COURT STRIKES ALLEGATIONS WHISTLEBLOWER LEARNED THROUGH DISCOVERY AND DISMISSES CLAIMS

In *United States of America and the State of Florida, ex rel. Bingham v. HCA, Inc.*, the employee of a medical office building management firm filed suit against a national health care system in the U.S. District Court for the Southern District of Florida. The lawsuit included allegations relating to one of the defendant's hospitals on the campus of which was a medical office building with parking. The whistleblower claimed that physicians who were tenants in the office building received significant financial benefits from a complex arrangement involving the building and its parking. Through the arrangement, the whistleblower claimed, the defendant "purposefully obscured the remuneration it paid to physicians to induce them to refer patients" to its hospitals and that the defendant subsequently submitted fraudulent claims from those referrals to the government. The remuneration, according to the whistleblower, violated both the Stark Statute[1] and the Anti-Kickback Statute.[2]

In a prior order in the case, the district court had dismissed the claims related to the hospital for failure to state a claim on which relief could be granted (but allowing certain claims relating to a separate medical center to proceed). Specifically, at least with respect to the hospital, a prior amended complaint had not identified the specific alleged fraudulent acts, who engaged in them and when they occurred.

But after learning additional information through discovery, the whistleblower amended his complaint with new allegations hoping to resurrect the claims related to the hospital. In a ruling that appears to be a first, the district court concluded that an amended pleading could not include information obtained only through discovery. The court's conclusion rested principally on a prior decision of the U.S. Court of Appeals for the Eleventh Circuit,[3] which, the district court wrote, "warned of a situation where 'a plaintiff does not specifically plead the minimum elements of their allegation, [and is able] to learn the complaint's bare essentials through discovery and may needlessly harm a defendants' goodwill and reputation by bringing a suit that is, at best, missing some of its core underpinnings and, at worst, are baseless allegations used to extract settlements.'" Quoting again from the Eleventh Circuit decision, the district court added that this is particularly problematic for lawsuits brought under the False Claims Act, which "provide a windfall for the first person to file…" From a policy perspective, this concerned the court because the government's decision whether to intervene will have already been made, and it would have "been compelled to decide whether or not to intervene absent complete information about the relator's cause of action." The court further noted that allowing a whistleblower to amend his pleadings based on information obtained through discovery would use the filing of a False Claims Act case as a "pretext to uncover unknown wrongs," thereby creating for the whistleblower (who is not required to suffer an actual injury) a potential windfall.

Because the court concluded that information obtained through discovery should be stricken from the amended pleading, the court dismissed the rest of the complaint because it suffered from the "same infirmities" as the prior pleading, i.e., the lack of specific facts supporting his allegations of fraud.

PRACTICAL TAKEAWAY

It has long been the case that the False Claims Act required independently obtained knowledge of fraud on the government in order to maintain a claim. The court's decision in *Bingham* reflects that requirement, but it extends the principle to impose a higher bar. Together with the requirement that fraud claims be pleaded with particularity, the *Bingham* decision, if widely followed, would present a significant additional hurdle for future qui tam relators.

If you have any questions, please contact Jonathon A. Rabin at jrabin@hallrender.com or (248) 457-7835 or your regular Hall Render attorney.

[1] 42 U.S.C. § 1395nn

[2] 42 U.S.C. § 1320a–7b

[3] *US ex rel. Clausen v. Laboratory Corp. of America, Inc.*, 290 F.3d 1301, 1313 n. 24