Published on *The National Law Review* https://natlawreview.com

A Grinchmas for Relators — First Circuit Denies Relators' Requests for Attorneys' Fees in Case Involving Issues of First Impression

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The First Circuit gave defendant AthenaHealth something extra to celebrate this past holiday season when on December 21, 2022, in *United States ex rel. Lovell v. AthenaHealth, Inc.*, it denied relators' claims for over $1 million in attorneys' fees in an appeal involving two issues of first impression.

AthenaHealth was a consolidated appeal involving two separate qui tam actions — one filed first by relator Geordie Sanborn and another filed by Cheryl Lovell and William McKusick. Both actions were filed within two months of each other and asserted similar claims. The government chose to intervene in both cases — but for only one type of claim. It ultimately resolved both cases for over $18 million through a single settlement document.

Private Sharing Agreement

Thereafter, as many relators do, Sanborn, Lovell, and McKusick entered into a private sharing agreement, which set forth how much each would be allocated from any relator's share from the settlement proceeds. The government also entered into a separate agreement with the relators whereby the government agreed to pay relator Sanborn a certain amount from the settlement proceeds. In this agreement, the government acknowledged (i) the existence of the relators' private sharing agreement, and (ii) that Sanborn was to pay Lovell and McKusick a portion of the relator's share pursuant to their private sharing agreement.

Attorney Fees for Me But Not Thee?

All three relators sought to recover their attorneys' fees from the district court under 31 U.S.C. § 3730(d)(1), the FCA's provision that allows such recovery. The district court awarded fees, but only to Sanborn and only for a portion of what Sanborn sought. The relators appealed the denial of their respective attorneys' fees requests, presenting two issues of first impression to the First Circuit: (1) whether a relator who receives a share of a qui tam settlement through a private sharing agreement with another relator is entitled to attorneys' fees under § 3730(d)(1); and (2) whether a relator is

entitled to attorneys' fees under § 3730(d)(1) for all claims asserted in a qui tam action even if the government chose to intervene on only certain claims. The First Circuit answered both questions in the negative. In doing so, the First Circuit analyzed the plain language of § 3730(d)(1) and the FCA's overall statutory scheme.

Settlement Share Must Be from the Government to Trigger Attorney-Fee Eligibility

On the first issue, the First Circuit outlined the statutory requirement that a relator receive a payment of "at least 15 percent but not more than 25 percent of the proceeds" in order to be entitled to attorneys' fees. The court stated that even if a relator received the maximum 25% share, that relator could not share with another relator the statutory minimum of 15% while also retaining his or her own statutory minimum of 15%, which is a prerequisite to receiving attorneys' fees. As a result, the First Circuit concluded that the "focus must . . . be on the receipt of a relator's share payment from the government," not from another relator. The First Circuit asserted that its conclusion comported with the FCA's overall statutory scheme by keeping the government in the "driver's seat" while also "providing sufficient incentives to qui tam plaintiffs and discouraging opportunism." Consequently, the court held that relators Lovell and McKusick did not receive a relator's share within the meaning of § 3730(d)(1) and thus were not entitled to attorneys' fees under that provision.

Attorney Fees Only Apply to Intervened Claims – Not Whole Cases

For the second issue, the court analyzed the word "action" as it is used in the first sentence of § 3730(d)(1). The court relied upon Supreme Court and other circuit court rulings to conclude that the FCA qui tam provisions are designed to be applied on a "claim-by-claim" basis. Following this reasoning, the court concluded that the FCA's use of "action" in § 3730(d)(1) means "government intervention in an individual claim" — not the case as a whole. Accordingly, the court affirmed the district court's denial of relator Sanborn's fee request for work performed on his claim in which the government did not intervene.

Both holdings certainly brought some additional cheer to defendant AthenaHealth this past holiday season. But looking forward, they also provide additional arguments for defendants in qui tam cases confronted with relator attorney-fee claims.

National Law Review, Volume XIII, Number 10