Eleventh Circuit Clarifies Scope and Effect of the FCA's Public Disclosure Bar

The Eleventh Circuit has recently issued an opinion clarifying the 2010 amendments to the False Claims Act ("FCA") and its "public disclosure bar," which prohibits suits based on information already publicly disclosed. In *United States ex rel. Osheroff v. Humana, Inc.*, 2015 WL 223705 (11th Cir. Jan. 16, 2015), the court followed the Fourth Circuit in holding that the amendments converted the public disclosure bar from a jurisdictional bar under Fed. R. Civ. P. 12(b)(1) into grounds for dismissal for failure to state a claim under Fed. R. Civ. P. 12(b)(6).[1] The Eleventh Circuit also held that the 2010 amendments changed the scope of the public disclosure bar and its "original source" exception.

Background

Relator Marc Osheroff filed suit in December 2010 in the United States District Court for the Southern District of Florida, alleging that health clinics and insurers in the Miami area were providing patients with free services such as transportation, meals, salon services, and entertainment, as well as medical services. The relator learned this information through his own research and interviews. The federal government declined to intervene.

The relator alleged violations of the Anti-Kickback Statute ("AKS"), 42 U.S.C. § 1320(a)-7b(b), which prohibits offering remuneration to induce the recipient to purchase goods or services for which payment may be made under a federal health care program; the Civil Monetary Penalties Law ("CMPL"), 42 U.S.C. § 1320a–7a, which prohibits offering remuneration to influence Medicare recipients to use a particular provider; and the FCA, under an "implied certification" theory.

In granting the motion to dismiss, the District Court focused on whether the relator had met the FCA's public disclosure bar, 31 U.S.C. § 3730(e)(4). The court found that the relator's allegations were substantially identical to the information contained in *Miami Herald* articles and the health clinics' websites, and that the relator was not an original source of any new information that was independent of, and materially added to, these sources. The court dismissed the complaint for lack of jurisdiction and the relator filed a motion for reconsideration, which was denied. The relator appealed.

The Eleventh Circuit's Holding

The Eleventh Circuit considered the effect of the 2010 amendments to the FCA's public disclosure bar, enacted as part of the Affordable Care Act. Earlier, the provision explicitly stated that dismissal would be for lack of jurisdiction. But the 2010 amendments deleted the reference to jurisdiction in Section 3730(e)(4), while retaining it in other provisions. The amendments also added new language allowing the government to oppose dismissal even if the public disclosure bar would otherwise apply. For these reasons, the Eleventh Circuit held that the FCA's amended public disclosure bar created grounds for dismissal under Fed. R. Civ. P. 12(b)(6), not Fed. R. Civ. P. 12(b)(1). Nevertheless, the court upheld the District Court's dismissal of the action, rejecting the relator's contention that the District Court improperly considered documents extrinsic to the allegations.

[1] In *U.S. ex rel. May v. Purdue Pharma L.P.*, the Fourth Circuit stated that after the 2010 amendments, "the public-disclosure bar is no longer a jurisdiction-removing provision." 737 F.3d 908, 916-17 (4th Cir. 2013). *See also U.S. ex rel. Absher v. Momence Meadows Nursing Center, Inc.*, 764 F.3d 669, 706 (7th Cir. 2014) (court states it is "no longer clear" that the public disclosure bar is jurisdictional in nature, but applies pre-amendment version because complaint was filed before the 2010 amendments).

The Eleventh Circuit noted that the 2010 amendments to the public disclosure bar changed its scope. The prior version considered information disclosed in both federal and state courts as publicly disclosed, but now, only information disclosed in federal courts may be considered a public disclosure. The 2010 amendments also changed the requisite connection between the relator's claims and public disclosures. Before 2010, actions "based upon" a public disclosure were barred; now, the public disclosure bar applies if "substantially the same" allegations were publicly disclosed. The amended public disclosure bar also refers to "the news media" as a source of public disclosures. In holding that web sites qualify as "news media," the Eleventh Circuit pointed to district courts coming to the same conclusion, and Supreme Court precedent holding that the term "news media" has a "broad sweep."

The 2010 amendments also changed the "original source" exception to the public disclosure bar. Before 2010, the relator's knowledge had to be direct and independent of the publicly available information in order for the relator to count as an original source of that information; now, the relator must have "knowledge that is independent of *and materially adds to* the publicly disclosed allegations or transactions." The relator in *Osheroff* argued that his information materially added to public disclosures because it showed that the clinics' free services were more than nominal in value. The Eleventh Circuit rejected these arguments; under the AKS any offer of remuneration is illegal, and public information was sufficient to infer that such remuneration was being provided.

Implications of the Court's Decision

The Eleventh Circuit's decision follows the decisions of other courts that have held that the FCA's amended public disclosure bar enables dismissal on the merits, not for lack of jurisdiction. Relators contesting application of the public disclosure bar at the pleading stage can now insist that courts apply a narrower Fed. R. Civ. P. 12(b)(6) standard to the inquiry.

At the same time, the Eleventh Circuit's decision also emphasizes the pleading burden for relators who wish to invoke the original source exception to the public disclosure bar. Evaluating whether a relator's information is a material addition to publicly disclosed information requires a close reading of the statutes whose violation is alleged under the FCA claims, to determine whether the plaintiff's information establishes an element of these offenses that is not present in publicly available information.

Ropes & Gray will continue to monitor developments in this area. If you would like further information, please contact one of the attorneys in our FCA practice or the Ropes & Gray attorney who usually advises you.

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