GREED AND CREATIVE PLEADING: A FORMULA FOR DISMISSAL UNDER THE FCA

On July 5, 2019, the United States Court of Appeals, District of Columbia Circuit issued an opinion enforcing Supreme Court precedent that the False Claims Act ("FCA") should be reserved for true fraud against the government—not "garden-variety regulatory violations."

In *U.S. ex rel. Kasowitz Benson Torres LLP v. BASF Corp.*,[1] the D.C. Circuit reviewed a district court's dismissal of an FCA action for failure to state a claim for relief. The whistleblowers alleged that several chemical manufacturers produced chemicals with adverse health effects and failed to disclose this information to the EPA, as required under the Toxic Substances Control Act ("TSCA").[2] The whistleblowers argued that although the EPA took no regulatory action against the defendants, the chemical manufacturers violated the FCA by "depriving the government of money by failing to pay TSCA civil penalties and by concealing their liability from the EPA."[3] The whistleblowers also argued that the chemical manufacturers deprived the government of "property" by failing to disclose adverse health information about the chemicals they manufactured.[4]

The D.C. Circuit, unimpressed with the whistleblowers' allegations, held:

- An unassessed potential penalty for regulatory noncompliance does not constitute an obligation that gives rise to a viable FCA claim; and
- A regulatory agency's statutory right to be informed does not constitute a traditional property right.[5]

In its opinion, the D.C. Circuit noted that the TSCA grants the EPA the *authority* to impose civil penalties, but does not require them to do so.[6] The Court held that an obligation "arises only if and when the EPA decides to impose a penalty"[7] and without an obligation to impose a civil penalty, the defendants' non-compliance with the TSCA did not equate to a claim of conversion, or any other appropriate claim for relief under the FCA.[8]

The whistleblowers' argument that the defendants violated the reverse false claims provision by knowingly avoiding an obligation to transmit property to the government was just as quickly dismissed. The Court held that the TSCA gave the EPA only an interest in the chemical manufacturers' substantial risk information.[9] The Court noted that this information is not transmitted to the EPA by chemical manufacturers for the EPA's benefit, but to allow the EPA to "carry out its regulatory mission."[10] The Court held that because the EPA's concern is regulatory, the defendants' obligation to inform the EPA of substantial risk information is not an obligation to transmit an interest in property.[11]

This opinion reinforces both the demanding materiality standard created by the Supreme Court's *Escobar* holding, as well as the First Circuit's ruling in *U.S. ex rel. D'Agostino v. ev3, Inc., et al.*,[12] which held that a whistleblower cannot take the place of a regulatory agency. To do so would create a chilling effect on a manufacturer's reporting obligations and the EPA's ability to perform its duties.[13]

TAKEAWAYS

This opinion serves as useful caselaw in combating unique regulatory arguments for liability under the FCA. Potential penalties under a statute or by a regulatory agency do not automatically create FCA liability, nor can a whistleblower rely on those potential penalties without placing themselves in the shoes of a regulatory agency.

If you have any questions, please contact:

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[1] No. 18-7123, 2019 WL 2896005 (D.C. Cir. July 5, 2019)

[2] *Id.* at *2.

[3] *Id.*

[4] *Id.* at *3.

[5] *Id.* at *2.

[6] *Id.* at *3.

[7] *Id.*

[8] *Id.*

[9] *Id.* at *4.

[10] *Id.*

[11] *Id.*

[12] 845 F.3d 1 (1st Cir. 2016).

[13] *Id.* at 8.