

Making the Qui Tam Plaintiff's Attorney Do Some Work

by Pete Haskel

Here is the scenario: An individual relator has sued your city in the name of ("qui tam") the United States for treble damages, civil penalties, and expenses under the federal False Claims Act ("FCA"), 31 U.S.C. §§ 3729, 3730. The United States has exercised its discretion not to intervene. 31 U.S.C. §§ 3730(b)(4), 3731(c). Thus, the relator's retained attorneys will be representing the United States in this litigation. *See* 31 U.S.C. § 3730(b)(4)(B).

This is definitely *not* a happy place for the municipal attorney, but it is one in which we are likely to be residing more frequently because of recent pro-plaintiff amendments to the FCA, including eliminating the pre-litigation public disclosure of facts through local government reports and audits as a ground for dismissing the qui tam action,[1] and because of the increasing popularity of the "false certification" theory for FCA complaints.[2] Under the false certification approach, a single false assertion as to a material fact, in a federal grant application or other application to participate in a federal program involving federal funds, can render the entire application false for FCA purposes, and render the city liable to pay, to the United States, treble the amount of monies received under the grant, plus over $10,000 in civil penalties for each such false claim, in addition to the relator's expenses, including attorney's fees. 31 U.S.C. §§ 3729(a)(1)(G), 3730(d)(4). In addition, the city losing an FCA suit (under the false certification theory or otherwise) may be disqualified from relevant federal programs, or required to submit to burdensome and expensive administrative oversight if it is allowed to continue participating in those programs. Almost always, the city will settle FCA suits as quickly as possible because the consequences of litigating and losing are so awful. (There are several impediments to, and hoops through which to jump for, a settlement of FCA litigation, but that is not my subject here.)

I have never fully litigated a FCA suit, but, on bad nights I have tried to think through what I would do if I had to fight one all the way to a jury. One approach that has fascinated me is the possible full development of the idea that the relator's lawyers theoretically represent the United States in the suit. Might there be ramifications of that fact that could help the defendant city that is forced to litigate FCA claims?

While many relators' attorneys are very experienced lawyers, I suspect that most have never or only rarely fully litigated a qui tam action, precisely because defendants settle if at all possible. They have a very lucrative practice ~~blackmailing extorting~~ negotiating settlements from desperate defendants with relatively little effort, because most FCA defendants simply cannot afford not to settle.

The FCA defendant's lawyer can legitimately assert that the defense should not be prejudiced because the Government decided to proceed through outside counsel. Outside counsel must be held accountable for fully representing the United States. Ask the judge to imagine how the court would react if outside counsel for the city refused to respond to discovery for lack of access to the client's documents, or claimed an inability to designate 30(b)(6) witnesses for a lack of knowledge of the details of the city's operations.

I have known federal agency lawyers to object to deposition subpoenas directed at their personnel in qui tam actions as if the agency and the Government were non-parties, citing housekeeping statutes that purport to give federal department secretaries the right to prevent their employees from complying with subpoenas. But I think the Government and its agencies, on whose behalf the qui tam relators sue, are just like any other parties. This can be made clear by serving them as parties with requests and notices through the relator's attorney.

> A federal-court litigant... can seek to obtain the production of documents from a federal agency by means of a federal subpoena. In federal court, the federal government has waived its sovereign immunity, *see* 5 U.S.C. § 702, and neither the Federal Housekeeping Statute nor the *Touhy* decision[3] authorizes a federal agency to withhold documents from a federal court. [*Exxon Shipping Co. v. U.S. Dep't of Interior*, 34 F.3d 774, 777-78 (9th Cir. 1994)]. To the extent that the Comptroller's regulation, 12 C.F.R. § 4.19 (1995), may be to the contrary, it conflicts with Federal Rule of Civil Procedure 45 and exceeds the Comptroller's authority under the Housekeeping Statute. *See In re Bankers Trust Co.*, 61 F.3d 465, 469-71 (6th Cir.1995), *cert. dismissed*, 517 U.S. 1205, 116 S.Ct. 1711, 134 L.Ed.2d 808 (1996). Accordingly, in past cases in which a federal-court litigant has come to federal district court in the District of Columbia to enforce a subpoena duces tecum against the Comptroller, this court has held that the district court owes no deference to the Comptroller in ruling on whether the documents are covered by the bank-examination privilege. *See*

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(*Editor's note*: The ruling is available online at http://www.canlii.org/en/on/onscdc/doc/2011/2011onsc5398/2011onsc5398.html.)

Called to the Bar in 1971, George Rust-D'Eye practises municipal and planning law, administrative law, and public law litigation. The former Metropolitan Solicitor for Metropolitan Toronto, Mr. Rust-D'Eye joined the firm of WeirFoulds LLP in 1989. He is co-author of Ontario Municipal Law: A User's Manual–2011 and Ontario's Municipal Conflict of Interest Act–A Handbook, and author of Handbook for Municipal Councillors. He has been designated by The Law Society of Upper Canada as a Certified Specialist in Municipal Law. He is co-Director and a Lecturer of the Part-Time Municipal Law LL.M. programme at Osgoode Hall Law School, York University. In June 2007, he was awarded the Ontario Bar Association's Award of Excellence in Municipal Law. ML

Ordinances

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they were constitutionally exempt from the application of the trespass legislation and Parks By-law, and contended that the trespass notice violated their rights under sections 2(a) through (d) of the *Canadian Charter of Rights and Freedoms* (their rights of freedom of conscience, expression, peaceful assembly, and association).

The judge rejected the City's argument that the protesters' act of camping out and, in effect, taking over a public park was not activity which engaged section 2 of the *Charter*, but concluded that the trespass notice was constitutionally valid and dismissed the application. Although enforcement of the trespass notice would infringe the applicants' section 2 fundamental freedoms, such an infringement could be justified under section 1 of the *Charter*. The City "has established that the limitations resulting from the enforcement of the Trespass Notice on the applicants' section 2 freedoms are 'reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'." "Although proclaiming a message of participatory democracy, the evidence, unfortunately, reveals that the Protesters did not practise what they were preaching when they decided to occupy the Park. Specifically, they did not ask those who live and work around the Park or those who use the Park—or their civic representatives—what they would think if the Park was turned into a tent city... The *Charter* does not permit the Protesters to take over public space without asking, exclude the rest of the public from enjoying their traditional use of that space, and then contend that they are under no obligation to leave. By taking that position and by occupying the Park the Protesters are breaking the law. Such civil disobedience attracts consequences...." For the 54-page ruling, see http://tinyurl.com/bpvsflt. ML

Second Look

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Schreiber v. Society for Sav. Bancorp, Inc., 11 F.3d 217, 220-21 (D.C. Cir. 1993); [*In re Subpoena Served Upon Comptroller of Currency, & Sec'y of Bd. of Governors of Federal Res. Sys. (Fleet Bank)*, 967 F.2d 630, 633-34 (D.C. Cir. 1992)].

Houston Bus. Journal, Inc. v. Office of Comptroller of Currency, U.S. Dept. of Treasury, 86 F.3d 1208, 1212 (D.C. Cir. 1996).

Treat the relator's attorney just as you would treat outside counsel retained by a plaintiff corporation. All discovery sought from the plaintiff is served on its attorney. Do not let the relator's attorney make you seek third-party discovery from federal agencies as if the United States were not a party. This discovery would include interrogatories, production requests, requests for admissions, and perhaps most importantly, Rule 30(b)(6) depositions of representative federal agency witnesses.

Object at depositions if a Department of Justice (DOJ) or agency attorney tries to defend or to ask questions — particularly if the DOJ objects after the outside lawyer has appeared as the attorney defending the deposition, or tries to ask questions after the relator's attorney has done so. The DOJ lawyer can observe but not participate. Seek a protective order if necessary. 31 U.S.C. § 3730(c)(4) gives the Government the right to copies of deposition transcripts when it has not intervened, but does not even give the DOJ the right to be present at, much less participate in, depositions.[4] Move to compel if the relator's counsel objects to discovery requests on the grounds that he or she lacks access to federal documents or witnesses.

Seek to hold relator's counsel to the unique ethical standards for government lawyers, making the lawyer subject simultaneously to the ethical duties of every jurisdiction where the lawyer "engages in that attorney's duties," in addition to the ethical duties imposed by local rules of the court where the case is pending. 28 U.S.C. § 530B(a) (the so-called McDade Amendment). These duties are sometimes conflicting. Will McDade apply to relator's attorneys? Yes, if the statute is applied literally. There are no cases. Think how McDade might apply to a relator's attorney whose offices are located in State X (and thus, works on your case there) while appearing as the attorney for the Government (as the attorney for different relators) in federal courts in a dozen other states.

Caveat: Will this approach induce the United States to reconsider its decision not to intervene? Will the judge allow a reconsideration of the non-intervention decision if not made for the purposes of settlement? Last, consider the state of your city's (and your office's) relations with your U.S. Attorney's Office when deciding to take the steps outlined here.

Notes

1. *See* Patient Protection and Affordable Care Act, Pub.L. 111–148, 124 Stat. 119, amending, among other things, 31 U.S.C. § 3730(e)(4)(A)(i)-(iii) (2010). "The major changes effected by the 2010 amendments to the FCA are to clarify that the public disclosure bar only applies if the 'criminal, civil, or administrative hearing' at which disclosure occurred was a federal proceeding and to make the bar applicable only if the United States government or its agent was a party to that hearing." U.S. v. Smith & Nephew, Inc., 749 F. Supp. 2d 773, 781 (W.D. Tenn. 2010).

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Second Look

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2. *See* U.S. ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cnty., N.Y., 495 F. Supp.2d 375 (S.D.N.Y. 2007).
3. U.S. ex rel. Touhy v. Ragen, 340 U.S. 462, 467-69 (1951) (federal court cannot enforce a subpoena against an employee of the federal governmental agency when the agency has validly enacted a regulation that withdraws from employees the power to produce documents).
4. Of course, the court *could* order that the DOJ or an agency attorney be allowed to participate in the deposition. Non-parties do not have an absolute right to attend federal civil action depositions, but the court has discretion to permit such attendance. *See* Grand River Enter. Six Nations, Ltd. v. Pryor, No. 02 Civ. 5068(JFK)(DFE), 2008 WL 806530 *1 (S.D.N.Y. Mar. 24, 2008) (discussing relevant factors and citing cases). However, in our scenario, the United States is still technically the plaintiff, so the DOJ or the agency attorney might assert the right to attend as the party representative (potentially preventing the relator's attendance). Alternatively, the relator or the federal lawyers could try to attend as consulting experts with the ~~connivance~~ cooperation of the relator's lawyer—which they undoubtedly would receive. **ML**

Cases

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fuse to answer Officer Beech's questions. Thus, a reasonable officer could believe that her refusal to answer constituted obstruction. This was sufficient to establish Beech's qualified immunity defense as a matter of law; therefore, the district court did not err in granting summary judgment in his favor.

On whether, as a matter of law, an individual subject to a *Terry* stop had the right to refuse to answer an officer's questions, the Tenth Circuit found there was no authority "clearly establishing a right" under the First or Fourth Amendment to refuse to answer an officer's questions during a *Terry* stop; further, there appeared to be nothing under the Fifth Amendment that would allow a person to ignore police requests for general information. Under circuit precedent, the Fifth Amendment right to remain silent might be triggered during a *Terry* stop, but this was narrowly limited to pre-arrest custodial interrogations where incriminating questions are asked. At the time of Koch's arrest, there was neither Supreme Court nor Tenth Circuit precedent, nor clearly established weight of authority from other courts, recognizing a right to refuse to respond to an officer's questions during a *Terry* stop. A reasonable officer could believe that, under the circumstances of this case, Koch was required to answer questions regarding Lance's whereabouts, and that her refusal to do so constituted a willful delay or obstruction of an officer's duty. **ML**

Mootness and Federal Claims

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City of Miami, 770 F. Supp.2d 1269 (S.D. Fla. 2011). This case is currently pending on appeal.
22. 455 U.S. 283 (1982).
23. *Covenant Christian Ministries, Inc.*, 654 F.3d at 1234 (the plaintiff church argued that its right to a building permit vested before the enactment of a 2008 ordinance, and thus, subsequent changes to a 2004 ordinance did not affect its entitlement to a building permit).
24. *Id.* (analyzing Georgia law and determining that the plaintiff did not have any vested rights under the prior ordinance).
25. *See* Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 608-09 (2001) ("[F]or so long as the plaintiff has a cause of action for damages, a defendant's change in conduct will not moot the case.").
26. *Covenant Christian Ministries, Inc.*, 654 F.3d 1231.
27. The district court severed the original ordinance by striking private parks, playgrounds and recreation centers. The Eleventh Circuit upheld this ruling, reasoning that the severance was consistent with the purpose of the residential zoning restriction which was intended for "low density single-family detached housing and residentially compatible uses requiring large amounts of open space." *Id.*
28. *See, e.g.*, Lewis v. Cont'l Bank Corp., 494 U.S. 472, 482 (1990) ("Our ordinary practice in disposing of a case that has become moot on appeal is to vacate the judgment with directions to dismiss. ... However, in instances where the mootness is attributable to a change in the legal framework governing the case, and where the plaintiff may have some residual claim under the new framework that was understandably not asserted previously, our practice is to vacate the judgment and remand for further proceedings in which the parties may, if necessary, amend their pleadings or develop the record more fully.").
29. *See, e.g., Buckhannon Bd. & Care Home, Inc.*, 532 U.S. 598, 605 (2001) ("prevailing party" refers only to a party who or that has achieved a "judicially sanctioned change in the legal relationship of the parties");Truesdell v. Philadelphia Hous. Auth., 290 F.3d 159, 163 (3d Cir. 2002); City of Morris v. Nationalist Movement, 273 F.3d 527, 535 (3d Cir. 2001) (events which occurred subsequent to the contested orders rendered appeal moot as to the Nationalist Movement's claim of right to use the courthouse steps and lawn, though not as to the question of attorney's fees).
30. *Buckhannon Bd. & Care Home, Inc.* at 608-09.
31. *Id.* at 601.
32. *Id.* at 605. *But see* NRA of Am., Inc. v. City of Chicago, 646 F.3d 992 (7th Cir. 2011) (remanding for award of attorney's fees in spite of mootness, where plaintiff prevailed on issue before the U.S. Supreme Court); People Against Police Violence v. City of Pittsburgh, 520 F.3d 226 (3d Cir. 2008) (plaintiff entitled to attorney's fees for obtaining preliminary injunction even though the case ultimately became moot through a revised ordinance). **ML**

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