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Fighting And Winning False Claims Act Cases

*The Editor interviews **Kerri Ruttenberg**, Trial Partner, Jones Day.*

Editor: Tell us about your practice.

Ruttenberg: I try cases on behalf of clients in state and federal courts. I usually represent individuals charged with complex white collar crimes and in parallel civil proceedings stemming from the same conduct. In addition to trial work, I've done a good deal of appellate work in state and federal courts around the country.

Editor: In the recent case *U.S. ex rel. Bunk v. Birkart, et al.*, the Department of Justice accused your client, Gosselin, of violating the False Claims Act (FCA). Please explain what triggers liability under the FCA?

Ruttenberg: The FCA prohibits the submission of claims for payment to the government that are false or fraudulent. This could occur if, for example, a company bills the government for work it did not actually complete, or bills the government for work that it knew did not conform to the terms of the contract. Courts have also found claims can be deemed false as a matter of law when they are submitted under a contract that was fraudulently obtained, even if the invoices under the contract do not themselves contain false statements.

Editor: What type of company is Gosselin and how did it get involved in the first place with the government?

Ruttenberg: Gosselin is an international moving and logistics company based in Belgium. Gosselin worked as a subcontractor for U.S. companies that contract directly with the military to move service members' personal property between the U.S. and Europe. The U.S. companies obtain contracts for this work through a cyclical bidding process – every six months, companies submit bids to handle moves in particular ocean traffic routes between the U.S. and Europe. As a subcontractor, Gosselin handled the packing, unpacking, transportation and storage on the European side of the move.

Kerri Ruttenberg

Editor: What were the allegations against Gosselin in this case?

Ruttenberg: In 2003, the government accused Gosselin of engaging in anticompetitive activity in the summer 2001 bidding cycle on 12 out of the 104 ocean traffic routes between the U.S. and Germany. Those claims were resolved, but in 2008 the relators filed a *qui tam* action that dramatically broadened the allegations against Gosselin. The government intervened in all of the relators' claims except one – an unrelated contract action that had nothing to do with this bidding process.

Editor: What is the role of a relator?

Ruttenberg: A relator is a private party who files a lawsuit on behalf of the government against a party it believes defrauded the government. The government may intervene and take over the litigation, or it can choose not to intervene and instead let the relator litigate the case. Either way, if the claim is successful, the relator keeps a percentage of the recovery.

Editor: How were the allegations against Gosselin broadened in the FCA action?

Ruttenberg: Instead of alleging Gosselin engaged in wrongdoing on 12 traffic routes at the start of one six-month bidding cycle, the government alleged that Gosselin's activity spanned four cycles (two years) for all 416 traffic routes in those four cycles. The government also alleged that there were "lingering effects" of Gosselin's actions for the next two years. Broadening the allegations greatly increased the claimed damages and potential civil penalties at issue on those claims. Ultimately, the vast majority of the government's claims were dismissed through successful litigation pre-trial, including the government's claims of lingering effects.

Editor: What was the outcome of the jury trial?

Ruttenberg: After a two-week trial in the Eastern District of Virginia, the jury rejected the government's remaining allegations of FCA violations, finding Gosselin not liable. The jury found Gosselin liable on the relators' separate claim, but because there were no economic damages proven on that claim, the only remaining question for the court post-trial was what, if any, civil penalties to impose.

Editor: Can you explain what the relators were alleging in their separate claim?

Ruttenberg: The relators accused Gosselin of submitting a false certificate of independent pricing when it originally bid for a particular government contract in 2001. The contract required significant subcontracting due to many unique and

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demanding requirements, such as a significant required daily minimum capacity and broad and unprecedented geographic service. Gosselin and several other companies agreed on the price for a subcontracting line item together rather than separately agreeing on the price for that line item. There were no subcontracting agreements on the other 50 line items in the contract, and no agreements on the ultimate prices the companies submitted to the government with their bids. But, the jury found that the joint agreement on the one subcontracting line item rendered the original certificate false. The relators then asserted that all invoices submitted under the contract, though not false in themselves, constituted false claims within the meaning of the FCA, and they sought a civil penalty for each invoice.

Editor: I understand the amounts sought in the *Gosselin* case were quite substantial.

Ruttenberg: Yes, the amounts sought were tremendous. The FCA provides for treble damages in addition to mandatory civil penalties. At the outset of the case, the government claimed over $100 million in single damages and many hundreds of millions in civil penalties. The civil penalty claims, in particular, were exceptionally high because the government sought one penalty for each invoice the U.S. companies submitted to the government for work that may have included Gosselin's services as a subcontractor. For the contract at issue in the relators' separate claim, Gosselin submitted over 9,000 invoices — this would have amounted to between $50 million and $100 million in penalties on that claim alone.

Editor: The *Gosselin* case has been getting a lot of attention in the world of false claims cases. What is unique about it?

Ruttenberg: There were quite a few issues of first impression in this case that were litigated before, during and after trial. The court's recent ruling awarding no civil penalties to the relators was particularly significant in two respects. First, the court held that the civil penalties the relators would be entitled to under the FCA would be an unconstitutionally excessive fine violating the Eighth Amendment. And second, the court held that it did not have discretion to award a penalty below the statutory range in the FCA, which is $5,500 - $11,000 per violation. Because the FCA-mandated penalties would have been unconstitutional and the court had no discretion under the statute simply to award a lower penalty, it awarded no penalties on the relators' claim.

This case was also rather unique simply because it went to trial at all. Most cases involving alleged violations of the FCA are settled before trial.

Editor: Why is it unusual for FCA cases to go to trial?

Ruttenberg: There are a few aspects of the FCA that make it difficult for companies and individuals to take these cases to trial. First, a liability finding can mean exceptionally large civil penalty awards in a high-invoicing industry. Even where the violation was an isolated event or where it caused little damage, there still is a risk of high civil penalties. This risk, as a matter of prudent business practice, is often too high for a company to bear. Moreover, in many industries an FCA liability finding can lead to a company losing licenses or its ability to contract with the government. Any of these consequences can mean the end of the company, whereas a settlement can eliminate the risk of such a devastating consequence.

Editor: Why did the potential civil penalties in this case violate the Constitution, when they were authorized by the FCA?

Ruttenberg: Sometimes statutes that may otherwise be constitutional can lead to unconstitutional results as applied in a particular case. That's what happened here. The relators and Gosselin stipulated that over the life of the contract at issue, which spanned three years, Gosselin submitted 9,136 invoices. As I've noted, the relators sought a penalty for each invoice, which would mean between $50 million and $100 million in penalties. Yet, there were no economic damages proven on the claims, and there were substantial mitigating circumstances surrounding Gosselin's conduct. For example, despite learning about the relators' allegations of fraud during the first year of the contract, the military renewed the contract twice more with Gosselin, each time affirmatively finding that Gosselin was a responsible company, had performed well on the contract, and offered the government the best value in the industry. The court considered the lack of tangible and intangible damage to the government and determined that even the minimum potential penalty was grossly disproportionate to the harm and was therefore unconstitutional, even if it was authorized by the FCA.

Editor: I had the impression that the FCA was almost automatic in terms of assessing a penalty for anything that could be described as a false claim even if the damage amounts were inconsequential.

Ruttenberg: You're correct that the government may be able to recover civil penalties even if the defendant caused no economic damages. That said, the United States Constitution trumps statutes. A statute cannot be applied in a particular case if it would work an unconstitutional result in that case. Here, the gross disparity between zero dollars in damage and tens of millions in penalties, coupled with the lack of intangible harm to the government beyond its obvious interest in the integrity of its contracting program, led the court to conclude that the statutory penalty would be unconstitutional.

Editor: What are the implications for other cases?

Ruttenberg: Although it is not binding precedent on other courts, the district court's opinion may be persuasive authority and certainly provides a roadmap for other litigants and courts determining appropriate civil penalties in future cases. If the Fourth Circuit upholds the district court's Eighth Amendment ruling and its reading of the FCA as non-discretionary outside of the express penalty range, the impact on FCA cases will be staggering. It will undoubtedly affect future cases in every stage of the litigation when substantial civil penalties are considered. This could range from the initial drafting of FCA complaints to settlement negotiations. I would also hope the case might empower companies to think twice about succumbing to threats of exorbitant civil penalties and settling if they otherwise might have opted to fight incorrect or overbroad allegations but for the civil penalty risk.