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False Claims Act Damages: D.C. Circuit Says Government Cannot Keep Going Back to the Well

*By Megan Mocho**

The author of this article discusses the U.S. Court of Appeals for the D.C. Circuit's recent ruling in United States v. Honeywell International Inc., which holds that a defendant may offset its False Claims Act damages, dollar for dollar, against the settlement amounts paid by other defendants.

False Claims Act (“FCA”) cases, particularly in the government contracts space, often have several defendants; prime contractors, subcontractors, vendors and individuals are all common targets. In healthcare FCA cases, with increasing regularity, multiple parties (hospitals, providers, investors, etc.) appear in the defendant bracket. According to the U.S. Supreme Court, these defendants face joint and several liability for the treble damages permitted under the statute.

But what if one or more defendants settles first?

D.C. CIRCUIT RULING

The U.S. Court of Appeals for the D.C. Circuit’s recent ruling in *United States v. Honeywell International Inc.* holds that a defendant may offset its damages, dollar for dollar, against the settlement amounts paid by other defendants.

This *pro tanto* approach is markedly different from the “proportionate share” approach, advanced by the government and followed by the district court, under which a defendant is responsible for its proportionate share of the damages, regardless of any amounts paid in prior settlements. According to the government, this approach allows a court to “calibrate a party’s punishment to its relative culpability, furthering, at least to some extent, the punitive effect of the [FCA].”

In rejecting the proportionate share approach, the court noted that “the FCA says nothing at all about how to address indivisible harms or whether joint and several liability is appropriate. And a literal reading could suggest that because

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a person is 'liable' for the damages sustained by the government based on that person's actions, no offset for settling parties is allowed." Such a reading, however, goes against the common law principle "that settlement with, or successful litigation against, one party reduces the damages owed by other parties who are jointly liable."

The position also goes against equitable principles because although the government cannot successively litigate against each defendant and recover the full damages, joint and several liability under the FCA has been interpreted to exclude a right to contribution. The court aptly noted that "[t]ogether these two rules mean that a person who violates the FCA in a joint scheme may have to pay for all the government's trebled damages, and, even if that defendant is the least responsible party, it cannot force the other violators to pay their fair share." In this posture, the government is poised to recover more than its total damages merely because one party settled early.

But the truth is most FCA cases settle when the government intervenes (whether that is a function of the case's merits, negotiating position imbalance, cost avoidance, etc.). By fashioning a *pro tanto* federal common law rule, the *Honeywell* decision addresses this reality and leaves it to the government to "pursue settlement and/or seek damages against each violator in line with its assessment of relative fault."

CONCLUSION

From a practical perspective, how this rule will be moderated in simultaneous settlement negotiations remains to be seen. Companies often do not know if they are but one of several defendants. FCA cases are filed under seal, blocking access to the named parties and allegations.

Even if a defendant receives a copy of the complaint via partial lift of the seal, the names of other defendants are typically redacted. Parties only become aware of FCA cases upon receipt of a FCA civil investigative demand or subpoena, but may not connect with other potential defendants in those instances.

Even if it is known that multiple parties are named, many investigations led by the U.S. Department of Justice ("DOJ") involve only the primary defendant, with secondary defendants never notified of the case or pursued. By the time DOJ issues a press release announcing a settlement, the ink has dried on the settlement agreement.

Only common interest communications or DOJ-provided insight into settlement negotiations will ensure the *Honeywell* damages rule is utilized during simultaneous settlement negotiations.