January 26, 2017

First Circuit Holds That, for Original Source Exception to the False Claims Act's Public Disclosure Bar to Apply, Information Supplied Must Be "Significant" or "Essential"

Summary

On June 30, 2016, the First Circuit addressed the kinds of information that a relator must provide to qualify as an original source to avoid dismissal under the False Claims Act's ("FCA") public disclosure bar. In *United States ex rel. Winkelman v. CVS Caremark Corp.*, 827 F.3d 201 (1st Cir. 2016), the First Circuit affirmed the lower court's dismissal of relators' claim on the basis of the public disclosure bar.

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Factual Background

On August 4, 2011, relators Myron Winkelman and Stephani Martinsen challenged the billing practices of CVS Caremark Corp. and affiliated companies (collectively, CVS). Winkelman was a consultant who became aware of CVS' billing practices through his work as an auditor. Pls.' 2d Am. Compl. ¶¶ 29–30. Martinson worked as a pharmacist at a CVS pharmacy in Minnesota. Pls.' 2d Am. Compl. ¶ 42. The focus of Relators' Complaint was CVS's Health Savings Pass program ("HSP"), a program allowing customers to purchase generic prescription drugs at discounted prices after paying a low enrollment fee. 827 F.3d. at 203. Relators alleged that CVS overbilled Medicare Part D and Medicaid, as well as state equivalent programs, because CVS was not reporting the lower prices given to HSP customers when seeking reimbursement from federal and state programs. *Id*. at 203–204.

Winkelman and Martinsen were not, however, the first to question the effect of CVS's HSP program on its reimbursement requests. In February 2010, labor unions had issued a report detailing CVS's HSP pricing practices. This report led to extensive news coverage as well as a Congressional investigation. *Id*. at 204. The State of Connecticut subsequently got involved: Connecticut both claimed that CVS was already required to report HSP pricing, and modified its statutes explicitly to require CVS to do so. CVS threatened to remove its HSP program from the state altogether as a result. *Id*. at 204–205.

Procedural History

The First Circuit began its analysis by declining to decide, as many other circuits have done, whether the post-2010 version of the public disclosure bar is jurisdictional in nature. *Id*. at 207 ("we need not resolve the jurisdictional question"). Instead, the court recognized that, even if the post-2010 version of the public disclosure bar is properly considered an affirmative defense, "an affirmative defense may serve as a basis for dismissal under Rule 12(b)(6)." *Id*. at 208. The court then continued its analysis, noting "[t]he press release, news articles, CRS report, and record of congressional testimony" were properly before the court because "even within the Rule 12(b)(6) framework, a court may consider matters of public record and facts susceptible to judicial notice." *Id*.

Analysis of the Merits

Turning to the merits, the First Circuit concluded that allegations "substantially similar" to relator's allegations had been publicly disclosed prior to relator's suit. The court noted "public disclosure occurs when the essential elements exposing the particular transaction as fraudulent find their way into the public domain." *Id*. at 208–209. The court noted that "[t]his type of disclosure can occur in one of two ways: either through 'a direct allegation of fraud' or

through revelation of 'both a misrepresented state of facts and a true state of facts so that the listener or reader may infer fraud.'" *Id*. In analyzing whether the relator's claims had been previously disclosed publicly, the court explained that "[t]he ultimate inquiry . . . is whether the government has received fair notice, prior to the [relator's] suit, about the existence of the fraud." Even though Medicaid, Medicare, and the various states included in Winkelman and Martinsen's suit had not specifically been named by the 2010 report or ensuing press coverage, the court concluded that enough was disclosed about CVS's practices in Connecticut's challenge—and the misrepresented and true state of facts—to put the federal government and other states on notice of CVS's potentially fraudulent practices. *Id*. at 210.

The First Circuit then turned to the crux of its analysis. Even if a claim has already been publicly disclosed, the FCA, as amended in 2010 by the Patient Protection and Affordable Care Act ("ACA"), Pub. L. No. 111-148, § 10104(j)(2), 124 Stat. 119, allows a claim to proceed if a relator is an original source of information. The ACA defines "original source" in two ways, based on the timing of relator's claim relative to the public disclosure: (1) First, relator is considered an original source if "prior to a public disclosure . . . [the relator] voluntarily disclosed to the Government the information on which allegations or transactions in a claim are based." 31 U.S.C. § 3730(e)(4)(B)(i). (2) Alternatively, even if the disclosure to the government is made after a public disclosure, relator is still considered an original source if relator possesses "knowledge that is independent of *and* materially adds to the publicly disclosed allegations or transactions." *Id*. § 3730(e)(4)(B)(2)(emphasis added). In this case, the First Circuit noted that "the relators' attempt to assume the mantle of original source status cannot clear the 'materially adds' hurdle (and, thus, we do not address the 'independent knowledge' hurdle)." 827 F.3d. at 211–212.

After noting that "[t]he meaning of the 'materially adds' language in the original source exception [was] a matter of first impression" in the First Circuit, the court turned to the definition of "material" in *Black's Law Dictionary* to conclude that, in order for an addition to be material, the information must be "sufficiently significant" or "essential." *Id*. at 208. The court then considered and rejected several arguments that Relators advanced for why the information they added met this standard. First, the court held that, on these facts, "[s]imply asserting a longer duration for the same allegedly fraudulent practice does not materially add to the information already publicly disclosed." *Id*. at 212. CVS had made clear by its conduct that it intended to continue its pricing practices. *Id*. Second, offering additional specific examples of previously publicly disclosed conduct, the court concluded, was not sufficient. *Id*. "[A] relator who merely adds detail or color to previously disclosed elements of an alleged scheme is not materially adding to public disclosures." *Id*. at 213. Third, while the court left open the possibility that, under certain circumstances, information relating to a defendant's intent may be material, the court held that, in this case, the public disclosures had already made clear that CVS was acting deliberately. *Id*. Accordingly, the First Circuit affirmed the district court's dismissal on public disclosure grounds.

Implications

The First Circuit's decision is significant for FCA defendants in that it makes clear the court will expect a relator to come forward with significant new information to qualify as an original source.

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