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# False Claims Act decisions to know from Q2 2023

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In this post, we summarize noteworthy False Claims Act (FCA) decisions from the second quarter of 2023.

**U.S. Supreme Court decisions**. The second quarter was particularly noteworthy because the Supreme Court decided two cases involving the FCA. Since we previously provided an in-depth analysis of those cases on the blog, we will not reanalyze those decisions here but encourage readers to read our summaries of *U.S. ex rel. Schutte v. Supervalu Inc.*[1] and *U.S. ex rel. Polansky v. Executive Health Resources*.[2]

**Other key rulings**. The Supreme Court's decisions were not the only significant FCA decisions this quarter.

The Third, Fifth, and Seventh Circuits also issued noteworthy opinions on a range of FCA issues, including:

- FCA liability for alleged violations of state laws relating to Affordable Care Act (ACA) exchanges.
- Potential defenses to retaliation claims.
- Sovereign immunity for tribal health centers.

We discuss those rulings below.

## No FCA liability for violation of state ACA exchange rules

### *U.S. ex rel. Johnson v. AmeriHealth Ins. Co. of New Jersey*

Under the ACA, each state is required to make available a health insurance exchange in which people and small businesses can compare and choose from health insurance plans. States have the option to create and run their own exchanges, operate their exchanges in partnership with the federal government, or allow the federal government to fully run these exchanges on behalf of the state. The ACA also requires all Qualified Health Plans (QHPs) to "adhere to the requirements of ... a state in connection with its Exchange, that are conditions of its participation or certification with respect to each of its QHPs."

In this *qui tam* lawsuit, *U.S. ex rel. Johnson v. AmeriHealth Ins. Co. of New Jersey*,[3] the relator alleged that the defendant health insurance companies defrauded the federal government by "falsely" certifying compliance with a New Jersey state regulation that requires health insurance providers to certify that copays for rehabilitative services do not exceed half of the total cost of service. After the United States declined to intervene, the defendants filed a motion to dismiss for failure to state a claim.

The district court ultimately granted the motion to dismiss, holding that the relator failed to plead falsity because, notwithstanding the requirement to meet state conditions of participation, the ACA did not require compliance with New Jersey's state law copay limitations.

On appeal, the Third Circuit upheld the district court's dismissal, based largely on the fact that New Jersey, at the time, did not have its own exchange but relied on the federal government to establish an exchange on its behalf. The Third Circuit held that although state and federal exchanges perform a similar service, they are not identical. The Third Circuit noted that all states are entitled to establish their own exchanges, thereby incurring the additional costs of such an endeavor, but also the increased regulatory control over those exchanges.

*The Seventh Circuit noted that nothing in the statute's language indicated that Congress intended to abrogate tribal sovereign immunity in the FCA's anti-retaliation provision.*

However, if states choose to cede the expense and control of running an exchange to the federal government, they cannot then impose "a patchwork of disparate state requirements" on the federal government operating those exchanges. Ultimately, the Third Circuit held that there was no falsity in the defendants' attestation of compliance with "state law regarding state mandated benefits for all services as applicable," since the New Jersey copay regulation was not "applicable" to QHPs on a federal exchange.

**This limiting of the application of state requirements on QHPs in the health insurance exchanges is potentially significant because, as of 2023, 30 of the 51 exchanges are still facilitated in whole or in part by the federal government**. Only 18 exchanges (now including New Jersey) are run exclusively by their respective states, with three additional states utilizing the federal platform to facilitate their own exchange.

**If other circuits follow the Third Circuit's lead on this issue, a failure to abide by state law requirements may not give rise**

**to FCA liability in a majority of states**. However, this decision still holds open the possibility of liability in those states that operate their own healthcare exchanges.

## Retaliation claim dismissed where decisionmakers unaware of allegedly protected activity

### *U.S. ex rel. Toledo v. HCA Holdings, Inc.*

This quarter saw multiple circuit courts address cases involving FCA retaliation claims. In *U.S. ex rel. Toledo v. HCA Holdings, Inc.*,[4] the Fifth Circuit affirmed a summary judgment on behalf of the defendants when a relator proceeding on FCA retaliation claims was unable to show that the individuals who made the decision to terminate her were aware of any allegedly protected activity.

The relator was an employee of Pasadena Bayshore Hospital, where she was tasked with reporting information about patients' rehabilitation stays to the Center for Medicare and Medicaid Services (CMS). The relator was terminated after internal audits determined that, despite recent reeducation, she had repeatedly entered non-compliant impairment group codes (IGCs) for otherwise compliant patients.

After her termination, the relator brought a *qui tam* action claiming that her employer had been engaging in fraudulent practices and that she had been retaliated against for highlighting various discrepancies to her supervisors. The government declined to intervene, and the relator voluntarily dismissed all but her retaliation claims. After the district court granted the defendants summary judgment on her remaining claims, the relator appealed.

On appeal, the Fifth Circuit affirmed the district court's granting of summary judgment, holding that the relator had not presented a genuine dispute of material fact as to whether the decision-makers who fired her actually knew of her allegedly protected conduct or that such knowledge led to her termination.

The Fifth Circuit noted that because the relator's position required her to report discrepancies to her supervisor, simply doing her job was insufficient to put the supervisor on notice that she was engaging in protected conduct. Furthermore, even if the relator's activity was protected, the relator still had an obligation to show that such conduct at least contributed to her termination, which she was unable to do.

**In so ruling, the Fifth Circuit affirmed that in order to prevail on a retaliation claim, relators must show not only that their activities are protected but that the decision-makers know about those activities *and* that those activities played some part in the decision to take disciplinary action against the relator**. If defendants can show that the decision to terminate the relator was made independent of any knowledge of allegedly protected activities, defendants can achieve a swift pretrial resolution of the retaliation claims in their favor.

## Sovereign immunity extended to facility operated by Native American tribes

### *Mestek v. LAC Courte Oreilles Cmty. Health Ctr.*

The Seventh Circuit also saw its own retaliation case this quarter in *Mestek v. LAC Courte Oreilles Cmty. Health Ctr.*,[5] where it upheld a district court's dismissal of a former employee's retaliation claims against a medical center operated by the Lac Courte Oreilles Band of Lake Superior Chippewa Indians. In that case, the plaintiff alleged that she was terminated from her position as Director of Health Information at the Tribe's Community Health Center after she identified issues with the Health Center's electronic billing system that may have improperly billed Medicare and Medicaid.

The plaintiff then brought retaliation claims under the FCA and Wisconsin law against the Health Center, five employees, and one independent contractor working for the Health Center, but not against the Tribe. Nonetheless, the district court dismissed the plaintiff's claims against both the Health Center and the employees based on the Tribe's sovereign immunity.

On appeal, the Seventh Circuit upheld the district court's dismissal, ruling that both the Health Center and its employees properly invoked the Tribe's sovereign immunity, thus requiring dismissal of the FCA retaliation claims. The Seventh Circuit noted that nothing in the statute's language indicated that Congress intended to abrogate tribal sovereign immunity in the FCA's anti-retaliation provision.

Even though the plaintiff did not name the Tribe as a defendant, the Seventh Circuit adopted the "arm of the tribe" test established in the Fourth, Ninth, and Tenth Circuits to determine that the Health Center was nonetheless entitled to sovereign immunity as an arm of the Tribe. Because the Health Center's employees acted in their official capacities to fire the plaintiff, the Tribe's sovereign immunity also extended to the Health Center's employees.

The Seventh Circuit then affirmed the district court's decision to decline to exercise supplemental jurisdiction over the sole remaining state law claim against the independent contractor.

**The Seventh Circuit's ruling is significant in that it could extend sovereign immunity, at least for FCA retaliation, to the more than 1000 healthcare facilities operated by Native American tribes in conjunction with the Indian Health Service across 37 states**.

Unless Congress clearly and specifically abrogates the sovereign immunity of Native American tribes under the FCA's anti-retaliation provision, any healthcare facility owned and operated by a Native American tribe may be considered an "arm of the tribe" and therefore entirely immune from claims of FCA retaliation by any of the thousands of employees at these facilities.

## Notes

[1] https://bit.ly/3L2iDkk

[2] https://bit.ly/3OW5qL4

[3] 2023 WL 3221746 (3d Cir. May 3, 2023).

[4] 2023 WL 2823899 (5th Cir. Apr. 7, 2023).

[5] 2023 WL 4240807 (7th Cir. June 29, 2023).

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