

DC Circ. Clears MWI In Nigerian FCA Suit

By **Dani Kass**

Law360, New York (November 24, 2015, 9:41 PM ET) -- The D.C. Circuit on Tuesday overturned a jury's trebled \$22.5 million verdict in a False Claims Act suit against Moving Water Industries Corp. over what constitutes high commissions during a Nigerian purchase backed by federal loans, finding the company can't violate a standard left vague by the government.

The government's rule requiring "regular commissions" is ambiguous, making it reasonable that companies can interpret regular as industry-wide, intra-firm, or as in MWI's case, individual-agent, the panel said. The reversal stemming from MWI's cross-appeal shut down the government's appeal over the district court's decision that the company owed nothing of the jury's \$22.5 million, as it had already paid back its loan with interest.

MWI had secured the \$74 million from the Export-Import bank to fund Nigeria's purchase of its pumping equipment. The 1998 whistleblower suit claimed the more than \$28 million, or more than 30 percent, commission given to Nigerian sales agent Alhaji Indimi was excessive.

The district court agreed and trebled the \$7.5 million in damages for a total of \$22.5 million, but then found that Nigeria's \$108 million repayment of the loans negated that, and ordered the company to pay only civil penalties. The government appealed, claiming that the company should have to pay \$15 million for the treble damages.

MWI, who argued that the agent was being paid his usual, and therefore regular, commission, cross-appealed the judgment.

"MWI could reasonably have concluded that Indimi's commissions were regular because they were consistent with what MWI had been paying him for over 12 years and were calculated using the same formula MWI used to determine commissions for all of its agents," the DC Circuit said.

The government has not published any definition of what "regular commissions" means or how to determine it, and only explained its understanding of the term after intervening in this suit, the court said. Officials at the bank said they keep the term flexible in order to make the loan approval process easier, according to the opinion.

"This may be the government's choice, but then the FCA may cease to be an available remedy if the government concludes after the fact that a particular commission is not 'regular' because it is too high," the court said.

The government in turn gave the exporters the right to interpret that standard unless the government tells them otherwise beforehand, which the court said it hadn't done in this case, having at most told the company that the commission should be around five percent as informal guidance.

Whether the higher commission was done in bad faith is irrelevant, the court said, as MWI still reasonably interpreted the requirement.

Brian Tully McLaughlin of Crowell & Moring LLP, who represented MWI, told Law360 that the company is very happy with the decision.

"MWI is a small, family-owned company that's been saddled with this lawsuit for more than 15 years," McLaughlin said. "I would say the D.C. Circuit's ruling vindicated their long struggle to defend themselves against the government's claims of fraud."

The DOJ didn't respond to requests for comment Tuesday.

U.S. Circuit Judges Judith W. Rogers, Janice Rogers Brown and Brett M. Kavanaugh sat on the panel.

MWI is represented by Robert T. Rhoad, Brian Tully McLaughlin, Charlotte E. Gillingham, Richard L. Beizer and Jason C. Lynch of Crowell & Moring LLP.

The government is represented by Melissa N. Patterson, Benjamin C. Mizer, Vincent H. Cohen Jr. Michael S. Raab and R. Craig Lawrence of the U.S. Department of Justice.

The case is USA v. MWI Corporation, et al, case number 14-5210, in the U.S. Court of Appeals for the D.C. Circuit.

— Editing by Ben Guilfooy.

All Content © 2003-2016, Portfolio Media, Inc.