# Review Of Gov't Action Dismissal Could Restrict FCA Claims

By **Colette Matzzie** (March 2, 2022)

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The U.S. Court of Appeals for the D.C. Circuit is slated to hear oral arguments on Thursday in Vermont National Telephone Co. v. Northstar Wireless LLC, a case that could limit whistleblower actions seeking to recover damages and penalties under the False Claims Act.

At issue is the U.S. District Court for the District of Columbia's dismissal of a qui tam whistleblower suit based on the so-called government action bar. The FCA precludes a relator — whistleblower — from bringing a qui tam lawsuit "based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the government is already a party."

The case arises from what the whistleblower, Vermont National Telephone, calls an unprecedented scheme in which Dish Network Corp. allegedly used sham entities it created to acquire $13 billion of wireless spectrum at heavily discounted prices in auction bidding that the Federal Communications Commission had reserved for "very small businesses" under the agency's small business program.

Despite the seriousness of the underlying allegations, the district court last year dismissed the suit, invoking the government action bar.

U.S. District Judge Colleen Kollar-Kotelly held that the lawsuit could not proceed because the FCC had conducted a post-auction licensing proceeding to determine whether the bidding entities were eligible for the bidding credits they had used.

The FCC ordered the bidding entities to pay for the difference between the winning bid and what the FCC receives in a reauction, following which those companies, SNR Wireless LicenseCo LLC and Northstar, decided to default on the some of the licenses voluntarily.

The district court further held, as an alternate ground for dismissal, that the allegedly false statements and certifications were not material because the FCC later determined that the bidding entities were not eligible.

The district court's decision to dismiss the qui tam lawsuit based on the FCC's actions is concerning. The government action bar is rarely invoked to dismiss a case and rightfully so. Congress limited its application to situations where the government is already a party in a civil suit or an administrative civil money penalty proceeding.

"Civil money penalty proceeding" has a specific meaning under federal administrative law. If Congress had intended the government action bar to apply to all administrative proceedings, it could have easily omitted the reference to civil money penalty proceedings, so that the government action bar would preclude qui tam actions where the government had conducted any administrative proceeding related to the conduct.

The purpose of the government action bar is to strike a balance so that qui tam suits are not brought when the government is pursuing civil money penalties for the federal fisc in another civil suit or administrative action. Here, Vermont National Telephone argues, the FCC could have, but did not, commence proceedings to assess forfeiture penalties. Whether

the FCC's post-license proceeding — in which the FCC considered much of the same evidence as in the qui tam case and could have assessed penalties — is a civil money penalty proceeding is hotly contested question in this case.

Vermont National Telephone further argues that default payments made voluntarily by the bidding entity are not civil money penalty proceedings as they arise within the context of the agency's licensing proceedings and are available to all bidders who wish to forego the license awarded to them.

Whistleblowers play a valuable role by alerting the government to allegations of fraud in federal proceedings to obtain a benefit, such as, in this case, an FCC spectrum license. Congress narrowly tailored the language of the FCA to preclude qui tam actions where the government is pursuing administrative proceedings to recover civil penalties for fraudulent conduct.

Conversely, Congress wanted to ensure that the bar did not impede qui tam actions to collect financial damages to the U.S. when an agency has not pursued a civil money penalty proceeding and where the qui tam case is otherwise viable. After all, a major impetus for the 1986 amendments to the federal FCA was to address concerns about insufficient enforcement by government agencies confronted with fraudulent conduct.

A more expansive reading of the government action bar could lead to the dismissal of qui tam actions that Congress wished to authorize. Federal administrative agencies pursue a wide variety of proceedings that might, in some way, address the allegations or transactions alleged in a qui tam suit but without addressing the underlying allegations of fraudulent conduct that would be presented in a qui tam lawsuit.

For example, an agency could resolve a bid protest or implement a contract adjustment in a government contractor case, or process an overpayment, yet these may not meet the standard for civil money penalty proceedings.

In those qui tam cases where a defendant invokes the government action bar to seek dismissal, it is important that those dismissals be limited to the specific circumstances Congress specified.

Without this limitation, defendants could manage to avoid liability for damages by identifying any administrative proceeding that might have involved the same transactions or resulted in some adverse action to it.

The government action bar should not allow defendants alleged to have defrauded the government and intended beneficiaries of federal programs to avoid accountability to taxpayers under the False Claims Act.

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