FALSE CLAIMS ACT UPDATE, NOVEMBER 2011

Can an incompetent, and ultimately dismissed, False Claims Act Complaint bar a future complaint under the FCA's "first to file rule?" The Court of Appeals in Washington D.C. answered the question for the first time on November 4, 2011.

Can a settlement agreement between an employer and an employee force dismissal of the employee's whistleblower suit? The Federal District Court in Tampa, Florida, was faced with that question in *U.S. ex rel. Scott v. Cancio*, and answered the question in the negative.

Does failure to comply with regulatory requirements or CDC advisories that are not conditions of payment constitute a violation of the False Claims Act? Not according to the U.S. District Court in New Jersey.

Can a *qui tam* whistleblower, who was also an employee, make general allegations, then flesh out her suit during discovery?

Can a whistleblower hide her identity if the government declines intervention?

Can there be a False Claims Act violation without a claim that is false?

All these questions were addressed by Federal Courts this November.

In November 2005, more than two years before Batiste filed his Complaint, Michael Zahara filed a whistleblower suit alleging SLM Corporation falsified loan records to increase its revenue. The Zahara Complaint alleged only generalities. Mr. Zahara was not able to identify any actual false records. His Complaint was therefore dismissed, without prejudice, for failure to plead with the required detail.

On June 13, 2008, Batiste filed his whistleblower lawsuit, making the same allegations as those made by Zahara more than two years earlier.

The False Claims Act, in a rule designed to prevent copycat whistleblower lawsuits, says nobody other than the Government may bring a related action based on the material elements underlying an earlier suit, even if some of the facts are different. Unfortunately for Batiste, the material elements of both suits were the same.

The whistleblower, along with the Government, argued that permitting the earlier dismissed lawsuit to bar Batiste's suit would be contrary to public policy, as it would permit the incompetent to bar recovery when the Government was injured. They suggested that the Court should read the FCA to add the "pleading fraud with particularity language" of the Federal Rules of Civil Procedure. The Court rejected the request that it rewrite the False Claims Act, a duty more properly within the power of Congress.

For the full case see *U.S. ex rel. Batiste v. SLM Corporation*, 659 F.3d 1204 (C.A.D.C. 2011)

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The whistleblower, Scott, sued his employer for discrimination and retaliation. The parties settled that case case on January 27, 2010, less than two weeks after Scott filed his whistleblower suit. That suit was filed under seal and the defendant did not know about it when settling the employment case. That settlement included a representation that Scott "had not filed any complaint, claim, or charge against Defendant in any state or federal agency or court," and included a broad release from any claims Scott might have.

Cancio moved to dismiss the FCA claim based on the prior settlement agreement.

The Court found that the most important fact was that, while the case was under seal and unknown to Cancio, the FCA case was filed prior to the settlement. While a settlement agreement can bar a later suit, the False Claims Act statute says an active case may only be dismissed "if the court and the Attorney General give written consent ot the dismissal and their reasons for consenting."

The Court did go out of its way to note that Cancio could seek relief in the employment case to set aside the agreement based upon any

misrepresentations or fraud by Scott.

For the full case see *U.S. ex rel. Scott v. Cancio*, 2011 WL 5975782 (M.D.Fla. 2011).

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A whistleblower alleged that a dialysis center failed to staff its facility as required by State regulations, and that it administered drugs contrary to a recommendation by the Center for Disease Control. However, he did not allege, nor could he show, that the Government would have refused to pay claims had it known of these alleged transgressions.

The Court ruled that a whistleblower could bring a lawsuit based upon certification of compliance with regulations, but only when compliance with the regulations was a condition of payment. The whistleblower's claims related to staffing and medication were dismissed.

For the full case see *Foglia v. Renal Ventures Management, LLC* 2011 WL 5882020 (D.N.J. 2011).

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Can a *qui tam* whistleblower, who was also an employee, make general allegations, then flesh out her suit during discovery?

A nurse practitioner brought a whistleblower suit against her employer, alleging violations of the False Claims Act for billing practices and for retaliatory dismissal. She covertly reviewed the employer's billing sheets, concluding they were fake. She also identified several other people who told her that the defendant billed Medicare when he did not actually see patients. However, she could not identify any actual patients, dates, claim numbers, or billing codes. She argued that, as a nurse practitioner, she knew "first-hand" of the fraud, but did not have access to billing records to prove it. Therefore, she asked that the Court permit her discovery to prove her case rather than dismissing it prior to discovery.

The Court rejected the whistleblower's request. It found that its parent Court, the First Circuit Court of Appeals, had "explicitly rejected this 'allege it now, prove it later' approach" in False Claims Act Cases and refused to let her file general allegations, then use discovery to try to prove them.

The Court also dismissed the whistleblower's retaliation claim, finding that she failed to allege that the employer knew of her covert investigations. Without such knowledge, the employer could not have discharged in retaliation for those actions.

For the full case see *U.S. ex rel. Glynn v. Compass Medical, P.C.* 2011 WL 5508916 (D.Mass. 2011).

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Can a whistleblower hide her identity if the government declines intervention?

In a case that might make whistleblowers think twice before filing FCA complaints, a whistelblower in Ohio filed a lawsuit, clearly hoping the Government would intervene, allowing her to cooperate and reap the reward. When the Government declined intervention, and the whistleblower considered the costs and possible rewards and decided to voluntarily dismiss the case, she asked the Court to keep the case sealed to keep her name confidential. While she no longer worked for the Defendant, she feared that her decision to be a whistleblower could hurt her socially and professionally.

The Court, finding that the purpose of the seal was to give the Government time to make its intervention decision, and that the presumption is for public access to court records, rejected the whistleblower's request. It also rejected her more limited to request to unseal the Complaint but to redact her name and any other identifying information, for the same reasons.

For the full case see *U.S. ex rel. Ruble v. Skidmore*, 2011 WL 5389325 (S.D.Ohio 2011).

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Can there be a False Claims Act violation without a claim that is false?

FALSE CLAIMS ACT DEFENSE

Can a whistleblower plead a False Claims Act case with the required specificity without showing any actual claims to the Government? Where the basis for the claim is fraud-in-the-inducement, a contract knowingly entered into intending non-performance, they can. So ruled the Federal District Court in Chicago in *U.S. ex rel. Wildhirt v. AARS Forever*. In that case the whistleblower alleged the defendant solicited and entered into the contract to provide respiratory therapy equipment, supplies, and service to VA patients under false pretenses, never intending to fulfill its contractual requirements. The Complaint was buttressed by numerous specific instances of non-performance.

The Court went out of its way to point out that its reasoning did not mean that a mere breach of contract could form the basis for a whistleblower lawsuit, but that the *qui tam* relator must show "that Defendants entered into the contract with their fingers crossed."

For the full case see *U.S. ex rel. Wildhirt v. AARS Forever, Inc.*, 2011 WL 5373985 (N.D.Ill. 2011).

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