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Fourth Circuit makes it harder for whistleblowers in FCA cases

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MAY 6, 2019

In a relatively recent decision, the U. S. Court of Appeals for the Fourth Circuit raised the bar a notch for whistleblowers in False Claim Act ("FCA") cases whose allegations lack specificity as to direct evidence of presentment for payment to the government for fraudulent services.

Indeed, in her dissenting opinion in *U.S. ex rel. David Grant v. United Airlines, Inc.*, No. 17-2151 (4th Cir. 2018), Judge Keenan opined that this ruling, affirming the dismissal of the claim at the pre-discovery pleading phase of the case, "effectively limits qui tam actions to whistleblowers in 'white collar' positions with access to financial and other business records."

The 4th Circuit observed in its opinion that, since FCA claims sound in fraud, each element of the claim must be pled with specificity, as required in cases alleging fraud by Federal Rule of Civil Procedure 9(b).

David Grant was a maintenance technician at United Airlines who claimed that United was submitting falsified claims to the government regarding the repair of jet engines for military transport planes.

Among other things, Grant contended that United misrepresented to the government that it had performed repairs using properly calibrated and certified tools and that it had falsely represented that certain unperformed inspections and repairs had, in fact, been performed.

Shortly after Grant complained to his superiors that the failure to properly perform the repairs and inspections could lead to catastrophic results, he was terminated, so he also brought a retaliation claim in his qui tam action against United.

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An essential element of claims such as Grant's, brought under §§3729(a)(1)(A) and (B) of the FCA, is sufficient evidence that the offending government contractor actually presented the false claim to the government.

While the Court conceded that Grant had sufficiently alleged that United had engaged in some fraudulent conduct, it found the District Court to have been correct in dismissing Grant's FCA claims.

As Judge Duncan, writing for the majority, put it: "[W]hile the allegations state with particularity that United engaged in at least some fraudulent conduct, the [complaint] fails to provide the last link which is critical for FCA liability to attach: namely, that this scheme necessarily led to the presentment of a false claim to the government for payment." *Id.*

The Court, in finding Grant's assertion of fraudulent certifications of work and an "umbrella" payment for the overall program by the government to be insufficiently specific, cited *U.S. ex rel. Nathan v. Takeda Farm N. Am., Inc.*, 707 F. 3d 451, 457 (4th Cir. 2013) for the proposition that an FCA plaintiff may not "allege simply and without any stated reason for his belief that claims requesting illegal payments must have been submitted, were likely submitted, or should have been submitted to the Government."

The Court acknowledged that it is oftentimes difficult for lower-level employees to have access to billing records and procedures that would facilitate the establishment of the presentment element, thus posing a practical challenge for such an employee to successfully bring an FCA claim.

It is noteworthy that, in this case, United was a subcontractor to Pratt & Whitney, which in turn was a subcontractor to Boeing, the holder of the contract with the Air Force, and this likely hampered Grant's ability to specifically allege the elements that could satisfy the presentment requirement.

The Court stated that there were two ways that Grant could have satisfied the presentment element. One means of doing so would have been to satisfy the standard set forth in *Harrison v. Westinghouse Savannah River Co.*, 176 F. 3d 776, 784 (4th Cir. 1999),

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which requires an FCA plaintiff, at a minimum, to describe "the time, place and contents of the false representations, as well as the identity of the person making the misrepresentations and what he obtained thereby."

In the alternative, Grant could have alleged a pattern of conduct that would "necessarily have led to the submission of false claims." *Id.*, citing *Nathan*, 707 F. 3d at 457. In this case, however, Grant did neither, thus his FCA claims were dismissed.

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But the Court stated that this concern was outweighed by the severe financial consequences that an FCA claim defendant faces in these "quasi-criminal" cases, which could cripple or even serve as a "death sentence" to a company.

The Court also noted that holding plaintiffs to this standard serves to discourage frivolous lawsuits and those that seek to find damning facts through discovery, as opposed to alleging them directly and specifically at the outset.

In sum, this ruling, confirming that plaintiffs must be held to the strict and specific fraud pleading standards for each element of an FCA claim, including presentment, while no doubt disheartening to the plaintiff's bar, should be reassuring to government contractors.

This article first appeared in the May 6, 2019, edition of Westlaw Journal Government Contract.

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