# BOILERPLATE LITIGATION AND THE FALSE CLAIMS ACT

Written by David B. Honig and Delphine P. O'Rourke Assertion of affirmative defenses creates risk for clients, attorneys and law firms. Treating False Claims Act litigation like any other litigation will lead to the unnecessary expenditure of time and money and potentially sanctions. A recent decision out of the Southern District of Texas, *United States ex rel. King v Solvay S.A.*,[1] is an excellent primer in how affirmative defenses should not be used.

### HEALTH CARE TAKEAWAY

Boilerplate affirmative defenses should be used with caution in FCA litigation. Health care providers and their counsel should remain aware that the defenses typically raised in other matters will not be available to them when dealing with the government, or with government contractors. It is important to keep this knowledge at the forefront throughout the relationship with the government. Contracts directly with the government or related in any way to a government program, must be entered into with the absence of these defenses in mind. Ongoing decisions must also be made with the lack of these defenses as a significant consideration for actions of a third party that a health care provider could rely upon as a defense for their own actions (e.g., waiver or unclean hands) is not available in a case brought on behalf of the government.

### AFFIRMATIVE DEFENSES AND THE FCA

Affirmative defenses are raised by defendants in litigation, stating specific reasons beyond the Plaintiff's ability to prove their case why the defendant should not be found liable. Examples of affirmative defenses in health care cases include Stark exceptions and Anti-Kickback safe harbors. Some litigators have a standard "basket" of affirmative defenses they raise in every case. These are called "boilerplate" defenses and the courts frown upon them more with each passing week.In *King,* the Defendant asserted twenty-five "affirmative and other defenses." These included defenses commonly seen in contract and general tort litigation, including contributory or comparative fault, waiver, estoppel, laches, unclean hands, failure to mitigate, superseding conduct of third parties, the learned intermediary doctrine and the absence of damages.[2] Most of these defense do not apply in FCA cases, as the action is brought on behalf of the government. Other defenses can apply but only in unusual and very specific circumstances. Asserting inapplicable affirmative defenses wastes an attorney's time and a client's money, particularly if the case reaches the motion to strike or motion for summary judgment stage. More importantly, courts can impose sanctions for frivolous pleadings under Rule 11(c) not only against an individual attorney but also against the attorney's entire firm.[3]Affirmative defenses raised by the Defendant and addressed by the Court in *King* included:

- **Comparative or Contributory Fault.** Solvay, the Defendant, raised comparative fault as an affirmative defense but did not clarify until after the relator brought a motion for partial summary judgment that it would abandon it for the FCA claims but retain it for state law claims. With Solvay's withdrawal of the defense as to the FCA claims, the court denied the motion for partial summary judgment as moot.
- **Waiver and Estoppel.** Generally, waiver and estoppel are not available against the government when the defendant's actions impacted the public fisc. While there may be exceptions to this general rule, they would be quite unusual and the defenses should not be raised in the absence of material facts that would show they would apply. The court, finding no facts or argument in support of such an unusual exception, granted the plaintiff's motion for partial summary judgment.
- **Unclean Hands and Laches.** Unclean hands is not available as a defense in FCA cases. Like estoppel, it is available against the government in extraordinarily rare cases and the defense should only be raised in such cases. Solvay withdrew the defense in regard to the FCA after the relator's motion was filed. With Solvay's withdrawal of the defense as to the FCA claims, the court denied the motion for partial summary judgment as moot.
- **Failure to Mitigate.** Failure to mitigate is not a defense in FCA cases as the "government has no duty to mitigate damages where fraud is alleged."[4] and therefore, the court granted the motion for partial summary judgment.
- **Superceding Conduct of Third Parties.** The trial court in *King* found that there could be instances in which the acts of third parties

THIS IS AN ADVERTISEMENT
© 2002-2024. Hall, Render, Killian, Heath & Lyman, P.C. All Rights Reserved.

caused the relator's damages. Based upon that language, the defense was addressed only regarding the relator's personal allegations and not the FCA claims. The motion for partial summary judgment was therefore denied.

- **Learned Intermediary.** The trial court noted that it was unlikely that the learned intermediary doctrine could be used against the government in an FCA case and that there were no cases supporting such use. However, the court denied the motion for partial summary judgment because of the relator's "unique theory of liability."[5]
- **Absence of Damages.** The Defendant argued that it raised absence of damages to bar recovery for claims that the relator was unable to prove at trial. The court denied the motion for partial summary judgment, though, finding it premature.

False Claims Act cases are unusual and complex. They are brought by a private litigant but are on behalf of the government. They are often based upon extraordinarily dense and complex regulations related to health care, defense or education. Defense of these cases is not the same as defense of general commercial cases and health care providers should ensure they select counsel knowledgeable about these differences.Should you have any questions regarding this article or False Claims Act litigation and compliance, please contact:

- David B. Honig at dhonig@hallrender.com or (317) 977-1447;
- Delphine P. O'Rourke at dorourke@hallrender.com or (610) 941-2785;
- Drew B. Howk at ahowk@hallrender.com or (317) 429-3607; or
- Your regular Hall Render attorney.

[1] 2015 WL 475935, S.D. Tex. Case No. H-06-2662, Feb. 4, 2015.[2] *King* at *1.[3] Fed.R.Civ.P. 11(c)(1).[4] *US ex rel. Garrison v. Crown Roofing Servs., Inc.*, 2011 WL 4914971 at *1, S.D.Tex. Oct. 14, 2011).[5] *King* at. *9.[[5]]

THIS IS AN ADVERTISEMENT
© 2002-2024. Hall, Render, Killian, Heath & Lyman, P.C. All Rights Reserved.