On the WLF Legal Pulse

Timely commentary from WLF's blog

Washington Legal Foundation
Advocate for Freedom and Justice®
2009 Massachusetts Avenue, NW
Washington, DC 20036
202.588.0302 wlf.org

July 30, 2019

No Money for Nothing: DC Circuit Rejects Law Firm's False Claim Act Artifice

by Cory L. Andrews

At the height of the Civil War, Congress passed, and President Lincoln signed, a law to deter and punish contractors who billed the Union army for worthless goods masquerading as necessities of war. Based on feudal England's practice of deputizing private citizens to protect the king's property, the False Claims Act's (FCA) *qui tam* provision allows a "relator" to sue on the government's behalf and share in any recovery. Or, as Senator Jacob M. Howard put it at the time, the FCA "set[s] a rogue to catch a rogue."

Since the Civil War, of course, the government's size and reach have steadily increased to Leviathan proportions. FCA fines have grown accordingly—from double the government's damages plus a $2,000 penalty per false claim in 1863, to treble the government's damages plus a maximum $21,536 penalty per false claim today. As the potential for bounties beyond the dreams of avarice has risen, so too has the number of rogues—and their lawyers—looking for a windfall.

In *U.S. ex rel. Kasowitz Benson Torres LLP v. BASF Corp.*, the lawyers *are* the relators. And though the Supreme Court has emphasized that the FCA is not a vehicle for punishing "garden-variety" regulatory violations, that didn't stop Kasowitz Benson from seeking billions of dollars in penalties by trying to weaponize the Toxic Substances Control Act (TSCA) via the FCA.

Under the law firm-relator's novel theory of FCA liability, several large chemical manufacturers defrauded the government simply by failing to report substantial risk information to EPA under the TSCA. By withholding that information, the relators allege, the defendants engaged in a "reverse false claim" by depriving the government of money (TSCA civil penalties) and property (the undisclosed risk information). The district court rejected the relator's legal theory and dismissed the complaint. On appeal, the DC Circuit recently affirmed. Judge Karen LeCraft Henderson channeled Senator Howard with her opinion's opening Latin phrase, *"Pecunia non satiat avaritiam, sed inritat"*: Money doesn't satisfy greed; it stimulates it.

Joined by Judges Srinivasan and Pillard, Judge Henderson made quick work of the relator's claims. Neither the FCA's text nor its broader purpose could support the relator's theory of the case.

First, the claim based on deprivation of a TSCA civil-penalty was "a non-starter." An "obligation" to pay a civil penalty under the FCA doesn't arise, the court explained, the moment a defendant violates some federal law. EPA has not yet assessed a penalty against the defendants. Besides, the

---

Cory L. Andrews is Vice President of Litigation of Washington Legal Foundation.

TSCA grants EPA the discretion to reduce or forgive a penalty for any violation. Mere contingent exposure to penalties is not "money" capable of being concealed under the FCA.

Nor is the defendants' alleged failure to provide the risk information through the TSCA's voluntary Compliance Audit Program, which allows regulated entities to receive reduced civil penalties for belatedly submitting risk information. In short, the defendants' non-disclosure did not result in a penalty, much less concealed "money" under the FCA.

Second, the TSCA's requirement that companies transmit risk information isn't an obligation to transmit property under the FCA. Here, the relators' claim turned on whether the government had a property interest in the risk information. But the federal government's only interest in the information is regulatory, an interest that does not rise to the level of "interests traditionally protected by property law."

The court added that the relator's property-interest claim also failed because regulatory agencies, not private relators, are charged with enforcing federal reporting requirements. The relator's theory, "if adopted, would make any violation of countless reporting requirements actionable under the FCA."

The federal government also rejected Kasowitz Benson's theory. Although the firm was nominally suing on its behalf, the government supported the *defendants'* motion to dismiss with a Statement of Interest in the trial court—a fact Judge Henderson noted in her opinion.

Of course, Kasowitz Benson could have filed a citizen suit under § 2619 of TSCA for these alleged violations. But the amount of attorneys' fees and costs available for a successful TSCA suit pale in comparison to the billions in damages the firm sought in its FCA suit.

The U.S. Supreme Court has tried to impose some rational limits to FCA litigation, most recently in *Universal Health Services, Inc. v. United States ex rel. Escobar*, but many federal appeals courts still view any false claim to be "material" and thus actionable. Ralph Waldo Emerson famously said "there is no den in the wide world to hide a rogue." Kudos to this D.C. Circuit panel, then, for shutting down at least one rogue's attempt to manufacture, rather than catch, another rogue.

