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Case Study: Sandager V. Dell Marketing

Law360, New York (May 17, 2012, 12:53 PM ET) -- While the False Claims Act generally is understood to be a "whistleblower" statute, it has been a tool of choice in recent years for opportunistic qui tam relators who lack any inside information regarding the very companies they sue. Not surprisingly, this lack of inside information has resulted in many qui tam cases being dismissed either because they merely mimic the allegations of a previously filed case or do not plead their allegations of fraud with sufficient particularity.

A very recent example of this trend is United States ex rel. Sandager v. Dell Marketing LP, C.A. No. 08-4805, 2012 U.S. Dist. LEXIS 59714 (D. Minn. April 25, 2012).[1] In that case, the relator, Bryan Sandager, filed suit against 19 information technology government contractors in the U.S. District Court for the District of Minnesota alleging that they violated the FCA by misrepresenting the country of origin of products that were sold to the government through the GSA Advantage! website.

Nowhere in his complaint or amended complaint did Sandager allege — let alone intimate — that he had any inside knowledge or information regarding any of the defendants. Instead, he based his allegations entirely on publicly available information that he had gleaned "through his long-held position in the industry." Sandager had worked as a corporate compliance officer at one of the defendants' competitors.

The defendants moved to dismiss on several grounds. First, in an issue of first impression in the Eighth Circuit, nine of the defendants argued that the case should be dismissed pursuant to the so-called "first-to-file bar," 31 U.S.C. § 3730(b)(5), because Sandager's allegations were based on the same underlying fraudulent conduct as earlier-filed qui tam suits that were pending when Sandager filed his action, and his claims did not give rise to a separate and distinct recovery by the government.

The relator contended that the first-to-file bar was inapplicable because the IT products at issue in his action were different from the IT products in the first-filed cases. The court disagreed, noting that "[u]ltimately, the question is whether the Government has sufficient notice of the fraudulent scheme through the first-filed complaint." The court found the previously filed cases provided the government sufficient notice to uncover the same facts alleged by Sandager and "the product distinction is immaterial because the fraudulent scheme alleged [by Sandager] is in material respects the same as alleged" in the prior cases.

The court also addressed the circuit court split regarding whether a procedural dismissal of a first-filed case precluded application of the first-to-file bar. Citing to the Sixth Circuit decision in Walburn v. Lockheed Martin Corp., 431 F.3d 966 (6th Cir. 2005), the relator contended that the first-to-file bar did not apply because, as to most of the defendants, the previously filed cases had been dismissed on procedural grounds.

The defendants urged the court instead to follow the standard enunciated by the D.C. Circuit Court of Appeals in United States ex rel. Batiste v. SLM Corp., 659 F.3d 1204, 1209 (D.C. Cir. 2011), which held that the plain language of the statutory text mandates that "as long as a first-filed complaint remains pending, no related complaint may be filed." Thus, because the earlier-filed qui tam suits were pending at the time that Sandager filed his action, the plain language of the first-to-file bar mandated that the amended complaint be dismissed. The court agreed with the defendants and followed Batiste, noting that "Walburn has been criticized and distinguished."

All 19 of the defendants also argued that the amended complaint should be dismissed because it contained only conclusory allegations, and failed to plead the "who, what, when, where and how" of alleged fraud as required by Fed. R. Civ. P. 9(b). For example, the amended complaint did not include details regarding any sales that allegedly violated the FCA, including "the precise Government purchasing agency, the exact purchase order, the price of the goods sold, and the amount the Government paid for the goods."

The defendants also argued that "in no instance does [the relator] provide any details as to when and, more importantly, if the Defendant actually sold non-conforming products to the Government." In response, Sandager contended that he did not need to allege details regarding actual sales. Instead, because products allegedly were "offered for sale ... the 'logical conclusion' is that actual sales occurred." In addition, because he alleged a scheme extending over a long period, Sandager contended that he was not required to "allege the specific details of every fraudulent claim."

The court recognized that Sandager is not required to allege the details of each and every fraudulent claim. However, he is required "to plead at least one representative example of an actual false claim." The court noted that "[t]here is abundant caselaw in support of the court's conclusion that Sandager's failure to allege — and acknowledged inability to allege — actual sales is fatal to his claims."

Each of the defendants sought dismissal of the amended complaint with prejudice on futility grounds, while the relator requested 30 days to seek leave to file a second amended complaint. The court again sided with the defendants. It did not believe that Sandager could resolve the "fundamental flaws" in his amended complaint simply by repleading. Nor would discovery be appropriate as it "would contradict the FCA's purpose and procedure." Accordingly, the court dismissed the action with prejudice.

The court's ruling in Sandager was in line with the holdings of several other courts that recently have addressed similar situations where an opportunistic relator either alleges the same fraudulent scheme as a previously filed action or fails to plead with particularity even one example of a false claim. Relators cannot avoid the first-to-file bar merely by alleging sales of different products if the government already had notice of the same underlying scheme based on allegations in an earlier-filed case; nor is it enough for a relator merely to allege a theory or methodology as to how a company could have violated the False Claims Act.

Instead, compliance with Rule 9(b) mandates that specific details be alleged by a relator showing the "who, what, when, where and how" of the alleged fraud. Were courts to hold otherwise, it would open the floodgates of baseless lawsuits by opportunistic relators and cause companies to needlessly incur significant resources fending off countless discovery fishing expeditions.

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Sheppard Mullin represented three of the defendants in this matter. Christopher Loveland and Jonathan Aronie were lead counsel.

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