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ATTORNEYS AS RELATORS – WHAT ABOUT THE FEES?

The past several years have seen a trend of attorneys now taking on the role of relator as well as counsel. This raises a new question: how are relators who act as counsel to be rewarded? By the relator's share? By attorneys' fees? By both? That question was answered recently by the Illinois Supreme Court, interpreting the state FCA, which closely mirrors the federal statute.

In *Illinois ex rel. Schad, Diamond & Shedden, P.C. v. My Pillow, Inc.*,[1] the court considered the case of a *qui tam* suit brought by Stephen Diamond.[2] Diamond brought the action based upon My Pillow's failure to collect state taxes for sales at craft shows, online and by telephone.[3] All the purchases identified in the complaint were made by Diamond, either to the firm or to his home.[4] Diamond, as well as two other attorneys in the firm, testified as witnesses. Diamond's ultimate petition for attorneys' fees included time as relator (e.g., purchasing pillows, attending craft shows and checking credit card statements) and did not separate that time from the time spent drafting legal pleadings or preparing witness examinations.[5]

The trial court granted Diamond's petition for approximately $600,000 in attorneys' fees[6] in addition to the $266,891 awarded as 30 percent of the recovery on behalf of the state.[7] On appeal, the appellate court ruled Diamond was entitled to the attorneys' fees for outside counsel who assisted in the lawsuit,[8] approximately $1,800,[9] but not those incurred by the relator/law firm.

The Illinois Supreme Court affirmed the ruling of the appellate court. It began its analysis with Illinois' long-standing ruling barring an attorney from charging fees for representing himself, "This is forbidden by every sound principle of professional morality as well as by the policy of the law." quoting *Willard v. Basset*.[10] The law did not change over the ensuing centuries. The court, in *Hamver v. Lentz*,[11] ruled "a lawyer representing himself or herself simply does not incur legal fees."[12] And, the United States Supreme Court found similarly, ruling that awarding fees to attorney *pro se* litigants would incentivize self-representation, putting into play "the adage that 'a lawyer who represents himself has a fool for a client.'"[13]

While the *Diamond* case was based on Illinois law, the similarity between the state and the federal FCA, as well as controlling U.S. Supreme Court case law, suggests that *pro se qui tam* relators will not have any more luck double-dipping in federal court.

If you have questions, please contact David Honig at (317) 977-1447 or dhonig@hallrender.com or your regular Hall Render attorney.

[1] 2018 IL 122487, ___ N.E. 3d ___ (2018).

[2] Id. at *1.

[3] Id. at *2.

[4] Id.

[5] Id. at *3.

[6] Id. at *4.

[7] Id. at *2.

[8] Id. at *3.

[9] Id. at *2.

[10] 27 Ill. 37, 38 (Ill. 1861).

[11] 132 Ill.2d 49, 547 N.E.2d 191 (Ill. 1989).

[12] Id. at 62.

[13] Kay v. Ehrler, 499 U.S. 432, 437, 111 S.C.t 1435, 113 L.Ed.2d 486 (1991).