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FALSE CLAIMS ACT UPDATE, OCTOBER 2011

A case based upon FOIA documents may be subject to the public disclosure bar.

A difference of scientific judgment does not create the basis for an FCA suit.

Whistleblowers who wish to dismiss their suits after the Government refuses intervention may not hide their identity from the defendants, even if the defendant is their employer.

These issues were all decided in Federal Courts this October. For detailed summaries and case cites, please see below.

Addressing two different questions related to the FCA's public disclosure bar, the 9th Circuit Court of Appeals affirmed dismissal of a whistleblower's lawsuit. First, it ruled that the whistleblower, who relied upon documents he received through a Freedom of Information Act Request, was subject to the public disclosure bar, as those records were required by statute to be provided to the federal government. Second, the Court ruled that the bar applied to all claims, including those made after the relevant disclosures, where the whistleblower's lawsuit concerned ongoing condut, rather than specific conduct during discrete time periods. (The Court did not approve the case for publication.)

For more see *U.S. ex rel. Law Project for Psychiatric Rights v. Matsutani*, 2011 WL 5056363 (9th Cir. 2011).

In a case involving a dispute about proper experimental methods between two scientists, the Third Circuit Court of Appeals granted summary judgment and dismissed a whistleblower's lawsuit. The whistleblower, a scientist who contested her colleagues findings based upon both her own research and their inability to replicate the data, brought a False Clams Act lawsuit as a *qui tam* relator, alleging that the defendants' grant application, progress reports and renewals constituted a violation of the Act. The Court granted summary judgment, finding that while the whistleblower might have "proof of a mistake," or "even negligence," she could not show that the defendants knowingly submitted a false claim based upon a difference of scientific opinion.

For more see *U.S. ex rel. Hill v. University of Medicine & Dentistry of New Jersey*, 2011 WL 5008427 (3rd Cir. 2011).

In two different cases involving whistleblowers who, perhaps, realized the Faustian nature of their self-imposed bargain too late, courts rejected their petitions to keep their failed cases under seal to protect their identities. In both cases the whistleblowers filed their *qui tam* cases under seal, hoping the Government would intervene, taking over prosecution of the case and ultimately giving them an award. Faced with the costs of litigation and uncertain outcomes when the government refused to intervene, they both voluntarily dismissed their cases and asked the courts to keep the complaints under seal. In one case the whistleblower argued that unsealing would risk his relationship with his employer, against whom he filed the lawsuit. The Court rejected this argument, noting that the whistleblower was merely speculating that te employer would retaliate, and that the whistleblower, happy to take the risk of exposure if the Government would take over the prosecution, could not "cherry pick the portions of the FCA that suit him."

In the second case the whistleblower argued two reasons to keep the case under seal. The first was that it might impair her ability to obtain employment. The second was that it might impair her continuing investigation into her allegations. The Court rejected both arguments, finding that she accepted the risk of having her identity divulged when she filed the action and that the public's right to court documents outweighed her concerns.

For more see *U.S. ex rel. Durham v. Prospect Waterproofing, Inc.*, 2011 WL 4793236 (D.D.C. 2011), and *U.S. ex rel. Danner v. Quality Health Care Inc.*, 2011 WL 4971453 (D.Kan. 2011)

For more information, please contact David B. Honig at dhonig@hallrender.com or (317) 977-1447.