

Nationwide implications for whistle-blowers in local DHL decision

In a case of first impression having national implications, Erie County State Supreme Court Justice John Curran upheld New York's recently enacted False Claims Act in the face of a federal pre-emption challenge.



FALSE CLAIMS

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In the case of *N.Y. ex rel. Grupp and Moll v. DHL*, the plaintiffs, former DHL contract carriers, brought a whistle-blower action on behalf of the State of New York under its False Claims Act. It charged DHL with imposing improper "jet fuel surcharges" on deliveries originated by the State of New York and its various statutory subdivisions.

Grupp and Moll claim that DHL charged the state for jet fuel surcharges on top of increased rates for overnight service, even though DHL knew certain parcels went by truck or other ground transport and not by air. The plaintiffs allege that DHL's conduct defrauded the state out of millions of dollars in overcharged package delivery costs.

New York adopted its False Claims Act in

April 2007. Like its federal counterpart, the New York FCA provides for treble damages, the recovery of attorneys' fees and penalties of up to \$12,000 per claim when it is demonstrated that a defendant submitted a false or fraudulent claim to the state for payment for goods or services with the requisite intent. The New York FCA, nearly identical to the federal False Claims Act, has primarily been used by the state to recover fraudulent health-care payments under the state's Medicaid program. The FCA, however, covers any type of demand for payment by the state that is knowingly false or fraudulent.

For purposes of the New York statute, the State of New York and all of its subdivisions are included as potential plaintiffs. Accordingly, cities, towns, school districts, villages and all political subdivisions affiliated with the state are potential plaintiffs under the FCA.

In a motion to dismiss the case, DHL argued to Justice Curran that the federal Airline Deregulation Act and the Federal Aviation Administration Authorization Act effectively pre-empted any state claim for the alleged overcharges set forth in the whistle-blowers' complaint. In particular, these statutes preclude states from making and enforcing any law that affects prices,

routes or services for air, truck or other forms of commercial transportation.

As a result, DHL argued that the state's invocation of the FCA to recover alleged overcharges for state-originated packages or parcels that traveled by ground but were assessed a jet fuel surcharge is pre-empted by the federal statutes. In rejecting this defense, Justice Curran adopted the reasoning of several federal courts of appeals, including the Fifth Circuit in *Cardinal Towing & Auto Repair Inc. v. City of Bedford, Texas*, 180 F3d 686 (1999), where pre-emption was rejected when a state acts as a "market participant" rather than as a regulatory authority in an effort to vindicate its own contractual or other rights regarding a commercial transaction.

Justice Curran reasoned that the state is not pre-empted from invoking its own statutory rights and remedies when, as in the DHL case, it is acting as a party in the marketplace like all others and is merely attempting to obtain the benefit of its bargain or to prohibit any continuing fraud. Through the whistle-blowers' complaint, the state alleges that DHL overcharged and misrepresented the services provided at various price levels. In particular, the whistle-blowers claimed DHL did not have the right to impose a significant jet fuel

surcharge on top of the already-enhanced charge for overnight service when, in fact, a particular parcel did not travel by air at all.

Justice Curran became the first state court judge in the nation to adopt the "market participant rule" in the context of a False Claims Act case. His decision, currently appealed to the Appellate Division, 4th Department, effectively undermines federal pre-emption defenses in cases involving the state FCAs if it can be shown that a state is merely vindicating its rights as a "market participant" and is not attempting to regulate commerce in general.

If sustained on appeal, Justice Curran's decision is a significant victory for whistle-blowers invoking New York's False Claims Act and creates a clear precedent for the other 34 states that also have adopted an FCA to combat fraud and abuse at a time when state budgets are under intense scrutiny and economic pressure.

The whistle-blowers, Grupp and Moll, are represented by Daniel Oliverio and Hodgson Russ LLP and the defendant, DHL, is represented by Peter Coll of Orrick, Herrington's New York office.

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