MWI Case Shows The False Claims Act Needs A Change


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Imagine your company becomes the subject of a U.S. Department of Justice investigation, which goes on for 30 months and ends with no grand jury indictment or criminal prosecution. Then, in a recalcitrant pivot, the DOJ decides to intervene in a complaint, previously filed under seal years earlier by a qui tam relator (colloquially referred to as “whistleblower”) under the federal civil False Claims Act, 31 U.S.C. §§ 3729-3733, triggering the complaint to become unsealed and prompting active litigation. The company suddenly finds itself subjected to potential treble damages and penalties of nearly $225 million, even though the company was not (or ever) suspended or disbarred from government contracting.


Robert T. Rhoad

That is precisely what happened to MWI Corporation, a small, family-owned pump manufacturer in Deerfield Beach, Florida, that has manufactured and provided infrastructure-grade pumping equipment for safe and sustainable drinking water, agricultural irrigation and flood abatement to customers in the U.S. and to emerging countries abroad since the 1920s.

Here is what we saw as MWI's general counsel and MWI's lead counsel at trial and on appeal.

In 1997, MWI was the largest small business user of loan programs of the Export-Import Bank of the United States and the No. 13 user overall. In that year, MWI was named as Ex-Im’s “Small Business Exporter of the Year.” In August 1998, however, a former employee filed an FCA case against the company under seal in district court in Washington, D.C., alleging that, in the early 1990s, the company failed to properly certify commissions it had paid to its agent on $73.4 million in loans to Nigeria backed by Ex-Im. The DOJ then ordered an investigation into these allegations. The grand jury/criminal investigation continued until early 2002, when the DOJ finally abandoned it with no indictment.

Failing to obtain an indictment, the DOJ announced it was intervening in the FCA case. Suddenly, MWI found itself facing draconian FCA damages and penalties, which would have bankrupted the company. The case finally went to trial in late 2013 and the fundamental issue at trial was whether the company's interpretation of the term “regular commission” — a term that was not then (or has ever since been) defined by Ex-Im — on Ex-Im’s supplier’s certificates was reasonable. In spite of this, it is notable that, at trial, the government attempted, unsuccessfully, to prevent the jury from hearing evidence that Ex-Im actually pays its export credit insurance brokers a commission of 40 percent, which is higher than the commission MWI had paid. In tandem, the government prevented the jury from hearing that the government of Nigeria had repaid the $74.3 million loans in full and with interest and fees of roughly $30 million.

At the conclusion of the trial, the jury returned a verdict for the government amounting to $7.5 million, which was trebled to $22.5 million. As a result of post-trial motions, however, the district court reduced that judgment to zero based on the fact that the loans in question had been repaid in full (plus additional interest and fees of roughly $30 million) a fact of which the government was fully aware when it elected to intervene in 2002. The district court nonetheless assessed mandatory statutory penalties against MWI in the amount of $580,000.

The DOJ appealed the offset of the damages to zero and MWI cross-appealed the judgment of liability. The National Association of Manufacturers weighed in on MWI's behalf and filed an amicus brief to show the full support of the business community.

On Nov. 24, 2015, the U.S. Court of Appeals for the D.C. Circuit issued its unanimous opinion, completely exonerating and vindicating MWI. The D.C. Circuit reversed the judgment of liability and ruled that the company's interpretation of the undefined and ambiguous term "regular commission" was reasonable and that the company had never been warned away from its interpretation by Ex-Im. The D.C. Circuit instructed the district court to enter judgment for MWI, which it did.

The D.C. Circuit subsequently denied the DOJ's petitions for rehearing and rehearing en banc. On Sept. 19, 2016, the U.S solicitor general declined to file a petition for a writ of certiorari to the U.S. Supreme Court, thereby abandoning the government's case against MWI after over 18 years of litigation. MWI's former employee, however, did file a petition for a writ of certiorari to the Supreme Court. The solicitor general later filed a reply brief arguing that this was not a case for the Supreme Court to grant certiorari and, on Jan. 9, 2017, the Supreme Court announced that it had denied certiorari in the case, thereby ending MWI's nearly two decadeslong legal nightmare.

MWI Corporation has finally been exonerated of any wrongdoing by the highest court in the land, but has absolutely no hope of ever recouping the significant legal fees and expenses it spent to defend itself or the millions of dollars in business it lost fighting what was deemed to be a meritless case brought by the government.

Under the FCA, prevailing defendants such as MWI can only avail themselves to the recovery of attorneys' fees and expenses if (1) the government does not proceed with the action; (2) the defendant prevails in the action; and (3) the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for the purposes of harassment). See 31 U.S.C. § 3730(d)(4) (Awards made under this section are separate and apart from routine costs sought through bill of costs filed with the clerk of the court, See United States ex rel. Lidenthal v. General Dynamics Corp., 61 F.3d 1402, 1413 (9th Cir. 1995).

Defendants rarely if ever win FCA cases — particularly in those in which the government elects to intervene. In the small percentage of FCA cases initiated by qui tam relators in which the government intervenes, it is successful in reaching a settlement or judgment in virtually all of them; and, in the vast majority of cases in which the government does not intervene, the relator, going it alone, is only successful a small percentage of the time. As the MWI "David and Goliath" case demonstrates, however, the time has come for Congress to amend the FCA to permit a prevailing defendant — whether in an intervened or nonintervened case — to recover its fees, expenses and losses.

The current paradigm is one under which the successful award of attorneys' fees and expenses to a prevailing defendant under Section 3730(d)(4) is an arduous undertaking doomed to failure. Nevertheless, it serves to provide one of few devices available to impose a degree of responsibility upon relators. Section 3730(d)(4) should be amended and expanded to allow for a presumption that a prevailing FCA defendant is entitled to the recovery of attorneys' fees and expenses from relators in nonintervened cases and equally important, to also allow prevailing FCA defendants to at least seek the recovery of attorneys' fees and expenses from the government in those cases in which the government intervenes. That is the only way to rein in the government and to prevent government FCA enforcement abuse and over-reach.

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