

Roderick Thomas Discusses Fifth Circuit's Dismissal of False Claims Act Suit

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Roderick L. Thomas, chair of Wiley Rein's White Collar Defense & Government Investigations Practice, was quoted yesterday in a *Bloomberg BNA* article about a U.S. appeals court's rejection of a whistleblower suit alleging that the sale of defective medical devices to a federal agency violated the False Claims Act (FCA).

The U.S. Court of Appeals for the Fifth Circuit affirmed a lower court's dismissal of the complaint in *USA ex rel. Steury v. Cardinal Health Inc.* The suit was based on an implied certification theory of liability. A three-judge panel said the whistleblower failed to clearly demonstrate how the defendant deviated from specifications set forth in a contract with the U.S. Department of Veterans Affairs, *Bloomberg BNA* reported. The panel also said the contractor's request for payment did not imply certification of compliance with the terms of the contract.

The ruling is helpful to defendants because it reiterates the Fifth Circuit's previous determination that there are limits on the types of certifications that can be actionably "false" under the FCA, Mr. Thomas told *Bloomberg BNA*.

"Although courts in other circuits have found that an increasing array of actions can give rise to false certification FCA liability, the Fifth Circuit continues to recognize that it is unfair to predicate a[n] FCA violation on a certification unless the certification is a prerequisite for payment," Mr. Thomas said.

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"In other words, not every minor contract breach can be the basis for a[n] FCA suit—a clear link to payment is key."