

Construction Law Alert | August 10, 2022

Good News for Sureties Under the False Claims Act



In United States ex rel. Scollick v. Narula, 2017 WL 3268857 (D.D.C. July 31, 2017), the court seemed to hold that a surety can be liable under the False Claims Act for its principal's participation in a fraudulent scheme on a bonded federal project, where the surety did nothing more than issue a bond. In other words, a surety might be liable under the False Claims Act for seemingly innocuous conduct. The decision was in response to a motion to dismiss, meaning that it underwent only the lowest level of scrutiny.

In Scollick, the court held that a surety could be liable for its principal's fraud where it should have known of its principal's fraud and nonetheless issued a bond. No affirmative conduct beyond the issuance of the bond was mentioned by the court as required for liability. The court also opined that the complaint's allegations were "sufficient to allege that the [surety] defendants continued to do business with [their co-defendants] upon becoming aware that [they] were submitting false claims, which ... is grounds for alleging an indirect presentment claim." This would seem to be a very low threshold for liability.

The good news for sureties is that the lax approach taken by the court in Scollick was largely corrected by its latest decision, recently unsealed. Click [here](#) for the decision. This recent decision addressed several pending summary judgment motions, including motions filed by the sureties. With the benefit of a fully developed factual record, the court concluded that no reasonable jury could find the sureties liable for False Claims Act violations.

The court explained that there was simply no basis for charging the sureties with knowledge of the allegedly fraudulent scheme. Moreover, the court explained that the sureties were not "participants" in the government's disabled veterans program. To the contrary, the principals were the participants. The court refused to impose an affirmative duty on the sureties to double-check the government's decision to include the principal. The court explained that no case placed such an affirmative obligation on a surety. The court ultimately rejected the False Claim Act action against the sureties as based on a duty constructed "out of thin air."

Although the original Scollick decision was concerning, the more recent Scollick decision should alleviate most of those concerns.

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