.S. ex rel. Feingold v. AdminaStar Federal, Inc.,* 324 F.3d 492 (7th Cir., Mar. 27, 2003).

HCFA statistical reports showing allegedly fraudulent reimbursement claims constituted public disclosure. Relator who obtained and reviewed these reports was not an original source.

Retaliation — *U.S. ex rel. Siewick v. Jamieson Science and Engineering, Inc., et al.,* 322 F.3d 738 (D.C. Cir., Mar. 28, 2003).

In whistleblower retaliation suit, court determined that the company, not the CEO, was the only employer. "Neither Dr. Jamieson's ownership nor his control of JSE makes him Dr. Siewick's 'employer' within its common law meaning."

Materiality — *U.S. v. Southland Management Corp., et al.*, 326 F.3d 669 (5th Cir., April 1, 2003) (en banc).

False statements that property was in a decent, safe and sanitary condition were not actionable because property owners were entitled to payment until HUD notified them that they had failed to take corrective action and that payments would be abated.

[Why would the government bring this case, and then appeal an adverse ruling on such appallingly bad facts?]

Stay — *International Air Response v. U.S.*, 324 F.3d 1376 (Fed. Cir., April 7, 2003).

District court in FCA suit has authority to stay statute of limitations period for challenging decision of contracting officer under the Contract Disputes Act.

Public Disclosure
Original Source — *U.S. ex rel. Hays v. Hoffman, et al.*, 325 F.3d 982 (8th Cir., April 9, 2003).

State audit reports qualify as public disclosure.

However, relator was original source of allegation that apples given to nursing home employees were gifts and not reimbursable by Medicare as food expense.

A jury found that false claims were submitted, but there were no measurable damages. The District Court determined that 336 claims were false and assessed the minimum fine of $1,680,000, plus $771,736 to the relator on his retaliation claim. On appeal, the government intervened to defend the position that the fine did not violate the Eighth Amendment. The court of appeals did not decide the Eighth Amendment issue, but reduced the number of claims to eight, and imposed the maximum $10,000 penalty for each claim.

Settlement — *U.S. v. Sforza, et al.*, 326 F.3d 107 (2d Cir., April 10, 2003).

FECA does not preclude a FCA suit to recover on false disability claims.

Settlement reached orally, on the record, before a magistrate judge is enforced. Agreement to exchange "mutual releases, general releases" does not include release of criminal liability.

Sealing — *Under Seal v. Under Seal*, 326 F.3d 479 (4th Cir., April 14, 2003).

Order unsealing FCA complaint is appealable under *Cohen's* collateral order doctrine.

Sealing is only justified in order that the government may investigate.

Original Source — *U.S. ex rel. Kinney v. Stoltz, et al.*, 327 F.3d 671 (8th Cir., May 5, 2003).

Original source requires direct knowledge. "A relator has direct knowledge when he sees it with his own eyes." Relator's knowledge was gained from depositions he took in a prior *qui tam* action, which was dismissed. Case dismissed.

Rule 9(b) — *U.S. ex rel. Garst v. Lockheed Martin Corp., et al.*, 328 F.3d 374 (7th Cir., May 8, 2003).

One hundred fifty-five page third amended complaint (and statement) with 400 paragraphs and 99 attachments lacked specificity required by Rule 9(b) and the simplicity required by Rule 8(a)(2). Dismissal with prejudice affirmed.

Relator Share — *U.S. ex rel. Donald v. University of California Board of Regents, et al.*, 329 F.3d 1040 (9th Cir., May 21, 2003).

Relator brought suit against a state-run hospital; government intervened and settled allegations.

Held that relator is not entitled to a share of settlement with a state entity.

Procedure Limitations — *U.S. ex rel. Mathews v. Healthsouth Corp.*, 332 F.3d 293 (5th Cir., May 22, 2003).

Amended complaint, which was delivered to court without requesting leave, was only considered filed for statute of limitations purposes when it was submitted with request for leave to file, where additional count (age discrimination) had no factual relationship to FCA allegations.

Retaliation — *Bradford v. Huckabee, et al.*, 330 F.3d 1038 (8th Cir., June 5, 2003).

Individuals were not "employer" for purpose of 3730(h) claim.

State a Claim — *U.S. ex rel. Willard v. Humana Health Plan of Texas Inc., et al.*, 336 F.3d 375 (5th Cir., June 26, 2003).

Allegation that HMO cherry picked healthy people for coverage did not state a cause of action.

"The False Claims Act does not create liability merely for a health care provider's disregard of Government regulations or improper internal policies unless, as a result of such acts, the provider knowingly asks the Government to pay amounts it does not owe."

Retaliation — *U.S. ex rel. Golden v. Arkansas Game & Fish Commission, et al.*, 333 F.3d 867 (8th Cir., June 25, 2003).

Claim that individual members of AG&FC made false claims in their individual capacity fails.

Retaliation claim fails for lack of evidence.

Excessive Fines — *U.S. v. Mackby, 339 F.3d 1013* (9th Cir., Aug. 12, 2003).

$729,454.92 in civil penalties and treble damages did not violate the Eighth Amendment where the government sought penalties for 1459 claims and single damages of $58,151.64.

Rule 9(b) — *U.S. ex rel. Hill v Morehouse Medical Associates, Inc.,* 2003 WL 22019936 (11th Cir., Aug. 15, 2003).

Reversing the district court, the court found that relator's complaint satisfied Rule 9(b).

Rule 9(b)
Retaliation — *Yuhasz v. Brush Wellman, Inc.,* 341 F.3d 559 (6th Cir., Aug. 20, 2003).

Complaint failed to comply with Rule 9(b).

"The mere fact that Yuhasz told Brush that its certifications of compliance were 'unlawful and illegal' does not establish notice" that Yuhasz was engaged in protected activity.

Summary Judgment — *U.S. v. Taber Extrusions, LP, et al.,* 341 F.3d 843 (8th Cir., Aug. 27, 2003).

Genuine issues of material fact precluded summary judgment.

Issue was whether invoices submitted by subcontractor were "pro forma." The court also noted that to hold the defendant subcontractor liable, the government must prove that it knew the prime contractor would use the allegedly pro forma invoices "in a manner which would cause the fact represented or omitted in the invoices to defraud the United States."

Settlement
Rule 9(b)
Public Disclosure
Original Source — *U.S. ex rel. Bledsoe v. Community Health Systems, et al.*, 342 F.3d 634 (6th Cir., Sept. 10, 2003).

Relator entitled to share of settlement of allegations voluntarily disclosed to government and under investigation at time he filed *qui tam* action as an "alternate remedy." The settlement agreement had specifically excluded relator's claim.

"We hold that 'alternate remedy' refers to the government's pursuit of any alternative to intervening in a relator's *qui tam* action."

Materiality
Collective
Knowledge — *U.S. ex rel. Harrison v. Westinghouse Savannah River Co.*, 2003 WL 22989240 (4th Cir., Dec. 19, 2003).

Materiality is an element, however . . .

No-OCI certification was held material even though the government continued payments after it investigated, determined that there was no OCI and continued payments.

While stating that it was not applying the collective knowledge doctrine, the court appears to have done so.