

ALERT

D.C. District Court Allows *Qui Tam* Case Involving the Service Contract Act Compliance-Related Allegations to Move Forward

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Judge Kessler of the D.C. District Court recently denied a motion to dismiss in a False Claims Act (FCA) case with a substantial Service Contract Act (SCA) component. *See United States, ex rel. Anthony Head v. The Kane Company, et al.*, Civil Action No. 05-317. The case serves as a reminder of the importance of compliance with the SCA and the potential collateral consequences under the FCA of non-compliance with the SCA.

In his complaint, the whistleblower, Anthony Head (also referred to as the "Relator" for FCA purposes), alleges that he became aware in 1998 that the Kane Company (an office moving company) had not been paying SCA-covered personnel at the required SCA wage determination rates on a number of its government contracts. The Relator alleged that he made officials of the company aware of this deficiency, but no action was taken. The complaint also alleges other improper conduct, including fraudulent billing and overcharging. The Government intervened in the case, pursuant to its right under the FCA.

The defendants moved to dismiss the SCA False Claims Act counts on various grounds, including (i) that the plaintiffs had not pled the requisite objective "false statement," (ii) that the plaintiffs did not demonstrate that SCA compliance was "material" to the Government's decision to pay, and (iii) failure to plead fraud allegations with particularity, as required by Fed. R. Civ. P. 9(b).

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Practice Areas

Civil Fraud, False Claims, *Qui Tam* and Whistleblower Actions
Government Contracts
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False Statements

The court noted that false claims may take the form of "presentment claims," "fraudulent inducement claims" and claims of "false certification (express or implied)." With respect to presentment claims - *i.e.*, invoices presented for payment - the court held that the whistleblower's and the Government's ("plaintiffs") allegations that fraudulent claims for payment had been made under SCA-covered contracts was sufficient to survive a motion to dismiss and that plaintiffs were not required at this stage of the pleadings to identify specific false invoices. [1]

The court also held that the plaintiffs' claims regarding fraudulent inducement and false certification adequately alleged initial false representations to the Government. The Relator argued that because the original government contracts were obtained through fraud - that is, under the false premise that the contractor would comply with the SCA - the theory of fraudulent inducement supports treating all subsequent demands for payment under those contracts as "false claims." In support, Relator alleged that Kane Company intended to ignore its SCA obligations, which the court interpreted as an implicit false representation of SCA compliance. The Government made similar arguments and also asserted that the subsequent invoices for payment constituted false certifications of compliance with the SCA. Based on these arguments, the court found the plaintiffs' allegations sufficient to withstand a motion to dismiss. [2]

Materiality

The defendants also challenged the "materiality" of the allegations - in essence arguing that these implied certifications were not material to the Government's decision to pay the allegedly false invoices. Specifically, the defendants argued that there was nothing in their contract linking payment to compliance with the SCA. The court held that this argument fails for two reasons: 1) that a direct linkage between the contract and compliance is not required and that materiality can be established in other ways (relying on *United States v. Science Applications Int'l Corp.*, 626 F.3d 1257, 1269 (D.C. Cir. 2010), and 2) in any event, that the plaintiffs were not required to plead a specific showing of materiality at this stage.

Pleading Fraud with Particularity

The court also found that plaintiffs' allegations satisfied the requirements of Fed. R. Civ. P. 9(b), which requires pleading allegations of fraud with particularity. In the end, the Relator's identification of the alleged scheme, the scheme's general time period (spanning over a decade), identification of a sampling of contracts in which this conduct occurred, the amounts paid under the identified contracts as well as the underpaid wages, were found sufficient by the court to meet the standard. [3]

[1] The court held that the claims in this case are not subject to the Fraud Enforcement and Recovery Act of 2009 (FERA) amendments to the FCA because the FERA amendments apply retroactively only to claims pending on or after June 7, 2008, and that "claims" has been interpreted to mean requests for payments by the defendants, not pending cases. See Motion to Dismiss Order at 12 (July 25, 2011) (citing *United States, ex*

rel. Bender v. N. Am. Telecomm'ns Inc., 750 F. Supp. 2d 1, 5 (D.D.C. 2010).

[2] In support of the motion to dismiss, the defendants attempted to rely on *United States, ex rel. UNITE HERE v. Cintas Corp.*, 06-cv-2413, 2008 WL 1767039 (N.D. Cal. Apr. 16, 2008). In that case, in which the Government did not intervene, the Relator alleged fraudulent inducement and false certification based on the defendant having obtaining government contracts under the pretense that it would comply with the SCA and by falsely certifying that it had done so; however, the *UNITE HERE* court dismissed the claims under Fed. R. Civ. P. 12(b) (6) and 9(b). Judge Kessler distinguished *UNITE HERE* by finding that Mr. Head had direct knowledge of the activities, whereas the Relator in *UNITE HERE* did not, and, more importantly, that the whistleblower in *UNITE HERE* had failed to allege that the defendant *acquired* its government contracts through false statements or fraudulent conduct.

[3] Notably, the court did dismiss the Relator's retaliation claim under the FCA because the claim was based on facts and actions taken that were subsequent to Relator's employment with Kane Company. The court also dismissed FCA claims based on an alleged conspiracy between Kane Company and its executives to violate the FCA, holding that the claim is barred by the intra-corporate conspiracy doctrine, which provides that employees acting within the scope of their employment cannot conspire with their own company.