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California Central District Rejects Federal Government's Expanded View of Causation Under Federal False Claims Act

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In this article, the authors discuss a recent decision that provides a bright line of defense against government attempts to reach deep-pocketed third party affiliates or associates of government contractors.

Third party defendants in False Claims Act litigation may be able to employ a new strategy to fight the government and avoid liability entirely: attacking the element of causation on summary judgment. For the first time in the Ninth Circuit, a court has required the government to establish more than just an “attenuated link” between a third party defendant’s actions and the submission of the alleged false statement or claim. In the much publicized case of *United States ex. rel. Humane Society v. Westland/Hallmark Meat Company et. al.*,¹ the government sued owners and operators of a meat packing facility in Chino, California, along with the estate and widow of the facility’s principal financier and twice convicted felon, Aaron Magidow, for inhumanely treating cattle and processing downer cows for use in the National School Lunch Program. The court dismissed the False Claims Act claims against the

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estate and widow of Aaron Magidow because the government failed to furnish sufficient evidence to establish a nexus between Magidow's affirmative acts and the actual submission of the alleged false statements and claims to the United States Department of Agriculture. The *Westland* decision provides a bright line of defense against government attempts to reach deep-pocketed third party affiliates or associates of government contractors.

The government recovers billions of dollars annually from lawsuits against fraudulent contractors under the False Claims Act ("FCA"). Indeed, FCA litigation has become a critical source of the government's revenue. In the coming years, we can expect the government to initiate even more FCA lawsuits because it remains in dire need of more revenue and therefore has greater incentive to both initiate lawsuits and intervene in lawsuits brought by *qui tam* plaintiffs. Though experienced practitioners often face a herculean task fighting the government, they also recognize when the government overreaches in enforcing the FCA. By knowing when and how to force the government's hand to prove the essential elements of FCA claims, such as the requirement of causation, defendants may be able to avoid liability entirely.

The FCA imposes liability on any party who "knowingly presents, or causes to be presented...a false or fraudulent claim for payment or approval" or who "knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government...."² Courts have recognized that these sections impose on the government *two independent* but necessary requirements: (1) *causation, i.e.*, that the defendant "presented" or "caused" the false claim to be presented to the government; and (2) *materiality, i.e.*, the defendant's actions were "material" to the government's *payment* of the false claim.³

The *Westland* decision is instructive on the interrelationship of these two separate requirements. In that case, the government unsuccessfully attempted to conflate the FCA's separate causation and materiality requirements in order to foist liability not just on the purported bad actors (*i.e.*, owners and operators of a meat packing facility accused of inhumanely treating cattle and processing downer cows for use in the National School Lunch Program), but on the estate and widow of the facility's financier, Aaron Magidow, a twice convicted felon in the meat packing industry. The government alleged that (1) the Magidow defendants had falsely certified to the government through the facility's bids and

invoices issued under the National School Lunch Program that the facility was complying with all USDA humane handling and inspection regulations; and (2) the Magidow defendants had falsified the facility's Applications for Grants of Inspection⁴ by failing to include the name of Magidow as a particular individual "responsibly connected" to the facility. The government's principal theory was that Magidow, as the facility's financier, necessarily influenced the submission of the alleged false statements or claims.

During discovery, the government unearthed significant evidence against the Magidow defendants, including that: (1) Magidow was responsibly connected to the facility, (2) that Magidow knew that because he was a twice convicted felon in the meat packing business he was not allowed to be responsibly connected to the facility; and (3) that if the government had known Magidow was responsibly connected to the facility it would never have agreed to award the subject contracts to the facility. Although the Magidow defendants disputed many of these facts, they nevertheless filed a motion for partial summary judgment on the government's FCA claims. The Magidow defendants argued that even if the court assumed all of these facts to be true, the court should still grant their motion because the government was unable to provide any evidence to establish the required causal link between Magidow's alleged actions and the submission of the alleged false statements or claims.

Seeking to persuade the court to deny the Magidow defendants' motion for summary judgment, the government argued that the Magidow defendants could be found liable under the FCA because the government's alleged harm (*i.e.*, moneys paid to the facility for the subject contracts) was the "reasonably foreseeable consequence" of the Magidow defendants' actions, even if they had no involvement in the submission of any false claim.⁵ The district court rejected these arguments and ruled that the government had to demonstrate a "nexus" between the acts of the...defendant and "the submission of purported false claims to the United States."⁶

For the first time in the Ninth Circuit, a court has required the government to establish more than just an "attenuated link" between a defendant's actions and the submission of a false statement or claim. This decision has significant implications for third party affiliates or associates of government contractors who, like the Magidow defendants, may need to defend against FCA claims worth tens of millions of dollars. The government may now

have to satisfy an additional burden of proof on the requirement of causation before it can pursue FCA claims against such third parties.

BACKGROUND OF UNITED STATES EX REL. HUMANE SOCIETY v. WESTLAND/HALLMARK MEAT COMPANY ET AL.

In January 2008, the Humane Society of the United States released an edited clip of video footage purportedly taken during a Humane Society worker's undercover stint at the Hallmark Meat Packing facility in Chino, California. The video depicted unidentified workers punching, kicking, dragging and otherwise mistreating cows who were too old, sick or stubborn to walk to the kill floor. In a nation freshly panicked by stories of mad cow disease, the video sparked a public outcry which led to the immediate investigation of Westland Meat Company — Hallmark's primary customer and one of the largest suppliers to the USDA's National School Lunch Program. The USDA promptly issued the largest meat recall in American history, and the Chino facility, along with Hallmark and Westland, quickly shuttered.

In the wake of this scandal, the Humane Society initially sued the government, but after several months, the Humane Society changed course and permitted the government to intervene on its behalf to sue Westland, Hallmark, and a host of ancillary companies and individuals under the federal FCA. For the next several years, the government hotly pursued its allegations of false claims against Westland, Hallmark, and the other defendants. The government sought damages for over 2,000 allegedly false invoices for a total of over \$300 million in actual damages as well as treble damages and civil penalties imposed under the FCA.

Critical to the government's ambitious damages claims were its allegations that Magidow, who died more than year before the Humane Society released video footage of the facility, was the master puppeteer behind the Westland and Hallmark operations. The government alleged that Magidow directed or otherwise influenced the owners of Hallmark to submit the false applications for grants of inspection and directed or otherwise influenced the owners of Westland to submit the false bids and invoices in the National Food Lunch Program.⁷ But these allegations ultimately did not find support in the evidence. The court recognized that all of the individuals involved in

the drafting and submission of the applications for grants of inspection testified that Magidow “was not involved in, exerted no influence over, and had nothing to do with, the application process.”⁸ And while the government submitted evidence that Magidow was financially involved with Westland and Hallmark through other companies he owned or controlled, and that he knew he could not be listed on the applications since he was a convicted felon, the court found that this evidence bore no weight on whether Mr. Magidow “did anything to cause a false claim to be presented to the United States.”⁹ In other words, the government failed to establish a firm evidentiary link between Magidow’s actions and the actual submission of the alleged false statement to the government. Even though Magidow had financial ties to the facility and its operations, there was zero evidence linking Magidow with the submission of the alleged false statement or claims.¹⁰

DEFINING THE CAUSATION REQUIREMENT

The Ninth Circuit itself has been ambivalent in its application of the FCA causation standard. In the circuit’s only discussion of the issue, in *United States v. Eghbal*,¹¹ the court chose to apply both the “but for” and “proximate cause” standards for FCA causation because, under the facts of that case, either standard would impose liability.¹² Under the “but for” test, a court evaluates whether the government would not have entered into the contract with the defendant “but for” the defendant’s actions.¹³ Under the “proximate cause” test, a court evaluates whether the defendant’s actions “foreseeably caused the presentation of false claims to the United States.”¹⁴ This landscape is further complicated by the fact that, in applying the materiality requirement, courts in the Ninth Circuit have referenced “causation” type language, holding *inter alia* that materiality looks to “whether the false statement is the cause of the Government’s providing the benefit.”¹⁵

THE PARTIES’ ARGUMENTS ON SUMMARY JUDGMENT

The government seized upon the unsettled causation standard in the Ninth Circuit to advance what the court called “a broader standard” of causation, which, like the standard for materiality, is based on harm to the govern-

ment.¹⁶ The government argued that the estate and widow of Mr. Magidow were liable under the FCA because Mr. Magidow's actions were "a substantial factor in causing the government harm, and that the government's payment of money to the Facility was a direct and foreseeable consequence of that failure."¹⁷ The government relied on several Supreme Court and Ninth Circuit cases.¹⁸

The Magidow defendants argued that under either the "but for" or "proximate cause" tests in the Ninth Circuit, the FCA on its face required the government to establish a nexus between the defendant and the alleged submission of the false statement or claim. The Magidow defendants argued that they were not liable because Magidow's actions were not "a substantial factor in causing the subject claim to be made...."¹⁹ The government's alleged harm was irrelevant to the causation analysis; the relevant inquiry was whether Magidow personally influenced the submission of claims.²⁰ The Magidow defendants relied on mostly persuasive out-of-circuit authority.²¹

THE COURT'S RULING

The court applied both "but for" and "proximate cause standards under *Eghbal*. The court defined "but for" causation as "whether or not the United States would have initially entered into or continued to engage in its contracts for meat products with the Facility, but for Arnie Magidow's *concealment or omission* of his involvement at the Facility."²² The court defined "proximate" causation as "whether Arnie Magidow's *concealment or omission of his involvement* at the Facility foreseeably caused the presentation of false claims to the United States."²³ Both of these standards contemplate actions by Magidow to "conceal or omit" — *i.e.*, to contribute to the submission or presentation of the alleged false claims. This is why, when the court recognized that, "[a]lthough...the United States need not show that Arnie Magidow actually submitted the claims or coerced those who submitted the claims to demonstrate causation," the court held that "the United States, nevertheless, does not present any admissible evidence that Arnie Magidow did anything to cause a false claim to be presented to the United States."²⁴ The court's ruling establishes that, whether a court applies a "but for" or "proximate cause" standard for causation, the government must still link the defendant's affirmative acts to

the submission of a false claim.

Quoting the Tenth Circuit in *Sikkenga* and the District of Florida in *Bane*, the court emphasized that the government must establish through evidence how a defendant's acts firmly link to the submission of the alleged false statement or claim. The court reiterated that the FCA's "causation" requirement is an essential statutory element with a very specific meaning: "The United States must show that Arnie Magidow *personally did something that caused the submission of the claims at issue.*"²⁵ FCA claims based on evidence of mere "attenuated" links between a defendant's acts and the submission of the alleged false statements or claims must be "winnow[ed] out" to "separate[] the wheat from the chaff."²⁶

Applying the legal standard for causation under *Sikkenga* and *Bane*, the court evaluated the evidence offered by the government in opposition to the Magidow defendants' motion for summary judgment. The government relied on three pieces of evidence to attempt to defeat summary judgment. First, the government cited deposition testimony from Magidow in a prior case, in which he admitted that he was a convicted felon, barred from participating in the production of meat for human consumption, and knew he could not have an inspection number in his name.²⁷ Second, the government presented evidence that Magidow participated in the operations of two corporate entities and named defendants — Cattleman's Choice, Inc. and M&M Management LLC — which jointly operated the Chino facility but were not listed on the applications for Grants of Inspection with the USDA.²⁸ Finally, the government presented declarations from its enforcement officers at the USDA that they would never have approved the applications for Grants of Inspection had Magidow been disclosed as "responsibly connected" to the Chino facility.²⁹

The court found that none of the evidence presented by the government satisfied a showing of causation under the FCA. The evidence presented by the government would have been "persuasive" were the government required to "demonstrate[] that Arnie Magidow was 'responsibly connected' to the Facility."³⁰ But that inquiry was irrelevant to the causation inquiry.³¹ On the contrary, "all of the persons involved with the drafting and submission of the applications for Grants of Inspection testified that Arnie Magidow was not involved in, exerted no influence over, and had nothing to do with, the application process."³² Consequently, the government was unable to prove

any “nexus” between any act of Magidow and the submission of alleged false claims to the government.³³ Under *Sikkenga* and *Bane*, a lack of evidence to establish causation doomed the government’s FCA claims against the Magidow defendants.

IMPLICATIONS OF THE COURT’S RULING

The court’s ruling dismissing the FCA claims against the Magidow defendants is particularly noteworthy given the mountain of evidence offered by the government connecting Magidow to the facility. To prevail on summary judgment, the Magidow defendants faced an uphill battle trying to overcome a number of problematic uncontroverted facts, including:

- Magidow had been twice convicted of felonies for bribing a federal meat inspector and for participating in fraudulent meat purchasing practices.
- Magidow was the sole shareholder and owner of Cattleman’s Choice, Inc., which paid for the facility’s operational costs, employed the facility’s employees, paid for Westland workers’ compensation insurance, and owned the facility’s accounts receivable, inventory and equipment.
- Magidow was one of only two members of M&M Management LLC, which owned the facility.
- Magidow, Cattleman’s and M&M were never identified on any application for a Grant of Inspection at the facility.³⁴

The court found that none of these facts spoke to whether Magidow, through his affirmative acts, caused the alleged false claims to be presented to the government. That question required a firm evidentiary link between Magidow’s actions and the actual submission of the alleged false statements or claims to the government, regardless of whether Magidow had ties to the facility and its financing and operations. The evidence unequivocally established that Magidow had no involvement whatsoever with the submission of the alleged false claims.

The court’s ruling provides a bright line of defense against government attempts to reach deep-pocketed third party affiliates or associates of a gov-

ernment contractor. As discussed in *Sikkenga* and similar authorities, the element of causation “separates the wheat from the chaff” and limits the FCA’s reach to those who actually contributed to the submission of a false claim to the government. Even where third parties are closely involved in the finances and operations of a defendant who submits false claims to the government, the court’s ruling requires the government to jump over one more hurdle — namely, showing that the third party acted in some affirmative manner to deserve FCA liability more than merely acquiescing to the acts of others. Those affirmative acts could include directing others to make false or fraudulent statements on government forms or controlling or influencing the submission of bids or invoices to the government. Without this bright line, the government could essentially impose an affirmative duty on third party defendants to police the actions of other parties — stifling cooperation between contractors and throwing grit in the otherwise well-oiled machine of government contracting. This is the key distinction between causation and materiality that the court prudently preserved: allowing the government to impose liability on a defendant who was not directly involved in making the false statements or claims but took actions in furtherance of those claims, while protecting third parties who took no action at all.

While it remains to be seen what causation standard the Ninth Circuit will ultimately adopt, experienced practitioners defending against FCA lawsuits should consider bringing motions for summary judgment against the government challenging the causal link between their clients’ actions and the submission of false statement or claims. In particular, the court’s ruling provides critical ammunition for third party affiliates or associates of government contractors who may have to defend against damage-heavy FCA claims brought by the government. At least in the Central District, the government must furnish evidence that establishes a firm, not flimsy, causal link between the third party’s actions and the submission of the alleged false statement or claim. Without such evidence, the government’s FCA claims will not likely survive summary judgment.

NOTES

¹ 2013 WL 4713557 (C.D. Cal. April 30, 2013).

² This language appears in the 1986 version of the statute, which applied in the *Magidow* case because the alleged false claims occurred during the period 2003 to 2008. See *United States ex rel. Humane Society v. Westland/Hallmark Meat Company et al.*, 2013 WL 4713557 (C.D. Cal. April 30, 2013). In 2008, the Supreme Court held in *Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662, 672 (2008), that the language “to get a false or fraudulent claim paid or approved...” imposed a requirement that the defendant’s false record or statement was material to the government’s decision to pay the false claim. In 2009, Congress amended this language in the FCA to include language requiring materiality. See 31 U.S.C. section 3729(a)(1)(B) (imposing liability on a defendant who “knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim....”).

³ See, e.g., *United States ex rel. Hendow v. University of Phoenix*, 461 F.3d 1166, 1172 (9th Cir. 2006) and *United States v. Eghbal*, 548 F.3d 1281 (9th Cir. 2008).

⁴ The USDA requires all meatpacking and slaughtering facilities to apply for grants of inspection.

⁵ See *Magidow Ruling*, at *8.

⁶ *Magidow Ruling*, at *12.

⁷ See *Second Amended Complaint*, at ¶ 69.

⁸ *Magidow Ruling*, at *12.

⁹ *Id.*

¹⁰ In fact, the evidence supported the opposition conclusion: *Magidow* had no involvement whatsoever in the presentation of false statements to the government.

¹¹ 548 F.3d 1281 (9th Cir. 2008).

¹² Notably, the court in *Eghbal* did not endorse a particular test for establishing the causation requirement under the FCA.

¹³ *Magidow Ruling*, at *10 (citing *Eghbal*, 548 F.3d at 1284).

¹⁴ *Id.*

¹⁵ *United States ex rel. Hendow v. University of Phoenix*, 461 F.3d 1166, 1172 (9th Cir. 2006).

¹⁶ *Magidow Ruling*, at *9.

¹⁷ *Government’s Opposition Brief*, at 2.

¹⁸ See *id.*, at 13 (citing, e.g., *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 544-45 (1943); *United States v. McLeod*, 721 F.2d 282, 284 (9th Cir. 1983)).

¹⁹ *Magidow Defendants’ Reply Brief*, at 4.

²⁰ See *id.*

²¹ See *Magidow Defendants’ Opening Brief*, at 10-12 (citing, e.g., *United States*

ex rel. Sikkenga v. Regence Bluecross of Utah, 472 F.3d 702, 714 (10th Cir. 2006); *United States ex. rel. Bane v. Breathe Easy Pulmonary Services, Inc.*, 597 F. Supp. 2d 1280, 1291 (M.D. Fla. 2009)).

²² Magidow Ruling, at *11 (emphasis added).

²³ *Id.* (emphasis added).

²⁴ *Id.* at *12.

²⁵ Magidow Ruling, at *12, n. 7 (emphasis added).

²⁶ *Id.*, at *12 (citing *Sikkenga* and *Bane*).

²⁷ Magidow Ruling, at *11.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*, at *12.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *See* Magidow Ruling, at *5-*6.