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CLIENT ALERT

Relator Precluded from Sharing in Settlement Proceeds Based on Conviction for Minor Role in Underlying FCA Violation

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On July 16, 2015, the United States Court of Appeals for the Ninth Circuit ruled that Charles Schroeder, a relator in a False Claims Act ("FCA") case, was not entitled to any portion of the settlement of the action as a result of his conviction for participating in the underlying FCA violation. The Ninth Circuit concluded that notwithstanding the fact that Schroeder neither planned nor initiated the FCA violation upon which the action was brought, and played only a minor role in the underlying fraudulent scheme, he was precluded from recovery due to his conviction. This case was a matter of first impression in the Ninth Circuit and the Court's holding is consistent with prior decisions from the Sixth and Eighth Circuits that have noted that relators who have been convicted for their participation in the fraud are not entitled to any recovery.

Background

Between 2002 and 2008, Schroeder worked as a radiological control technician for CH2M Hill, the primary contractor responsible for the cleanup of underground storage tanks at the Hanford Site, a former plutonium production facility in Washington state. CH2M Hill's contract for the project with the U.S. Department of Energy ("DOE") was worth approximately $2.7 billion.

In April 2008, the DOE Office of Inspector General received an anonymous tip about timecard fraud at the Hanford Site and began investigating. Shortly thereafter, Schroeder admitted to his role in the fraud in response to questioning by the DOE. Then, in 2011, Schroeder pled guilty to participating in a criminal conspiracy to submit false timecards in order to receive unearned overtime.

In June 2009, prior to pleading guilty, Schroeder filed a whistleblower suit against his employer CH2M Hill in the Eastern District of Washington alleging violations of the FCA based on the fraudulent timecard scheme to which he later pleaded guilty. Specifically, Schroeder alleged that CH2M Hill fraudulently billed the DOE for work performed at the Hanford Site by systematically billing for full shifts when employees only worked partial shifts and by diverting routine regular shift work to overtime shifts where workers were paid time-and-a-half or double time. The government intervened in Schroeder's FCA case in August 2012.

In March 2013, CH2M Hill agreed to pay $19 million to settle the FCA charges that were the subject of Schroeder's *qui tam* complaint.

District Court Decision

After intervening in the case filed by Schroeder, the government moved in October 2012 to dismiss Schroeder as the relator and argued that Section 3730(d)(3) of the FCA bars Schroeder from recovery because he was convicted of participating in the fraudulent scheme that was the subject of the allegations in his complaint. Section 3730(d)(3) provides in relevant part:

> [I]f the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action.

31 U.S.C. § 3730(d)(3). The government argued that allowing Schroeder to continue as the relator in the case, which would entitle him to some portion of any resulting settlement or damages, would undermine the judicial process because "[t]he relator not only engaged in and profited from his criminal conduct, but fully understood that he had been caught, was under investigation, and even admitted to his wrongdoing long before he ever filed a *qui tam* case." If Schroeder were allowed to proceed as relator, the government argued that it would provide an incentive for individuals to participate in a crime, report it to the government, plead guilty to obtain a lighter sentence, and then profit from their misdeeds by filing a *qui tam* action.

In May 2013, after CH2M Hill and the government reached a settlement, the District Court dismissed Schroeder from the case and held that the plain language of the FCA "mandates [Schroeder] not receive any share of the proceeds of the action." The Court noted that, although Schroeder may not have "planned and initiated" the FCA violation, he was convicted for the timecard fraud.

Ninth Circuit Decision

On appeal to the Ninth Circuit, Schroeder argued that the provision in the FCA barring a relator from receiving any share of the proceeds of the FCA action if "convicted of criminal conduct arising from his or her role in the [FCA] violation" should not apply to minor participants who did not plan or initiate the fraudulent scheme. Schroeder argued that such an application could lead to an "absurd" result of permitting a person who orchestrated the fraud, but was not convicted, to profit from a *qui tam* lawsuit while denying recovery to a convicted person who played only a minor role in the fraud.

The Ninth Circuit rejected Schroeder's argument holding that "[a]pplying the statute to minor participants in a fraud does not produce an absurd or unreasonable result" because the statute "does not contain an exception for minor participants" and therefore should be applied to any relator that has been convicted based on conduct relating to the alleged FCA violation, regardless of his or her role. The Court noted that the statute may have been drafted so as to achieve goals such as "preventing criminally culpable individuals from gaining from their conduct," while still permitting "the investigatory benefits of actions brought by planners and initiators who often have greater knowledge about co-conspirators and the scope of a fraudulent scheme."

The Court also rejected Schroeder's argument that applying Section 3730(d)(3) to minor participants in the fraud would undermine the purpose of the FCA by discouraging potential *qui tam* plaintiffs from bringing information about fraud to the government's attention. The Court concluded that the purpose of the statute was "to restrict eligibility and reduce rewards for certain relators" who, like Schroeder, had been convicted of criminal conduct

relating to the alleged violation, which is consistent with the statute's goal "to find a balance between 'deterring parasitic claims [and] fostering productive suits.'"

Takeaways

The Ninth Circuit's decision is noteworthy because it confirms that, regardless of the role that a relator played in the fraud alleged in a *qui tam* complaint, he or she is not entitled to any recovery if the relator has been convicted of criminal conduct relating to the alleged fraud. Furthermore, the Court recognized that prohibiting relators who have been convicted of a crime from proceeding with a complaint is consistent with Congress's effort to balance the need to foster productive *qui tam* suits while deterring parasitic claims that allow relators to profit from their criminal conduct. The decision makes clear that, although relators will not be permitted to profit from their wrongdoing, the government will continue to pursue FCA violations based on *qui tam* complaints regardless of the wrongdoing by the whistleblower who initially may have filed the *qui tam* complaint.

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