Whistleblower Defense Alert: District Court Finds Bank Cannot Face FCA Liability Without Evidence of Explicit Claims to Fannie Mae and Freddie Mac

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By Jacob Mahle and Jessica Baverman

Last month, the United States District Court for the Northern District of Illinois confronted a bank's potential liability for false information obtained (and even allegedly encouraged) by bank employees in the processing of consumer loans, and found that without allegations of submission of claims to federally-sponsored financial institutions who purchase mortgage loans and related securities, and payment by the Government, allegedly fraudulent loan information cannot support a *qui tam* claim's survival of a Rule 9(b) motion to dismiss.

In *United States ex rel. Brooks v. Wells Fargo Bank, N.A.*, No. 17-cv-1237, 2019 U.S. Dist. LEXIS 39370 (N.D. Ill. Mar. 12, 2019), the relator brought *qui tam* claims against Wells Fargo claiming that the bank "submitted fraudulent claims, gave false statements, and committed unlawful retaliation in violation of" the False Claims act, 31 U.S.C. § 3729 et seq. (*Id.* at *1.) Relator Brooks worked for Wells Fargo for six years in its lending department, and his work included supervision of underwriters responsible for evaluating "high-risk loan requests." (Id. at *2.) In that capacity, Brooks denied on multiple occasions two loans that he claimed failed to meet the underwriting standards of Fannie Mae and Freddie Mac. In the first case, the relator claimed that he denied the loan three times but it was approved when the sales team allowed a "third party" to review the file to make a final determination. (*Id.* at *3.) In the second case, the relator claimed that a Wells Fargo lending officer told the relator the loan would be approved if the applicant knew how much income was needed to qualify for the loan. When the relator allegedly told his superiors that such a disclosure would be "illegal and unethical," he was purportedly "cut-off" from involvement in the application—which was ultimately approved after Wells Fargo allegedly told the applicant how much income was needed on the application. (*Id.*)

The relator alleged that Wells Fargo "provided false information to Fannie Mae and Freddie Mac for repayment [by] stating that applications met all underwriting standards and were free from fraud and material misrepresentation." (*Id.* at **3-4.) The first count of the complaint alleged that Wells Fargo submitted fraudulent claims for payment to the United States government, while the second count asserted that the bank used false statements in connection with its sale of mortgage loans to Fannie Mae and Freddie Mac. The relator's final count alleged that he was unlawfully terminated after notifying his superiors about the false statements to Fannie Mae, Freddie Mac, and the FHA. (*Id.* at *4.)

Wells Fargo moved to dismiss the amended complaint under Fed. R. Civ. P. 12(b)(6) and argued that its allegations were not stated with the particularity required by Rule 9(b). Specifically, Wells Fargo argued that the complaint failed to sufficiently plead the submission of claims to the United States government, and that it did not adequately allege materiality. *(Id.)* The District Court agreed.

First, the Court considered whether the complaint adequately alleged Wells Fargo actually submitted false claims to the government. The Relator relied on the alleged false income statements he claimed were provided to Fannie Mae and Freddie Mac, but the Court found such allegations were insufficient. The Relator did not state whether the first loan applicant even applied for a Fannie Mae or Freddie Mac loan through Wells Fargo, not to mention the fact that, as the Court noted, the bank could not have sold the loan to both entities. (*Id.* at *7.) On the second loan example, the Relator himself alleged he was "cut off" from communications regarding the loan after he voiced his concerns, making it impossible for him to know whether anything was submitted to Fannie Mae or Freddie Mac. Indeed, the Relator did not even allege whether the loans in question were bought by Fannie Mae or Freddie Mac. As the court held, the "lack of specificity as to who Wells Fargo sent the alleged false claim" was fatal to the Relator's case. (*Id.*)

Second, the Court concluded that the Relator also failed to adequately allege that a claim for payment was submitted to the United States government. As the Court noted, "when alleging an FCA violation, the pleadings must contain specific facts that assert the government's money was spent as a result of the fraudulent claim." (*Id.* at **9-10.) Here, the Relator simply asserted that the United States had been forced to bail out Fannie Mae and Freddie Mac when they were placed in receivership. (*Id.* at * 10.) As such, the Relator claimed he did not need to plead a "specific connection between federal funds and the alleged fraudulent claim because it is 'public knowledge' that 'payment of fraudulent claims is directly tied to governmental losses.'" (*Id.*) The District Court soundly rejected this position, finding no link between the purported fraudulent claims and government spending as Fannie Mae and Freddie Mac are still private corporations, with funding sources other than the government. Consequently, "a payment by Freddie Mac and Fannie Mae does not automatically result in spending by the United States government," and the Relator's failure to connect the alleged fraud with "specific money spent by the federal government" rendered his claims insufficient under Rule 9(b). (*Id.* at **10-11.)

Finally, the District Court concluded that, even if the Relator adequately alleged a false claim was submitted to Fannie Mae and Freddie Mac, and then adequately connected those claims to actual payment by the Government, his suit still failed because of the FCA's public disclosure bar. Under the public disclosure bar, a court must dismiss *qui tam* actions when the claims are "based upon the public disclosure of allegations or transactions" in a variety of arenas, including the news media. Here, the Court noted that this element was "easily satisfied," because the allegations have been the subject of national press and previous litigation. These disclosures included previous FCA claims by the Government against Wells Fargo, and public statements about that litigation by the Department of Justice. (*Id.* at **12-13.) The

Relator could not escape the public disclosure bar as an original source, either, because his claims did not "materially add" to allegations that were already publicly disclosed, and they were instead "substantially similar" to previous allegations and claims against Wells Fargo. (*Id.* at ** 14-15.)

With each statutory revision, FCA defendants find themselves with fewer and fewer defenses. But as the *Brooks* decision indicates, there are still potent obstacles to *qui tam* suits. If a relator cannot satisfy the fundamental requirements of demonstrating the false statement was made to the government entity, and connecting that false statement to actual payment by the Government, those *qui tams* should rightly fail, as they did here.