Whistleblower Defense Alert: Defeating a Whistleblower's Cursory Allegations of Scienter in FCA Cases Involving a Defendant's Good Faith Interpretation of a Regulation or Contract

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CLIENT ALERT | 6.2.2014

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A recent decision dismissing a whistleblower's complaint with prejudice is good news for companies facing a False Claims Act (FCA) case that turns on the interpretation of a regulation or contractual provision. In *U.S. ex rel. Thompson v. Honeywell Int'l, Inc.*, Case No. CV 12-2214-JAK (C.D. Cal.), the court articulated a clear and defendant-friendly formulation of the pleading standard for scienter in such cases. The court held that a whistleblower must allege facts demonstrating that the defendant's interpretation of regulations was "so clearly incorrect" so as to support a plausible inference that the defendant knew it was violating the regulations. That bodes well for future efforts by defendants to resolve these types of FCA cases prior to expensive discovery.

Traditionally, courts have deferred defendants' attacks on the scienter element of FCA cases until the summary judgment stage, based either on Rule 9(b)'s pronouncement that scienter need only be alleged "generally" or by drawing all factual inferences in the plaintiff's favor. However, that has begun to change in light of the Supreme Court's Rule 8 pleading standard as set forth in *Twombly* and *Iqbal*, which requires a plaintiff to allege facts that render a claim "plausible on its face." The *Thompson* court artfully integrated the plausibility pleading standard with the traditional line of FCA scienter cases holding that a contractor relying on a good faith interpretation of a regulation does not possess the requisite intent to violate the FCA. Companies facing FCA cases that turn on the interpretation of regulations or contractual provisions should look to attack allegations of scienter aggressively under the Rule 8 standard addressed in *Thompson* rather than under the more common Rule 9(b) approach.

In *Thompson*, the whistleblower alleged that the defendant submitted fraudulent claims seeking reimbursement for modifications to GPS software used in military aircraft and tanks. The government declined to intervene in the case. Whether the defendant was entitled to

reimbursement turned on the interpretation of two FAR provisions. Although the court acknowledged that the interpretation of at least one of the provisions raised "a question of fact…[that] will require the presentation of evidence, which may include expert testimony[,]" that finding was not enough for the whistleblower to earn a ticket to discovery. Instead, the court dismissed the complaint due to the absence of facts supporting a plausible inference that the defendant's interpretations were "clearly incorrect." Such a showing was necessary to establish the related inference that the defendant knew or should have known its interpretation was incorrect and thus possessed the requisite intent to defraud. Because the complaint only suggested that the defendant's interpretations ***might*** be wrong, the court dismissed the complaint.

The relator then moved for reconsideration, drawing the court's attention to an email from a government contracting officer cited in the complaint, which the relator contended the court failed to address. Last month, the court denied the motion for reconsideration and further emphasized its plausibility analysis. The court concluded that, while it was "possible" to read the email in question to support the relator's case, "when … considered in context, it is not [a] plausible [reading]." In making this determination the court noted that the email in question conflicted with a subsequent email from a different government contracting officer that expressly endorsed the defendant's interpretation of the FAR provision at issue. As a result, the court concluded that the defendant's interpretation could not be clearly incorrect, and the relator's case was not plausible. The relator has appealed to the Ninth Circuit.

In addition to being a useful tool at the motion to dismiss stage, companies that operate in complex regulatory environments should keep the holding in *Thompson* in mind when reviewing their compliance programs. Efforts to seek regulatory guidance and efforts to discuss potential contractual ambiguities with the government will be extremely helpful if a whistleblower later decides to challenge the company's interpretation. Compliance programs should take care to document such efforts so that the company will have concrete evidence of its good faith (and by extension, its lack of scienter). Defendants can use the *Thompson* analysis to emphasize that, in order to prevail, the plaintiff must establish not only that its interpretation of a regulation or contractual provision is correct, but also that the defendant understood its interpretation was ***clearly incorrect***.

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