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FOURTH CIRCUIT ADDRESSES EXPANDED DEFINITION OF "ORIGINAL SOURCE"

In 2010, the False Claims Act ("FCA") was extensively amended to limit the public disclosure bar and to expand the ability of whistleblowers to qualify as "original sources" in *qui tam* litigation. This month, the Fourth Circuit Court of Appeals took an in-depth look at both provisions, in the case US ex rel. Moore & Co. v Majestic Blue Fisheries. Moore & Company, P.A., was a law firm that prosecuted a wrongful death case against Majestic Blue. During discovery in that lawsuit, the law firm learned details about Majestic Blue's business practice. In particular, Moore learned that Majestic Blue hired Americans to present themselves as fishing boat captains, though they were not actually captains of those boats, to allow the company to qualify for federal fishing licenses. Moore brought an FCA lawsuit against Majestic Blue based upon that information. Majestic Blue moved to dismiss based upon the public disclosure bar, arguing that (a) stories about the use of Americans as shills for foreign captains had previously been published and (b) much of the information Moore relied upon came from Freedom of Information Act disclosures. The court began by comparing the 1986 FCA amendment, which first introduced the public disclosure bar to the 2010 amendment. The 1986 amendment read:

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in [i] a criminal, civil, or administrative hearing, [ii] in a congressional, administrative, or Government Accounting Office 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.

The 2010 amendment significantly changed that language. It read:

> *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.

JURISDICTIONAL BAR OR FAILURE TO STATE A CLAIM?

First, the court noted that the language changed the "public disclosure" bar so that it was no longer a jurisdictional question. For a legal practitioner, this is significant, for it means that a challenge under the bar must be brought under Fed.R.Civ.P. 12(b)(6), not 12(b)(1), and can only be asserted prior to filing an answer.

PUBLIC DISCLOSURE

The court next considered whether the disclosures identified by Defendants were "public disclosures," as contemplated by the statute. At issue were two internet news reports and a FOIA response. Relying upon Schindler Elevator Corp. v. U.S ex rel. Kirk, the court ruled that the written agency response to a FOIA request, including the responsive documents, constituted a "federal report" for the purposes of the FCA. The court next compared the information in the FOIA response and the two internet reports to conclude that the transaction at issue was publicly disclosed

ORIGINAL SOURCE

Moore was counsel in a wrongful death suit on behalf of a Majestic Captain who was lost at sea. During discovery in that action, Moore deposed Majestic principals and learned details about its business dealings. Moore learned of the fraud already publicly disclosed, but it also learned the details of how that fraud occurred. Moore claims to be an original source for that detail. The Court agreed. The 1986 amendments to the FCA defined "original source" as "an individual who has direct and independent knowledge of the information on which the [complaint's] allegations are based." But, the new FCA defines it as one "who has knowledge that is independent of **and materially adds to the publicly disclosed allegations or transactions**." (emphasis added)

The court, in a case of first impression, determined that a relator could "materially add" to the public disclosure if he or she "adds in a significant way to the essential factual background: "the who, what, when, where and how of the events at issue." In reaching this conclusion, the court evaluated the information available to the public under a Fed.R.Civ.P. Rule 9(b) analysis and determined that the

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complaint brought by the relator, with the added detail learned through the wrongful death action, was sufficient to survive a Rule 9(b) challenge, and that was sufficient to rule that it added materially to the pre-existing public disclosures.

HEALTH CARE TAKEAWAY

The amended FCA's definition of "original source," as interpreted by the Third Circuit Court of Appeals, creates a new arena of liability for Medicare and Medicaid providers, as well as other government contractors. Litigants who would otherwise be barred from bringing FCA cases can use discovery in other cases to gather facts that could "materially add" to pre-existing public disclosures, allowing them to recreate whistle-blower status. Litigants must therefore take great care in other cases (e.g., unlawful discharge or discrimination lawsuits) to keep discovery from wandering into an area that would expose them to FCA liability. Every such case brought against a health care provider should be defended both against the pending claims and against the potential mining for a False Claims Act lawsuit.

If you have any questions, please contact David B. Honig at dhonig@hallrender.com or (317) 977-1447 or your regular Hall Render attorney.

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