FALSE CLAIMS ACT UPDATE – PUBLIC DISCLOSURE AND ORIGINAL SOURCE

Several FCA opinions have been issued since the last FCA Update. The most interesting is a District of Nevada case, US ex rel Guardiola v Renown Health. Renown Health was the parent company for two other corporate defendants that provided acute health care services. The relator was Renown's Director of Clinical Compliance. She alleged Renown improperly billed "zero-day stays" and "one-day stays" as inpatient encounters. These stays were also reported in a Recovery Audit Contractors ("RAC") audit. Renown shared the RAC audit results both internally and with non-employee Renown physicians and their staff.

The defendants moved to dismiss for lack of jurisdiction, arguing that the RAC audit and their disclosure of that audit outside the company constituted public disclosures and that the relator was not an original source.

The court first determined that, while the claims at issue pre-dated the 2010 amendments to the FCA, the case was filed after those amendments; therefore, the 2010 version of the public disclosure bar applied to the motion. The statute, as amended, states that:

The court shall dismiss an action or claim . . . if substantially the same allegations or transactions as alleged in the 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). There was no question that the RAC audit constituted an "other Federal ... audit." The question was whether the audit was publicly disclosed. Renown argued that it was, as the results of the audit were shared with individuals outside the company, specifically including over 500 doctors connected to, but not employed by, Renown. The court based its rejection of Renown's argument upon a prior ruling by 9th Circuit in *US ex rel. Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512, 1518 (9th Cir. 1995), *overruled on other grounds by Hughes*, 520 U.S. 939). In *Schumer*, the circuit court found that "[u]nder a 'practical, commonsense interpretation' of the jurisdictional provisions, information that was 'disclosed in private' has not been publicly disclosed." *Id*. at 1518 (citations omitted). The trial court found that the the doctors told about the RAC audit were "economically linked" to Renown and had an economic incentive to keep the information confidential; therefore, they were not outsiders and there was no public disclosure.

As a result of the *Guardiola* case, which is not binding but may be considered persuasive by other courts, providers in receipt of negative RAC audit results may wish to consult with counsel to determine if and how those results might be made public in a way that will prevent parasitic lawsuits.

The only recent circuit court case was also a public disclosure/original source case, US ex rel Schumann v Astrazeneca, ___ F.3d ___, Oct. 20, 2014 (3d Cir. 2014). Schumann was a former executive with Medco, a pharmacy benefit manager. He alleged that the defendants, AstraZeneca and Bristol-Myers Squibb, gave Medco rebates and educational funds in exchange for favorable treatment of their pharmaceuticals but failed to include those payments in its required best prices report to the government.

Schumann did not challenge the defendants' claim that the claims against Bristol-Myers Squibb were based on publicly disclosed information, but as to both defendants, he claimed he was an original source of the information. An original source must have direct and independent knowledge of the underlying allegations. 31 USC . § 3730(e)(4)(b)(1986). (The court applied the pre-2010 version of the statute, as the case was originally filed prior to the amendment.) Schumann argued that he had direct knowledge because he learned the information by reviewing existing agreements and internal documents, discussing those documents with colleagues and by comparing the terms of agreements to those he had previously seen. He argued he had independent knowledge because he concluded, based upon his own experience and expertise, as well as the information he learned both from his own investigation and other publicly disclosed information, that kickbacks had been paid and best price statutes ignored.

The court began its analysis by noting that direct and independent knowledge are two distinct requirements. The first, direct knowledge, must be obtained "without any 'intervening agency, instrumentality, or influence.'" *Id*. at p. 16, citation omitted. The second, independent knowledge, "cannot be merely dependent on a public disclosure." *Id*. (citation omitted).

The court found, first, that Schumann did not have direct knowledge when it was gained "by reviewing files and discussing the documents therein with individuals who actually participated in the memorialized events." *Id*. at 20. It then rejected the argument that independent knowledge could be demonstrated by the application of expertise to publicly disclosed information. *Id*. at 21.

In summary, the 3rd Circuit found that a relator could not make himself an original source by conducting his own internal investigation and reaching his own conclusions. Rather, he had to be an actual participant in, or observer of, the underlying acts themselves.

It is important to note that the FCA, as amended in 2010, no longer includes the direct knowledge requirement. The amended version of the statute defines an original source, in relevant part, as one "who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions." It is not clear whether an investigation, such as that performed by Schumann, would be barred as indirect; however, his conclusions would still not qualify as independent knowledge.

Should you have any questions regarding the False Claims Act or defense against whistleblower actions, please contact:

- David B. Honig at dhonig@hallrender.com or (317) 429-1447;
- Drew B. Howk at ahowk@hallrender.com or (317) 429-3607; or
- Your regular Hall Render attorney.