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THE SIXTH CIRCUIT JOINS THE MAJORITY AND CONFIRMS THAT A PRIOR LAWSUIT IMPLICATES THE PUBLIC DISCLOSURE BAR TO FALSE CLAIMS ACT LAWSUITS

For the first time in a published decision, the Sixth Circuit Court of Appeals has held that, even under the 2010 Amendment, a prior lawsuit against the same corporate defendants alleging a substantially similar scheme to defraud invokes the FCA's public disclosure bar, joining the majority of circuits.

RELATOR ALLEGED A SCHEME OF FALSIFIED RECORDS TO SUPPORT UNNECESSARY HOSPICE CARE

Kathi Holloway filed suit against a regional hospice entity (the "entity") alleging that, between 2004 and 2018, the entity defrauded Medicare.[1] Holloway alleged that the entity perpetrated this fraud, generally, by using several different methods to accept and keep hospice patients who did not need hospice services such as fraudulently charting patient decline or hospice eligibility and refusing to produced altered charts for audit by Medicare.[2] The entity allegedly "certified patients as hospice-eligible under Medicare regulations, even though many of them were not."[3] The Government elected not to intervene, the case was unsealed, and the entity moved to dismiss for failure to state a claim and lack of jurisdiction due to prior public disclosure.[4]

DEFENDANT ARGUED BOTH VERSIONS OF THE PUBLIC DISCLOSURE BAR FORECLOSE RELATOR'S SUIT

The entity argued, *inter alia*, that three *qui tam* complaints "filed in the United States District Court for the District of South Carolina" against the entity's parent company and other associated entities were a prior public disclosure, which bar Holloway's suit.[5] Because Holloway's allegations spanned from 2004 to 2018, both versions of the public disclosure bar were analyzed in determining the entity's motion.[6] Additionally, Holloway waived any argument that she was an original source.[7]

THE PUBLIC DISCLOSURE BAR FORECLOSED RELATOR'S SUIT

The Sixth Circuit agreed with the majority of district courts that "the *qui tam* relator is, in all cases, the government's agent."[8] Thus, a relator's *qui tam* suit is a public disclosure. The Sixth Circuit then analyzed the pre-2010 version of the public disclosure bar, noting that if a Relator's claims were "based upon" fraud allegations that had been previously publicly disclosed, they were jurisdictionally barred.[9] The Sixth Circuit more specifically considered whether "essentially the same scheme was the primary focus"[10] and if a "substantial identity exists between the publicly disclosed allegations or transactions and the *qui tam* complaint."[11] Ultimately, the Sixth Circuit found that Holloway's allegations about conduct prior to the 2010 amendment were jurisdictionally barred, noting "enough information exists in the public domain to put the government on notice of the fraud alleged"[12] because "the entire point of *qui tam* actions is to prosecute fraud of which the government is unaware."[13]

The Sixth Circuit then turned to Holloway's allegations of fraud subsequent to the 2010 amendment to the public disclosure bar. The Sixth Circuit noted that this bar allows the continuance of more claims, identifying it as "more lenient" because it "replaced 'based upon' with 'substantially the same.'"[14] The Sixth Circuit identified its pre-amendment analysis as the majority position, acknowledging that only the Fourth Circuit required actual knowledge by a relator of the prior claim for it to serve as a bar.[15] The majority of circuits have "held that their pre-amendment precedent continues to control."[16] The Sixth Circuit noted that in a prior, unpublished decision, it continued in the majority because it "had already interpreted the based upon language to mean a substantial identity."[17] Thus, the public disclosure bar must remain "wide-reaching," but the "substantially the same" amendment requires the amended version to be "more sensitive to differences between the *qui tam* complaint and prior disclosures."[18]

PRACTICAL TAKEAWAY

Relator added new details regarding an alleged fraudulent patient-retention scheme that had already been the subject of an FCA lawsuit against the same corporate actor. This additional detail was not enough to overcome either the pre-Amendment or post-Amendment version of the public disclosure bar when the same corporate defendant was alleged to have participated in the same scheme in prior FCA lawsuits.

If you have any questions, please contact Ryan McDonald at (317) 429-3671 or rmcdonald@hallrender.com or your regular Hall Render attorney.

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[references]

[1] *United States ex rel. Holloway v. Heartland Hospice, Inc.*, ---F.3d ----, 2020 WL 2900764, *3 (6th Cir. 2020).

[2] *Id*, at *2.

[3] *Id*, at *3.

[4] *Id*, at *3.

[5] *Id*, at *5.

[6] *Id*, at *4.

[7] *Id*.

[8] *Id*, at *5 (citing *U.S. ex rel. Gilbert v. Virginia College, LLC*, 305 F.Supp. 3d 1315 (N.D. Ala. 2018) and analyzing 31 U.S.C. 3730(e)(4)(A)(i)).

[9] *Id*, at *6, (citing 1986 version of 31 U.S.C. § 3730(e)(4)(A))

[10] *Id*, at *7 (citing *U.S. ex rel. McKenzie v. BellSouth Telecomm., Inc.*, 123 F.3d 935, 940 (6th Cir. 1997) (internal quotations omitted)).

[11] *Id* (citing *McKenzie*, 123 F.3d at 940 (accepting the Tenth Circuit's analysis in *U.S. ex rel. Fine v. Advanced Sciences, Inc.*, 99 F.3d 1000, 1006 (10th Cir. 1996)).

[12] *Id*, at *7 (citing *Walburn v. Lockheed Martin Corporation*, 431 F.3d 966, at 975 (6th Cir. 2005) and *U.S. ex rel. Poteet v. Medtronic, Inc.*, 552 F.3d 503, at 512 (6th Cir. 2009))

[13] *Id* (citing *U.S. ex rel. Dingle v. Bioport Corp.*, 388 F.3d 209, 215 (6th Cir. 2004).

[14] *Id*, at *8 (citing *U.S. ex rel. Advocates for Basic Legal Equality, Inc. v. U.S. Bank, N.A.*, 816 F.3d 428, 430 (6th Cir. 2016)).

[15] *Id* (citing *U.S. ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1331, 1348 (4th Cir. 1994)).

[16] *Id*, at *9.

[17] *Id*, (citing *U.S. ex rel. Armes v. Garman*, 719 F.App'x 459, 463 n. 2 (6th Cir. 2017) (internal quotations omitted)).

[18] *Id*, at *10 (considering *Walburn*, 431 F.3d at 970; *U.S. ex rel. Kirk v. Schindler Elevator Corp.*, 563 U.S. 401, 408 (2011); and *U.S. ex. rel. Goldberg v. Rush University Medical Center*, 680 F.3d 933, 935-36 (7th Cir. 2012).

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