



The False Claims Act Landscape and the Significance of the Third Circuit’s Dismissal of *United States of America, ex rel. Anthony R. Spay v. CVS Caremark Corp. et al.*

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Most people are familiar with the phrase, “it’s a marathon and not a sprint!” In relation to high-stakes litigation in general and the False Claims Act (FCA) in particular, no truer words have been spoken. Many of these cases take years to come to fruition, and the appeals that follow, as in *United States of America, ex rel. Anthony R. Spay v. CVS Caremark Corp. et al.*,¹ is another time-consuming process.

“The statute, first passed in 1863, includes an ancient legal device called a ‘qui tam’ provision (from a Latin phrase meaning ‘he who brings a case on behalf of our lord the King, as well as for himself’). This provision allows a private person, known as a ‘relator,’ to bring a lawsuit on behalf of the United States, where the private person has information that the named defendant has knowingly submitted or caused the submission of false or fraudulent claims to the United States. The relator need not have been personally harmed by the defendant’s conduct.”² Too often, attorneys with no knowledge or experience in this area of the law file a case because of the potential value. Granted, everyone needs to start somewhere, but the FCA differs from typical civil and criminal cases in many procedural ways and can have serious repercussions for the plaintiff and their attorney.

The allure of bringing FCA³ cases has steadily increased over the past 20 years with the health care sector comprising the largest number of both cases and total dollar recovery. On Dec. 21, 2017, the U.S. Department of Justice (DOJ) announced that in fiscal year 2017,

FCA settlements totaled \$3.7 billion, with \$2.4 billion involving the health care industry.⁴ In 1987, three *qui tam* matters were filed; yet, in 2017, 491 *qui tam* matters were filed.⁵ “In addition to combatting health care fraud, the FCA serves as the government’s primary civil remedy to redress false claims for government funds and property under government programs and contracts relating to such varied areas as defense and national security, food safety and inspection, federally insured loans and mortgages, highway funds, small business contracts, agricultural subsidies, disaster assistance, and important tariffs.”⁶ This brings us to an important nuance of the FCA—the government knowledge inference doctrine, which was a focus of the *CVS* case.⁷

The purpose of this article is to provide a procedural history of the case and to explain the government knowledge inference doctrine, which played a pivotal role in the dismissal of the *CVS* case and the subsequent upholding by the Third Circuit.

Case Analysis

In 2009, relator Anthony R. Spay filed under seal, in *U.S. ex rel. Spay v. CVS Caremark Corp.*,⁸ a *qui tam* action on behalf of the U.S. government, alleging FCA violations. The relator was a registered pharmacist with nearly 35 years of experience in the pharmacy industry. The relator “claimed that this allegedly false information resulted in the government paying the sponsors more than they were actually entitled to during the reconciliation period. According to Spay, the defendants did this by populating prescriber ID records with ‘dummy IDs,’ which the defendants claimed were used to replace erroneous ID data.”⁹ Notably, this case relied on the FCA pre-Fraud Enforcement and Recovery Act of 2009.^{10,11}

In June 2011, the United States declined to intervene in this action. Subsequently, in August 2011 the first amended complaint was filed alleging that various practices by the defendants resulted in

false claims being presented by defendants to the Centers for Medicare & Medicaid Services (CMS) under the Medicare Part D program.¹² On April 23, 2012, the defendants filed a motion to dismiss, which the U.S. District Court for the Eastern District of Pennsylvania denied in its entirety. Factual and expert discovery commenced, resulting in over 1.4 million pages of documents and over 30 witness depositions. The relator's counsel subsequently filed a motion to appeal with the Third Circuit, which was argued on Nov. 10, 2016, before the panel of Chief Judge D. Brooks Smith, Judge Theodore A. McKee, and Judge L. Felipe Restrepo.¹³

This is where the transition to the government knowledge inference begins. “The ‘government knowledge inference’ helps distinguish, in FCA cases, between the submission of a false claim and the knowing submission of a false claim—that is, between the presence and absence of scienter.”¹⁴ This means that, “the government must be aware of the false claims and didn’t need the assistance of private parties to ferret them out. And if the government knew about the information yet did nothing, then the government probably thought the suit meritless and any private action was apt to be spurious, driven only by the lure of the act’s sizable damages.”¹⁵ This rationale is what the Eastern District of Pennsylvania utilized in dismissing the initial action.

In his Third Circuit opinion, Judge McKee honed in on two items related to the “doctrine.” First, he suggested that the “government knowledge inference might be more aptly named a ‘government acquiescence inference,’ as knowledge alone on the part of the government is insufficient to establish an FCA defense.”¹⁶ And, second, he focused on the two-prong test: “(1) the government knew about the alleged false statement(s), and (2) the defendant knew that the government knew.”¹⁷ In *CVS*, the Third Circuit concluded that the first prong was met; however, there was inadequate evidence to meet the second prong. Hence,

While it is true that both the government and contractors throughout the industry knew what was happening, there is no evidence of any explicit approval from the government to Caremark of this temporary work-around. More importantly, this evidence of what was occurring in the industry does not establish that Caremark knew that CMS was aware of the practice of using dummy prescriber IDs. Indeed the record shows that Caremark was simply hopeful that its use of the dummy IDs would be acceptable. Thus, the circumstances here are somewhat different than the usual case where the government knowledge inference has been applied. Drawing reasonable inferences in Spay’s favor, as we must, the evidence does not demonstrate Caremark’s knowledge for purposes of the second prong. We agree with Spay and the amici that the district court erred in relying upon the government knowledge inference in dismissing these claims based on the dummy prescriber IDs.

If an entity is going to invoke the government knowledge inference defense, it is important that both prongs are met. Ultimately, the district court’s order granting the motion to dismiss was granted.

Conclusion

Importantly, no specific proof of intent to defraud the government is required. But, what is required is for the two-prongs of the government knowledge inference to be met. *CVS* proffers a notable expla-

nation of various facets of the FCA, as well as the defense known as government knowledge inference. Overall, counsel should consider this case before filing. ☉

Endnotes

¹*United States of America, ex rel. Anthony R. Spay v. CVS Caremark Corp. et al.*, (3d Cir. 2017) [hereinafter *CVS*], <http://www2.ca3.uscourts.gov/opinarch/153548p.pdf>.

²U.S. Dep’t of Justice, *False Claims Act Cases: Government Intervention in Qui Tam (Whistleblower) Suits*, <https://www.justice.gov/sites/default/files/usao-edpa/legacy/2012/06/13/InternetWhistleblower%20update.pdf> (last visited Dec. 23, 2017).

³31 U.S.C. § 3729 *et seq.*

⁴Press Release, U.S. Dep’t of Justice, Justice Department Recovers Over \$3.7 Billion From False Claims Act Cases in Fiscal Year 2017 (Dec. 21, 2017), <https://www.justice.gov/opa/pr/justice-department-recovers-over-37-billion-false-claims-act-cases-fiscal-year-2017>.

⁵U.S. Health & Human Servs., *Fraud Statistics—October 1, 198-September 30, 2017, Civil Division, U.S. Department of Justice* (Dec. 19, 2017), <https://www.justice.gov/opa/press-release/file/1020116/download>.

⁶*Supra*, note 4.

⁷P.J. Dannunzio, *Third Circuit Upholds Dismissal of False Claims Act Case Against CVS Caremark*, LEGAL INTELLIGENCER (Nov. 20, 2017, 6:09 PM), <https://www.law.com/thelegalintelligencer/sites/thelegalintelligencer/2017/11/16/third-circuit-upholds-dismissal-of-false-claims-case-against-cvs-caremark/?sreturn=20171123095310>.

⁸*U.S. ex rel. Spay v. CVS Caremark Corp.*, No. 09-4672 (ED Pa. 2009).

⁹Dannunzio, *supra* note 7.

¹⁰Pub. L. 111-21 (May 20, 2009).

¹¹During the course of the *CVS* appeal, the Supreme Court decided *Universal Health Servs. Inc. v. Escobar*, 136 S. Ct. 1989 (2016).

¹²“On March 22, 2007, Caremark Rx LLC merged with CVS Corporation to form defendant CVS Caremark Corporation. The defendants are various subsidiaries of defendant CVS Caremark Corporation.” *U.S. ex rel. Spay v. CVS Caremark Corp.*, No. 09-4672, 2015 WL 5582553, at *3 (E.D. Pa. Sept. 22, 2015).

¹³*CVS*, 875 F.3d at 748.

¹⁴*United States of America Amicus Curie, United States ex rel. Edward J. Burbaw, et al. v. Michael Orenduff, et al.*, Case Nos. 05-2393 and 06-2006 (10th Cir. 2008) (citing *United States ex rel. Becker v. Westinghouse Savannah River Co.*, 305 F.3d 284, 289 (4th Cir. 2002)) (collecting cases); *Shaw v. AAA Eng’g & Drafting, Inc.*, 213 F.3d 519, 534 (10th Cir.2000); *see also United States v. Southland Mgmt. Corp.*, 326 F.3d 669, 682 n.8 (5th Cir. 2003) (en banc) (Jones, J., concurring) (noting that some courts have “inaptly named” this government knowledge theory a “defense” whereas “it is not a statutory defense to FCA liability”).

¹⁵*United States ex rel. Cantekin v. University of Pittsburgh*, No. 91-0715, 1998 U.S. Dist. LEXIS 13305 (W.D. Pa. Feb. 9, 1998), *rev’d on other grounds*, 192 F.3d 402 (3d Cir. 1999).

¹⁶*CVS*, 875 F.3d at 759.

¹⁷*Id.*