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Fourth Circuit Holds that the False Claims Act Does Not Expand Common Law Corporate Successor Liability

Summary

In *United States ex rel. Bunk v. Gov't Logistics N.V.*, 2016 U.S. App. LEXIS 20481, 842 F.3d 261 (4th Cir. 2016), the Fourth Circuit addressed a successor corporation's liability for a predecessor corporation's liabilities under the False Claims Act

("FCA"). Although relators argued that the common law doctrines that normally govern successor liability should be expanded under the FCA to include successor liability under a "substantial continuity" theory, the Fourth Circuit rejected this argument, holding that the common law controls. Applying a common law analysis to the record in this case, the court then allowed FCA claims to proceed against the successor corporation because it found that relators had offered sufficient evidence under a "fraudulent transaction" theory to survive summary judgment.

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Background

The conduct at issue in this case started more than 15 years ago with bids for U.S. Government international shipping contracts. Certain defendants, including Gosselin Group N.V. ("Gosselin Group"), paid twelve other shipping companies—freight forwarders—a specified fee so that those companies would handle freight only from companies that did not bid against the defendants. *Id.* at *8. Those defendants colluded with other companies to inflate bids. *Id.* at *8–*9. After winning a U.S. Government contract in May 2001, those defendants in turn subcontracted work to their cooperating competitors. *Id.* at *9.

In 2002, Relators Kurt Bunk and Ray Ammons (collectively, "Relators") filed FCA *qui tam* complaints under seal. *Id.* at *5. Relators operated shipping companies that competed against Gosselin Group. *Id.*

In 2004, defendant Gosselin Group entered a guilty plea to two criminal conspiracy offenses. *Id.* at *2. Defendant Marc Smet, Gosselin Group's CEO, signed the plea agreement individually and also on behalf of Gosselin Group. *Id.* at *7. Pursuant to a separate agreement, Smet was barred from doing business with the United States for three years, until March 2007. *Id.* at *9. Because Gosselin Group and Smet appealed, the criminal proceedings did not conclude until 2006. *Id.* at *12.

In September 2006, after the conclusion of the criminal proceedings, the Department of Justice ("DOJ") gave Gosselin Group and Smet notice of Relator's civil *qui tam* claims. *Id.* at *12. In response, Smet orchestrated a transfer of Gosselin Group's shipping business to another company. *Id.* at *12–*13. Gosselin Group employee Jan Lefebure owned another company with a freight forwarding and transportation license, Brabiver. *Id.* at *13. Brabiver's three other principals were also former Gosselin Group employees. *Id.* Smet made unsecured interest-free loans to Brabiver's four principals. *Id.* at *13–*14. At Brabiver's first and only shareholder meeting, these loans were used to create and capitalize a third company, Government Logistics N.V. ("Government Logistics"). *Id.* at *14. Gosselin Group and Government Logistics signed agreements transferring Gosselin Group's business to Government Logistics and committing Government Logistics to use exclusively Gosselin Group and its related entities to perform that business. *Id.* All of the agreements had been prepared by Smet's attorney. *Id.* On July 1, 2007, Government Logistics began shipping on behalf of Gosselin Group. *Id.* at *15. Government Logistics owned no assets, other than

some automobiles, a chair, and a table. *Id.* at *16. All money that came into Government Logistics actually went out to Gosselin Group. *Id.*

In 2008, both the government, who had intervened in Relator Ammon's complaint, and Relator Bunk named Government Logistics as a defendant, as a successor to Gosselin Group *Id.* at *17. The district court severed the claims against Government Logistics, and a jury trial was conducted on the claims against Gosselin Group and other closely associated defendants. *Id.* at *19. The jury found for Gosselin Group on one claim and against the Gosselin Group on another claim. *Id.* at *20. The decision was appealed and remanded, with the ultimate outcome remaining the same. *Id.* at *21.

After the Gosselin Group's liability had been established, the next step—and where this decision by the Fourth Circuit falls—was to determine whether Government Logistics was liable as a successor to Gosselin Group. *Id.* at *21. On November 3, 2014, cross motions for summary judgment were filed. *Id.* at *22. On December 29, 2014, the district court granted Government Logistics' motion for summary judgment. *Id.* at *24. On November 15, 2016, the Fourth Circuit reversed.

Successor Liability Under the FCA Follows the Common Law

Relators argued that Government Logistics was liable as a successor under two theories. First, Relators argued that because there was "substantial continuity" between the corporate entities, Government Logistics was responsible for Gosselin Group's liabilities. This theory would provide for more expansive successor liability than is traditionally recognized under the common law. Second, Relators argued that because the transaction creating Government Logistics was fraudulent, it was liable as a successor to Gosselin Group. This "fraudulent transaction" theory falls within traditional common law principles.

After considering these arguments, the Fourth Circuit rejected Relators' effort to establish more expansive successor liability under the FCA. The Court reasoned that the "substantial continuity" theory, as conceived in *United States v. Carolina Transformer Co.*, 978 F.2d 832, 838 (4th Cir. 1992), is an expansion of the common law's "mere continuation" theory. *Id.* at *30. In *United States v. Bestfoods*, 524 U.S. 51, 63 (1998), the Supreme Court had held that statutes could expand common law corporate ownership principles only if they did so explicitly. *Id.* Because the FCA does not explicitly address successor liability, the FCA does not allow broader successor liability than what is provided for under the common law. *Id.* at *31.

The Fourth Circuit did allow the claims against Government Logistics to proceed based on the common law "fraudulent transaction" theory of successor corporation liability. In holding that the claims here could survive defendants' motion for summary judgment, the court focused on the evidence Relators had offered regarding fraudulent intent. *Id.* at *43. Ultimately, it found there was enough to preclude summary judgment for Government Logistics. *Id.* at *36.

Implications

By rebuffing Relators' efforts to use this case to expand successor liability under the FCA, the Fourth Circuit has imposed important limits to the scope of defendants who may be reached under the Act.

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