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ALERT

False Claims Act

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# Fourth Circuit Holds False Claims Act Relators Cannot Use Facts Learned by Their Attorney in a Previous Case to Defeat the FCA's Public Disclosure Bar

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Earlier this year, the Fourth Circuit held in *United States ex rel. May v. Purdue Pharma L.P.*, 811 F.3d 636 (2016) that the a complaint that is "based on" relators' attorney's work on a prior dismissed FCA action triggers the False Claims Act's public disclosure bar where the earlier case involves the same underlying alleged fraud.

## Background

As the Fourth Circuit commented, the "FCA allegations at issue [in this case] have enjoyed a long though not particularly fruitful life." *Id.* at 638. In 2006, Mark Radcliffe, a former sales manager for Purdue Pharma ("Purdue") filed a qui tam action under the FCA against Purdue. He alleged that Purdue marketed OxyContin as having a falsely inflated painkilling potency and thereby deceived physicians into prescribing OxyContin instead of Purdue's older painkilling drug, MS Contin. In 2010, the Fourth Circuit held that Radcliffe's 2006 qui tam action must be dismissed based on a release Radcliffe signed upon accepting a severance package.

Two months after the final resolution of Radcliffe's suit, his lawyer filed another qui tam action against Purdue – this time on behalf of Radcliffe's wife, Angela Radcliffe, and former employee, Steven May ("Relators"). The district court dismissed the Radcliffe/May suit on *res judicata* grounds, but the Fourth Circuit vacated that judgment, holding that Mark Radcliffe's release "was personal to him." On remand, the district court dismissed the complaint under the FCA's public disclosure bar, concluding that the allegations were based on claims from Mr. Radcliffe's suit.

## The Fourth Circuit's Holding

A unanimous panel of the Fourth Circuit affirmed the district court. As an initial matter, the court determined that the pre-2010 version of the FCA's public disclosure bar applied in this case because the alleged misconduct occurred between 1996 and 2005. The Fourth Circuit interprets the pre-2010 public disclosure bar more narrowly than its sister circuits. While the other circuits interpret the language barring suits "based upon the public disclosure of allegations" to preclude suits that are "substantially similar to" or "supported by" publicly disclosed information, the Fourth Circuit precludes suits "only where the relator has actually derived from a public disclosure the allegations upon which his qui tam is based." *Id.* at 640.

Here, the Relators' claims were nearly identical to publicly disclosed information in Mr. Radcliffe's 2006 case. And, the Court held that Relators did not learn of the alleged fraud independently of the prior lawsuit; their knowledge stemmed from their attorney's involvement in the prior action, and his knowledge was imputed to them.

The court first noted that, in *Siller v. Becton Dickinson & Co.*, 21 F.3d 1339 (4th Cir. 1994), it had predicted that the pre-2010 public disclosure bar would apply where an attorney-Relator based his claim on information he learned when representing another client in a matter involving the same fraud allegations and where the allegations were publicly disclosed before the Relator filed suit. The court then adopted this dictum as its holding, finding no meaningful difference between the hypothetical attorney-Relator in *Siller* and the Relators in this case. The court

observed that the purpose of the public disclosure law is to "strike a balance between empowering the public to expose fraud on the one hand, and preventing parasitic actions on the other," and concluded that a lawyer re-filing the same case with different clients leaned towards the parasitic end of the spectrum. *Id.* at 642. The court also noted that when Congress in 1986 eliminated the "government knowledge" requirement—which barred suits based on evidence or information the government had when the action was brought—Congress did not "invite a free for all" that would encourage lawsuits by Relators who "(1) know of no useful new information about the scheme they allege, and (2) learned of the relevant facts through knowledge their attorney acquired when previously litigating the same fraud claim." *Id.* at 642-43. Finally, the court observed that "[a]ccepting the view of the Relators also leads to absurd results." *Id.* at 643.

## Implications of the Court's Decision

Although the Fourth Circuit is unique in applying the narrower "derived from" test to the pre-2010 public disclosure bar, the Court's willingness to recognize and reject an effort to do an end run around the FCA's bar on parasitic suits is encouraging.

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.