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May 31, 2001

COURT REVERSES ITSELF AND RULES *QUI TAM* LAWSUITS ARE CONSTITUTIONAL

(U.S. ex rel. Riley v. St. Luke's Episcopal Hospital)

In an opinion issued earlier this week, the entire United States Court of Appeals for the Fifth Circuit reversed one of its panels and ruled in an 11-2 decision that the *qui tam* or relator provision of the False Claims Act is constitutional under the Take Care Clause and Appointments Clause of Article II of the Constitution.

The opinion, written by Circuit Judge Carl E. Stewart, was based upon the court's historical examination of the role of *qui tam* laws in our country's early history to buttress the conclusion that *qui tam* does not violate the Take Care Clause. The court also found no violation of the Appointments Clause because the private party bringing the lawsuit for the benefit of the government does not have a "continuing and formalized relationship of employment with the United States Government" that rises to the level of an "officer" of the United States requiring appointment by the President. The en banc court also relied upon a recent U.S. Supreme Court decision in *Vermont Agency of Natural Resources v. United States ex rel. Stevens* that held that the relators in *qui tam* lawsuits have standing under Article III to bring *qui tam* lawsuits.

The False Claims Act provides that the United States can seek civil penalties against a government contractor that submits false or fraudulent claims for payment against the United States for goods or services that were not provided. The law also has a "*qui tam*" provision which allows a private citizen to bring the suit in the name of the United States. If the Justice Department believes that the case lacks merit or refuses to prosecute the case, the private citizen can receive up to 30 percent of any penalties imposed by the court against the government contractor. Many frivolous and abusive "whistle blower" lawsuits are brought by activist groups and attorneys to force businesses to settle the case and to extract large financial awards.

In this case, Joyce Riley, a former nurse at St. Luke's Hospital, filed a *qui tam* lawsuit claiming that the hospital submitted false Medicare and Medicaid reimbursement claims because some of the care was provided by resident medical students rather than a licensed doctor. The Justice Department declined to enter the case. In its brief, WLF argued that under Article III of the Constitution, only persons who have been injured have legal standing to prosecute cases in federal court. Because there was no financial or other legal harm to the nurse by the alleged false claims, she lacked standing to prosecute the case on her own.

Further, the separation of powers require that civil prosecutions in the name of the United States be conducted by the Executive Branch, not by private groups or citizens, an argument which the Fifth Circuit adopted. WLF's brief also suggested that only in a rare *qui tam* case would a private plaintiff have legal standing. For example, if the relator was being paid from funds under a government contract that were diverted due to the alleged "fraud" upon the government, she would have suffered an injury which could be redressed by a restitution order.

In the original three-judge panel opinion issued in 1999, Circuit Judge Jerry Smith ruled in favor of WLF, stating that the *qui tam* provisions unconstitutionally gave private citizens the authority to prosecute government contractors who violate the False Claims Act in contravention of Article II which mandates that the Executive Branch "take care that the laws be faithfully executed." Congress cannot transfer this power to private citizens or private attorneys general.

In the recent *en banc* ruling reversing that decision, Judge Smith filed a strong dissenting opinion which was joined by Circuit Judge Harold DeMoss. Judge Smith argued, as he did in his original opinion, that the "majority fails to recognize either the encroachment on executive power that results from turning over litigation of the government's business to self-appointed relators or the consequent violations of separation of powers."

WLF's brief was drafted with the *pro bono* assistance of Evan Slavitt and Lisa T. McElroy, lawyers with the Boston, Massachusetts office of Gadsby & Hannah.

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