

December 19, 2016

Fifth Circuit Affirms Disqualification of Attorney Relator for Ethical Violations

The Fifth Circuit affirmed *per curiam* the disqualification of an attorney relator and dismissed his *qui tam* action against contractor Northrop Grumman Corporation (“Northrop Grumman”) without prejudice to the government. In *U.S. ex rel. Holmes v. Northrop Grumman Corp.*, No. 15-60414, 2016 WL 1138264 (5th Cir. Mar. 23, 2016), the Fifth Circuit held that the district court did not abuse its discretion in disqualifying as a relator an attorney who violated four ethical duties in the process of filing a False Claims Act action.

Attorneys
[John P. Bueker](#)
[Kirsten Mayer](#)
[Cassandra A. LaRussa](#)

Background

Relator Donald Holmes (“Holmes”) represented Munich Re, a reinsurance company, in an arbitration proceeding against Northrop Grumman to resolve reinsurance coverage disputes that arose from losses caused by Hurricane Katrina. While arbitration was pending, Holmes filed a *qui tam* action under seal against Northrop Grumman alleging that the company defrauded the United States Navy. Holmes then gave to the Department of Justice Civil Frauds Division a series of documents that he obtained from the Navy under a protective order. The protective order expressly prohibited parties from using the documents for any purpose other than the arbitration between Munich Re and Northrop Grumman. The United States declined to intervene, citing “serious ethical and professional responsibility concerns.” *Holmes*, 2016 WL 1138264 at *2 n.3.

The district court granted Northrop Grumman’s motion to disqualify Holmes for unethical conduct and ordered the case dismissed with prejudice as to Holmes and without prejudice as to the United States. The court found that Holmes violated at least four ethical duties and that disqualifying the relator without dismissing the case would unfairly prejudice the defendant, as the complaint was prepared based on the “fruits” of Holmes’ improper conduct.

Fifth Circuit Decision

The Fifth Circuit held that the district court did not abuse its discretion in disqualifying Holmes and dismissing the case. First, the court found that the disqualification of Holmes as the relator was appropriate because district courts have discretion to punish unethical conduct in the course of litigation. The lower court identified four ethical duties that Holmes violated, clearly articulating the basis for his disqualification.

On appeal, Holmes did not advance any convincing argument as to why the district court’s decision should be reversed. In fact, Holmes conceded that he was bound by the protective order in place at the time he gave the documents to the United States and that ethical obligations are not suspended in False Claims Act cases. The Fifth Circuit criticized Holmes’ failure to present a well-supported argument and to cite legal authority to support his position. The court also rejected Holmes’ final argument that he was improperly denied an evidentiary hearing on the issue of his disqualification as unsupported in the case law.

Accordingly, the Fifth Circuit found no abuse of discretion in the district court’s dismissal of the case. Though Holmes’ improper behavior was not related to the merits of the *qui tam* action, the district court found that defendant Northrop Grumman would be unfairly prejudiced by “a record developed primarily through the fruits of Holmes’ unethical conduct.” *Holmes*, 2016 WL 1138264 at *3.

Implications

While the decision in *Holmes* was made easier by *Holmes*' failure to challenge effectively the district court's decision on appeal, the case is noteworthy for the outright dismissal of a *qui tam* case where the relator was disqualified for unethical conduct, albeit a dismissal without prejudice to the government.

If you would like to discuss the foregoing or any related FCA matter, please contact the Ropes & Gray attorney with whom you regularly work, or any attorney in our [False Claims Act](#) practice.