IADC COMMITTEE NEWSLETTER

TOXIC AND HAZARDOUS SUBSTANCES LITIGATION

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IN THIS ISSUE

Reporting on a recent decision from the Fifth Circuit, Michael Fox provides another update on the status of litigation brought by private litigants attempting to use the False Claims Act to enforce reporting obligations and obtain substantial recoveries under the Toxic Substances Control Act.

Reverse False Claims Update: No False Claims Act Liability for Merely Failing to Report Leaks of Toxic Substances

ABOUT THE AUTHOR

Michael L. Fox is a partner with Sedgwick LLP in San Francisco. He represents energy companies, chemical and equipment manufacturers, and construction companies in toxic tort, environmental release, general liability, and serious personal injury matters. He also handles a variety of commercial litigation matters involving unfair competition, fraud, insurance, and contract disputes. He can be reached at michael.fox@sedgwicklaw.com.

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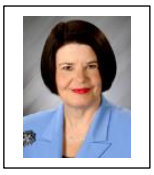
Member participation is the focus and objective of the Toxic and Hazardous Substances Litigation Committee, whether through a monthly newsletter, committee Web page, e-mail inquiries and contacts regarding tactics, experts and the business of the committee, semi-annual committee meetings to discuss issues and business, Journal articles and other scholarship, our outreach program to welcome new members and members waiting to get involved, or networking and CLE presentations significant to the experienced trial lawyer defending toxic tort and related cases. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:



Deborah C. Prosser
Vice Chair of Newsletter
Kutak Rock LLP
Deborah.Prosser@KutakRock.com

Introduction

The False Claims Act's (FCA) broad reach includes imposing liability and substantial fines on those who misrepresent compliance with United States Government contracts and those who avoid paying fines or satisfying other financial obligations to the Government. The latter types of claims — referred to as "reverse" false claims — have recently been brought by private citizens under the FCA's *qui tam* provisions in an effort to obtain recovery for enforcement of environmental statutes and regulations that otherwise provide no private right of action for damages. However, these efforts may be short-lived, as the Fifth Circuit recently held that a company has no liability under the FCA to report leaks of toxic substances which were subject to penalties under the Toxic Substances Control Act (TSCA), since the non-mandatory and non-assessed contingent penalties did not constitute an obligation to pay penalties to the Government.

Reverse False Claims under the FCA

The September 2016 edition of the Toxic and Hazardous Substances Litigation Committee Newsletter summarized the history of the FCA[1] and explained that 2009 amendments to Section 3729(a)(1)(G), known as the reverse false claims section, removed any requirement that a person make or use a false record or statement in the course of avoiding an obligation to pay money to the Government, and instead imposed liability if a person "knowingly conceals" or "knowingly and improperly avoids or decreases" an "obligation" to pay. The amendments added a definition for "obligation" to now mean "an established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment."[2]

Courts interpreting the FCA before its adoption of a definition for "obligation" generally held that, in order to create reverse false claims liability, the obligation must be fixed and definite at the time of the false claim[3] and that reverse false claims do not occur when the defendants merely fail to report environmental violations.[4] However, district courts interpreting the post-2009 version of the FCA with its new definition of

[1] 31 U.S.C. s 3279 et seq.

[2] 31 U.S.C. s 3729(b).

[3] *American Textile Mfrs. Inst., Inc. v. The Limited, Inc.,* 190 F.3d 729, 735 (6th Cir.1999) ("ATMI") ("To recover under the False Claims Act ... the United States must demonstrate that it was owed a specific, legal obligation at the time that the alleged false record or statement was made, used, or caused to be made or used" and "[t]he obligation cannot be merely a potential liability."); *United States v. Q Int'l Courier, Inc.*, 131 F.3d 770, 774 (8th Cir.1997) (FCA requires a "fixed sum that is immediately due"; a potential penalty is insufficient).

[4] *US ex rel. Marcy v. Rowan Companies, Inc.*, 520 F.3d 384, 391 (5th Cir. 2008) (mere contingent potential that fines or penalties might be sought and imposed under the Federal Water Pollution Control Act does not constitute an obligation to pay or transmit money

"obligation" reached different results, with the Middle District of Louisiana notably finding reverse false claim liability because the TSCA gives rise to an obligation to report chemical leaks and failure to do so would result in the imposition of a fine or penalty, whether fixed or not.[5]

The Fifth Circuit Speaks

In *Simoneaux*, Jeffrey Simoneaux brought a *qui tam* suit against his former employer, E.I. duPont de Nemours & Company ("duPont"), for failure to report chemical leaks to the Environmental Protection Agency ("EPA"), an alleged violation of the TSCA, arguing that duPont's failure to report the leaks was a knowing avoidance of an obligation to pay a penalty, a "reverse" false claim under 31 U.S.C. § 3729(a)(1)(G). DuPont moved for summary judgment, arguing that it did not have any "obligation" under the FCA because the EPA had not yet assessed a penalty. As indicated above, the district court rejected duPont's argument, finding that the 2009 amendments significantly broadened the scope of the reverse false claims provision, and that violation of a statute that imposes monetary penalties supports reverse false claims liability.

On appeal, the Fifth Circuit reversed the district court, holding that "unassessed regulatory penalties are not obligations under the FCA."[6] Under the FCA, as amended, an obligation to pay is an established duty that need not be fixed.[7] Agreeing with duPont and the United States (as *amicus curiae*), the court found that "'established' refers to whether there is any duty to pay, while 'fixed' refers to the amount of the duty."[8] Accordingly, the court found that, even if the company violated the statute, there is no "obligation" to pay the Government before it has assessed a penalty.[9] Thus, duPont's actions did not give rise to reverse false claims liability.

The Fifth Circuit acknowledged that the 2009 amendments clarified the definition of "obligation" in response to conflicting definitions previously developed in the courts, but concluded that Congress did not intend to include contingent penalties in the amended definition.[10] Regardless of whether the TSCA mandated a penalty, the payment obligation was still contingent on the EPA's discretion whether or not to assess a penalty.[11] In support of its conclusion, the court quoted Senator Jon Kyl's explanation of the amendment: "'Obviously, … we don't want the Government or anyone else suing under the False Claims Act to treble and

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or property to the Government within the meaning of the FCA); *United States ex rel. Bain v. Georgia Gulf Corp.*, 386 F.3d 648, 658 (5th Cir. 2004) (same re Clean Air Act).

[5] *Simoneaux v. E.I. du Pont de Nemours & Co*., 2016 WL 236239 at *2 (M.D. La. January 20, 2016).

[6] *United States ex re. Simoneaux v. E.I du Pont de Nemours & Co.*, 843 F.3d 1033, 1039 (5th Cir. 2016).

[7] *Id.* at 1037.

[8] *Id.* at 1036.

[9] *Id.* at 1039-1040.

[10] *Id.* at 1038.

[11] *Id.* at 1040-1041.

enforce a fine before the duty to pay that fine has been formally established."[12] The court also quoted the Government's *amicus curiae* brief: "'A statute enforceable through an unassessed monetary penalty … creates an obligation to obey the law, not an obligation to pay money.'"[13]

Distinguishing a recent Third Circuit decision imposing reverse false claims liability for failing to pay customs duties,[14] the Fifth Circuit noted that, while customs law imposed a *duty to pay,* most regulatory statutes, like the TSCA, imposed only a duty to obey the law, with the duty to pay not being established until the penalties are assessed.[15] In sum, the mere fact that a monetary penalty *may* be imposed under a statute — such as the TSCA — does not, without more, give rise to reverse false claims liability.

Simoneaux's Impact

The most immediate impact of the Fifth Circuit's decision in *Simoneaux* may be to bring to a halt similar litigation brought by Kasowitz Benson Torres LLP against manufacturers of isocyanates, now pending in the United States District Court for the District of Columbia.[16] In Kasowitz, the *qui tam* law firm plaintiff, or relator, alleges that the manufacturers concealed reportable substantial risk information for several decades, helping them to avoid paying billions of dollars in penalties under the TSCA and the companies' agreement to participate in a Compliance Audit Program (CAP).[17] The defendants have filed a motion to dismiss,[18] relying, in part, on the Fifth Circuit's decision in *Simoneaux* and another rare statement of interest filed by the United States in support of dismissal, that unassessed penalties under either the provisions of the TSCA or the defendants' participation in the CAP "do not give rise to reverse FCA liability."[19] If the district court in *Kasowitz* follows *Simoneaux,* and the D.C. Circuit ultimately affirms, reverse false claims may not be brought by private bounty hunters for mere technical violations of environmental statutes like the TSCA, without automatic payment obligations or regulators' assessment of fines.

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[12] *Id.* at 1038.

[13] *Id.* at 1037.

[14] *United States ex rel. Customs Fraud Investigations, LLC v. Victaulic Co.*, 839 F.3d 242 (3rd Cir. 2016).

[15] *Simoneaux*, 843 F.3d at 1040.

[16] *United States ex rel. Kasowitz et al., v. BASF Corp. et al.*, D.D.C. Case No. 1:16-CV-02269. *Kasowitz* was originally filed in the Northern District of California but was transferred to the District of Columbia.

[17] See Amended *Qui Tam* Complaint, D.D.C. Case No. 1:16-CV-02269, Doc. 21.

[18] See Defendants' Memorandum of Points and Authorities in Support of Motion to Dismiss Amended Complaint, D.D.C. Case No. 1:16-CV-02269, Doc. 110. The motion remains pending as of the date of this publication.

[19] See Statement of Interest by the United States of America Regarding Defendants' Motion to Dismiss, D.D.C. Case No. 1:16-CV-02269, Doc. 117. According to the defendants, the Government has filed only three (out of 107 in FCA cases since 2005) amicus briefs and statements of interest in favor of dismissal. See Defendants' Reply in Support of Their Motion to Dismiss Relator's Amended Complaint, D.D.C. Case No. 1:16-CV-02269 at p. 9 of 46, Doc. 118.

If the district court in *Kasowitz* diverts from *Simoneaux,* a related but potentially unresolved issue is the extent of knowledge of violations and obligations required to impose liability under the FCA. The Sixth Circuit recently held that a relator must plead sufficient facts to create an inference that the defendants knew, deliberately ignored, or recklessly disregarded the fact that they had an obligation to the Government and avoided that obligation, or that they delivered less than all of the money or property owned to the Government.[20] The defendants in *Kasowitz* seek more specific knowledge by a single corporate actor.[21] Circuit splits on the degree of knowledge required to support reverse false claims liability could require the Supreme Court's clarification.

Conclusion

Reverse false claims under the FCA following the 2009 amendments provided a novel approach to imposing civil liability, substantial fines, and financial windfalls to *qui tam* plaintiffs who otherwise had no means of private recovery under environmental protection and toxic risk disclosure statutes like the TSCA. With the Government's and Fifth Circuit's rejection of these efforts, other district and circuit courts may soon follow suit.

[20] *United States ex rel. Harper v. Muskingham Watershed Conservancy Distr.*, 842 F.2d 430, 436 (6th Cir. 2016) (Petition for a writ of certiorari filed 4/21/17).

[21] The defendants argue that the relator must establish that a single employee of the defendant knew (1) the EPA would have exercised its discretion to allege TSCA reporting violations and seek penalties, (2) penalties would have been imposed, (3) penalties would have been upheld on appeal, and (4) the defendant was concealing or improperly paying the unassisted penalties. See Defendants' Memorandum of Points and Authorities in Support of Motion to Dismiss Amended Complaint, D.D.C. Case No. 1:16-CV-02269, Page 42 of 76, Doc. 110

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