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No Government Intervention? No FCA Merit In 5th Circ.

Law360, New York (August 24, 2011) -- Twelve years ago, the Fifth Circuit made waves by being the first federal appellate court to hold that the U.S. Constitution prohibits prosecution of False Claims Act cases by relators when the federal government declines to intervene. Riley v. St. Luke's Episcopal Hosp., 196 F.3d 514 (5th Cir. 1999) (Smith, J.; dissent by Stewart, J.).

A divided Fifth Circuit, in a majority opinion by Judge Carl Stewart, vacated and reversed en banc over a vigorous dissent by Judge Edwin Smith that complained of allowing such actions to go forward "in the government's name, under total control of the self-interested and publicly unaccountable relator, even if the attorney general has concluded that proceeding with a lawsuit is not merited or is otherwise not in the United States's interests." Riley v. St. Luke's Episcopal Hosp., 252 F.3d 749, 758 (5th Cir. 2001) (Smith, J. dissenting).[1]

Judge Smith cited dismissal and recovery "figures show[ing] that the cases in which the government declines to intervene are generally the meritless cases." Id. at 767 n.37. Relegated to a dissenting opinion in a controversial constitutional case, this acknowledgment of the lack of merit of cases in which the government does not intervene gained little traction in the case law.

On Aug. 5, 2011, the Fifth Circuit again issued a significant False Claims Act opinion that calls into question the merit of False Claims Act allegations against defendants as to which the government declines to intervene, this time in a unanimous panel decision authored by Judge Smith and joined by Judge Stewart. United States ex rel. Jamison v. McKesson Corp., No. 10-60376, 2011 U.S. App. (5th Cir. Aug. 5, 2011).

While the decision affirming the dismissal of the relator's claims based on the FCA's public disclosure bar is noteworthy for several reasons, perhaps its most interesting statement came in a line about the defendants as to whom the government did not intervene, as to which the court said the cases against those defendants "presumably lacked merit" because of the government's decision not to intervene. Id. at *22. The court acknowledged what dismissal statistics strongly support but which few courts say, which is that False Claims Act cases in which the government declines to intervene rarely have merit.

In Jamison, the Fifth Circuit affirmed the dismissal of the relator from the action under the (pre-2010 amendment) False Claims Act's "public disclosure bar" codified at 31 U.S.C. § 3730(e)(4). Jamison's complaint alleged a Medicare fraud scheme in which hospitals allegedly established a subsidiary to provide Durable Medical Equipment ("DME"), which would then contract exclusively with a DME supply company to operate the subsidiary, thereby allegedly providing DME suppliers with guaranteed customers and allowing the supplier to charge more for its products. Id. at *4. The relator alleged that this is fraudulent because the hospital represents itself as a DME supplier when it is not and obtains higher reimbursements from Medicare, part of which it keeps as a kickback from the actual DME supplier. Id.

The increasing prevalence of this type of arrangement was reported in a 2003 Special Advisory Bulletin on "Contractual Joint Ventures" published by the Health and Human Services Office of the Inspector General. Id. Jamison read this report and then filed his FCA complaint against nearly 450 defendants, including nursing homes and DME suppliers. Id. The initial complaint included Beverly and McKesson as defendants but contained no specific allegations regarding these two entities. Id. at *5. Jamison added details about Beverly and McKesson in his first amended complaint. Id. at *7. The U.S. Department of Justice intervened against seven defendants. Id. at *22. The district court dismissed Jamison as a relator on the grounds that his complaint violated the FCA's public disclosure provisions. Id. at *26.

The Fifth Circuit affirmed, holding that Jamison's action was based upon publicly disclosed information and that Jamison was not an original source. Jamison, 2011 U.S. App., at *14-26. The court stated that the only information that the original complaint provided that was not in the prior public disclosures was the names of the 450 defendants. Id. at *21-25. In the course of holding that Jamison had not carried his burden of showing that this provided any useful information, the court stated that the government's decision not to intervene as to all but seven of the 450 defendants showed that "[t]he cases against the others presumably lacked merit." Id. at *22.

This marks a departure in the case law from other appellate courts commenting on government decisions not to intervene, which have nearly uniformly stated that such a decision does not necessarily reflect the lack of merit of the claims. See, e.g., United States ex rel. Chandler v. Cook County, 277 F.3d 969, 974 n.5 (7th Cir. 2002) ("There is no reason to presume that a decision by the Justice Department not to assume control of the suit is a commentary on the merits"); United States ex rel. Ubl v. IIF Data Solutions, No. 09-2280, 2011 U.S. App., at *30 (4th Cir. April 19, 2011); United States ex rel. Atkins, 470 F.3d 1350, 1360 n.17 (11th Cir. 2006); United States ex rel. Williams v. Bell Helicopter Textron Inc., 417 F.3d 450, 455 (5th Cir. 2005) (stating the government may not intervene for many reasons and "a decision not to intervene may not necessarily be an admission by the United States that it has suffered no injury in fact, but rather the result of the cost benefit analysis").

Although prior to the Jamison decision most courts refrained from citing the government's decision not to intervene as evidence of a lack of merit of the relator's claims, statistics support that a decision not to intervene does indeed correlate very strongly with lack of merit. In support of his statement in the dissent in Riley that "cases in which the government declines to intervene are generally the meritless cases," Judge Smith cited statistics that as of September 2000, the government intervened in only 22 percent of cases, but recovered by settlement or judgment in 77 percent of those cases, losing only 2 percent of those that had been decided. In cases in which the government did not intervene, only 5 percent resulted in recoveries, while 74 percent were lost. Riley, 252 F.3d at 767 n.37.

Since the Riley decision 10 years ago, the numbers reflect that relators have fared about the same or worse in cases in which the government does not intervene, recovering in approximately 5 percent of cases and losing approximately 85 percent; conversely, the government recovered in approximately 85 percent of cases in which it intervened, losing approximately 5 percent of such cases. See Fraud Statistics, Qui Tam Intervention Decisions & Case Status as of Sept. 30, 2010, released by Civil Division, U.S. Department of Justice. This disparity suggests that the Jamison court is correct that a government decision not to intervene reflects the lack of merit of a relator's claims.

The question after Jamison is whether the Fifth Circuit has opened the door for other courts to consider FCA suits presumptively meritless where the government declines to intervene. Only time will tell whether other courts will adopt the view of the panel in Jamison, or whether it will be limited to cases in which courts must assess the value of suits such as Jamison's that are leveled against wide swaths of industries but yield few if any claims as to which the government intervenes. In the meantime, defense practitioners may find citation to the Jamison decision useful where the government declines to intervene in FCA cases against their clients.

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[1] The FCA provides that, where the government declines to intervene, relators may maintain the action in the name of the United States, and court and attorney general consent is required for dismissal. 31 U.S.C. § 3730(b)(1).