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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

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## 'Sensitive' Freight Shipper For DOD Must Face FCA Claims

By **Bryan Koenig**

Law360, Washington (April 28, 2017, 8:04 PM EDT) -- A Georgia federal judge on Friday left largely intact a government False Claims Act suit accusing a domestic trucking company of bribing U.S. Department of Defense contracting officials in pursuit of "sensitive freight shipments" and then inflating shipping costs, trimming only state law claims barred by the underlying contract's existence.

The only thing U.S. District Judge Leslie J. Abrams tossed Friday in the government's case — first brought by a whistleblower named James E. Reeves — against Mercer Transportation Co. Inc. were alternative state law claims of unjust enrichment and payment by mistake, which Judge Abrams found were precluded under Georgia law, which prevents such allegations when there's an agreement between the parties.

"The government counters that courts routinely allow these claims to proceed in the alternative to FCA claims," Judge Abrams said. "While the government is correct that courts usually allow claims for unjust enrichment and payment by mistake to proceed in the alternative to FCA claims, this rule does not apply when there are allegations of an underlying contract."

Left intact were the claims under the FCA itself as well as common law fraud and induced breach of fiduciary duty, with Judge Abrams finding prosecutor contentions of misrepresentation and damages to the government to be enough at this stage for the remaining state law claims. The allegations are sufficiently detailed, the judge said, they're within the statute of limitations, they adequately show allegedly false claims for payment made through a database confirming shipment delivery, and they adequately identify Mercer workers who allegedly bribed military officials, bribes sufficiently traced at this stage to the company itself.

Undergirding the suit is the work Mercer performed for the Marine Corps Logistics Base, or MCLB, located in Albany, Georgia, that Judge Abrams said sends out military weapons, ammunition, explosives and more to locations all over the country using shippers such as Mercer.

Two DOD employees and two Mercer workers have already pled guilty to bribery charges, according to the ruling, which noted admissions of cash gifts, cruise tickets, a hunting trip and meals purchased for the DOD officials.

According to the decision, Mercer employee David Nelson copped to paying DOD worker Mitchell Potts \$500-\$1,500 for each shipment Mercer was awarded. The decision counted 1,333 "government bills of lading" that Mercer allegedly won based on the bribery scheme between October 2006 and April 2012.

As part of the scheme, Mercer purportedly submitted multiple bills of lading on single-drive hauls instead of using a single bill with multiple drop-offs, charging the government for multiple shipments

when there was really one combined drive. And the bribery appears to have borne fruit.

"In 2006, before the bribery scheme was fully implemented, Mercer was paid approximately \$278,652 for shipments arising out of MCLB," Judge Abrams said. "In 2007, however, the total payments jumped to \$6,500,000 ... Between 2007 and 2012, Mercer was paid approximately \$23,000,000 from shipments arising from MCLB. In 2013, after Potts and [DOD worker Jeffrey Philpot] were terminated, the total payments drastically decreased to \$218,000."

The case traces back to Reeve's late June 2013 complaint, according to the decision, which noted government intervention three years later. Mercer had argued the case came too late, but Judge Abrams rejected contentions of an expired three-year statute of limitations that would have started running in June 2010, if the government should have known about the allegations before then.

The company's only contention of prior government knowledge, the judge said, was based on an anonymous 2008 email sent to Mercer purportedly also detailing allegations sent on to the U.S. Marine Corps' fraud department. The judge noted that only U.S. Department of Justice officials have the "responsibility to act" in FCA cases.

"Even assuming that the sender emailed this complaint to the USMC fraud department, which is not alleged definitively, there is no allegation that this e-mail was forwarded to anyone at the Department of Justice. Accordingly, Mercer has not met its burden of demonstrating that the statute of limitations has run with regard to the FCA claims," the judge said.

Judge Adams also rejected three-year statute of limitations arguments against the state law tort claims bearing down on Mercer, again noting that the company hasn't established that the email really was sent to the Marine Corps.

Also sufficient, the judge said, are contentions that Mercer's claims were false, despite arguments from the company that prosecutors haven't actually identified false information. While a bribery scheme alone wouldn't be enough, the judge noted that the government's allegations go beyond that, contending that if it weren't for the bribery scheme the shipments would have instead gone to other, cheaper shippers.

The U.S. Department of Justice declined to comment, and press inquiries to Mercer and the whistleblower were not immediately successful late Friday.

The whistleblower is represented by Zahra S. Karinshak, A. Jarrod Jenkins of Krevolin & Horst LLC and Hays Gorey Jr. of GeyerGorey LLP.

Mercer is represented by R. Gregg Hovious and Daniel W. Redding of Middleton Reutlinger, and Alfreda L. Sheppard, Louis E. Hatcher and Christopher L. Foreman of Watson Spence LLP.

The government is represented by G.F. Peterman III and Todd P. Swanson with the U.S. Department of Justice.

The case is U.S. et al. v. Mercer Transportation Co. Inc., case number 1:13-cv-00108, before the U.S. District Court for the Middle District of Georgia.

--Editing by Jack Karp.

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