CARLTON FIELDS

First District Tells Relators: Know Your Role in State Whistleblower Actions

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Last week, the Florida First District Court of Appeal issued a decision of first impression confirming the controlling role that the Attorney General's office plays in the life, or death, of a whistleblower action in Florida. In *Barati v. State*, 1D15-213, 2016 WL 699129 (Fla. 1st DCA 2016), the court confirmed that the Attorney General retains the power to unilaterally dismiss a whistleblower action, even after declining to intervene. *Barati* resolves the power struggle between the Attorney General, as the chief legal officer of the state, and whistleblowers, purporting to bring claims on behalf of the state to right purported wrongs against the state.

Florida False Claims Act

The Florida False Claims Act (FFCA), modeled after the federal False Claims Act, permits private individuals known as relators, to bring lawsuits on behalf of the state against persons or entities who knowingly make false demands for payment from the state. Fla. Stat. §§ 68.082, 68.083. Lawsuits under the federal or Florida statute are often called *qui tam* actions based on a Latin phrase that translates to "who as well for the king as for himself sues in this matter." *Barati*, 2016 WL 699129, at *2 (Fla. 1st DCA 2016) (citation omitted). The purpose of the statute is to give private individuals financial incentives to disclose fraud being perpetrated against the state. The FFCA provides for substantial financial penalties, and if a *qui tam* action is successful, the whistleblower and the state split any recovery. Fla. Stat. §§ 68.082(2), 68.085. When a whistleblower files a lawsuit under the FFCA, he or she must immediately serve the complaint, along with the material evidence and information related to the allegations of fraud, on the Attorney General in his or her capacity as head of the Florida Department of Legal Affairs. Fla. Stat. § 68.083(3). At that point, the Department "may elect to intervene and proceed with the action, on behalf of the state," and if it elects to do so, "has the primary responsibility for prosecuting the action, and is not bound by any act of the person bringing the action." Fla. Stat. §§ 68.083(3),

68.084(1). The Department may also decline to intervene, in which case "the person who initiated the action has the right to conduct the action." Fla. Stat. § 68.084(3). However, even if the Department does not initially intervene, "the court, without limiting the rights of the person initiating the action, may nevertheless permit the department to intervene and take over the action on behalf of the state at a later date upon showing of good cause." Fla. Stat. § 68.084(3). A separate sub-section of the statute, without the "good cause" requirement, provides that "[t]he department *may at any point* voluntarily dismiss the action notwithstanding the objections of the person initiating the action." Fla. Stat.§ 68.084(2) (emphasis added). ***Barati* Confirms the Attorney General Retains the Unilateral Power to End Whistleblower Cases** In *Barati*, the Attorney General declined to intervene in a *qui tam action* filed by a relator based on allegations that the Florida Department of Law Enforcement had paid a company for a product that did not comply with contract requirements. *State v. Barati*, 150 So. 3d 810, 811 (Fla. 1st DCA 2014), *reh'g denied* (Nov. 24, 2014). Undeterred, the whistleblowers pursued the lawsuit, at their expense, for another three years. Thereafter, however, the Attorney General re-emerged in the case and filed a notice of voluntary dismissal on the basis that she had the unilateral right to dismiss *qui tam* actions even after choosing not to intervene. *Barati*, 2016 WL 699129, at *2. The trial court agreed, and found that the Attorney General is vested with the statutory authority to dismiss *qui tam* proceedings notwithstanding the objections of a whistleblower and notwithstanding the Attorney General's initial decision to not intervene. *Id.* The whistleblowers appealed the dismissal order to the Florida First District Court of Appeal, which affirmed in a lengthy decision issued on February 23, 2016. The First DCA gave four reasons for its decision. 1. The clear language of the statute compelled the result. The court noted that there is no common law right to bring *qui tam* claims and thus "[t]he Legislature is the sole authority of all rights granted private relators to file and litigate *qui tam* actions." *Barati*, 2016 WL 699129, at *7. Additionally, the court pointed out that the Department must establish "good cause" to *intervene* in a FFCA lawsuit if it initially chooses to not intervene but that there is no similar "good cause" requirement when the Department wants to *dismiss* the lawsuit. Fla. Stat. § § 68.084(2), 68.084(3). Specifically, the court observed that "nowhere in the statute is the court authorized to evaluate or deny the Attorney General's decision to terminate *qui tam* litigation." *Barati*, 2016 WL 699129, at *8. 2. The result squares with federal precedent interpreting the Federal False Claims Act. The FFCA is based on its federal counterpart. As such, the court looked to decisions interpreting the federal law as guidance concerning the state law. It noted that under the federal statute, "[t]he Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion *and the court has provided the person with an opportunity for a hearing on the motion*." 31 U.S.C. § 3730(c)(2)(A) (emphasis added). Even with the hearing requirement under the federal statute, courts have concluded that the federal government has nearly unqualified discretion to unilaterally dismiss *qui tam* proceedings. The *Barati* court found that "the overarching principle at issue in these cases and in the instant case flows from one fundamental fact: The relator is only the assignee of the government under both statutes, despite the federal law's broader language allowing the relator to demand a hearing where the government seeks to dismiss." *Id.* at *10. 3. The Attorney General maintains a paramount position

as “the real party in interest” in *qui tam* actions. *Id.* at *12. As above, the court again noted that a whistleblower “is and always remains an assignee of the State's substantive right to prosecute a qui tam action, albeit an assignee with some procedural prerogatives strictly defined by positive law and in no manner arising out of a common law or constitutional substantive ground.” *Id.* at *12. 4. The Attorney General’s unilateral authority to dismiss *qui tam* proceedings is consistent with the strict separation of powers principles embedded in the Florida Constitution. The Attorney General is designated as the “chief state legal officer” under the constitution. Art. IV, § 4(b), Fla. Const. Additionally, the Attorney General is statutorily obligated to appear in legal proceedings in which the state is a party. Fla. Stat. § 16.01(4). The court concluded that “[c]onducting and terminating legal actions brought in the name of and for the benefit of the State is the *sine qua non* of the State's chief legal officer” and found that “[a] State's chief legal officer without the authority to conduct the State's litigation would be no legal officer at all.” *Barati*, 2016 WL 699129, at *15. **Conclusion** *Barati* sends a clear message to would-be whistleblowers who may elect to pursue their claims absent intervention from the Attorney General. Whistleblowers proceeding without the benefit of assistance from the Attorney General risk having their case dismissed against their will, maybe after years of time and expense pursuing it, should the Attorney General determine that further pursuit of such claims is not in the state’s interest. *Barati* confirms the absolute trump card that the state holds in all whistleblower actions and sends a clear message to whistleblowers to know their role when it comes to prosecuting such actions on their own.

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