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Civil False Claims Act: Fourth Circuit Holds That a "False Claim" Requires an "Objective Falsehood," Rejects Falsity Based on Disputed Legal Question, Requires Allegations of Materiality to Satisfy Rule 9(b) and Affirms Arbitration of Section 3730(h) Claims

Last Friday, the Fourth Circuit Court of Appeals affirmed the dismissal of a *qui tam* case arising out of an Iraq "task order" contract alleging that the defendant fraudulently induced the Army to issue a task order for transportation services based on an allegedly false misrepresentation that it would comply with the task order's maintenance and safety requirements. *See United States ex rel. Wilson v. Kellogg Brown & Root, Inc.*, No. 07-1516, 2008 WL 2069804 (4th Cir. May 16, 2008). In the course of its decision, one of the first arising out of the task order contracting process so prevalent in reconstruction efforts in Iraq, the court issued a number of important rulings on the meaning of "falsity" under the False Claims Act, the relationship between breach of contract and the FCA, and the arbitration of personal retaliation claims brought under 31 U.S.C. §3730(h).

Objective Falsehood Required

First, citing *United States ex rel. Lamers v. City of Green Bay*, 168 F.3d 1013, 1018 (7th Cir. 1999) and *United States ex rel. DRC, Inc. v. Custer Battles*, 472 F.Supp.2d 787, 797 (E.D.Va. 2007) (another Iraq contract case pending argument in the Court of Appeals), the court began by holding that a "false" claim or statement under the FCA requires an "objective falsehood." 2008 WL 2069804, at *4. The court found that the relator failed to allege falsity under the FCA because his assertion that the defendant did not comply with maintenance requirements rested on his own subjective interpretation of those requirements. Quoting *Lamers*, the court reasserted that "imprecise statements or differences in interpretation growing out of a disputed legal question are . . . not false under the FCA." *Id.*

Many courts, at the urging of DOJ and relator's counsel, have argued, successfully, that differing legal interpretations of ambiguous statutes, regulations or contract provisions should be considered only as an issue of "knowledge" or intent, which is a subjective standard not generally

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resolvable in pretrial motions. *See, e.g., United States ex rel. Walker v. R & F Properties, Inc.*, 433 F.3d 1349 (11th Cir. 2005); *United States ex rel. Oliver v. Parsons, Inc.*, 195 F.3d 457 (9th Cir. 1999); *Commercial Contractors, Inc. v. United States*, 154 F.3d 1357, 1366 (Fed. Cir. 1998). The court in *Wilson*, however, returns this issue to where it belongs—the objective determination of whether or not a claim or statement is "false." *See* Boese, Civil False Claims and Qui Tam Actions, §2.03[B] (Aspen Publishers, 3d ed.) (2006 & Supp. 2008-1).

The Fourth Circuit in *Wilson* held that the False Claims Act requires a common-sense approach:

> [w]hile the "phrase 'false or fraudulent claim' in the False Claims Act should be construed broadly," *id.* at 788, it just as surely cannot be construed to include a run-of-the-mill breach of contract action that is devoid of any objective falsehood. An FCA relator cannot base a fraud claim on nothing more than his own interpretation of an imprecise contractual provision. To hold otherwise would render meaningless the fundamental distinction between actions for fraud and breach of contract.

Id. at *5 (quoting *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 788 (4th Cir. 1999)).

Materiality and Rule 9(b)

Second, the court held that, even if the statement was "false," it could not have been material, and affirmed dismissal under Rule 9(b) for failure to plead the necessary facts demonstrating materiality. In a fraudulent inducement FCA case, the court found, the requisite intent "must be coupled with prompt, substantial nonperformance." *Id.* at *7. Interestingly, the court noted that it "bears repeating that the United States, the actual party to the contract with KBR, has not brought a breach of contract action expressing dissatisfaction with KBR's performance." *Id.* at *8. The court also noted that any specific facts alleged in the complaint were related to contractual nonperformance rather than fraud, and, if the action proceeded, it would rest on facts learned in discovery. "This is precisely what Rule 9(b) seeks to prevent," the court found. *Id.*

Arbitration of Retaliation Claims

Third, the court held that retaliation claims under 31 U.S.C. §3730(h) must be arbitrated if the relator's employment contract and applicable state law require arbitration of employment claims. It rejected the relator's argument that the False Claims Act prohibits waiver of a relator's right to assert retaliation claims in federal court based on the finding that, although Section 3730(h) *authorizes* retaliation actions to be brought "in the appropriate district court of the United States," it does not impose a requirement to do so when the relator's employment contract and applicable state law require arbitration.

Authors and Contributors

For more information regarding this client alert, please contact your usual Fried Frank attorney or any of the attorneys listed below:

Washington, DC

John T. Boese
+1.202.639.7220

Fried, Frank, Harris, Shriver & Jacobson LLP

New York
One New York Plaza
New York, NY 10004-1980
Tel: +1.212.859.8000
Fax: +1.212.859.4000

Washington, DC
1001 Pennsylvania Avenue, NW
Washington, DC 20004-2505
Tel: +1.202.639.7000
Fax: +1.202.639.7003

Frankfurt
Taunusanlage 18
60325 Frankfurt am Main
Tel: +49.69.870.030.00
Fax: +49.69.870.030.555

Hong Kong
in association with
Huen Wong & Co.
9th Floor, Gloucester Tower
The Landmark
15 Queen's Road Central
Hong Kong
Tel: +852.3760.3600
Fax: +852.3760.3611

Shanghai
No. 888 Wanhangdu Road
7th Floor, Unit D
Shanghai 200042
(until Summer 2008, when we will be located in Park Place, Nanjing Road West)
Tel: +86.21.2321.0188
Fax: +86.21.6326.6899

Fried, Frank, Harris, Shriver & Jacobson (London) LLP

London
99 City Road
London EC1Y 1AX
Tel: +44.20.7972.9600
Fax: +44.20.7972.9602

Fried, Frank, Harris, Shriver & Jacobson (Europe)

Paris
65-67, avenue des Champs Elysées
75008 Paris
Tel: +33.140.62.22.00
Fax : +33.140.62.22.29

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