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Ninth Circuit Holds that Fannie Mae and Freddie Mac Are Not Agents of the Government Under the False Claims Act

In *United States ex rel. Adams v. Aurora Loan Servs.*, 813 F.3d 1259 (9th Cir. 2016), the Ninth Circuit affirmed the district court's dismissal of Relators False Claims Act ("FCA") complaint, holding that the Federal National Mortgage Association ("Fannie Mae") and the Federal Home Loan Mortgage Corporation ("Freddie Mac") were not officers, employees, or agents of the federal government for purposes of the False Claims Act, and thus Relators had failed to plead any claim for payment from the government under 31 U.S.C. § 3729(b)(2)(A)(i) of the FCA.

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Background

In order to reduce capital costs in certain borrowing sectors, Congress has the authority to establish financial services corporations called government sponsored enterprises ("GSE"). The most well known GSEs are Fannie Mae and Freddie Mac, which were created to purchase home mortgages from the initial lenders to allow those lenders to make additional loans to new home buyers. During the housing crisis, Congress passed the Housing and Economic Recovery Act of 2008, which created the Federal Housing Finance Agency ("FHFA"), a federal agency with the power to take control of Fannie Mae and Freddie Mac. On September 6, 2008, the FHFA took control of the Fannie Mae and Freddie Mac, placing the GSEs under its conservatorship.

In 2013, relators brought an FCA suit against various lenders and loan servicers. The relators alleged that the defendants certified that the loans purchased by Fannie Mae and Freddie Mac were free and clear of home owner association liens and charges, when they were not. As a result of these false certifications, the defendants allegedly knowingly caused Fannie Mae and Freddie Mac to pay these charges. The United States District Court for the District of Nevada dismissed the complaint for failure to state a claim. The district court held that Fannie Mae and Freddie Mac are not instrumentalities of the government under the FCA and, therefore, relators had failed to plead that a request or demand for money or property was made to an officer, employee, or agent of the United States, as is required by § 3729(b)(2)(A)(i).

The Ninth Circuit's Holding

The Ninth Circuit affirmed the district court's dismissal of the complaint, observing that, although Fannie Mae and Freddie Mac were initially chartered by the federal government, they are private companies. The court found that previous rulings that Fannie Mae and Freddie Mac are federal instrumentalities for state and city tax purposes are inapplicable to FCA actions. Additionally, the court found that the FHFA's conservatorship does not make the GSEs federal instrumentalities. Under the conservatorship, the FHFA assumes the rights and duties of Fannie Mae and Freddie Mac, without giving these entities any federal authority. In the absence of federal authority in the GSEs, or any allegation that the FHFA had taken permanent control, the conservatorship did not transform Fannie Mae and Freddie Mac into federal instrumentalities.

Implications of the Court's Decision

While the lenders and loan servicing entity defendants here avoided the need to defend this complaint, the Ninth Circuit was careful to specify that its decision affirming the district court was based on the fact that relators' pursuit of defendants relied exclusively on § 3729(b)(2)(A)(i) in asserting the alleged FCA violations. The court explicitly noted that it expressed no opinion as to whether relators could state a claim under § 3729(b)(2)(A)(ii), a provision of

the FCA that prohibits the submission of claims to third parties other than the government under certain limited circumstances. Because relators did not argue that they could proceed under 3729(b)(2)(A(ii)), despite the US DOJ noting the provision in its amicus brief, the Ninth Circuit declined to rule on that theoretical possibility.

Companies doing business with Fannie Mae and Freddie Mac should take notice of the *Adams* opinion and recognize that it did not foreclose FCA liability for false statements or claims submitted to the GSEs. We will continue to monitor cases addressing these issues. Please contact an author of this Alert or your usual Ropes & Gray attorney if you have questions.