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White Collar Watch

An eye on whistleblowers, false claims and compliance

Saul Ewing LLP

White Collar and Government Enforcement Practice

Contents

Whistleblower's one-two punch: Confidential informant/employee spurs criminal investigation, then successfully sues individual company owner in *qui tam* action

By Christopher R. Hall, Meghan J. Talbot and Gina M. Russoniello

IN BRIEF

- **Schuylkill Products case highlights how a whistleblower can put an employer on track to face both criminal and civil proceedings under the False Claims Act.**

In a stark reminder of the importance of a robust compliance program, a former employee whose disclosures to the FBI launched a criminal prosecution became the successful plaintiff in a *qui tam* motion for summary judgment against one of the individual owners of the now-defunct company.

Background

The False Claims Act ("FCA") complaint was brought by a former employee of Schuylkill Products, Inc. ("SPI") who blew the whistle on fraudulent billing practices by the Pennsylvania-based manufacturer of concrete bridge beams. According to federal prosecutors, the fraud involved more than $136 million in government contracts and lasted for more than 15 years. SPI gained lucrative contracts under the government program which requires companies to subcontract a percentage of their work to a "Disadvantaged Business Enterprise" ("DBE"). The subcontracts were procured by minority-owned Marikina Construction Corp., ("Marikina"), but this company operated merely as a front for SPI. Marikina held the subcontracts, but SPI performed all the work (and retained most of the profits).

Investigation, indictment, and conviction

SPI employee Robert Green contacted the FBI to report what he characterized as DBE fraud. Green provided information as a confidential informant, and was compensated $5,300 for his assistance in the FBI investigation, during which Green made numerous recordings later used by the government in its criminal prosecution of SPI's owners. The subsequent prosecution led to the guilty plea of Ernest Fink (director and officer of SPI) and the conviction of Joseph Nagle (president and CEO of SPI) after trial by jury.

The agreement to which Fink pleaded contained a statement of facts that included acknowledgment that Fink and other upper-level SPI managers used Marikina as a shell and that Marikina did not perform a commercially useful function. At trial, Nagle was convicted of 26 of the 30 charges against him, including conspiracy to defraud the U.S. Department of Transportation, conspiracy to commit wire and mail fraud, and conspiracy to launder money. After the conviction, Middle District of Pennsylvania Judge Sylvia Rambo upheld the sum of $53.9 million as the loss attributable to Nagle. Currently, both Fink and Nagle are awaiting sentencing.

Qui tam action

On January 8, 2010, less than two months after the filing of the grand jury indictment of Fink and Nagle, Relator-Plaintiff Green filed a FCA lawsuit against SPI, Fink, Nagle, and Marikina. Nagle and SPI never responded to Green's complaint, and default judgment was entered against them in 2012. One month later, Fink filed his answer, but did not file a response to the plaintiff's subsequent Motion for Summary Judgment.

On May 22, 2014, Judge Rambo entered summary judgment for the plaintiff; Fink's admissions as part of his guilty plea provided sufficient support. The court stated: "as both the criminal and these civil proceedings involved the same conspiracy, Defendant Fink's guilty plea conclusively establishes all of the factual issues as to his liability under the FCA counts set forth in the amended complaint."

Takeaway

Whistleblowers may serve as both "original sources" of information for criminal investigations and for *qui tam* actions. Relators, moreover, may sue not only their former employer but also their former supervisors and managers in their individual capacities. Companies should understand the parallel nature of the criminal and civil proceedings in the FCA context, and should strive to deploy robust compliance programs to encourage employees to raise their concerns internally to afford companies the opportunity to assess allegations of misconduct, take remedial action, and self-report where warranted. Please feel free to contact the authors if you have questions about this case, the FCA, or your compliance program.

Alleged illegal recruiting for college leads to False Claims Act complaint

By Gregory G. Schwab

IN BRIEF

- **Stevens-Henager College and its owners are accused of offering compensation incentives to admission consultants based on the number of students they recruit.**
- **The government alleges that the college falsely certified compliance with federal law that prohibits such incentives in a case originally brought by two whistleblowers.**

The United States has filed a complaint under the False Claims Act in the U.S. District Court for the District of Idaho against Stevens-Henager College, Inc. and its owner, the Center for Excellence in Higher Education, for allegedly illegally compensating recruiters. Stevens-Henager operates a chain of colleges in Idaho and Utah that focus on "career-oriented programs," offering degrees in healthcare, business, technology and graphic arts. The college's website states that it is "a private, nonprofit college," although the complaint describes the institution as a "for-profit" operation.

The United States intervened in the federal suit, which was originally filed by two whistleblowers, Katie Brooks and Nannette Wride. According to the complaint, both Brooks and Wride worked for the college as admissions consultants, during which time they allege they "became aware of Stevens-Henager's incentive compensation practices for admissions employees."

The government alleges that the college falsely certified compliance with federal law that prohibits a university from paying incentive-based compensation to its admissions recruiters based on the number of students they recruit. Congress enacted this prohibition in Title IV of the Higher Education Act to curtail the enrollment of unqualified students, high student loan default rates, and the waste of student loans and grant funds.

The complaint alleges that at Stevens-Henager, "a recruiter could double his or her income by recruiting a large number of students, so long as a few graduated. Conversely, the reward per student completion was reduced or entirely withheld if the consultant had not enrolled a sufficiently high number of students." The complaint further alleges that "[w]ith this lucrative incentive compensation program and constant performance reminders to its recruiters, Stevens-Henager directly or indirectly encouraged its recruiters to enroll anyone who was willing to apply for federal funds regardless of the students' likelihood of success or ability to benefit from Stevens-Henager's educational programs. In addition, the complaint alleges that "Stevens-Henager wrongfully procured funding for its own benefit and abused the Title IV program's purposes. Further, this irresponsible recruitment saddles unqualified students with large debts that are difficult or impossible to repay, leading to defaults that ultimately cost the government millions of dollars."

Stevens-Henager allegedly made "false statements" to the Department of Education about its recruiting practices and used safe harbors of the Higher Education Act to feign compliance, while operating in violation of the law.

In June 2010, the Department of Education proposed eliminating the safe harbors, noting that "the elimination of the safe harbors was necessary" and that "the Department's experience demonstrates that unscrupulous actors routinely rely upon these safe harbors to circumvent the intent of Section 487(a)(20) of the HEA [Higher Education Act]. The safe harbors were eliminated in October 2011, with the Department of Education concluding that "rather than serving to effectuate the goals intended by Congress ... the safe harbors have served to obstruct those objectives," according to the complaint.

According to a Department of Justice press release, Assistant Attorney General for the Civil Division, Stuart F. Delery, stated, "Congress has made clear that colleges should not pay improper incentives to admissions recruiters. . . . The Department of Justice and the Department of Education are working together to combat unlawful recruitment practices that can harm students and result in the waste of taxpayer funds."

Similarly, Wendy Olson, U.S. Attorney for the District of Idaho, stated, "Fighting fraud and protecting federal tax dollars from abuse is a priority for this office. . . . The False Claims Act is an important tool for doing just that. Whistleblowers are necessary to our ongoing efforts to combat fraud, waste and abuse."

The suit against Stevens-Henager College is not the first time that the government has used the False Claims Act to crack down on recruitment practices that violate the law. Over the years, the government has intervened in dozens of suits where whistleblowers complained of incentive-based compensation tied to recruitment practices. Institutions must remain vigilant that bonuses, commissions, or other incentives are not tied to how successfully recruiters or admissions staff enroll students.

Court enforces False Claims Act's first-to-file rule to bar complaint alleging details of off-label promotion scheme about which another relator had previously complained

By Aaron Kornblith

IN BRIEF

- **When an alleged scheme to market drugs for unapproved "off-label" uses had already been identified by an earlier complaint, a later complaint providing additional details, but alleging the same "essential facts," was barred by the statute.**
- **The Court of Appeals rejected the argument that later complaints were only barred if they alleged identical facts.**

The U.S. Court of Appeals for the First Circuit upheld the dismissal of a False Claims Act ("FCA") complaint brought against pharmaceutical giant Bristol-Myers Squibb, Inc. ("BMS"), ruling that the complaint alleged the same "essential facts" as an earlier complaint.

The relator, or whistleblower, in the case, Michael A. Wilson, was a former BMS sales representative. Mr. Wilson filed a complaint in October 2006 alleging that BMS violated the federal Anti-Kickback Statute and FCA by promoting several drugs for off-label uses. While physicians are permitted to prescribe medications for uses other than those approved by the Food and Drug Administration, Medicaid does not generally reimburse patients for "off-label" uses, and companies are prohibited from marketing their medications for off-label uses. In September 2007, BMS settled Wilson's claims unrelated to the alleged off-label promotion and agreed to pay the United States more than $317 million. The government declined to intervene in what remained of the case.

Not satisfied, Wilson then filed a second amended complaint in April 2009, expanding on his allegations of off-label promotion, and adding Sanofi-Aventis U.S., LLC ("Sanofi") as a defendant. BMS and Sanofi moved to dismiss the FCA claims on the ground that they violated the FCA's "first-to-file" rule. The first-to-file rule, which is contained in the FCA, provides that once an FCA claim has been filed, non-governmental parties are barred from "bringing a related action based on the facts underlying the pending action." The companies cited as support for their motion a complaint which had been filed in May 2006, five months before Wilson filed his original complaint. The May 2006 complaint alleged that BMS engaged in a nationwide scheme to promote off-label uses of its drugs. That complaint focused on the same drugs identified by Wilson and accused BMS of using the same mechanisms to promote those drugs, but it identified different off-label uses from Wilson's complaint.

In February 2013, the U.S. District Court for the District of Massachusetts granted BMS and Sanofi's motion to dismiss. The court reasoned that because "Wilson's complaint d[id] not alert the government to a new type of fraudulent scheme or even new aspects of an existing scheme allegedly being perpetrated by the defendants," Wilson's claims were barred by the first-to-file rule.

On appeal, the First Circuit upheld the dismissal of Wilson's FCA claims. The court noted that the first-to-file rule is part of the larger balancing act of the FCA's *qui tam*, or whistleblower, provision, which attempts to reconcile the conflicting goals of encouraging citizens to act as whistleblowers while preventing opportunistic suits. The court applied the "essential facts" or "material elements" test, under which a later FCA suit is barred if it alleges "all the essential facts of a previously filed claim or the same elements of a fraud described in an earlier suit." The rule's application is not limited to situations where the complaints list "identical facts," the court reasoned, because an earlier suit that alleges the essential facts of a scheme has already served the purpose of putting the government on notice of the scheme and providing an opportunity to investigate it.

Comparing Wilson's complaint to the one filed five months prior, the court found the overlap to be "considerable," including "the same defendants, the same drugs, the assertion of nationwide schemes, and the allegations of specific mechanisms of promotion common to both and leading to common patterns of submission of false claims under the federal Medicaid program." In light of these similarities, the different details alleged by Wilson concerning specific off-label uses for which the drugs were promoted were insufficient to prevent his claims from being "related" within the language of the FCA, and therefore barred by the first-to-file rule. The court also recognized that the lack of government investigations resulting from the earlier complaint did not affect its analysis.

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