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A Radical Overhaul? The Third Circuit Analyzes the Federal False Claims Act's Public Disclosure Bar after the Patient Protection and Affordable Care Act

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TO DISMISS A CASE BASED ON THE PUBLIC DISCLOSURE BAR, THE DEFENSE WILL HAVE TO ESTABLISH THAT THE ALLEGATIONS OF FRAUD ALREADY WERE EXPOSED IN THE NEWS MEDIA OR CERTAIN FEDERAL SOURCES OF INFORMATION.

Pharmaceutical, health care and government contracting companies that have faced federal False Claims Act lawsuits know that they can be high risk, high exposure and high anxiety. Indeed, False Claims Act cases can involve years of costly litigation and the threat of potentially severe penalties.

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One avenue of early defense is to invoke the so-called "public disclosure bar," which prevents a person from pursuing an action based on certain publicly disclosed information unless that person qualifies as an "original source" of the information. After all, the purpose of the False Claims Act is to expose allegedly hidden fraud, not to allow a person to profit off of information potentially already known to the government. *See, e.g., United States ex rel. Springfield Terminal Ry. v. Quinn*, 14 F.3d 645, 649 (D.C. Cir. 1994) (the public disclosure bar attempts to strike a balance between "adequate incentives for whistle-blowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant information to contribute of their own").

In 2010, as part of the Patient Protection and Affordable Care Act (PPACA), Congress weakened the public disclosure bar, expanding the scope of the "original source" exception. And, in February 2016, the U.S. Court of Appeals for the Third Circuit analyzed the new language, which it described as "radically chang[ing]" and "overhaul[ing]" the public disclosure bar, and explained how to apply the revised version. *See United States ex rel. Moore & Co., P.A., v. Majestic Blue Fisheries, LLC,* No. 14-4292, 2016 U.S. App. LEXIS 1729, at *2-9 (3d Cir. Feb. 2, 2016).

The bottom line is that, to dismiss a case based on the public disclosure bar, the defense will have to establish that the allegations of fraud already were exposed in the news media or certain federal sources of information, such as reports, hearings or Freedom of Information Act responses. However, even if there were such public disclosure, a False Claims Act case still will be able to proceed if the person bringing the action contributed additional material information from outside of those public sources.

Moore & Co., P.A., v. Majestic Blue Fisheries, LLC

In *Moore*, a law firm brought a False Claims Act lawsuit against Korean nationals and their LLCs, claiming that the LLCs acquired U.S. fishing licenses by fraudulently certifying that U.S. citizens controlled the LLCs and that U.S. captains commanded their fishing vessels. *See Moore*, 2016 U.S. App. LEXIS 1729, at *1-2. The defendants moved for dismissal, arguing that the law firm's allegations were disclosed in news articles and in Freedom of Information Act responses and that the law firm did not qualify as an original source. The district court granted dismissal, the law firm appealed, and the Third Circuit overturned the dismissal because the Court of Appeals determined that the law firm could be considered an original source.

Public Disclosures Limited to the News Media and *Federal* Sources

Previously, the public disclosure bar applied when "(1) there was a 'public disclosure'; (2) 'in a criminal, civil, or administrative hearing, in a congressional, administrative or [GAO] report, hearing, audit, or investigation, or from the news media'; (3) of 'allegations or transactions' of the [alleged] fraud; (4) that the relator's[1] action was 'based upon'; and (5) the relator was not an 'original source' of the information." *United States ex rel. Paranich v. Sorgnard*, 396 F.3d 326, 332 (3d Cir. 2005) (quoting 31 U.S.C. § 3730 (e)(4)(A)).[2]

The 2010 amendments narrowed the application of the public disclosure bar to disclosures in *federal* sources or in the news media, thus allowing lawsuits based on information publicly disclosed in state and local sources to proceed. Indeed, now,

> to be publicly disclosed, the alleged fraud must have been revealed through at least one of three sources: (1) "a *Federal* criminal, civil, or administrative hearing in which the Government or its agent is a party"; (2) "a congressional, Government Accountability Office, or other *Federal* report, hearing, audit, or investigation"; or (3) "news media."

Moore, 2016 U.S. App. 1729, at *13-14 (citing 31 U.S.C. § 3730(e)(4)(A)(i)-(iii)) (emphasis added).

In *Moore*, the defendants argued that the alleged fraud was disclosed in news articles and in responses to Freedom of Information Act (FOIA) requests, both of which qualify as sources of public disclosures under the statute. *Id.* at *14-16. The Court of Appeals agreed, noting that FOIA responses fit within the category of a "federal report." *Id.* at *16-18.

Having established that information contained in news articles and FOIA responses qualified as public disclosures, the Court of Appeals next considered whether "substantially the same 'allegations or transactions' of fraud" appeared in those sources. *Id.* at *18-22. The Third Circuit previously adopted a formulistic approach to analyze whether a public disclosure qualifies as an allegation or transaction of fraud:

> [I]f X + Y = Z, Z represents the allegation of fraud and X and Y represent its essential elements. In order to disclose the fraudulent transaction publicly, the combination of X and Y must be revealed, from which readers or listeners may infer Z, i.e., the conclusion that fraud has been committed.

United States ex rel. Atkinson v. Pa. Shipbuilding Co., 473 F.3d 506, 519 (3d Cir. 2007) (internal citations and quotations omitted).

Under this analysis, the public disclosure must either provide Z (the allegation of fraud) or both X and Y (the misrepresented facts and the actual facts) from which the fraud can be inferred. *Id.*; *see also United States ex rel. Zizic v. Q2Administrators, LLC*, 728 F.3d 228, 236 (3d Cir. 2013).

In *Moore*, the Court of Appeals concluded that the alleged fraud was publicly disclosed because documents obtained through FOIA requests revealed that the defendants had certified that their LLCs were controlled by U.S. citizens and that U.S. citizens commanded their boats and news reports revealed that this was not the case. *Id.* at *19-22. Thus, the X and the Y of the alleged fraud were publicly disclosed, and the Court of Appeals turned to the final question of whether the law firm's case could be revived through the original source exception.

An Original Source Must Supply Additional Independent and Material Information

The law firm argued that it qualified as an original source under the 2010 amendments because it provided additional details about the fraud that it had acquired through discovery in a federal wrongful death action, such as who was involved and how they initiated and perpetrated the alleged fraud. *Moore*, 2016 U.S. App. 1729, at *22-23. The court agreed.

The court explained that, before the changes in the law, "we had required that a relator's knowledge must be independent not just from information that qualified as a public disclosure under § 3730(e)(4)(A), but also from information readily available in the public domain." *Id.* at *23-24 (citing *Atkinson*, 473 F.3d at 522). Now, however, the new language requires that the "relator's knowledge must be independent of, and materially add to, *not all information readily available in the public domain, but, rather, only information revealed through a public disclosure source in § 3730(e)(4)(A)*."[3] *Id.* at **25* (emphasis added). This interpretation expands who qualifies as an original source. Before, an original source had to have information that was not easily accessible in the public domain. After *Moore*, however, an original source must just have knowledge independent of the information available in the statutorily enumerated sources of public disclosures.

Based on the facts before it, the Court of Appeals held that information acquired through civil discovery was independent of the publicly disclosed information, even though that information was available in the public domain. *Id.* at *27.

The Court of Appeals still had one more step to consider because the information must be independent *and* materially add to what already is publicly disclosed. Noting that it had not previously interpreted the phrase “materially adds,” the Court of Appeals looked to the plain meaning of the words and concluded that “a relator must contribute significant additional information to that which has been publicly disclosed so as to improve its quality.” *Id.* at *27-28.

To answer the question of what kind of information might qualify, the Court of Appeals looked to the Federal Rule of Civil Procedure 9(b) pleading standard: “Specifically, a relator materially adds to the publicly disclosed allegation or transaction of fraud when it contributes information — distinct from what was publicly disclosed — that adds in a significant way to the essential factual background: ‘the who, what, when, where and how of the events at issue.’” *Id.* at *29-30 (internal citation omitted).

Since the law firm added significant details, such as who conducted the fraud, when it started and how it continued, the Court of Appeals concluded that it qualified as an original source in this context. *Id.* at *30-33.

The Next Battleground

Which version of the public disclosure bar applies may mean the difference between an early dismissal and a lengthy and costly court battle. Indeed, if the post-amendment statute applies, state and local reports may no longer qualify as sources of public disclosures, and information in the public domain may be considered “independent” for original source purposes.

Accordingly, for the next few years, the first significant early legal battle in False Claims Act cases may not be whether the public disclosure bar applies, but which version of the public disclosure bar applies.[4]

Practice Tips

If faced with a False Claims Act lawsuit, here are some practice tips to keep in mind:

- Analyze which version of the False Claims Act applies, focusing on the dates of the alleged conduct. If the alleged conduct includes a period of time before the 2010 amendment's effective date, there is an argument that the former version of the statute should apply at least to the alleged violations that occurred before the amendment. *See e.g., United States ex rel. Radcliffe v. Purdue Pharma L.P.*, 737 F.3d 908, 914-918 (4th Cir. 2013); *United States ex rel. Dickson v. Bristol-Meyers Squibb Co. (In re Plavix Mktg., Sales Practices & Prods. Liab. Litig.)*, No. 13-1039, 2015 U.S. Dist. LEXIS 111311, at *884-885 (D.N.J. Aug. 20, 2015).

- Next, explore the sources of the relator's knowledge. For example, did the relator base the complaint on information learned from FOIA requests? FOIA responses are considered federal reports and, therefore, qualifying sources of public disclosures both before and after the amendment.

- Finally, consider making early discovery requests designed to uncover the state of the relator's knowledge *before* bringing the lawsuit. By establishing what information the relator brought to the table, it might be possible to establish that he or she did not contribute anything new and material.

Endnotes

1. In a False Claims Act case, the whistleblower plaintiff is known as a "relator." "The FCA empowers a person, or 'relator,' to sue on behalf of the United States those who [allegedly] defraud the government, and to share in any ultimate recovery." *Moore*, 2016 U.S. App. LEXIS 1729 at *2.

2. Before the law was amended in 2010, the public disclosure bar provided: "No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information." 31 U.S.C. § 3730(e)(4)(A) (2006). Now, it provides: "The court shall dismiss an action or claim under this section, unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed – (i) in a Federal criminal, civil, or administrative hearing in

which the Government or its agent is a party; (ii) in a congressional, Government Accountability Office, or other Federal report, hearing, audit or investigation; or (iii) from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information." 31 U.S.C. § 3730(e)(4)(A) (2012).

3. Before the amendments, an "original source" was defined as "'an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.'" *Paranich*, 396 F.3d at 332 (quoting 31 U.S.C. § 3730(e)(4)(B)). Now, an original source includes one "who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the Government before filing an action under this section." 31 U.S.C. § 3730(e)(4)(B) (2012).

4. Another issue to consider is that, pre-amendment, the public disclosure bar was jurisdictional: "[n]o court shall have jurisdiction over an action under this section based upon the public disclosure…." *See Moore*, 2016 U.S. App. 1729, at *9-10 (citing 31 U.S.C. § 3730(e)(4)(A) (2006)). After the 2010 amendment, however, the bar is no longer jurisdictional, and a motion to dismiss based on the public disclosure bar must be made under Federal Rule of Civil Procedure 12(b)(6), not 12(b)(1). *Id.* at *10-12; 31 U.S.C. § 3730(e)(4)(A) (2012) ("The court *shall dismiss* an action or claim under this section, unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed…") (emphasis added). The effect of this change may include who bears the burden of persuasion and in what context a court may consider information from outside the pleadings. *See Moore,* 2016 U.S. App. 1729, at *10-11, n.4.