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REPORT

False Claims Act

Changes to FCA Public Disclosure Bar Open Door to More Qui Tam Filings

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One litigious area under the False Claims Act, 31 U.S.C. §§ 3729-33, has been the scope of the FCA's jurisdictional bar to *qui tam* actions based upon information that already has been ''publicly disclosed.'' The purpose of the public disclosure bar is to deter ''parasitic'' lawsuits by *qui tam* relators based upon allegations of fraud made in public proceedings, unless the *qui tam* relator is the ''original source'' of the information. What kind of ''public disclosures'' fall within the jurisdictional bar, however, long has been a source of disagreement among circuit courts. Now, within the space of a week, the Supreme Court and Congress both have answered that question – but they have answered it inconsistently, leaving federal contractors with one standard for pending cases, and another one for prospective cases.

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In *Graham County Soil and Water Conservation District v. United States ex rel. Wilson*, 559 U.S. ___, No. 08-304, 2010 WL 1189557 (March 30, 2010), the Supreme Court interpreted the FCA's jurisdictional bar broadly, holding that information in a state or local report, audit, hearing or investigation is ''publicly disclosed,'' and so may not be used by *qui tam* relators to support an FCA action. Congress adopted the opposite approach in the Patient Protection and Affordable Care Act (Patient Protection Act), Pub. L. No. 111-148, § 10104(j), signed into law on March 23, 2010. The Patient Protection Act amended the FCA to narrow the definition of ''public disclosures,'' so that the statute now bars only *qui tam* actions based on publicly disclosed information from ''federal'' proceedings – and even those actions may proceed at the election of the Department of Justice. The Patient Protection Act amendments apply to all future FCA cases, not just cases alleging healthcare fraud.

Since *qui tam* cases can remain under seal for years, the double standard created by *Graham County* and the Patient Protection Act will continue to cloud FCA litigation for some time. This article discusses the Supreme Court's decision in *Graham County*, the changes to the FCA made by the Patient Protection Act, and the impact of these changes on federal contractors.

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I. The Evolving Concept of the Public Disclosure Bar The FCA was enacted during the Civil War in the expectation that it ''would help the government uncover fraud and abuse by unleashing a posse of ad hoc deputies to uncover and prosecute frauds against the government.''[1] In 1943, Congress acted to keep the posse from becoming a horde, by adding a provision barring *qui tam* actions based on information already known to the Government, even if the relator was the original source of the Government's information.[2]

In 1986, Congress again revised the FCA to try to strike the proper balance ''between encouraging private citizen involvement in exposing fraud against the government[,] while preventing opportunistic suits by private persons who became aware of fraud but played no part in exposing it.''[3] The 1986 amendments, located at 31 U.S.C. § 3730(e)(4), lowered the jurisdictional barrier for *qui tam* relators who were an ''original source'' of the information that had been publicly disclosed:

(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, *unless the action is brought by the Attorney General or the person bringing the action is an original source of the information*.

(B) For purposes of this paragraph, *''original source'' means an individual who has direct and independent knowledge of the information on which the allegations are based* and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

31 U.S.C. § 3730(e)(4) (emphasis added).

Despite Congress's attempts to provide a more balanced standard for jurisdiction over *qui tam* actions alleging publicly disclosed information, the 1986 amendment caused widespread litigation over the intended scope of the jurisdictional bar. As one court noted, ''virtually every court of appeals that has considered the public disclosure bar explicitly or implicitly agrees on one thing . . . : the language of the statute is not so plain as to clearly describe which cases Congress intended to bar.''[4] One of the primary sources of confusion was the 1986 amendment's reference to public disclosures of ''allegations or transactions in a criminal, civil or administrative hearing,'' since Congress did not specify whether that phrase included state as well as federal sources of publicly disclosed information. Circuit courts adopted differing interpretations of Section 3730(e)(4), some limiting the jurisdictional bar to *qui tam* cases based on information publicly disclosed in federal proceedings, while other courts held that the 1986 amendment barred actions based on information publicly disclosed in federal *or* state proceedings.[5]

II. The Supreme Court's Decision in Graham County On March 30, 2010, Justice Stevens handed down the Supreme Court's 7 to 2 decision resolving the circuit court split as to whether publicly disclosed information from state or local sources could be used by a *qui tam* relator as the basis for an FCA action.

In *Graham County*, two North Carolina counties received federal contracts to remediate areas damaged by flooding under a federal disaster assistance program. The relator, an employee of a county soil and water conservation district that was performing part of the work, suspected fraud in connection with the district's performance. The relator alerted local and federal officials about possible fraud, and both the county and the State issued reports identifying potential irregularities in the contracts' administration.[6] The court reasoned that public disclosure of allegations or transactions occurs under the FCA in at least one of three ways:

1. In a criminal, civil, or administrative hearing;

2. In a congressional, administrative, or GAO report, hearing, audit, or investigation; or

3. In the news media.

The Fourth Circuit Court of Appeals had found that ''only federal administrative reports, audits or investigations qualify as public disclosures under the FCA.''[7] The court of appeals reasoned that it was ''hard to believe that the drafters of this provision intended the word 'administrative' to refer to both state and federal reports when it lies sandwiched between modifiers which are unquestionably federal in character.''[8] The Supreme Court rejected the ''Sandwich Theory,'' finding that ''[t]he adjectives in Category 2 are too few and too disparate to qualify as 'a string of statutory terms . . . .' ''[9] The court found that all three categories listed in Section 3730(e)(4)(A) ''provide interpretive guidance,'' and held that ''it is the fact of 'public disclosure' — not Federal Government creation or receipt — that is the touchstone of FCA Section 3730(e)(4)(A).''[10] The court therefore held that a state or local report, audit or investigation may trigger the public disclosure bar.

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[1] *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 784 (4th Cir. 1999) (internal quotation marks omitted).

[2] The 1943 Amendments were made in response to a notoriously ''parasitic'' FCA lawsuit, *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943). In *Hess*, the Supreme Court upheld a verdict in favor of a *qui tam* relator who copied his allegations of fraud by a government contractor directly from a federal criminal indictment against that contractor. *See id.* at 546-48. The court stated that Congress could have limited the reward to informers who provided *new* information to civil prosecutions, but ''(n)either the language of the statute nor its history'' suggested that it intended to do so. *Id.* at 546.

[3] *United States ex rel. Barth v. Ridgedale Elec., Inc.*, 44 F.3d 699, 702 (8th Cir. 1995).

[4] *United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 681 (D.C. Cir. 1997).

[5] *Compare*, *e.g.*, *United States ex rel. Dunleavy v. County of Delaware*, 123 F.3d 734, 745 (3d Cir. 1997) (administrative reports must originate from federal government in order to be considered public disclosures under the FCA), *with United States ex rel. Bly-Magee v. Premo*, 470 F.3d 914, 918-19 (9th Cir. 2006), *cert. denied*, 552 U.S. 1165 (2008) (*qui tam* action could be based on information obtained by relator from state agency audit report), *Battle v. Board of Regents*, 468 F.3d 755, 762 (11th Cir. 2006) (FCA did not bar *qui tam* action based on state audit reports of University's noncompliance with federal regulations), and *Hays v. Hoffman*, 325 F.3d 982, 989 (8th Cir. 2003) (state reports and audits could be public disclosures, at least where reports and audits involved a cooperative state-federal program).

[6] *Graham County*, 2010 WL 1189557 at *3.

[7] *United States ex rel. Wilson v.Graham County Soil & Water Conservation Dist.,* 528 F.3d 292, 301 (4th Cir. 2008) (emphasis added).

[8] *Id.* at 302 (citations omitted).

[9] *Graham County,* 2010 WL 1189557 at *5.

[10] *Id.* 2010 WL 1189557 at *5, 7.

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III. The Patient Protection and Affordable Care Act By the time the *Graham County* decision was published, however, Congress had changed what the Supreme Court called the ''plain text'' of the FCA's public disclosure bar. Buried in the Senate's Manager's Amendment to what became the Patient Protection Act were significant amendments to the FCA's public disclosure provision. These changes, for which there is no explanatory legislative history, apply to all prospective FCA actions.

The Patient Protection Act made several revisions to Section 3730(e)(4) of the FCA. First, the amendment expressly limits the jurisdictional bar to *qui tam* suits based upon publicly disclosed information from specific *federal* sources:

4(A) The court shall dismiss an action or claim under this section, unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed –

(i) in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party;

(ii) in a congressional, Government Accountability Office or other Federal report, hearing, audit or investigation; or

(iii) from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.[11]

The statute further narrows the public disclosure definition by limiting federal hearings included in the jurisdiction bar to those in which ''the Government or its agent is a party.''[12] Presumably, therefore, allegations of fraud in connection with a government contract made in a federal civil action between private parties will be fair game for copycat *qui tam* relators.

Second, the Patient Protection Act changes the absolute jurisdictional bar in the FCA to a discretionary standard, with that discretion vested in the Department of Justice rather than the courts. Section 10104(j)(2) of the Act amends FCA § 3730(e)(4) to provide that courts shall dismiss *qui tam* actions based upon public disclosures, ''unless opposed by the Government.'' This change effectively provides the Department of Justice with the power to veto a defense motion to dismiss a *qui tam* action based upon publicly disclosed information.

Third, the Patient Protection Act changes the definition of an ''original source.'' Under the 1986 version of the FCA, an ''original source'' was defined as a *qui tam* relator who had ''direct and independent'' knowledge of the public information on which the allegations were based. 31 U.S.C. § 3730(e)(4)(B). Congress has revised this definition to a more subjective standard:

(B) For purposes of this paragraph, ''original source'' means an individual who either

(i) prior to a public disclosure under subsection (e)(4)(A), has voluntarily disclosed to the Government the information on which the allegations or transactions in a claim are based, or

(ii) who has knowledge that is *independent of and materially adds to* the publicly disclosed allegations or transactions and who has voluntarily provided the information to the Government before filing the action.[13]

The statute offers no guidance on what qualifies as a ''material'' addition.

IV. Impact on Federal Contractors

A. Dual Standards for Qui Tam Jurisdiction One practical effect of *Graham County* and the Patient Protection Act is a reorientation of the divide in interpreting the FCA's public disclosure bar, at least over the next few years. Prior to the *Graham County* decision and the passage of the Patient Protection Act, practitioners were confronted with a territorial divide in interpreting the public disclosure bar, bounded by the differing circuit court decisions interpreting FCA § 3730(e)(4). Now, there is a temporal split. As the Supreme Court noted,[14] Congress did not make the Patient Protection Act retroactive, so cases filed before March 23, 2010, will be governed by *Graham County*'s broad interpretation of the 1986 FCA jurisdictional bar. Since *qui tam* cases are filed under seal, and often remain there for two or more years, the holding in *Graham County* will continue to bar *qui tam* suits based upon publicly disclosed information from federal, state, or local proceedings. *Qui tam* cases filed on or after March 23, 2010, based on information publicly disclosed on or after that date, will be governed by the amendments to the FCA made by the Patient Protection Act. A third category of cases, those filed after March 23, 2010, but based on information publicly disclosed before that date, doubtless will be the subject of litigation as to which standard should apply.

B. Expanded Opportunities for Qui Tam Relators The narrowing of the jurisdictional bar in the Patient Protection Act has the potential to open the floodgates to parasitic *qui tam* actions based on publicly disclosed information from state and local proceedings, civil litigation between private parties in federal courts, or even Federal proceedings, as long as the relator has independent information that adds something ''material'' to the public information.

The Government's new discretion to veto the jurisdictional bar also potentially will increase the number of *qui tam* cases that survive a defendant's motion to dismiss. One might speculate that the Government is in a better position than a court to determine whether a *qui tam* suit is duplicative of the public record, and DOJ presumably has a keen interest in maximizing the Government's overall recovery by not sharing it with a parasitic relator. The reality, however, is quite different: DOJ is under intense pressure from the relators' bar and Congress not to act in a manner perceived to be hostile to whistleblowers. This is evidenced by DOJ's notorious reluctance to move to dismiss a *qui tam* suit even when the Government's own investigation has shown the action to be meritless. In the Government's new role as gatekeeper to the public disclosure bar, DOJ may be tempted to keep the gate open and worry later about the value of the Government's share. Further, DOJ's administrative burden would be reduced if it can avoid an active role in prosecuting FCA actions merely by filing an opposition to a defendant's motion to dismiss. The net effect may be that the Government shares more recoveries – including nuisance value settlements — with parasitic relators.

[11] Pub. L. No. 111-148, § 10104(j).

[12] *Id.*

[13] *Id.* (emphasis added).

[14] *Graham County*, 2010 WL 1189557, at *2 n.1, *citing Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997). *Hughes* held that the 1986 amendments to the False Claims Act could not be applied retroactively, since those amendments resulted in elimination of a defense.

V. Conclusion The intersection of the *Graham County* decision and the Patient Protection Act seems likely to complicate jurisdictional litigation over the next few years. The legislative changes to the FCA, which were not subjected to congressional debate, can be expected to result in a significant increase in *qui tam* filings, as well as new litigation over the meaning of the revised ''original source'' definition. The net effect of these FCA changes on Congress's ongoing quest for balance and certainty in fact does the opposite: The Patient Protection Act skews an already draconian law in favor of parasitic relators, and will result in increasingly expensive litigation for federal contractors.

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