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## Fifth Circuit Limits Reverse False Claims Act Liability

On December 13, 2016, in *United States ex rel Simoneaux v. E.I. DuPont de Nemours & Co.*, No. 16-30141, 2016 WL 7228813 (5th Cir. Dec. 13, 2016), the Fifth Circuit rejected an expansive construction of “reverse” false claims and held that an unassessed penalty for alleged violations of the Toxic Substances Control Act is not an “obligation” that gives rise to reverse False Claims Act (“FCA”) liability. The decision reversed the district court’s denial of defendant’s summary judgment motion.

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### Background

In *Simoneaux*, relator Jeffrey Simoneaux brought a *qui tam* suit against his former employer, E.I. duPont de Nemours & Company (“duPont”), for failure to report chemical leaks to the Environmental Protection Agency (“EPA”), an alleged violation of the Toxic Substances Control Act. The relator argued that duPont’s failure to report the leaks was a knowing avoidance of an obligation to pay a penalty, a “reverse” false claim under 31 U.S.C. § 3729(a)(1)(G). The relator also brought a claim for wrongful retaliation.

The company moved for summary judgment, arguing that it did not have any “obligation” under the FCA because the EPA had not yet assessed a penalty. Relying on Fifth Circuit precedent, *United States ex rel. Bain v. Georgia Gulf Corp.*, 386 F.3d 648 (5th Cir. 2004), and *United States ex rel. Marcy v. Rowan Cos.*, 520 F.3d 384 (5th Cir. 2008), duPont asserted that an “obligation” under the FCA does not include “potential or contingent” obligations, and that the EPA had assessed no fines or penalties for the alleged Toxic Substances Control Act violation.

The district court rejected duPont’s argument, finding that the Fraud Enforcement and Recovery Act of 2009 (“FERA”) significantly broadened the scope of the reverse false claims provision, abrogating *Bain* and *Marcy*. The district court held that reverse false claims liability can be premised solely on the violation of a statute that imposes monetary penalties. The district court also denied duPont’s motion for summary judgment on relator’s retaliation claim.

### Fifth Circuit Decision

The Fifth Circuit reversed the district court, holding that “unassessed regulatory penalties are not obligations under the FCA.” 2016 WL 7228813, at \*6. As amended by FERA, an “obligation” under the FCA is “an established duty” that “need not be fixed.” *Id.* at \*3. Agreeing with duPont, the court found that “‘established’ refers to whether there is *any* duty to pay, while ‘fixed’ refers to the *amount* of the duty.” *Id.* Accordingly, there is no “obligation” to pay the federal government when the government has not yet assessed a penalty, even if the company violated the statute. Thus, the court found that duPont’s actions did not give rise to reverse false claims liability.

The Fifth Circuit acknowledged that FERA, in response to conflicting definitions developed in the courts, clarified the definition of “obligation.” But consideration of the legislative history led the court to conclude that Congress plainly did not intend to include contingent penalties in the amended definition of “obligation.”

The court warned that the district court’s improper interpretation of “obligation” could lead to an “extraordinarily broad construction of the FCA,” *id.* at \*5, in which an individual or company would face reverse FCA liability for

the mere violation of a federal statute or regulation even if no penalty were ever assessed. The court concluded that the statutory definition of “obligation” “cannot bear the weight of that interpretation.” *Id.* at \*6.

On appeal, the relator also argued that the phrase “shall be liable” in the Toxic Substances Control Act mandates a penalty. Thus, he argued, the obligation to pay was not contingent and was instead an “established duty.” The court summarily rejected this argument, agreeing with duPont that the payment obligation is contingent on EPA discretion whether or not to assess a penalty.

The Fifth Circuit also dismissed for lack of jurisdiction duPont’s appeal with respect to the FCA retaliation claim because it was not “fairly included” in the certified order.

### Implications

The Fifth Circuit’s opinion imposes a clear limit to the scope of reverse false claims liability. The court makes clear that the fact that a monetary penalty *may* be imposed does not, without more, give rise to reverse false claims liability. By reversing the district court’s broader read of the definition of “obligation,” this decision rejects an expansion of FCA liability that relators have sought here and in other suits.

The case is also noteworthy for the role of the United States as *amicus curiae*. The United States agreed with duPont that the definition of “obligation” does not include potential or contingent obligations in connection with regulatory violations. The United States explained that “[a] statute enforceable through an unassessed monetary penalty . . . creates an obligation to obey the law, not an obligation to pay money.” *Id.* at \*3.

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