

DC Circ. Ruling Gives FCA Defendants An Easy Out, US Says

By **Jacob Fischler**

Law360, Washington (February 9, 2016, 11:03 PM ET) -- The federal government asked the D.C. Circuit on Monday to undo its reversal of a \$580,000 statutory damages award in a False Claims Act case against a water pump company, saying an appellate panel twisted the law's purpose in permitting the company to claim ignorance of fraudulent conduct.

If allowed to stand, a circuit court panel's November decision over what constitutes a "regular commission" payable to a Nigerian sales agent would fundamentally weaken the FCA by establishing that a defendant could escape liability if the government doesn't explicitly warn against every type of conduct it would consider fraud, even if the company acted unreasonably in light of what it knew or should have known, the U.S. Department of Justice said in a petition for rehearing.

Under the standard the panel used to clear Moving Water Industries Corp. of FCA liability on the grounds that the definition of an unreasonably high commission payment was vague, the government would be forced to "envision and then warn against every possible 'reasonable' interpretation" that might be used to justify fraudulent overspending, the DOJ said.

Such a standard "is not only unrealistic, it is contrary to Congress' decision to deprive defendants of a deliberate ignorance defense," the government said. "Given the ease with which a defendant can proffer a purported ambiguity, such a standard will allow many defendants to escape liability and, at a minimum, will consume vast amounts of federal resources as government employees attempt to guess and address all possible permutations of any condition of payment."

Courts have widely held that contractors cannot be held liable for FCA violations when the only evidence that they knowingly submitted false claims points to a reasonable misinterpretation of a requirement, the government said. However, when there is conflicting evidence about whether the action was based on what the company knew or should have known, a jury is allowed to weigh the evidence and decide if the defendant acted knowingly, the DOJ said.

That scenario played out in the MWI case, in which a jury in 2013 found the contractor had issued false supplier's certifications to the Export-Import Bank to confirm that it had not paid any irregular commissions or bribes related to the sales of the pumping equipment to Nigeria, when in fact it had overpaid the country's sales agent by \$7.5 million.

The damages were trebled to \$22.5 million under the FCA, but the district court let MWI off the hook in light of Nigeria's repayment of the loans with interest and fees, which totaled \$108 million, according to

the DOJ. But the lower court did ultimately award \$580,000 in statutory damages.

MWI arranged to sell irrigation pumps and other equipment to seven Nigerian states in 1992 for \$82 million, helping secure eight loans from the Export-Import Bank of the U.S. to finance those sales. The bank agreed to lend Nigeria \$74 million, and the individual Nigerian states agreed to pay the remainder of the purchase price. Before the bank would approve the loans to Nigeria, it required MWI to certify that had paid only "regular commissions" in connection with the pump sales.

On cross-appeal last year, the company argued that "regular commissions" was an imprecise term and the government had never warned that its conduct was in danger of violating that vague standard. A three-judge panel unanimously agreed, saying the government's rule requiring "regular commissions" is ambiguous, making it reasonable that companies can interpret the term in a number of ways, and MWI's stated understanding was among the reasonable interpretations.

In an email, MWI attorney Robert Rhoad said the panel correctly applied relevant precedent.

"Simply stated, we don't believe that there is any colorable claim for rehearing in this 18-year-old case. MWI hopes and expects that the government's petition will be rejected and this long-running saga will finally be put to rest."

A spokeswoman for the DOJ declined to comment Tuesday.

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, Michael S. Raab, Benjamin C. Mizer and Channing D. Phillips of the U.S. Department of Justice.

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

--Additional reporting by Dani Kass and Caroline Simson. Editing by Mark Lebetkin.

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