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 require the assistance of an administrative 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. In United States v. 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 421 U.S. 994 (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 Page Litigation, 2002 WL 1946078, at *2 (C.D. Cal. August 16, 2002), on reconsideration, 2002 WL 13174947 (C.D.Cal Oct 18, 2002). Is the matter beyond “the convention of judges” or does the agency possess the “more specialized experience, expertise and insight” lacking in the courts? In Far East Conference v. United States, 342 U.S. at 574. See also, Premo Pharmaceutical Laboratories, Inc. v. United States, 629 F.2d 803 (3rd Cir. 1980) (determination as to whether 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 an 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?

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 judgment 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 the primary jurisdiction as a “prudential” doctrine. 2. 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 inapplicable). 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, 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 the filing of a qui tam action, not bringing suit under the FCA.” The court found no basis for concluding that Medicaid’s “internal enforcement scheme” was the government’s exclusive remedy. The court’s findings are in line with 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., 895 F. Supp. 844, 851-2 & n. 12 (E.D. Va. 1995). Among the justifications offered for the 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 852. Delaware has 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., 895 F. Supp. 195, 197 (N.D. Cal. 1996).

Whatever the rationale, if the FCA/Qui Tam complaint raises the issue of FCA applicability 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 make it where appropriate, in order to further their clients’ defenses and develop its potential applicability to FCA litigation.

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