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Seventh Circuit Clarifies Retroactivity of Part of 2010 Amended Definition of "Original Source" for Purposes of Public Disclosure Bar

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On January 4, 2016, the Seventh Circuit issued an opinion addressing the scope of the public disclosure bar under the False Claims Act ("FCA"). In *United States ex rel. Bogine v. Medline Industries, Inc.*, 809 F.3d 365 (7th Cir. 2016), the court held that because the 2010 amendment to the definition of "original source" was a "clarifying rather than a substantive amendment," the revised definition applies retroactively, *id.* at 369, and affirmed the district court's dismissal of the case under the public disclosure bar.

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Background

Relator August Bogina III filed suit in 2011 in the United States District Court for the Northern District of Illinois, alleging that Medline violated the FCA by using a system of rebates, bribes, and kickbacks to induce nursing facilities to purchase their products. The relator's allegations centered on the relationship between Medline and the Tutera Group, a chain of nursing homes and a Medline customer. The relator claimed to have learned of the facts underlying his allegations through his business associate Michael Tutera, who is the brother of one of the current principals of Tutera and himself a former member of Tutera's ownership group. The federal government declined to intervene.

The district court dismissed the complaint under the FCA's public disclosure bar. In so holding, the district court focused on a similar suit filed in 2007 by Sean Mason, an employee of Medline; that suit alleged that Medline had given bribes and kickbacks to entities that purchased its medical equipment, though it did not name Tutera specifically. The suit brought by Mason was resolved in 2011 — before the relator in *Bogine* filed his complaint — with a settlement between Mason, Medline, and the United States. The district court held that the claims alleged by the relator were substantially similar to allegations and transactions that were publicly disclosed in the earlier *qui tam* suit against Medline, and so could not survive the public disclosure bar.

The Seventh Circuit's Holding

A unanimous panel of the Seventh Circuit agreed with the district court that the relator was not an original source. First, the court held that the 2010 amendment to the FCA's definition of "original source," which requires a relator to have "knowledge that is independent of" *and* "materially adds" to otherwise public allegations, applies retroactively. The court reasoned that retroactivity was appropriate because the 2010 amendment clarified what the court characterized as an opaque prior definition of "original source," rather than modifying the definition substantively. This holding departs from other courts that have declined to give retroactive effect to the new definition. *See, e.g., United States ex rel. Hartpence v. Kinetic Concepts, Inc.*, 792 F.3d 1121 (9th Cir. 2015) (en

banc) (applying pre-2010 definition of "original source"); *United States ex rel. Kester v. Novartis Pharmaceuticals Corp.*, 43 F. Supp. 3d 332, 354 (S.D.N.Y. 2014) (same).

Second, the court compared the allegations in the relator's complaint to the claims in the Mason action, and found that the relator's claims were too similar to the previously disclosed allegations to survive the public disclosure bar. The court noted the similarities between the two complaints, and held that the relator "is not allowed to proceed independently if he merely 'adds details' to what is already known in outline." *Id*. at 370. And because the claims were so similar, the court reasoned, the government was on notice of the relator's claims when it investigated the Monson action years earlier; the relator thus was not an original source of the information underlying the allegations.

The court also rejected the relator's final argument in support of the originality of his claims: that he alleged misconduct continuing to the present day, while the earlier case's allegations ended at an earlier date. The court found this insufficient to satisfy Rule 9(b), as the present-day allegations were all made on "information and belief," which, in a fraud case, "can mean as little as 'rumor has it that. . . .'" *Id*.

Implications of the Court's Decision

The Seventh Circuit's decision confirms the continued strength of the public disclosure bar in FCA litigation. The opinion, which consistently described the relator as a "bounty hunter," also underscores that the public disclosure bar extends not only to identical later-filed claims, but also to later-filed claims that the government *could have* investigated in connection with an earlier-filed claim.

The court's wholesale rejection of the relator's "on information and belief" pleading as to allegations continuing to the present day also serves to underscore the robust procedural protections offered by Rule 9(b) in FCA cases.

If you have any questions or would like to discuss the foregoing or any related matter, please contact the Ropes & Gray attorney with whom you regularly work, or an attorney in our False Claims Act practice.