FEBRUARY 25, 2015

ANOTHER CIRCUIT RULES ON THE PUBLIC DISCLOSURE BAR

Today the Sixth Circuit Court of Appeals joined several other Circuit Courts in finding that an administrative review, and even a repayment to the appropriate government oversight entity, did not qualify as a "public disclosure" under the False Claims Act's public disclosure bar.

The False Claims Act bars cases brought by whistleblowers if the cases are based upon public disclosures and the whistleblower is not the original source of the information. The purpose of this bar is to prevent parasitic, or "me too," whistleblower actions.{{1}}

One question courts have wrestled with has been, "what is a public disclosure?" The Seventh Circuit Court of Appeals has answered that, in addition to media reports, reports to government oversight agencies would qualify as "public disclosures" because the goal is to bring an action to the attention of the government.{{2}} Other Circuit Courts have disagreed. In a very recent decision, the Fourth Circuit, in *US ex rel. Wilson v. Graham County Soil And Water Conservation Dist.*, explicitly rejected the Seventh Circuit's reasoning, finding the disclosure must be something in the public domain and available outside the government.{{3}}

Today, the Sixth Circuit sided with the Fourth in *US ex rel. Whipple v. Chattanooga-Hamilton County Hospital Authority*.

In *Whipple,* the hospital was the subject of an investigation conducted by AdvanceMed Corporation, a Medicare Part A contractor, at the direction of the United States Department of Health and Human Services, Office of the Inspector General. The OIG's office then opened an administrative investigation into errors and over-payments identified by AdvanceMed. The hospital engaged Deloitte Financial Advisory Services to investigate those findings and to conduct a larger audit. At the completion of all these investigations the hospital submitted a voluntary recheck of almost half a million dollars, and the investigation was administratively closed. The hospital based its motion to dismiss for lack of subject matter jurisdiction upon these audits, investigations, and repayments.

The trial court accepted the hospital's argument and dismissed the case for lack of subject matter jurisdiction.

On appeal, the Sixth Circuit Court reversed, finding that the term "public disclosure" "requires some affirmative act of disclosure to the public outside the government."{{4}} In doing so, the Court explicitly rejected the Seventh Circuit Courts reasoning in *Farmington*, just as the Fourth Circuit Court did just a few weeks ago. The Court also rejected the argument that the disclosure to AdvanceMed was not public, as AdvanceMed was acting as an agent of the government, and that the disclosure to Deloitte was not public, as Deloitte was engaged by the hospital and Deloitte was not free to otherwise disseminate the information.

Health Care Takeaway

The health care takeaway is the same as that found in Self-Disclosure, the Public Disclosure Bar and the FCA – Uncertainty, Circuit by Circuit, but it must be expanded to providers within the Sixth Circuit as well, those in Kentucky, Michigan, Ohio and Tennessee.

One of the purposes of making a self-disclosure is to quietly resolve alleged errors, over-payments or other violations without drawing broad attention to the entity. Now, contractors will have to reevaluate their policies and procedures related to conducting internal investigations and self-reporting. Certainly their cost/benefit analysis will change. Whereas in the last five years since the enactment of the Patient Protection and Affordable Care Act of 2010, many more health care providers have been making voluntary disclosure submissions, that trend may change if more Circuits adopt the holding of the Fourth Circuit.

We close with one final note of caution. Given the split between the Circuits, as well as the lack of decision in several Circuits, the law remains fluid. What appears to be permissible today in one Circuit could change before the actions get challenged by the government or a *qui tam* whistleblower. It could change because a Circuit Court is persuaded by a new decision or what comes to be a clear majority view, or it could change if the Supreme Court accepts a case to resolve the conflict. Therefore, it is important to have up-to-the-minute advice about what the law is, and what it might be in the future, when making these important decisions.

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

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Should you have any questions regarding contracting, compliance or government advice and assistance, please contact:

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[[1]]Recent amendments to the FCA changed the bar from a jurisdictional limitation to a basis for dismissal in the absence of a government objection. For more on this subject please see False Claims Act Update - Public Disclosure and Original Source.[[1]]

[[2]]*US v. Bank of Farmington*, 166 F.3d 853, 861 (7th Cir., 1999)[[2]]

[[3]]For a more detailed discussion of this decision please see Self-Disclosure, the Public Disclosure Bar and the FCA – Uncertainty, Circuit by Circuit.[[3]]

[[4]]US ex rel. Whipple v. Chattanooga-Hamilton County Hospital Authority at p. 10.[[4]]

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