PUBLIC DISCLOSURE BAR DEFENSE UNDER FALSE CLAIMS ACT JEOPARDIZED BY RECENT FEDERAL AMENDMENTS

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The "public disclosure" bar under the False Claims Act ("FCA") recently spelled defeat for the whistleblower plaintiff in *U.S. v. McKesson Corp.*[1] In this action, which arose under the FCA's *qui tam* provisions, a federal court in Mississippi granted summary judgment in favor of McKesson and the other defendants after finding that the claim brought by the *qui tam* – whistleblower – plaintiff was based on publicly disclosed information and that he was not the original source of that information. During the relevant period for this ruling, the jurisdictional bar under the FCA provided a solid defense mechanism for companies defending *qui tam* lawsuits brought by "parasitic" whistleblowers.

Recent amendments to the public disclosure bar provision of the FCA, however, may have severely narrowed a company's future ability to rely on this defense. Specifically, the Patient Protection and Affordable Care Act ("PPACA"), which was signed into law by President Obama on March 23, 2010, fundamentally altered this statutory provision in several different ways. First, the term "publicly disclosed" now includes only information from federal sources and the news media, not state or local proceedings.[2] Second, the "original source" exception has been expanded to include persons who have knowledge that is "independent of and materially adds" to publicly disclosed information.[3] And, third, the Department of Justice has been given significant discretion to oppose the dismissal of *qui tam* actions even if they are based on "substantially the same allegations or transactions" that have already been publicly disclosed.[4]

Background

The FCA provides the federal government with an increasingly used method for combating fraud through the reporting actions of independent whistleblowers. Generally, under the *qui tam* provisions of the FCA, private citizens – relators – may bring a lawsuit on behalf of the federal government against any person who "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval" to the U.S. government.[5] Relators are highly incentivized to bring such actions because they can receive between 15 to 25 percent of the federal share of civil recovery in successful actions.[6] Since January 2009, the Department of Justice's total recoveries under the FCA have topped $3 billion, nearly $2.3 billion of which related to cases involving fraud against federal health care programs.[7]

U.S. v. McKesson

In *U.S. v. McKesson Corp.,* the Department of Justice intervened in a *qui tam* whistleblower suit under the FCA. The relator's action alleged that McKesson Corp. and other defendant entities formed an improper joint venture by setting up a "sham" durable medical equipment supplier under the control of one of the defendant entities, a skilled nursing facility chain.[8] This suit further alleged that another defendant entity had been created solely to provide durable medical equipment supplies and service to the captive patient base of these skilled nursing facilities. Finally, the relator alleged that the defendants violated the FCA by failing to conform to the 21 federal supplier standards established for the regulation of durable medical equipment suppliers. In addition to denying the foregoing allegations, the defendants also filed motions to dismiss claiming that the court lacked

subject matter jurisdiction over the relator's claims because his complaint was based on publicly disclosed allegations and transactions and because he was not the original source of the information.

Ruling in favor of defendants' motions to dismiss, which were analyzed via summary judgment, the court applied the following three prong statutory test: (1) were the allegations or transactions "publicly disclosed"; (2) was the action "based on" publicly disclosed allegations; and (3) was the relator the "original source" of the information.[9] Regarding the first prong, the court found that the allegations had been "publicly disclosed" because there were disclosures by a variety of sources that placed the "very essence of the allegations" into the public domain; and because the government "would not face great difficulty in identifying possible perpetrators" from these disclosures.[10] Secondly, the court found that the allegations in the public disclosures were substantially similar to those in the relator's complaint and, therefore, determined that the suit was based upon public disclosures.[11] Thirdly, the court determined that the relator was not the "original source" of the information on which the complaint's allegations were based because he failed to demonstrate that he had direct and independent knowledge of such information.[12] Accordingly, the court ruled that it did not have jurisdiction over the relator's action and granted summary judgment in favor of the defendants.

Recent FCA Amendments

Although courts may continue applying a similar test to the one utilized in *McKesson*, the recent FCA amendments under the PPACA seem to have fundamentally altered the statutory scope of the three prongs. As a result, future defendants will likely have a more difficult time invoking the public disclosure bar as a defense to certain *qui tam* suits.

Narrowing of "Publicly Disclosed"

Previously, courts did not have jurisdiction over FCA actions based upon the "public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional administrative, or Government [General] Accounting Office report, hearing, audit, or investigation, or from the news media," unless these actions were brought by the U.S. Attorney General or the relator was the original source of the information. As a result of the PPACA, however, the FCA now defines the term "publicly disclosed" to include only federal information sources and the news media, not state or local proceedings.[13] This represents a broadening of the types of disclosures that *qui tam* plaintiffs may rely on and likely restricts a company's future ability to invoke the public disclosure bar.

Expansion of "Original Source" Exception

The PPACA also changed the definition of original source, removing the requirement that an individual have "direct and independent knowledge" of the information underlying the allegations. Now, the term "original source" includes an individual who has "knowledge that is independent of and materially adds to the publicly disclosed" information.[14] Consequently, this expanded definition seems to further restrict a company's future ability to use the public disclosure bar as a jurisdictional defense and will likely increase the volume of FCA litigation.

Justice Department Discretion

Previously, the FCA empowered courts to impose a jurisdictional bar on *qui tam* actions based on public disclosures. Under the amended FCA, however, the Department of Justice has significant discretion in determining whether such actions should proceed. Specifically, the FCA now empowers courts to dismiss *qui tam* actions or claims if they are based on substantially the same information that has been publicly disclosed, *unless opposed by the government.*[15] The Department of Justice may, therefore, decide to oppose the dismissal of *qui tam* suits whenever it deems fit. Very likely, the government will utilize this newly-given discretion on a case-by-case basis in an effort to comport with its prosecutorial needs and goals.

Conclusion

The FCA amendments under the PPACA continue the government's recent trend of easing restrictions for *qui tam* suits and increasing the powers of federal prosecutors. Although it remains to be seen how these changes will play out in court, a company's future ability to rely on the public disclosure bar defense seems to have been severely narrowed. As a result, certain *qui tam* lawsuits that previously would have been jurisdictionally barred may now proceed and contribute to increased FCA litigation.

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[1] *See U.S., ex rel, Jamison v. McKesson Corp., et al.*, No. 2:08CV214-SA-DAS, 2010 WL 1276712 (N.D. Miss. Mar. 25, 2010). On May 27, 2010, the whistleblower plaintiff appealed the district court's decision to the U.S. Court of Appeals for the Fifth Circuit.

[2] 31 U.S.C. § 3730(e)(4)(A).

[3] 31 U.S.C. § 3730(e)(4)(B).

[4] *See supra* note 2.

[5] 31 U.S.C. § 3729(a)(1).

[6] 31 U.S.C. § 3730(d)(1).

[7] *See* Press Release, U.S. Dep't of Justice, *Novartis Vaccines & Diagnostics to Pay More Than $72 Million to Resolve False Claims Act Allegations Concerning TOBI* (May 4, 2010), *available at* http://www.justice.gov/opa/pr/2010/May/10-civ-522.html.

[8] *See U.S. v. McKesson Corp.*, 2010 WL 1276712, at *1.

[9] *Id.*, at *2.

[10] *Id.*, at *7.

[11] *Id.*, at *11.

[12] *Id.*, at *14.

[13] *See supra* note 2.

[14] *See supra* note 3.

[15] *See supra* note 2.