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No Money for Nothing — Eighth Circuit Limits Relators' Ability to Recover a Share of Government Settlements of Qui Tam Suits

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Following an 8-2 *en banc* decision issued by the United States Court of Appeals for the Eighth Circuit earlier this month, potential relators may think twice before bringing their False Claims Act ("FCA") *qui tam* suits in the Eighth Circuit. In *Rille v. PricewaterhouseCoopers LLP*, No. 11-3514 (8th Cir. Oct. 5, 2015), the Court vacated a district court order awarding two relators a percentage of the Government's settlement of an FCA *qui tam* suit in which it had intervened, holding that when the government intervenes in an FCA action brought by a relator, and then settles both the claim brought by the relator and a different claim that does not overlap factually with the relator's claim, the relator is entitled only to a share of the settlement of the claim that he brought. The Court remanded the case to the district court to analyze whether there was factual overlap between the claims settled by the Government and the claims brought by the relators.

This case began more than a decade ago when the two relators, Norman Rille and Neal Roberts, sued multiple government contractors on behalf of the United States, alleging that they had paid kickbacks to systems integration consultants in exchange for recommending their products to the Government. The relators subsequently amended their complaint to include defective pricing allegations.

Eventually, the Government intervened and settled with defendant Cisco Systems, Inc. Although the settlement provided for the dismissal of the relators' action against Cisco and gave the relators no share of the proceeds, the district court awarded the relators approximately $8 million of the settlement. The Government appealed, arguing that the settlement was based not on kickbacks but on a defective pricing scheme that it had discovered during a routine audit, not as a result of information received from the relators. After a panel of the Eighth Circuit affirmed, the Court agreed to hear the case *en banc*.

Under the FCA, relators are entitled to a share of "the proceeds of the action or settlement of the claim." 31 U.S.C. § 3730(d)(1). The majority concluded that the "proceeds" of an "action" in this provision refers to the proceeds of an action litigated to judgment. In a case involving a settlement, by contrast, the majority held that the relator's share is limited to the proceeds of "the claim" he brought. The majority further reasoned that it would be "inconsistent with the purposes of the [FCA] to permit a relator automatically to receive a share of the proceeds when the relator might have had nothing to do with the government's recovery on a particular claim that was added after the government's intervention." The proceeds of a relator's "claim" encompasses a settlement only to the extent that it is "based on claims that factually overlap[] with the claims brought by the relator[]."

The decision drew a strongly worded dissent from the two judges on the original panel that had upheld the district court order, who opined that "where the conduct described by the government as a 'different claim' was settled within an action comprised exclusively of the relators' claims, there is no government claim to compare to the relators' claims."

Under the Eighth Circuit's decision, *qui tam* relators may face new obstacles in seeking recovery of settlements negotiated by the Government — at least in the Eighth Circuit. Even where the Government intervenes and does not formally add any claims, it can argue that the relators are not entitled to any settlement proceeds by asserting that the conduct underlying the settlement was not the same as the conduct underlying the relators' claim, thus forcing relators to prove that they are entitled to recovery based on a factual overlap analysis. That analysis may turn, at least in part, on how the Government itself chooses to describe the conduct in the settlement agreement.