First Circuit Affirms District Court's Discretion to Limit the Scope of Discovery in False Claims Act Case

Last month, the United States Court of Appeals for the First Circuit in *United States ex rel. Duxbury v. Ortho Biotech Products, L.P.*, No. 12-2141, 2013 WL 2501930 (1st Cir. June 12, 2013) ("*Duxbury II*") affirmed the district court's limitation of discovery concerning publicly disclosed False Claims Act ("FCA") allegations to the time period and geographic region over which relator qualified as an original source. Notably, however, the court deflected the question of whether the pre-amendment[1] original source exception to the public disclosure bar applied and instead chose to rule on the alternate ground that the district court's actions fell well within its broad discretion to manage discovery. By declining to rule on jurisdictional grounds, the court reaffirmed the power of district courts to exercise considerable discretion to limit the scope of discovery in FCA cases, regardless of whether the public disclosure bar applies.

Background and Procedural History

Prior to 2010, the FCA's public disclosure bar stated that "[n]o court shall have jurisdiction over an action . . . based upon the public disclosure of allegations . . . unless the person bringing the action is an original source of the information." 31 U.S.C. 3730 (e)(4)(A) (2006). To qualify as an original source, the relator must have "direct and independent knowledge of the information on which the allegations are based and [have] voluntarily provided the information to the Government before filing an action . . . ." 31 U.S.C. 3730 (e)(4)(B) (2006).

In 1992, Ortho Biotech Products, L.P. ("OBP") hired Mark Duxbury as a sales manager. Duxbury was responsible for marketing OBP's drug Procrit to health care providers in the western United States, particularly in the state of Washington. In July 1998, OBP terminated Duxbury. In 2003, Duxbury filed his original complaint and amended his complaint in 2006 after the government declined to intervene. The amended complaint contained three counts relating to OBP's allegedly improper efforts to market Procrit; only Count I, however, was the subject of this recent appeal to the First Circuit. Count I alleged that, from 1992 to the present, OBP engaged in a nationwide kickback scheme that caused healthcare providers and hospitals to submit false claims to Medicare.

In January 2007, OBP filed a motion to dismiss relator's amended complaint, which the district court granted. With respect to Count I, the district court found that: 1) all of the kickback allegations had already been publicly disclosed in a prior suit; 2) relator qualified as an original source of the allegations concerning the time while he was employed by OBP (1992 to 1998); 3) none of these allegations had been pled with particularity pursuant to Fed R. Civ. P. 9(b). On appeal, the First Circuit agreed with the district court's first two findings, but determined that relator's allegations concerning the eight accounts that he had serviced in the state of Washington during his tenure at OBP were adequately pled with the specificity required by Rule 9(b). *United States ex rel. Duxbury v. Ortho Biotech Products, L.P.*, 579 F.3d 13, 21-32 (1st Cir. 2009) ("*Duxbury I*"). The court specifically noted that these allegations were based on relator's personal knowledge and direct communications with the accounts, supported by his furnishing of the dates and amounts of the false claims allegedly submitted by these providers to Medicare. *See Id.* at 30.

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[1] Congress amended the FCA's public disclosure rule and its original source exception in 2010. *See* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, tit. X, § 10104(j)(2), 124 Stat. 119, 901-02 (2010). However, the First Circuit noted that the statute's pre-amendment language governed this case.

On remand, the district court entered an order limiting discovery to those allegations over which relator qualified as an original source. The district court reasoned that, in light of *Duxbury I*, the law of the case dictated that relator was an original source only as to the claims arising during his employment by OBP. Next, because relator could qualify as an original source only with respect to claims of which he had direct and independent knowledge, the district court narrowed the scope of discovery to the region relator serviced as a sales manager for OBP. The parties also agreed that the FCA's six-year statute of limitations barred relator's claims prior to 1997. As such, the district court's order limited discovery to relator's claims between November 1997 and July 1998 that pertained to the region in the western United States of which he had direct and independent knowledge. *See United States ex rel. Duxbury v. Ortho Biotech Products, L.P.*, No. 03-12189-RWZ, 2010 WL 3810858, at *3 (D. Mass. Sept. 27, 2010).

After eight months of discovery, the parties filed a joint stipulation explaining that relator could not proffer any evidence to support his allegations that OBP had engaged in any kickbacks during the time period and in the geographic region outlined by the court's discovery order. The district court, therefore, granted summary judgment in favor of OBP. Relator appealed both the grant of summary judgment and the propriety of the district court's discovery order.

First Circuit Decision

In both his briefing and at oral argument, relator primarily attacked the district court's discovery order. First, he argued that the district court incorrectly found that it lacked subject-matter jurisdiction over relator's allegations of a common, nationwide kickback scheme based upon a misapplication of the original source exception and the Supreme Court's decision in *Rockwell Int'l Corp. v. United States*, 549 U.S. 457 (2007). Second, relator contended that the district court's discovery order contradicted the First Circuit's ruling in *Duxbury I*. The court's decision in *Duxbury II* did not address the merits of relator's argument concerning the original source exception. The court, instead, held that, even assuming *arguendo* that the district court had subject matter jurisdiction over all of relator's kickback claims, the limitations imposed on discovery were consistent with the holding in *Duxbury I* and within the district court's "broad discretion in managing discovery." *Duxbury II*, 2013 WL 2501930, at *6.

In addressing Duxbury's claims, the court explained that relator misread *Duxbury I*. According to the court, the only portion of Count I that survived on remand were those claims from the years 1992 to 1998; the decision never addressed the scope of discovery and explicitly declined to consider the applicability of the statute of limitations. Likewise, the court emphasized that *Duxbury I*'s conclusion that the allegations in Count I were adequately pled rested upon a single paragraph in the complaint consisting entirely of allegations relating to Washington-based accounts. Therefore, the court concluded, the district court's discovery order was perfectly consistent with *Duxbury I*'s holding.

The court further held that the district court's decision to limit the scope of discovery to the western United States was well within its "considerable latitude" in managing discovery. *Id.* at *7 (internal citations omitted). Citing to the Sixth Circuit's decision in *United States ex rel. Bledsoe v. Cmty. Health Sys., Inc.*, 501 F.3d 493, 515, 523-24 (6th Cir. 2007), the court explained that the district court appropriately limited discovery to only those portions of the complaint that satisfied Rule 9(b). The court also observed that this case did not present a situation in which relator had uncovered evidence which might provide the basis for expanding discovery. Rather, relator was seeking to engage in a "fishing expedition" into "purely speculative allegations" of nationwide fraud despite the fact that he was not even able to muster any evidence within the narrow geographic area in which he actually worked. *Duxbury II*, 2013 WL 2501930, at *7 (internal citations omitted).

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In *Duxbury II*, the First Circuit declined the opportunity to address the scope of the pre-amendment original source exception and instead offered FCA defendants a victory with potentially longer-term impact. In particular, the court reaffirmed that district courts have considerable latitude in limiting discovery in FCA cases to allegations that were well-pled under Rule 9(b). If the district courts take up the First Circuit's invitation here, this may lead to more limited, or staged discovery in those FCA cases that do survive a motion to dismiss.

If you would like further information, please contact one of the attorneys in our False Claims Act practice or the Ropes & Gray attorney who usually advises you.