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Posted at 6:19 AM on May 12, 2010 by Sheppard Mullin

Finally, A Ruling That Applies Some Common Sense To The False Claims Act

By Jonathan S. Aronie and Christopher M. Loveland

Search for the phrase *False Claims Act* on the Internet, and you will be hit with a barrage of websites telling you how easy it is to bring a fraud case against a Government contractor. Sadly, these websites are right. The bar to bringing FCA claims has been lowered to such an extent over the past 5-10 years that the Act practically invites frivolous lawsuits. Thus, it is with great pleasure that we report that at least one court – the United States District Court for the District of Massachusetts – has taken a step toward restoring at least some common sense to application of the statute.

On April 27, 2010, in *United States ex rel. Crennen v. Dell Marketing, L.P.*, *et al*., No. 06-10546-PBS (April 27, 2010), the Massachusetts district court dismissed plaintiff Christopher Crennen's False Claim Act lawsuit against 10 GSA Schedule contractors. (Mr. Crennen actually began the case with 32 defendants, but, with some prompting from the court, later dismissed all but 10 of them.) Mr. Crennen had argued that each defendant violated the False Claims Act by allegedly selling non-Trade-Agreements-Act-compliant products to the United States Government through its GSA Schedule Contract – a particularly popular FCA allegation since 2005.

Interestingly, Mr. Crennen did not work for – or even compete against – any of the defendants in his lawsuit, which often is the case in suits like this. You might rightly ask then how Mr. Crennen came upon the purported fraud he alleged in his complaint. A good question, with a telling answer.

It appears from Mr. Crennen's complaint that he based his allegations upon little more than a visit to his local electronics superstores, where he proceeded to write down the country of origin and part numbers from the backs of the computers he found on the shelves. He then simply sued every GSA Schedule contractor he could find that listed those same part numbers on GSA Advantage (the official GSA Schedule website). (He also, incidentally, claimed that all of the companies somehow conspired together to violate the False Claims Act as a group – a claim that, to his credit, he ultimately withdrew.)

At this point, you may be asking yourself what Mr. Crennen alleged in his suit as *the claim*

against the Government. After all, an actual claim is an essential element of a False Claims Act lawsuit. (Generally speaking, an FCA relator must demonstrate a (1) claim (2) that is false and (3) material, and that is (4) submitted to the Government or one of its primes (5) "knowingly.") Mr. Crennen, however, did not present any evidence of an actual claim. Not surprisingly, this prompted each of the defendants immediately to file a motion to dismiss the complaint for "failure to plead fraud with particularity."

The Federal Rules of Civil Procedures (Rule 9(b)) makes clear that if you are going to charge someone with fraud, you have to have actual details of the fraud. Since fraud is, as they say, "fight'n words," general allegations of fraud are not supposed to cut it in court. Federal courts, however, have a reputation for interpreting the term "particularity" very broadly.

Nonetheless, the defendants were not deterred, and argued in their motions that Mr. Crennen's claim failed to comply with Rule 9(b) because it did not identify "a single false claim presented by any defendant or third party to the government." In response, Mr. Crennen contended that a more "flexible standard" instead of the traditional Rule 9(b) standard should be applied by the court. Citing the First Circuit's decision in *United States ex rel. Duxbury v. Ortho Biotech Prods., L.P.*, 579 F.3d 13 (1st Cir. 2009), Mr. Crennen argued that since it was "plausible" that the defendants made a sale to the government based on the fact that allegedly non-compliant products were listed on the GSA Advtange! Website, his complaint should be allowed to proceed.

The Court rejected Crennen's arguments and concluded that his claims were "deficient." Distinguishing the cases cited by Mr. Crennen's legal team, the Court concluded that "[t]he standard is not plausibility, . . . but particularity." Accordingly, the Court dismissed Count I of the complaint (which had alleged the knowing presentment of a false or fraudulent claim for payment or approval) because it failed to contain any "facts to create a strong inference that a false claim was submitted."

Count II of Mr. Crennen's complaint received similar scrutiny.

Mr. Crennen's second count alleged that the defendants made false statements regarding the country of origin of their products on GSA Advantage! "to get a false or fraudulent claim paid" in violation of § (a)(2) of the False Claims Act. Mr. Crennen contended that, based on the Supreme Court's decision in *Allison Engine Co. v. United States ex rel. Sanders*, 128 S. Ct. 2123 (2008), liability attached upon the making of a false statement regardless of whether or not a claim for payment ever was submitted to or paid by the government. The Court disagreed, finding that, even subsequent to *Allison Engine*, there must be a connection between the allegedly false statement and the false or fraudulent claims.

Although the Massachusetts district court recognized some language in one case cited by Mr. Crennen (*United States ex rel. Gagne v. City of Worcester*, 565 F.3d 40 (1st Cir. 2009)) that could be read as weakening the need to connect the allegedly false statement to the claim, the court cautioned that the *Gagne* decision "must be read in context."

In *Gagne*, the First Circuit still required details of the alleged fraud and a real connection of

those details to the false or fraudulent claims. The *Gagne* court offered the following example to make the point: "posting a false statement on a website in the expectation that a claim will be submitted does not trigger liability without pleading a claim or a 'planned' claim." The court in the *Crennen* case simply "decline[d] to interpret the words 'planned claim' used in *Gagne* so broadly as to hold a defendant liable under the FCA for a false statement without allegations of a specific planned false claim." Accordingly, the court dismissed Count II of Mr. Crennen's complaint.

Prior to the dismissal, in an effort to keep his complaint alive, Mr. Crennen had contended that he would be able to identify the claims that he believed to exist if the court would grant him discovery – in other words, for the non-lawyers among us, if the court would order the defendants to turn over all of their sales data. Mr. Crennen also argued that he could come up with the necessary claims if the court would give him one more opportunity to amend his complaint. While many courts seem to bend over backward to give plaintiffs the chance to amend and then re-amend their complaints, this Massachusetts court was not taken in by the argument, finding that "after three years and a government investigation [Mr. Crennen] still cannot allege that any specific claim was planned or submitted for a product listed on the GSA Advantage! website with a false country of origin." Accordingly, the Court dismissed the amended complaint *with* prejudice.

While the *Crennen* decision does not create any new law in the False Claims Act area, it does give some hope to those of us who defend against FCA cases for a living that pockets of common sense still exist out there. And that, in some jurisdictions at least, a relator's allegations actually are going to be measured against the standard that the law imposes upon them. A fair result all around.

P.S. For those interested in the procedural posture of the case leading up to the dismissal, here you go: Christopher Crennen, filed a sealed qui tam complaint against thirty-two corporate defendants in March 2006. The complaint was unsealed in May 2009, and, on July 22, 2009, the United States declined to intervene. Mr. Crennen amended his complaint on September 18, 2009, reducing the number of defendants to ten. No other substantive changes were made to the complaint by the amendment. That same day, the Court ordered Mr. Crennen to serve all of the defendants by September 30, 2009. The defendants subsequently filed motions to dismiss pursuant to Rules 9(b) and 12(b)(6) of the Federal Rules of Civil Procedure.

P.P.S. Sheppard Mullin attorneys Jonathan S. Aronie and Christopher M. Loveland represented three of the 10 defendants in the Crennen litigation.