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SEVENTH CIRCUIT: WHISTLEBLOWERS CANNOT BUILD FCA CLAIMS UPON PUBLIC INFORMATION AND SPECULATION

The public disclosure bar remains one of the most important tools for disposing of False Claims Act ("FCA") claims. The Seventh Circuit's recent decision in *United States ex rel. Bellevue v. United Health Services of Hartgrove, Inc.* clarified the effect of the 2010 amendments to the public disclosure bar and affirmed the dismissal of whistleblower allegations built upon inferences and publically available information.

BACKGROUND

The defendant was a psychiatric hospital focused on caring for children and teens. Authorized by Illinois to maintain 150 beds, the Hospital would occasionally place patients on one or two rollout beds in a group room to care for children until a traditional bed became available. A former nursing counselor alleged this practice continued from August 2005 through the present and that it violated the FCA because the Hospital exceeded its 150-bed capacity and thereby either explicitly or implicitly certified its compliance with all federal and state laws. Both the federal and state governments declined intervention.

The district court granted the Hospital's motion to dismiss for failure to state a claim of fraud with particularity as required by Federal Rules of Civil Procedure 12(b)(6) and 9(b). The Hospital successfully argued that Illinois and CMS each issued an audit letter in 2009 notifying the Hospital that its patient count exceeded the permitted number under its license. The district court ruled that the public disclosure bar prevented any claims prior to the 2009 letters but not claims through the present. Despite this, the court went on to rule that the allegations failed on their merits and it dismissed the action. On appeal, the Seventh Circuit revisited the public disclosure analysis, affirming the district court's ruling for pre-2009 claims but also expanding it to bar all of the whistleblower's claims.

ANALYSIS

The Seventh Circuit carefully parsed the 2010 amendments' substantive changes to the FCA's public disclosure bar, which removed the jurisdictional bar language. This required the court to treat the public disclosure bar as a jurisdictional challenge for the pre-amendment claims but not the post-amendment claims. The 2010 amendments also clarified what constitutes a public disclosure. The court considered this clarification nonsubstantive and therefore applied it retroactively to all of the whistleblower's claims. Applying these analyses, the Seventh Circuit walked step by step through the three-step framework of the public disclosure bar, concluding that all of the whistleblower's claims failed to clear it.

The claims were publicly disclosed. The Seventh Circuit concluded that the audit letters publicly disclosed the critical elements of the alleged fraud: more patients than beds. The inference the whistleblower claimed was unique—the knowing misrepresentation—did not save the claims. The court reiterated that inferences and logical consequences of the disclosed information are sufficient to trigger the public disclosure bar.

The claims were substantially similar to the disclosed allegations. The Seventh Circuit concluded that the disclosed audits were substantially similar to the alleged fraud. Even though the whistleblower alleged continuing fraud past the date of the audit letters, the court made clear that such "unimpressive" differences do not save claims related to the same entity and regarding the same conduct.

The whistleblower was not an original source. Finally, the Seventh Circuit concluded that the whistleblower was not an original source of the allegations and therefore could not survive the public disclosure bar. The whistleblower's claims were built upon inferences—not direct knowledge of the Hospital's billing practices. Inferences are not "independent of [and cannot] materially add to the publicly disclosed allegations or transactions."

The Seventh Circuit affirmed dismissal with prejudice, expanding the district court's public disclosure bar analysis.

PRACTICAL TAKEAWAYS

Health care providers facing whistleblower actions have two exit ramps in litigation: a motion to dismiss and a motion for summary judgment. The first of these must be quickly compiled and crafted to leverage the unique contours of FCA litigation. Here, the Hospital's invocation of the public disclosure bar prevented long and drawn out discovery and motion practice and quickly disposed of meritless

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allegations. Similarly situated providers should confer with counsel on how to implement a defense strategy that maximizes their ability to challenge such claims early in litigation.

If you have any questions or would like additional information about this topic, please contact:

- Amy O. Garrigues at agarrigues@hallrender.com or (919) 447-4962;
- David B. Honig at dhonig@hallrender.com or (317) 977-1447;
- Drew B. Howk at ahowk@hallrender.com or (317) 429-3607;
- Jon S. Zucker at jzucker@hallrender.com or (919) 447-4964;
- Laetitia L. Cheltenham at lcheltenham@hallrender.com or (919) 447-4968; or
- Your regular Hall Render attorney.

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