

FINANCIAL FRAUD LAW REPORT

VOLUME 2

NUMBER 8

SEPTEMBER 2010

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POSTMASTER: Send address changes to the Financial Fraud Law Report, A.S. Pratt & Sons, 805 Fifteenth Street, NW., Third Floor, Washington, DC 20005-2207. ISSN 1936-5586

Recent Developments Impact the False Claims Act

PETER B. HUTT II

The author analyzes a number of recent developments that will have a large affect on the application of the False Claims Act.

Several concurrent developments, reflecting the government's continued focus on fighting fraud in federal programs, are destined to have a significant impact on the False Claims Act ("FCA"). This article addresses these developments:

- New legislation that narrows the FCA public disclosure defense;
- A new Supreme Court FCA decision that addresses the public disclosure defense;
- Delegation of Civil Investigative Demand authority below the attorney general within the Department of Justice ("DOJ"); and
- Expansion of recovery audits.

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PUBLIC DISCLOSURE DEFENSE NARROWED

The massive new health care reform law includes a little-noticed provision of major importance to the False Claims Act: a wholesale rewrite of the public disclosure provision of the statute. The amendment is not as radical as some legislative proposals introduced in Congress over the past two years, but the amendment significantly narrows the circumstances in which defendants can obtain dismissal of *qui tam* actions that are based on public disclosures.

Background

The public disclosure bar¹ was added to the FCA in 1986 as a means to guard against parasitic lawsuits that were based upon public disclosures of information in certain enumerated ways, including the news media and government hearings, audits, investigations and reports. There was an exception for actions asserted by “original sources,” defined as individuals with direct and independent knowledge of the information who had voluntarily provided their information to the government.

This provision became one of the principal tools available to defendants to seek dismissal of *qui tam* actions. Because the bar was jurisdictional, defendants could seek early targeted discovery into public disclosure issues and avoid expensive discovery on the merits. *Qui tam* plaintiffs’ attorneys for years complained that the public disclosure defense should be weakened, principally on the grounds that (1) it permitted dismissal of *qui tam* cases that were meritorious; (2) it was poorly drafted and, thus, allowed judges leeway to dismiss cases that should have gone forward; and (3) the decision whether a *qui tam* suit based on public disclosures should proceed should be decided by the Department of Justice (“DOJ”), not defendants or the courts.

At the behest of *qui tam* attorneys, several bills were introduced over the past two years that would have effectively killed the public disclosure bar. These bills would have provided that only the DOJ could seek dismissal of a lawsuit on public disclosure grounds. As a practical matter, the DOJ would not have the resources, the information or the incentive to seek dismissal of *qui tam* actions based on public disclosures.

Current Amendments to Public Disclosure Bar

The current public disclosure law was first introduced in December 2009 as part of the Senate health care bill that was finally signed into law on March 23, 2010. As amended, the bar now reads as follows:

(4)(A) 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.

(B) For purposes of this paragraph, “original source” means an individual who either

(i) prior to a public disclosure under subsection (e)(4)(A), has voluntarily disclosed to the Government the information on which the allegations or transactions in a claim are based, or

(ii) 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 the action.

Several features of the new bar are important to understand:

- *Defendants Can Still Raise Defense.* Perhaps most importantly, the law did not strip defendants of their ability to raise the public disclosure bar as a defense. Defendants can still seek dismissal of *qui tam* suits on public disclosure grounds.

- *Not Jurisdictional*. The bar is no longer labeled as jurisdictional in nature. This means that it will be more difficult for defendants to seek early targeted discovery on public disclosure issues. Courts may not be able to raise the issue *sua sponte*, and defendants are less likely to be able to seek interlocutory review of an adverse public disclosure ruling.
- *Department of Justice Veto*. The statute attempts to provide the DOJ with a veto over any defendant's motion to dismiss on public disclosure grounds. It is not entirely clear, though, what government actions will serve to meet the new test of "opposed by the Government." One reading might be that "opposition" requires intervention.
- *Public Disclosures Narrowed to Federal Disclosures*. The list of qualifying "public disclosures" has been narrowed to unambiguously exclude disclosures made in state (as opposed to federal) investigations, hearings, reports and audits. This resolves the issue that the Supreme Court considered in *Graham County v. United States ex rel. Wilson*⁴ and effectively overrules that decision.
- *Public Disclosures Do Not Include Private Litigation*. Disclosures would need to be made in a federal proceeding in which "the Government or its agent is a party." This means that disclosures in private litigation in federal court would not qualify as triggering disclosures.
- *"Based Upon" Inquiry Tightened*. The prior public disclosure bar required a showing that the *qui tam* action was "based upon" public disclosures, and most courts required only that the allegations be "similar to" the publicly disclosed information. The new law requires that the allegations be "substantially the same" as the publicly disclosed information, which courts may view as a tighter nexus requirement.
- *Original Source Exception Broadened*. The "original source" exception no longer requires relators to have "direct and independent" knowledge of publicly disclosed allegations. The new law has two prongs. One is met if the relator discloses information to the government before the

public disclosure. The other prong is met if the relator has knowledge independent of the disclosure that “materially adds” to the disclosed information and that is voluntarily provided to the government before the *qui tam* suit is filed. This latter prong is a substantial erosion of prior law, because it permits a *qui tam* plaintiff to go forward after a clear public disclosure, as long there is some unspecified amount of “material” new information.

- *Retroactivity Not Clear.* Congress did not indicate whether the changes to the public disclosure bar should operate retroactively. But the Supreme Court’s recent FCA decision (discussed below) has already answered part of this question, holding that the new law does *not* apply to cases pending as of the date of enactment. The Supreme Court did leave open one question: whether the new law applies retroactively to conduct that predates the law’s enactment where no *qui tam* case is pending. Defendants will obviously argue that the law should not apply retroactively to any such conduct, but relators’ counsel may contend otherwise.
- *Ultimate Effect.* The goal of the legislation is unambiguous: to permit *qui tam* suits to go forward that previously would have been dismissed. This will have the effect of encouraging *qui tam* suits that, in the past, might not have been filed. An uptick in the number of *qui tam* filings can be anticipated.

NEW SUPREME COURT DECISION CONCERNING PUBLIC DISCLOSURE BAR

On March 30, the Supreme Court issued a decision construing the “old” version of the public disclosure bar. The ruling will not apply to the new law, but is still relevant for pending cases and possibly prior conduct.³ The question presented was whether the bar is triggered by a public disclosure made in a state and local “administrative...report, hearing, audit, or investigation,” or whether the disclosure must be in a federal source. In a 7-2 decision, Justice Stevens relied upon the statutory text to find that the term “administrative” is not limited to federal sources, and, therefore,

a public disclosure in a state or local report, hearing, audit, or investigation would suffice to trigger the bar.

As noted above, the statutory text of the new law clearly provides the contrary — a public disclosure triggers the bar only if in a “Federal” report, hearing, audit or investigation.

CID AUTHORITY DELEGATED

Last year’s amendments to the FCA in the FERA statute authorized the attorney general to delegate the authority to issue Civil Investigative Demands (“CIDs”). After almost a year, the extent of delegation is now clear.

As of January 10, the attorney general delegated authority to issue CIDs to the assistant attorney general for the Civil Division, and, as of March 24, 2010, this authority was re-delegated to the U.S. Attorneys in FCA cases they are assigned or delegated.⁴ Authority was not delegated below the U.S. Attorney level, as some had feared. U.S. Attorneys are required to provide notice and reports to the assistant attorney general of CID use. When cases are jointly handled by the Civil Division and a U.S. Attorney’s office, the Civil Division must consult with the U.S. Attorney before issuing a CID.

RECOVERY AUDITS AUTHORIZED BEYOND HEALTHCARE

The White House issued a Presidential Memorandum on March 10, directing all federal agencies to expand their use of payment recapture audits to locate and recover “improper payments.” This type of audit program has been used by Medicare in the form of a recovery audit contractor program. In essence, private contractors are hired to identify payments that are made in error or that are due to fraud, waste and abuse, and the contractors are compensated (in part) based on the amount of improper payments they identify or recover.

The expansion of recovery audits beyond Medicare will take some time to implement. But it could lead to significant additional activity in many areas of federal procurement, including construction and defense procurement.

NOTES

¹ 31 U.S.C. 3730(e)(4).

² No. 08-304 (March 30, 2010).

³ *See Graham County v. United States ex rel. Wilson*, No. 08-304, at n.1 (March 30, 2010).

⁴ *See* Fed. Reg. 14,070 (March 24, 2010).