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TOXIC SUBSTANCES

FALSE CLAIMS ACT

The recent use of *qui tam* suits under the False Claims Act to recover for violations of the Toxic Substances Control Act ''potentially thwarts the government's regulatory and enforcement role,'' attorney Michael L. Fox says. This approach also places companies at risk for interpreting the Environmental Protection Agency's inaction in this matter as ''an indication that there is no need to provide additional substantial risk information, nor pay potential fines or penalties for their failure to do so,'' the author says.

False Claims Act Liability for Failure to Make Required Toxic Risk Disclosures

By Michael L. Fox

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The United States government's most effective civil tool to ferret out fraud and annually return billions of dollars to taxpayer-funded programs is the False Claims Act (FCA). The FCA's broad reach includes liability for misrepresenting compliance with government contracts and so-called ''reverse'' false claims to avoid paying fines or satisfying other financial obligations to the government. Citizen suit (*qui tam*) provisions permit private individuals to bring an action on behalf of the federal government against those who violate the FCA, and this tool has recently been utilized in an effort to obtain recovery for enforcement of environmental statutes and regulations that otherwise provide no private right of action for damages, such as the Toxic Substances Control Act (TSCA). Courts are now addressing the viability of such FCA actions, which could have a significant impact on manufacturers with disclosure obligations pursuant to the TSCA.

The False Claims Act

The False Claims Act (FCA), 31 U. S. C. § 3729 *et seq*., imposes significant penalties on those who defraud the federal government. It was enacted in 1863 to stop the massive frauds perpetrated by large contractors during the Civil War, when the government was billed for nonexistent or worthless goods, charged exorbitant prices for goods delivered, and generally robbed in purchasing the necessities of war. *Universal Health*

Services, Inc. v. United States, et al., ex rel. Escobar et al., 579 U.S. ___ , 136 S.Ct. 1989, 1996 (2016); *United States v. McNinch*, 356 U. S. 595, 599 (1958). Congress has repeatedly amended the FCA, but its focus remains on those who present or directly induce the submission of false or fraudulent claims. 31 U. S. C. § 3729(a)(imposing civil liability on ''any person who . . . knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval''). The FCA generates significant recoveries for the government – notably in excess of $3.5 billion annually for the past four years. (Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, Justice Department Recovers Over $3.5 Billion From False Claims Act Cases in Fiscal Year 2015 (Dec. 3, 2015), https://www.justice.gov/opa/pr/justice-department-recovers-over-35-billion-false-claims-act-cases-fiscal-year-2015.)

In general terms, Sections 3729(a)(1)(A) and (B) set forth FCA liability for any person who knowingly submits a false claim to the government or causes another to submit a false claim to the government or knowingly makes a false record or statement to get a false claim paid by the government. Defendants are subjected to treble damages plus, effective August 1, 2016, minimum per-claim penalties of $10,781 (up from $5,500) and maximum per-claim penalties of $21,563 (up from $11,000). (Civil Monetary Penalties Inflation Adjustment, 81 Fed. Reg. 42,501 (June 30, 2016), https://www.gpo.gov/fdsys/pkg/FR-2016-06-30/pdf/2016-15528.pdf.) To encourage private individuals who are aware of fraud being perpetrated against the government to disclose that information, the *qui tam* provisions of the FCA permit private individuals to bring an action on behalf of the federal government against those who violate the act, and, if the plaintiff (or ''relator'') prevails, he or she is entitled to a portion of the proceeds of the action or settlement of the claim. 31 U.S.C. § 3730(b)(1) & (d). The federal government may directly enforce the FCA, or it has the right to intervene and itself prosecute a *qui tam* suit and collect the bulk of the proceeds from any settlement or judgment. *Id.* § 3730 (b)(4) & (d).

Section 3729(a)(1)(G), known as the reverse false claims section, provides liability where one acts improperly to avoid having to pay money to the government. Section 3729(a)(1)(G) imposes liability on any person who:

> knowingly makes, uses or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government.

The statute was amended in 2009, in part, to remove any requirement that a defendant make or use a false record or statement in the course of avoiding an obligation to pay money to the government, and, under the new version of the statute, it is now enough that a person ''knowingly conceals'' or ''knowingly and improperly avoids'' or ''decreases'' the obligation.

Congress also enacted a statutory definition for the term ''obligation'' in 2009, where one had never existed before. An obligation is now defined as ''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.'' 31 U.S.C. § 3729(b)(3).

Most courts interpreting the FCA before its adoption of a definition for ''obligation'' held that, in order to create reverse false claims liability, the obligation must be fixed and definite at the time of the false claim (*American Textile Mfrs. Inst., Inc. v. The Limited, Inc.*, 190 F.3d 729, 735 (6th Cir.1999) (''To recover under the [FCA]. . . 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)), and that reverse false claims do not occur when defendants merely fail to report environmental violations. *US ex rel. Marcy v. Rowan Companies, Inc.*, 520 F.3d 384 (5th Cir. 2008). Decisions from the Fifth Circuit noted that the mere contingent potential that fines or penalties might be (but have not been) sought and imposed under the Clean Air Act or Federal Water Pollution Control Act does not constitute ''an obligation to pay or transmit money or property to the Government'' within the meaning of the FCA. *Id.* at 391; *United States ex rel. Bain v. Georgia Gulf Corp.*, 386 F.3d 648, 658 (5th Cir. 2004).

The relatively few courts that have interpreted the post-2009 version of the FCA with its new definition of ''obligation'' have reached different results. In *United States ex rel. Nissman v. Southland Gaming,* No. 2011-0010, 2016 BL 103201 (D. V.I. March 31, 2016), the district court held that unassessed fines and penalties do not fall within the scope of the FCA and that the definition's reference to ''whether or not fixed'' does not change the body of law holding that a contingent fine or penalty does not fall within the FCA. In *United States ex rel. Boise v. Cephalon, Inc.*, No. 08-287, 2015 BL 232385 (E.D. Pa. July 21, 2015), another district court denied a motion to dismiss the relator's reverse false claim for violation of an agreement with the Department of Health & Human Services, but noted that ''whether or not fixed'' refers to whether or not *the amount owed* was fixed at the time of the violation rather than *an obligation to pay* was fixed.

The United States District Court for the Middle District of Louisiana reached a different result in *Simoneaux v. E.I. du Pont de Nemours & Co.*, No. 12-219-SDD-EWD, 2016 BL 14896 (M.D. La. January 20, 2016). In *Simoneaux*, the relator claimed that DuPont had an obligation under the Toxic Substances Control Act (TSCA) to report leaks of sulfur dioxide, sulfur trioxide, and sulfuric mist at its Burnside plant, and that it knowingly concealed its TSCA reporting obligation in order to avoid paying environmental penalties to the government, thus giving rise to a reverse false claim under the FCA. Finding the statutory definition of ''obligation'' to be clear and unambiguous, the court strictly construed the statutory definition and found that, because the TSCA gives rise to an obligation to report chemical leaks and the failure to do so would result in the imposition of a fine or penalty, whether fixed or not, the 2009 Congressional definition of obligation had been satisfied, so the court denied DuPont's summary judgment motion. *Simomeaux* is currently on appeal to the Fifth Circuit (5th Cir. Case No. 16-30141; calendared for oral

   ISSN 0887-7394

argument on November 2, 2016), which recently cited *Marcy*, *supra*, 520 F.3d 384, in an unpublished decision that affirmed a district court's dismissal of a reverse false claim where the obligation to refund the government had not yet arisen. *U.S. ex rel. Guth v. Roedel Parsons Koch Blache Balhoff & McCollister*, 626 Fed. Appx. 528, 533 (5th Cir. 2015). Thus, while *Simoneaux* remains to be resolved, its outcome could significantly impact companies' liability for TSCA violations that the government has not sought (and may never seek) to enforce.

The Toxic Substances Control Act

The Toxic Substances Control Act (TSCA) of 1976 provides the United States Environmental Protection Agency (EPA) with authority to require reporting, record-keeping and testing requirements, and restrictions relating to chemical substances and/or mixtures. Certain substances are generally excluded from the TSCA, including, among others, food, drugs, cosmetics, and pesticides. Under Section 8(e) of the TSCA, any person who manufactures (including imports), processes, or distributes in commerce a chemical substance or mixture and who obtains information which reasonably supports the conclusion that such substance or mixture presents a substantial risk of injury to health or the environment to immediately inform the EPA, except where the EPA has been adequately informed of such information. 15 U.S.C. § 2607(e). The TSCA was recently amended and revised, on June 22, 2016, with President Barak Obama's signing of the Frank R. Lautenberg Chemical Safety for the 21st Century Act into law. However, the provisions at issue here are substantially unchanged.

The EPA may assess civil monetary penalties of up to $37,500 for each violation for failing to make such reports, each day such failure continues is a separate violation, and any such assessment is subject to judicial review. 15 U.S.C. § 2615(a)(1) & (3). The government may also bring a criminal action for knowing and willful violations of this reporting requirement, and available criminal sanctions include both fines and imprisonment. *Id.* § 2615(b). While the EPA is entitled to damages when it brings an enforcement action, the TSCA only authorizes citizen suits ''to restrain'' violations of its substantive provisions, and plaintiffs bringing such suits are limited to injunctive relief for ongoing violations. *In re Methyl Tertiary Butyl Ether (''MTBE'') Products Liability Litigation*, 117 F. Supp.3d 276, 296 (S.D.N.Y. 2015); *Arbor Hill Concerned Citizens Neighborhood Ass'n v. City of Albany, N.Y.*, 250 F.Supp.2d 48, 60 (N.D.N.Y.2003) (TSCA's citizen's suit provision does not authorize any remedy for statutory violation).

Using the FCA to Recover Damages

As demonstrated by *Simoneaux* and a recent *qui tam* action filed in California against manufacturers of isocyanate chemicals, plaintiffs are attempting to use the FCA as an end-run around the TSCA's lack of a private right of action for damages. However, notwithstanding its robust use of and reliance on the FCA to recover billions, the government apparently rejects use of the FCA to enforce the TSCA.

In *Simoneaux*, the relator alleges that DuPont knowingly concealed, avoided, or decreased an obligation to pay mandatory penalties to the United States which DuPont had an established legal duty arising from the TSCA to pay as a result of DuPont's failure to give immediate notice of substantial risk information to the EPA required by Section 8(e) related to the release of sulfur dioxide and sulfur trioxide from DuPont's Monroe, Louisiana plant over several years. The relator claims that, since the TSCA states that violators ''**shall be liable** to the United States for a civil penalty'' for each daily violation, DuPont's alleged concealment of the violations supports a reverse false claim of millions of dollars under the FCA. Notably, the EPA never instituted enforcement proceedings or imposed any penalties despite knowing of the allegations, and did not intervene in the action. Furthermore, the government filed an *amicus* brief in the Fifth Circuit in support of DuPont, arguing that the FCA does not apply because the TSCA ''creates no obligation to pay money to the government before the EPA actually assesses a penalty under it.'' (See *Amicus Curiae* Brief of the United States in Support of Appellant, 5th Cir. Case No. 16-30141, Doc. 00513523918.)

In a *qui tam* action recently filed in the Northern District of California, the relator, Kasowitz Benson Torres & Friedman LLP, similarly alleges that manufacturers of isocyanates hid risks that the chemicals could cause permanent respiratory injury in humans when inhaled at levels below the current exposure limits, and that they had a duty to report that information to the EPA under the TSCA. (*United States ex. rel. Kasowitz et al.. v. BASF Corp. et al.*, N.D. Cal. Case No. 4:15-cv-02262. The relator claims that the manufacturers' alleged concealment of substantial risk information for several decades helped them to avoid paying billions of dollars in penalties under the TSCA, now resulting in reverse false claims under the FCA. (See Amended *Qui Tam* Complaint, N.D. Cal. Case No. 4:15-cv-02262, Doc. 21.)

The government also declined to intervene in *Kasowitz*, suggesting a position similar to that which it is taking in *Simoneaux*. (See *United States' Notice of Election to Decline Intervention*, N.D. Cal. Case No. 4:15-cv-02262, Doc. 27.) However, the relator in *Kasowitz* also alleges that the manufacturers violated their contractual obligations to the EPA pursuant to their agreement to participate in a Compliance Audit Program (CAP), which had been developed to encourage companies to audit their files for substantial risk information that had not yet been reported as required by Section 8(e) in exchange for reduced reporting penalties. The relator claims that the manufacturers' alleged concealment of information contractually required to be disclosed pursuant to the CAP, in order to avoid payment of full penalties, results in reverse false claims under the FCA. The viability of the reverse false claims will likely hinge on the court's determination of whether the contractual violations merely resulted in unassessed statutory penalties (which may not support a reverse false claim) or obligations pursuant to their established payment relationship with the government (which may).

Conclusion

The recent use of *qui tam* suits under the FCA to recover for purported violations of the TSCA potentially thwarts the government's regulatory and enforcement role, and also places companies at risk for interpreting the EPA's inaction as an indication that there is no need to provide additional substantial risk information, nor pay potential fines or penalties for their failure to do so. The government currently appears to oppose use of the FCA for TSCA enforcement and collection efforts, but that position could change – and its FCA recoveries could increase significantly – if the courts interpret the 2009 amendments to the FCA to permit reverse false claims for such TSCA violations.

   ISSN 0887-7394