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# CIVIL FALSE CLAIMS ACT: D.C. Circuit Decisively Rejects Justice Department Attempts To Impose FCA Liability Based On Non-Compliance With Ambiguous Agency Regulation

The long-running False Claims Act ("FCA") saga of Moving Water Industries ("MWI") is finally reaching an end. After battling against what it considered to be unfair FCA allegations first initiated by a *qui tam* relator in 1998, and later pursued by the Justice Department when it intervened in the case, MWI has at last found relief from a D.C. Circuit panel that said enough is enough.

In a unanimous panel decision, the D.C. Circuit reversed a jury verdict for the government and remanded the action to the district court with instructions to enter final judgment for MWI. *United States ex rel. Purcell v. MWI Corp.*, No. 14-5210, slip op. (D.C. Cir. Nov. 24, 2015). This turn of events represents not only a rare defeat for the government, but also a critically important ruling that should have repercussions far beyond MWI's immediate vindication. Citing Supreme Court and other circuit precedents, the D.C. Circuit made clear that there can be no violation of the FCA where (1) the law or regulation at issue is ambiguous, (2) the defendant's interpretation of that language is reasonable, and (3) the agency issued no formal guidance indicating that the defendant's interpretation was wrong. The court also rejected a number of FCA arguments the Justice Department routinely makes in response to "ambiguous regulation" defenses. Given the prevalence of FCA litigation patterned on this exact fact pattern, the impact of this decision should be widespread.

**The *Purcell* Decision**

In the early 1990s, MWI and Nigeria jointly applied to the Export-Import Bank ("Ex-Im Bank") for a $74.3 million loan to fund Nigeria's purchase of certain MWI irrigation equipment. Ex-Im Bank's loan approval process included MWI's submission of a "Letter of Credit Supplier's Certificate," in which MWI certified that it had not paid anything other than "regular commissions" to agents in connection with the transaction. The central liability issue in the protracted FCA case was whether MWI's payment of 30% commissions to its Nigerian sales agent rendered its certification false. Thus, this was a classic "false certification" case in which the alleged falsity of the claims was based upon an express certification by the defendant.

Notwithstanding the district court's findings that the "regular commissions" language was ambiguous and that MWI had a reasonable interpretation—namely, that "regular" meant what MWI historically had paid the same sales agent—the case went to the jury, which returned a verdict against MWI. Significant post-trial litigation then ensued, based primarily on the issue of how the amounts paid back by Nigeria should be applied to the damages assessed by the jury. The case then went to the D.C. Circuit on cross-appeals, where the Justice Department argued that the district court incorrectly determined that Nigeria's repayments completely offset the jury's damage assessment, leaving only statutory penalties. MWI understandably agreed with the damages ruling but also sought reversal of the jury's FCA liability finding. Once it found that FCA liability had not been established, due to insufficient evidence that MWI had the requisite FCA "knowledge," the D.C. Circuit never reached the "damages" dispute. Because this was a "false certification" case, the court also could have resolved the question by looking at "falsity" under the FCA, but chose to resolve it in terms of "knowledge," probably because the precedents it relied on were based on scienter. *See* John T. Boese, Civil False Claims and *Qui Tam* Actions, §§2.03[A], [B] (Wolters Kluwer Law & Business) (4th ed. & Supp. 2015-2) (discussing the interplay between "falsity" and "knowledge" in FCA cases).

Addressing the issue of FCA liability, the D.C. Circuit quickly agreed that the "regular commissions" term was ambiguous and that MWI's interpretation was objectively reasonable. Given these findings, the D.C. Circuit reasoned that the only remaining question was whether there was evidence that the agency had "officially" warned away MWI from its otherwise reasonable interpretation. Scouring the trial record, the panel found no published guidance supporting the government's *post hoc* claim that the term referred to commissions paid regularly in the industry as a whole. To the contrary, the panel pointed to trial evidence that Ex-Im Bank officials acknowledged that they had not issued written guidance because they preferred to have a "flexible" standard. Slip op. at 13.

Importantly, the D.C. Circuit also rejected four government arguments aimed at proving the "knowing" falsity of MWI's "regular commissions" certification. First, the D.C. Circuit rejected the argument that the agency's notification to the industry could be in the form of "informal" guidance. *Id*. at 13-14. Second, relying on the Supreme Court's decision in *Safeco Ins*. *Co. of Am. v. Burr,* 551 U.S. 47 (2007), the court discounted evidence showing that some MWI employees questioned the interpretation followed by the company, holding instead that such subjective intent—*i.e.,* bad faith—is not enough when a defendant relies on an objectively reasonable interpretation of an ambiguous regulation. *Id*. at 14-15. Third, the D.C. Circuit rejected a favored government argument, often advanced in these types of cases, that the defendant acted recklessly by not seeking a legal opinion from the agency. *Id*. at 15. Finally, the D.C. Circuit was not persuaded by the government's contention that the commission payments were so high that they had to be irregular, pointing instead to evidence that, on a percentage basis, the payments were less than what the Bank paid its own brokers. *Id*.

The result, according to the D.C. Circuit, is that no jury could properly find that MWI acted "knowingly" under the FCA. The court emphasized that "[s]trict enforcement of the FCA's knowledge requirement helps to ensure that innocent mistakes made in the absence of binding interpretive guidance are not converted into FCA liability." *Id*. at 9-10. As the D.C. Circuit recognized, this outcome also avoids the potential due process problems posed by "penalizing a private party for violating a rule without first providing adequate notice of the substance of the rule." *Id.* at 10 (quoting *Satellite Broad. Co. v. F.C.C.*, 824 F.2d 1, 3 (D.C. Cir. 1987)). With these comments, the D.C. Circuit is the first court to formally reference the due process question in applying the FCA, and the ramifications of the due process doctrine on FCA litigation can no longer be ignored.

The D.C. Circuit's decision reinforces the important principle that the FCA does not reach "an innocent, good-faith mistake about the meaning of an applicable rule or regulation" or extend to claims made based on "reasonable but erroneous interpretations of a defendant's legal obligations." *Id*. It also adds to the growing body of law that recognizes that the government and relators alike will have difficulty establishing that a defendant acted recklessly where the underlying conduct rests on an interpretation of an ambiguous statute or regulation. *See Safeco Ins.*, 551 U.S. 47 (2007); *United States ex rel. K & R Ltd. P'ship v. Mass. Hous. Fin. Agency*, 530 F.3d 980 (D.C. Cir. 2008); *see also* FraudMail Alert No. 08-07-09; Br. of Nat'l Ass'n of Mfrs. as *Amicus Curiae* in Support of Defendant-Appellee/Cross-Appellant and in Support of Reversal of the Decisions Finding Liability under the False Claims Act, *United States ex rel. Purcell v. MWI Corp.,* No. 14-5210 (D.C. Cir. filed Mar. 2, 2015). (The reader should be aware that some authors of this Alert filed the above-referenced *amicus* brief in the D.C. Circuit, urging reversal of the liability finding of the jury.)

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