

NEW 7TH CIRCUIT FCA CASE IS A PRIMER IN WHISTLEBLOWER CASES

The Seventh Circuit Court of Appeals just issued its decision in [US ex rel. Nelson v. Sanford-Brown, Ltd.](#). This decision is sure to find its way into briefs and arguments for years to come in False Claims Act ("FCA") cases. It touched upon many of the different ways a *qui tam* relator can fail to bring an adequate FCA claim.

PUBLIC DISCLOSURE BAR

First, the court noted that the actions alleged to be false began in 2006 and ran through 2012. During that time, the FCA was amended. The court ruled that, for the purpose of the "public disclosure bar," the 2010 version of the statute controlled. Of particular interest, the court also stated the "public disclosure bar" was a jurisdictional bar. In 2010, the statute was amended to change the language from "No court shall have jurisdiction over an action under this section ..." to "The court shall dismiss an action or claim under this section, unless opposed by the Government" Nonetheless, the Seventh Circuit applied the "public disclosure bar" as a jurisdictional bar rather than merely a discretionary basis for dismissal.

Many of the problems with Nelson's case were of his own making. In responses to the Defendants' motions, Nelson conceded "that his allegations have been 'publicly disclosed'" and "he does not have direct and independent knowledge of the allegations pled upon information and belief." The court, relying upon "the well-settled rule that a party is bound by what it states in its pleadings,"¹ rejected his attempts to retreat from those admissions in his briefs.

The court found that jurisdiction existed only for claims based upon events occurring during the few months of his employment, as that would be the only opportunity for him to be an original source of information.

FRAUD WITH PARTICULARITY

Nelson's next failure was his attempt to lump all Defendants together in his Complaint, rather than to provide specific allegations against each. The court affirmed dismissal for failure to plead fraud with particularity.² It also affirmed the trial court's denial of his motion to file a second amended complaint based upon his 42-day delay in requesting such relief.

CONDITIONS OF PARTICIPATION OR PAYMENT

It is well established that regulatory violations only constitute FCA violations if they are conditions of payment, not merely conditions of participation. Nelson, and the Government in an *amicus* brief, invited the court to do away with this distinction, arguing "under the FCA, payment as participation are one and the same, as a claimant is not entitled to payment unless eligible to participate." The court flatly rejected the invitation: "Distilled to its core, Nelson and the government's theory of liability lacks a discerning limiting principle." Referencing an earlier case in which the Court described such an argument as "absurd,"³ the court said "we conclude that it would be equally unreasonable for us to hold that an institution's continued compliance with the thousands of pages of federal statutes and regulations incorporated by reference into the PPA are conditions of payment for purposes of liability under the FCA."

The court again reiterated its rejection of the "so-called doctrine of implied false certification," stating "The FCA is simply not the proper mechanism for government to enforce violations of conditions of participation" and "evidence that an entity has violated conditions of participation after good-faith entry into its agreement with the agency is for the agency—not a court—to evaluate and adjudicate."

PRACTICAL TAKEAWAY

The Seventh Circuit Court of Appeals will continue to enforce the public disclosure bar as a jurisdictional bar unless the whistle blower is also an original source of the information. Government contractors who identify errors should take advantage of self-reporting opportunities and should also consider additional steps to make sure that such disclosure trigger the self-disclosure bar. For more on this issue, please read [Self-Disclosure, the Public Disclosure Bar and the FCA - Uncertainty, Circuit by Circuit](#).

The Seventh Circuit continues to reject the "implied false certification" theory of falsity for FCA cases. Government contractors operating in the Seventh (and Fifth) Circuit may continue to expect the protection offered by Courts that require actual falsity or knowing violations of conditions of payment to state a False Claims Act violation.

¹ *Soo Line R. Co. v. St. Louis Southwestern Ry Co.*, 125 F.3d 481, 483 (7th Cir. 1997)

² Fed.R.Civ.P. 9(b)

³ *9. U.S. ex rel. Absher v. Momen Meadows Nursing Ctr., Inc.*, 764 F.3d 699, 706 (7th Cir. 2014)