

Four False Claims Act Rulings That Deter Meritless FCA Actions

False Claims Act Alert

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Health industry practice lawyers from Akin Gump Strauss Hauer & Feld LLP have represented clients in four groundbreaking False Claims Act (FCA) court decisions issued during 2011. Each decision creates significant roadblocks to the government's and purported whistleblowers' ability to maintain meritless FCA actions. Specifically, these decisions will—

- limit alleged whistleblowers' ability to institute FCA *qui tam* actions by parroting information in the public domain when they lack firsthand knowledge of the allegations
- restrict the government and whistleblowers from successfully suing consultants and other vendors to health care providers for allegedly "causing" these providers to retain overpayments when the third party knows nothing more than that the health care provider has possession of the funds
- curb the government's ability to sue health care entities under the FCA when the government, or its contractors, had previously reviewed and approved the underlying claims
- empower FCA defendants to recover their reasonable attorneys' fees when they are subjected to frivolous *qui tam* actions.

***United States ex rel. Jamison v. McKesson Corp.*¹: Whistleblowers' Ability to File Parasitic, Industrywide Qui Tam Actions Substantially Hampered**

In *Jamison*, Akin Gump represented Golden Living, a successor company to Beverly Enterprises, Inc., which, during the relevant time period, operated the country's largest skilled nursing facility chain and its affiliate Ceres Strategies Medical Services LLC (CSMS), an enteral nutrition supplier.

In *Jamison*, the purported whistleblower ("relator") operated a durable medical equipment (DME) company that supplied enteral nutrition to nursing home patients. He believed that more than 400 defendants, including nursing homes and DME suppliers that competed against his company, violated the FCA and the Anti-Kickback Law² because, according to the relator, the nursing homes created "sham" DME supply companies that, in turn, formed improper joint ventures with other companies to provide supplies to nursing home patients and profit from those services.

¹ 649 F.3d 322 (5th Cir. 2011).

² 42 U.S.C. § 1320a-7b.



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The relator, in his initial complaint, failed to plead any specific facts concerning Beverly's or CSMS' alleged unlawful practices. Instead, he only referred to generic practices occurring within the industry. In an amended complaint, the relator included some additional details regarding his allegations based upon his post-filing "investigation" and noted that the generic practices he identified were similar to those the Department of Health and Human Services Office of Inspector General (OIG) described in a Special Advisory Bulletin regarding suspect contractual joint ventures.

Because it appeared, from the face of his amended complaint, that the relator modeled his action after the practices the OIG described in its Bulletin, the defendants moved to dismiss the relator's action for lack of jurisdiction under the FCA's public disclosure bar, which prohibits actions based upon specified types of publicly disclosed information unless the relator qualifies as an "original source," meaning, among other things, that the relator has direct, firsthand knowledge of the allegations. The defendants also immediately sought discovery to learn whether the relator's action was, in fact, based upon public disclosures and, if so, whether the relator could qualify as an original source. When, in discovery, the relator was deposed, he admitted that, after reading the OIG Bulletin, he searched public records to identify potential defendants that fit the pattern identified in the OIG Bulletin and named those 400 companies and individuals in his lawsuit. The relator's deposition also demonstrated that he had no firsthand knowledge regarding how any defendant actually operated its business. This fact was not surprising because the relator had never been employed by, or contracted with, any defendant nor was he ever in a position to review any of its internal documents.

As a result of these facts, the district court granted the defendants' motion to dismiss.³ The court ruled that the "very essence of the [relator's] allegations" had been publicly disclosed in multiple governmental administrative reports. Moreover, although the governmental reports did not name specifically the defendants, the court found that "the Government would not face great difficulty in identifying possible perpetrators from these disclosures" inasmuch as, among the 400 defendants the relator sued, were "the largest nationwide skilled nursing facility chain [defendant Beverly] and its associated DME supplier [defendant CSMS]."

The 5th Circuit affirmed the district court's dismissal and, in so doing, erected two significant principles of FCA law. First, the court ruled that courts, to determine whether the public disclosure bar is triggered, must compare the relator's initial complaint (as opposed to amended complaint) with information in the public domain. The court based its ruling upon the principle that a court must assure itself that it possesses jurisdiction over the lawsuit at each stage of the proceeding and, thus, cannot merely review the amended complaint, which otherwise would be the operative complaint in the action. This ruling is significant because relators will typically learn facts and evidence from the Department of Justice (DOJ) after they file their initial action and then use that information to amend their complaint. By applying its jurisdictional analysis to the original complaint, the court appropriately focused its attention on the complaint that would best reveal whether the relator actually contributed any useful evidence to the government and not simply managed to learn information from DOJ as that department investigated the relator's allegations.

Second, the 5th Circuit ruled that even though the public disclosures, by themselves, "likely are not sufficient publically to disclose allegations" because they described generic practices and did not identify the names of specific defendants, the public disclosure bar, nonetheless, was triggered because "for the public-disclosure bar to apply, the publicly disclosed allegations or transactions need only be as broad and as detailed as those in the relator's complaint, because that is all that is needed for the action to be 'based on' the publicly disclosed allegations." Thus, inasmuch as the relator's original complaint, which named almost 450 defendants, "included no allegations specific to the defendants, but merely repeated a general description of fraud easily available in several government documents," the court ruled that the FCA's public disclosure bar was triggered. Additionally, the court pointed out that if the rule were otherwise "a *qui tam* relator could arbitrarily select a large group of defendants in any industry in which public disclosures have revealed significant fraud, in hopes that his allegations will prove true for at least a few defendants," and the court would not "countenance such relator lotteries, which are quintessentially parasitic suits by opportunistic late-comers who add nothing to the exposure of fraud and which the public disclosure bar is designed to prevent."

³ For the district court's decision, see *United States ex rel. Jamison v. McKesson Corp.*, 2010 U.S. Dist. LEXIS 28562 (N.D. Miss., Mar. 25, 2010).

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As *qui tam* actions continue to proliferate and relators are tempted to sue substantial segments of entire industries based upon novel interpretations of generic governmental reports, the 5th Circuit's decision establishes important precedent barring *qui tam* actions when the relator's initial complaint is substantially similar to publicly disclosed governmental guidance, and the relator does not contribute any firsthand information to substantiate his allegations.

***United States ex rel. Huey vs. Summit Healthcare Ass'n, Inc.*⁴: Relator's Ability to Sue Third Party Consultant Limited**

In *Huey*, Akin Gump represented Brim Healthcare, which provided management services, including chief executives, to hospitals, including codefendant Summit Healthcare Association.

In *Huey*, the *qui tam* plaintiff was a former CFO at Summit's hospital. He alleged that Brim, the hospital management company, had conducted an audit of the hospital's billing practices to prepare the hospital for the Centers for Medicare and Medicaid Services (CMS) Recovery Audit Contractors audit and identified a substantial Medicare overpayment. The relator further contended that, rather than report and repay the Medicare overpayment, the hospital management company and hospital conspired, through the acts of the Brim-installed chief executive and hospital board members, to keep the overpayment hidden from the government.

Brim moved to dismiss the relator's action under Fed. R. Civ. P. 12(b)(6). Specifically, Brim pointed out that, even if the relator's allegations were true, there was no FCA violation because for FCA exposure to exist, one must either "present" or "cause" another to present a false claim. Here Brim, as a management company, did not "present" any false claim to the government (only the hospital presented claims) and did not "cause" the hospital to present any false claim because, even if it had known that the hospital may be holding a Medicare overpayment, it did not "cause" the hospital to retain the overpayment because it took no action to compel the hospital to retain those funds. The district court concurred, ruling that a third party's mere knowledge that another party may be committing fraud, without more, does not result in an FCA violation.

Consultants or other vendors to health care providers frequently learn that those providers have conducted preliminary audits or reviews indicating that some potential Medicare or Medicaid overpayment may exist. The court's ruling establishes important precedent protecting these third parties from potentially crippling FCA liability when they merely know that a health care provider for whom they work may be retaining, or merely possess, a potential overpayment.

***United States ex rel. Jamison v. McKesson Corp.*⁵: DOJ Barred from Filing FCA Actions After CMS' Contractors Found that the Provider's Conduct Conformed to Law**

In *Jamison*, as noted above, Akin Gump represented Beverly Enterprises and an affiliated DME supply company, CSMS. Although the district court dismissed the relator from the action under the public disclosure bar, which the 5th Circuit later affirmed, the lawsuit continued against defendants because the United States intervened in the action on the relator's behalf. Recently, the district court, on summary judgment, dismissed a substantial portion of the government's case.

In *Jamison*, the government alleged that defendants knowingly submitted, or caused to be submitted, false claims because CSMS did not operate in compliance with Medicare's DME Supplier Standards. While the government's lawsuit was pending, CMS' agent, National Suppliers Clearinghouse (NSC), twice revoked CSMS' billing privileges on the grounds that CSMS allegedly failed to comply with Medicare's DME Supplier Standards. On both occasions, CSMS appealed NSC's determination and, on both occasions, CSMS prevailed during the administrative proceedings.

⁴ 2011 U.S. Dist. LEXIS 26740 (D. Ariz. Mar. 2, 2011).

⁵ 784 F. Supp. 2d 664 (N.D. Miss. 2011).

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As a result of the administrative proceedings, CMS even paid CSMS' claims for the time period in which CSMS' billing privileges had been revoked.

Based upon these administrative findings, CSMS and Beverly immediately moved the district court to dismiss the government's allegation that CSMS not only operated in non-compliance with the Supplier Standards but that it **fraudulently** operated out of compliance with those Supplier Standards, noting that the government's theory in the FCA case could not be squared with CMS' administrative determinations.

The district court concurred. The court pointed out that the government, to prove an FCA violation, must show that defendants' certification that it complied with the Supplier Standards was "objectively" false. As proof that DOJ could never establish objective falsity in this case, the court pointed out that the NSC and CMS possessed a different interpretation than DOJ regarding the scope of the Supplier Standards, and, thus, ultimately DOJ's "contention here rests not on an objective falsehood, as required by the FCA, but rather on its subjective interpretation of Defendants' regulatory duties."⁶

The district court's dismissal will establish important precedent limiting DOJ's ability to assert an FCA violation if the government agency that processed the health care claims, or its contractors, had previously reviewed and approved defendants' claims.

In Re Natural Gas Royalties Qui Tam Litigation: Defendants Empowered to Recover Attorneys' Fees When Relators File Frivolous Qui Tam Actions⁷

In *In re Natural Gas Royalties Qui Tam Litigation*, Akin Gump represented ExxonMobil in a *qui tam* action alleging that more than 300 energy companies submitted or caused the submission of false statements by mismeasuring the value of natural gas on federal lands. The defendants moved to dismiss the relator because his action was based upon public disclosures, and the relator, who was never an employee of the more than 300 companies he sued, could not qualify as an "original source."

During discovery regarding whether the relator possessed sufficient firsthand knowledge regarding the allegations to qualify as an original source, the defendants learned that the relator possessed absolutely no evidence to support his claims other than rank speculation. For example, as the "material evidence" that the relator is statutorily required to provide the government, the relator's purported evidence did not even mention more than 200 of the 300 defendants he sued and, as to the other 100, the purported evidence consisted of little more than handwritten notes regarding "cold calls" relator's representatives had made to company representatives seeking information regarding how those defendants measured gas.

A relator possesses a perverse incentive under the FCA to name as many defendants as possible because—like a person holding lottery tickets—the more that are included, the greater the likelihood that the person might hit the jackpot and obtain a substantial recovery. Perceiving that this type of abuse would likely exist, Congress enacted a fee-shifting provision within the FCA to protect innocent parties from abusive *qui tam* actions. Specifically, the FCA's fee-shifting provision authorizes defendants to obtain their reasonable attorneys' fees if they show that the relators' action is clearly frivolous, clearly vexatious or brought primarily for purposes of harassment.

Because of the relator's demonstrated lack of knowledge, after the district court's dismissal of the *qui tam* action, Akin Gump was selected to file a motion under the FCA's fee-shifting provision for defendants' attorneys' fee on behalf of more than 300 companies the relator sued. The district court granted defendants' motion, finding that the relator's

⁶ Because of the FCA's relatively low standard of proof and the government's high credibility in bringing lawsuits, it is extraordinarily rare for companies to prevail against the government at summary judgment in FCA lawsuits, with usually, on average, fewer than one such case per year appearing in the published case law. Akin Gump now has two such victories. *See also United States v. Prabhu*, 442 F. Supp. 2d 1008 (D. Nev. 2006).

⁷ *See In re Natural Gas Royalties Qui Tam Litigation*, No. 99-MD-1293 (W.D. Wyo. July 22, 2011).

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“sweeping allegations of fraud” were based upon little more than rank speculation and that relator’s claim to possess firsthand knowledge, and thus qualify as an original source, was clearly frivolous.

Congress empowered private individuals to file lawsuits on the government’s behalf and to obtain a substantial share of the government’s proceeds in exchange for the relators’ breaking “the conspiracy of silence” and contributing valuable firsthand, insider evidence of fraud to the government. The district court’s decision will deter relators from (i) invoking the FCA for illegitimate purposes by abusing their statutory privilege to sue on the government’s behalf and (ii) distorting the intent of the legislation by filing frivolous lawsuits against hundreds of defendants based upon publicly available information rather than valuable, inside information.

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