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Contact:
Christopher G. Foster
Of Counsel
213.417.5130
cfoster@mpplaw.com

Fifth Circuit Holds Potential Environmental Penalty is not an "Obligation" Under the False Claims Act

The False Claims Act, 31 U.S.C. § 3729, *et seq*., (FCA) was enacted in 1863 in response to Congressional concern that suppliers of goods to the Union Army during the Civil War were defrauding the government. The FCA imposes liability on anyone who knowingly submits a false claim to the government or causes another to submit a false claim to the government or knowingly makes a false record or statement to get a false claim paid by the government. The FCA also has a provision known as the "reverse false claims section" which imposes liability where someone acts improperly – not to get money from the government, but to avoid having to pay money to the government. The FCA allows a private person to file suit on behalf of the government. A suit filed by an individual is known as a "*qui tam*" action, and the person bringing the action is referred to as a "realtor."

In *U.S. ex rel. Simoneaux v. E.I. DuPont de Nemours,* 2016 WL 7228 813 (December 13, 2016) the Fifth Circuit considered a *qui tam* action brought by Simoneaux against his former employer, duPont, under the FCA. In his action Simoneaux alleged that duPont violated the FCA's reverse-false-claims provision by failing to report leaks of sulfur dioxide and sulfur trioxide to the Federal Environmental Protection Agency (EPA) as required by the Toxic Substances Control Act (TSCA). Simoneaux claimed that by allowing the leaks and failing to report them under TSCA, duPont owed the U.S. a penalty and had avoided that obligation by failing to report the leaks.

DuPont moved for summary judgment asserting that even if it had violated TSCA, it had no "obligation" to pay the U.S. because the EPA had not assessed a penalty. This position was consistent with the holdings in *U.S. ex rel. Bain v. Georgia Gulf Corp.,* 386 F. 3d 648 (5th Cir. 2004) and *U.S. ex rel. Marcy v. Rowan Cos.*, 520 F. 3d 384 (5th Cir. 2008), which held that the reverse false claims provision does not extend to potential or contingent obligations to pay the government fines or penalties that have not been levied or assessed. Despite these authorities the district court denied summary judgment concluding that the Fraud Enforcement and Recovery Act of 2009 (FERA), which amended the FCA, had abrogated the holdings in *Bain* and *Marcy.* The court held that under the FCA, as amended, a person can be liable for a reverse false claim based merely on a violation of a statute that imposes monetary penalties.

FERA amended the FCA to define "obligation" as "an established duty, whether or not fixed, arising from…statue or regulation…" The district court emphasized the phrase "whether or not fixed" in ruling that unassessed regulatory penalties are included within its plain meaning. On appeal, duPont, and the United States as *amicus curiae,* asserted that "established" is the key word arguing that, "A statute

enforceable through an unassessed monetary penalty creates an obligation to obey the law, not an obligation to pay money."

The Fifth Circuit agreed with duPont and the U.S., stating: "The most reasonable interpretation is that 'established' refers to whether there is *any* duty to pay, while 'fixed' refers to the *amount* of the duty." The court's holding went on to conclude: "Although FERA's new definition resolved uncertainty regarding whether the *amount* of an obligation needs to be fixed, it did not upset the widely accepted holding that contingent penalties are not obligations. And a plain reading of TSCA shows that penalties are not mandatory…In sum, FERA did not upset *Bain* and *Marcy's* holding that unassessed regulatory penalties are not obligations under the FCA. For FCA liability to attach, there must be an 'established' duty 'to pay or transmit money or property to the Government.'"

The Fifth Circuit's ruling in *Simoneaux* is in accord with the controlling authority on this issue in the Ninth Circuit. *See, e.g. U.S. v. Bourseau,* 531 F. 3d 1159, 1169-70 (9th Cir. 2008).