Can Primary Jurisdiction Be Asserted In False Claims Act/*Qui Tam* Actions?

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Given the fact that a great deal of False Claims Act (31 U.S.C. §§ 3729-33) ("FCA") litigation involves highly technical issues, such as Medicare/Medicaid billing regulations, FDA requirements, and government contracting rules, it would seem that the doctrine of primary jurisdiction would be invoked frequently in these cases. After all, the genesis of the concept is to foreclose judicial intervention that might disrupt the exercise of administrative regulatory schemes and "second-guess" agency expertise. While such arguments have led the assertion of the doctrine in many areas of the law, this has not been true in FCA/*Qui Tam* cases, where, to say the least, courts have been reluctant to defer to administrative agencies. Nonetheless, it is not an infrequent occurrence for FCA/*Qui Tam* defense counsel to assert primary jurisdiction when moving to dismiss either Department of Justice ("DOJ") or relator complaints.

I. Underpinnings Of The Primary Jurisdiction Doctrine

The courts commonly review a number of considerations when determining whether to apply the primary jurisdiction doctrine. These include: (a) the extent to which the issues are unusually complex and may impact upon national policy; (b) whether a defendant's liability may turn upon correctly interpreting administrative regulations; (c) if any federal policy or statute mandates that the initial decision be made by the courts; (d) whether administrative agency uniformity and consistency will be impaired by a court litigating the matter to conclusion; and (e) has the pertinent agency expressed its concern about possible disruption to its regulatory framework if the court renders a decision interpreting and applying agency regulations. *Far East Conference v. United States*, 342 U.S. 570, 574-5 (1952); *Mississippi Power & Light Co. v. United Gas Pipe Line Co.*, 532 F.2d 412, 420 (5th Cir. 1976), *cert. denied*, 429 U.S. 1094 (1977).

Other considerations supporting application of the doctrine are whether the matter at issue has been committed exclusively to an agency's jurisdiction, or if the court has requested an amicus brief from the agency. *In re Paxil Litigation*, 2002 WL 1940708, at *2 (C.D. Cal. August 16, 2002), *on reconsideration*, 2002 WL 31375497 (C.D.Cal Oct 18, 2002). Is the matter beyond "the conventional experience of judges" or does the agency possess the "more specialized experience, expertise and insight" lacking in the court? *Far East Conference v. United States*, 342 U.S. at 574. *See also, Premo Pharmaceutical Laboratories, Inc. v. United States*, 629 F.2d 795, 803 (2d Cir. 1980) (determination as to whether a drug is "safe and effective" committed to FDA due to superior expertise). In short, given an inclusive federal regulatory scheme having been put into place by Congress, and implemented through the designated administrative agency, does the case raise issues that the agency is not only better equipped to resolve, but to do so consistent with established national policy?

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However, any primary jurisdiction argument will be weakened if the agency has not been "charged with primary responsibility for government supervision or control of the particular industry or activity involved." *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Trans-Atlantic*, 400 U.S. 62, 68 (1970). When considering application of primary jurisdiction, the district court should "defer only if the benefits of obtaining the agency's aid outweigh the need to resolve the litigation expeditiously." *Gulf States Utilities Co. v. Alabama Power Co.*, 824 F.2d 1465, 1473 (5th Cir. 1987). Hence the designation of primary jurisdiction as a "prudential" doctrine.

II. The Doctrine Usually Is Inapplicable In False Claims Act Cases

Generally speaking, however, the federal courts will hold that the primary jurisdiction concept has no applicability in FCA/*Qui Tam* cases. *See, e.g., United States ex rel. Taylor v. Gabelli*, 345 F. Supp.2d 340, 353 (S.D.N.Y. 2004) (application of the primary jurisdiction doctrine in FCA cases is infrequent).

Various reasons have been offered by the courts as to why the primary jurisdiction doctrine has no place in cases brought under the False Claims Act.

In *United States ex rel. Aranda v. Community Psychiatric Centers of Oklahoma, Inc.*, 945 F. Supp. 1485, 1489, the *qui tam* complaint alleged inappropriate Medicaid quality of care standards. The district court rejected defendant's contention that "administrative procedures available under the Medicaid program are prerequisites to or substitutes for the government bringing suit under the FCA." The court found no basis for concluding that Medicaid's "internal enforcement scheme" was the government's exclusive remedy.

Other justifications have been offered by district courts for foreclosing the applicability of the primary jurisdiction doctrine in FCA/*qui tam* cases. For example, in *United States ex rel. Johnson v. Shell Oil Co.*, 34 F. Supp. 2d 429, 431-33 (E.D. Texas 1998), the court explained that no administrative agency has the power to settle or litigate false claims actions, while a U.S. district court does have exclusive jurisdiction vested in it for this type of claim. *See, United States v. Hardrives, Inc.*, 1993 WL 385498, at *6 n. 10 (9th Cir. Sept. 30, 1993) (Agency "has no jurisdiction over fraud claims and so cannot have the 'first word' on the existence of fraud"). Also, referral to an agency could inordinately prolong the proceedings. In fact, District Courts lack any authority to compel administrative agencies to review allegations of regulatory impropriety referred to them. *United States v. Estate of Rogers*, 2001 WL 818160, at *18-*21 (E.D. Tenn. June 28, 2001) (referral by court to Health Care Finance Administration resulted in declination to consider the referred issue by HCFA).

The courts have relied upon additional justifications for declining to implement the doctrine. If no request has been made by the pertinent administrative agency that the matter be referred to it for handling, this may well play a role. *See, Luckey v. Baxter Healthcare Corp.*, 1996 WL 242977, at *5-*6 (N.D. Ill. May 8, 1996). The *Luckey* court also rejected another frequent argument made in support of primary jurisdiction: the technical issues involved in FCA litigation are simply too complex or too far outside the expertise of federal judges. *Luckey* involved issues relating to plasma testing procedures and products which allegedly filed to comply with FDA regulatory standards. Not surprisingly, the district judge rejected this contention, noting that district courts are accustomed to dealing with "complex technical issues." *Id.* at *6.

Some courts also have raised concerns grounded specifically in the *qui tam* provisions of the FCA. For example, it has long been recognized that if the government declines to intervene in a *qui tam* action, a relator cannot be foreclosed from proceeding with his action even though the government may have potential administrative remedies. The Third Circuit made this point explicit in *United States ex rel. Dunleavy v. County of Delaware*, 123 F.3d 734, 739 (3d Cir. 1997). *See also, United States ex rel. Haskins v. Omega Institute, Inc.*, 11 F. Supp.2d 555, 560 (D.N.J. 1998) ("When the government declines to intervene in the *qui tam* action, case law provides that a relator's claim should not be stayed or dismissed without prejudice even though the government may pursue an alternate remedy").

The Department of Justice on occasion has filed *amicus* briefs in support of relators facing dismissal for failure to state a claim predicated upon a defendant's invocation of the primary jurisdiction doctrine. *See, e.g.*, James B. Helmer, Jr., *False Claims Act: Whistleblower Litigation*, 1079-1081 (3d. Ed. 2002). Among the principal arguments relied upon by DOJ are that no administrative agency has the authority to adjudicate or compromise any FCA action. The only forum for such actions is found in the United States District Courts. Moreover, DOJ suggests, there is a "presumption" against any Congressional intention to limit the ability of the Attorney General to prosecute offenses within his authority. *See, e.g., United States v. General Dynamics Corp.*, 828 F.2d 1356, 1362-66 (9th Cir. 1987) (doctrine held inapplicable in criminal fraud prosecution). In addition, only the district courts can impose mandatory FCA multiple damages and penalties upon defendants. Helmer at 1079.

It is also important to bear in mind that even if the primary jurisdiction doctrine were implemented in FCA cases, it would not be a basis for either a Rule 12(b)(6) dismissal or for summary judgment under Rule 56. This is because the district court would only defer or stay the FCA proceeding until the technical issue provoking the referral was resolved. *Estate of Rogers*, 2001 WL 818160, at *20 (E.D. Tenn. June 28, 2001) ("The primary jurisdiction doctrine merely enables federal courts to stay judicial proceedings while seeking the guidance of an administrative agency's expertise"). *See also, Reiter v. Cooper*, 507 U.S. 258, 268 (1993). Or, as the Supreme Court has expressed it, primary jurisdiction allows the district court to suspend (*i.e.*, stay) the judicial process and direct the parties to seek a decision before the appropriate administrative agency. *United States v. Western Pacific Railway Co.*, 352 U.S. 59, 64 (1956).

III. The Primary Exception To Denial Of The Doctrine

The only instances in which primary jurisdiction has been recognized to apply in FCA cases are those situations involving issues related to the Davis-Bacon wage/hour legislation. *See, United States v. Dan Caputo Co.*, 152 F.3d 1060 (9th Cir. 1998). Among the justifications offered for this unique application of the primary jurisdiction doctrine to FCA cases is that the wage/hour provisions constitute a "carefully crafted administrative scheme" for resolving classification disputes, which ought not to be bypassed. *Id.* at 1062. Davis-Bacon issues have been recognized to be governed by primary jurisdiction in a wide variety of cases. *United States ex rel. Windsor v. Dyncorp., Inc.*, 895 F. Supp. 844, 851-2 & n. 12 (E.D. Va. 1995). Another important consideration is that the matter, by statute, is committed solely to the Department of Labor. *United States ex rel. I.B.E.W., AFL-CIO Local Union No. 217 v. Chen Construction, Inc.*, 954 F. Supp. 195, 197 (N.D. Cal. 1997).

Whatever the rationale, if the FCA/*Qui Tam* complaint involves wage classification issues pertaining to the Davis-Bacon Act, then a primary jurisdiction motion is highly appropriate.

Conclusions

There seems little reason to expect that the courts will modify their rather stringent view toward the applicability of the primary jurisdiction doctrine in FCA/*Qui Tam* litigation unless challenged to do so. Defense counsel should, therefore, continue to invoke it, where appropriate, in order to further define its parameters and to develop its potential applicability to FCA litigation.

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