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False Claims Act sees causation change

In October, following briefing and argument from Michael Shapiro, my partner at Scandaglia Ryan LLP, the 7th U.S. Circuit Court of Appeals overturned 25 years of precedent and altered the way federal courts will evaluate a claim for damages under the False Claims Act, 31 U.S.C. Section 3729, in the case of *U.S. v. Luce*, 873 F.3d 999 (7th Cir. 2017).

The False Claims Act, which generally provides a remedy for fraud against the government, allows recovery of "damages which the government sustains because of the act of" the defendant. Those damages are subject to mandatory trebling.

In 1992, the 7th Circuit, in *U.S. v. First National Bank of Cicero*, 957 F.2d 1362 (7th Cir. 1992), analyzed this statute and concluded that a plaintiff was required to prove mere "but for" causation in order to recover damages.

In doing so, the court broke with two other circuits that required False Claims Act plaintiffs to also prove proximate causation to establish damages.

In its ruling in *U.S. v. Luce*, the court acknowledged that its ruling in *First National Bank of Cicero* created a circuit split. The 7th Circuit did so because it was concerned that applying proximate causation would be unduly restrictive of actions brought under the False Claims Act.

Since *First National Bank of Cicero*, several other circuits adopted a requirement of proximate causation in False Claims Act cases, but none had adopted the 7th Circuit's rule.

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In *Luce*, the district court concluded the government established its damages under *First National Bank of Cicero* using but for causation to recover damages in fraud. The 7th Circuit reversed the district court by overturning its own precedent. The court offered several reasons for its decision to change course.

First, the 7th Circuit noted that its rule for causation in False Claims Act cases was different from the common-law rule, which requires proof of proximate causation. This was important to the court's analysis because a recent Supreme Court case analyzing the False Claims Act, *Universal Health Services Inc. v. United States ex rel. Escobar*, 136 S.Ct. 1989 (2016), stated that, absent any indication to the contrary, it is presumed that Congress incorporates the common-law meaning of legal terms used in statutes.

Second, the 7th Circuit explained that proximate causation "comports with the FCA's statutory purpose," to filter out claims that present only an "attenuated" link between a defendant's actions and the government's alleged loss.

Finally, the court noted, in light of those conclusions, "it is not surprising that the clear weight of authority among our sister circuits supports the view that 'but for' does not fulfill adequately the causation requirement of the statute."

The 7th Circuit's ruling in *Luce* is significant for several reasons.

First, the court eliminated a split between it and four other circuits that have addressed this issue. Damage claims under the False Claims Act will now be analyzed in a consistent manner across the county with the 7th Circuit no longer operating as an outlier.

Second, and most importantly, the application of proximate causation to False Claims Act cases will change how damages are analyzed in those cases.

Under *First National Bank of Cicero*, the government or a relator could prove damages without undertaking to show that those damages were the foreseeable consequence of a defendant's conduct.

That is no longer the situation following *Luce*. It will be interesting and important to observe how the *Luce* decision impacts proof of damages in False Claims Act cases in the 7th Circuit going forward.

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