FEBRUARY FCA UPDATE

February was an interesting month, with one case showing how OIG advisory opinions can be taken too far, another considering fraud under a corporate integrity agreement, and a court applying burden-shifting for the first time at the appellate level in FCA retaliation cases. Cases reviewed from February are:

- *US ex rel. Boggs v. Bright Smile Family Dentistry, P.L.C.* (W.D. Okla.)
- *Harrington v. Aggregate Industries - Northeast Region, Inc.* (C.A. 1 Mass)
- *Klein, M.D. v. City of New York* (S.D.N.Y.)
- *Klusmeier v. Bell Constructors, Inc.* (C.A. 11 Fla.)
- *US ex rel. Matheny v. Medco Health Solutions, Inc.* (C.A.11 Fla.)

***US EX REL. BOGGS V. BRIGHT SMILE FAMILY DENTISTRY, P.L.C.* (W.D. OKLA.)**

Bright Smile, a dentistry practice, published coupons in local advertising. The coupons offered a $15 gas card with a dental appointment, and coupons were given for Medicaid patients. The advertisement also offered courtesy transportation for all patients with appointments who needed it.

Bright Smile moved to dismiss based upon advisory opinions from the Department of Health & Human Services Office of Inspector General (OIG). The opinions applied to very specific situations. They included one case where a nursing facility was not easily accessed through public transportation and required crossing a toll bridge, and another where the 108-acre hospital campus lacked sufficient close-in parking and walkways were difficult for feeble patients to navigate.

The court found that reliance upon the OIG opinions was insufficient to force dismissal. The factual situations in the opinions differed from the core allegations in the case, as the opinions addressed specific needs, while the whistleblower alleged that Bright Smile simply used transportation as a marketing tool.

OIG advisory opinions given to other entities are only as valuable as their ability to persuade and, in a case that does not perfectly mirror the basis for the opinion, are unlikely to give a basis for dismissal. They should be relied upon with great caution.

***HARRINGTON V. AGGREGATE INDUSTRIES - NORTHEAST REGION, INC.* (C.A. 1 MASS)**

In the most significant legal decision of February, the First Circuit Court of Appeals considered whether to apply the burden-shifting framework of *McDonnell Douglas Corp. v. Green* to FCA retaliation cases. Trial courts had done so, but this case was the first time the framework was applied at the appellate level.

In an FCA retaliation case, brought under section 3730(h)(1) of the FCA, the employee must show (1) s/he was engaged in conduct protected under the FCA; (2) the employer had knowledge of the conduct; and (3) the employer retaliated because of the conduct.

Under *McDonnell Douglas* burden-shifting, the employee must first show a *prima facie* case of retaliation. The burden then shifts to the employer to produce any evidence (it is a burden of production, not persuasion) of a legitimate, nonretaliatory reason for the action. The burden then shifts back to the employee to show that the proffered reason is a pretext masking actual retaliation.

The Court, comparing the requirements of the FCA retaliation provision and the *McDonnell Douglas* framework, determined it was a mechanism appropriately applied to such cases.

***KLEIN, M.D. V. CITY OF NEW YORK* (S.D.N.Y.)**

Klein, who brought numerous claims based upon his termination by the Department of Education, amended his complaint to add a claim as a *qui tam* relator under the FCA. The court, without considering the details of the claim, dismissed the FCA count. Klein brought the claim as a

pro se Plaintiff, representing himself without an attorney. The Court, noting that relators lack a personal interest in FCA actions but are rather acting on behalf of the government, followed Second Circuit precedent (*US ex rel. Mergent Servs. v. Flaherty*, 2d Cir. 2008) and dismissed the claim.

***KLUSMEIER V. BELL CONSTRUCTORS, INC.* (C.A. 11 FLA.)**

In *Klusmeier* the whistleblower alleged violations of a contract with the government, then speculated that, because Bell submitted some invoices, false claims must have been submitted. The case was dismissed pursuant to Fed.R.Civ.P. 9(b), which requires that allegations of fraud be plead "with particularity."

***US EX REL. MATHENY V. MEDCO HEALTH SOLUTIONS, INC.* (C.A. 11 FLA.)**

False Claims Act cases must be plead with particularity. However, they do not need to be plead with the detail required to prove the case at trial. In the *Matheny* case the Defendants leaned too heavily on Rule 9(b), only to have it crash beneath them.

In *Matheny* the Defendant, Medco, was already under a Corporate Integrity Agreement (CIA) with the government. The CIA required Medco to submit random samples of patient charts to the OIG's Independent Review Organization. The whistleblower alleged that Medco, rather than submitting random samples, created fictitious patient accounts or simply eliminated evidence using a computer program called "datafix," all to hide and retain known overpayments. The whistleblower included in his complaint the Medicare and Medicaid invoice and check numbers, as well as the specific amount paid. he also included the specific fictitious patient account numbers used to hide the overpayments. He also named the people involved in the scheme, stated the date of a meeting in which it was discussed, attached copies of spreadsheets discussed at the meeting, the amount of the overpayment, and how long the overpayment remained in the patients account before being moved to a fictitious account. Finally, he alleged personal knowledge, stating he was present at the meeting and describing his own conversations with Medco's Compliance Officer about the overpayments.

The trial court's granting of Medco's Rule 9(b) Motion to Dismiss was reversed on appeal.

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