Arnall Golden Gregory LLP

Client Alert

Contact Attorneys Regarding This Matter:

Aaron M. Danzig
404.873.8504 – direct
aaron.danzig@agg.com

W. Jerad Rissler
404.873.8780 – direct
jerad.rissler@agg.com

Arnall Golden Gregory LLP
Attorneys at Law

171 17th Street NW
Suite 2100
Atlanta, GA 30363-1031

One Biscayne Tower
Suite 2690
2 South Biscayne Boulevard
Miami, FL 33131

2001 Pennsylvania Avenue NW
Suite 250
Washington DC 20006

www.agg.com

When Is *Qui Tam* False Claims Act Litigation "Based Upon" Prior Public Disclosure and Who Qualifies as "Original Source" of Information?

Two U.S. Courts of Appeal—the Seventh Circuit and the DC Circuit—have recently addressed related issues that arise when *qui tam* relators pursue False Claims Act (FCA)[1] litigation following the public disclosure of facts related to the alleged false claims—a factor that may bar the claim. The Seventh Circuit concluded that a qui tam relator's action was not "based upon" a public disclosure because the relator's allegations could only be considered "substantially similar" to the public disclosure at an inappropriately high level of generality. The DC Circuit found that the allegations of a relator were "based upon" a public disclosure but that the relator's suit was not barred because he qualified as an "original source." These cases offer a more expansive view of actions that can be brought by qui tam relators following a public disclosure of the underlying allegation or information. This may result in more "copycat" qui tam suits and more difficulty for defense counsel in getting these suits dismissed.

FCA Prohibits *Qui Tam* Suits Based Upon Prior Public Disclosure of Allegations or Transactions Unless Relator Is Original Source

The FCA prohibits the knowing submission of false or fraudulent claims for payment to the United States government and imposes fines and treble damages to punish offenders.[2] The FCA encourages individuals with information regarding violations of the FCA to come forward and to assert claims on behalf of the government by offering a share of any recovery.[3] Such individuals (known as *qui tam* relators) are entitled to a share of any amount recovered on behalf of the federal government.[4]

To prevent unnecessary and duplicative litigation that would divert funds from the Treasury, the FCA imposes a limitation on who may serve as a *qui tam* relator when the underlying conduct has been publicly disclosed. The FCA bars suits "based upon the public disclosure of allegations or transactions … unless the action is brought by the Attorney General or the person bringing the action is an original source of the information."[5] "Original source"

1 31 U.S.C. §§ 3729-33. As discussed below, the FCA was amended in 2010, but the changes to the FCA relevant to the issues discussed herein are not retroactive. Since the events underlying the FCA claims occurred prior to the 2010 amendments, the prior version of the FCA applies. Except as specifically noted, all references to the FCA are to the version preceding the 2010 amendments.
2 31 U.S.C. § 3729(a).
3 31 U.S.C. § 3730(b)(1).
4 31 U.S.C. 3730(d).
5 31 U.S.C. § 3730(e)(4)(A).

is defined as "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."[6] To determine whether the bar applies, the count must determine whether the *qui tam* suit is "based upon" a "public disclosure," and if so, whether the relator may still pursue the claim as an "original source."

U.S. ex Rel. Goldberg v. Rush University Medical Center

Teaching hospitals may bill "for work by residents (that is, recent graduates still in training) on a fee-for-service basis only when a teaching physician supervises the residents."[7] In the 1990s, the Department of Health and Human Services "concluded that many if not all of the 125 teaching hospitals associated with medical schools were billing for unsupervised services that residents performed."[8] The Government Accountability Office (GAO) reached the same conclusion in a GAO publication issued July 1998.[9]

The relators in *Goldberg* filed suit in 2004 against Rush University Medical Center, a teaching hospital, alleging that the hospital improperly submitted fee-for-service bills for unsupervised work of residents performed in the hospital's operating theaters.[10] Beyond this general allegation, the relators argued that their suit "arises from residents' services that were supervised, but inadequate—and, perhaps more importantly, that the hospital certified had been supervised."[11]

The Seventh Circuit noted its conclusion in a prior case "that the 1998 GAO report and similar public documents disclose that billing for unsupervised work by residents was an industry-wide practice."[12] In this case, the court held "that an allegation that a particular teaching hospital had billed for residents' unsupervised work was 'based upon' that disclosure, and that only an 'original source' of the information could pursue *qui tam* litigation."[13] In a subsequent decision, the Seventh Circuit held "that a private suit is 'based upon' a public disclosure when the allegations are 'substantially similar,' even if the private relator adds details."[14]

The court framed this issue as "whether the allegations of [the relators'] complaint are 'substantially similar' to, and thus 'based on,' the [prior public disclosures.]."[15] The court noted that the relators' allegations did more than merely parrot the public disclosures. The relators alleged a type of deceit that public disclosures did not attribute to any teaching hospital. The court concluded that the relators' allegations of false billing could be considered "substantially similar" to that described in the public disclosures only "at the highest

6 *Id.* § 3730(e)(4)(B).
7 *United States ex rel. Goldberg v. Rush Univ. Med. Ctr.*, No. 10-3785 (7th Cir. May 21, 2012) at 1 (hereinafter "*Goldberg*").
8 *Id.* at 2.
9 *Id.*
10 *Goldberg* at 4.
11 *Id.* at 4.
12 *U.S. ex rel. Gear v. Emergency Medical Associates of Illinois, Inc.*, 436 F.3d 726 (7th Cir. 2006).
13 *Id.*
14 *U.S. ex rel. Glaser v. Wound Consultants, Inc.*, 570 F.3d 907, 920 (7th Cir. 2009).
15 *Goldberg* at 5. The court had previously noted that the relators could not qualify as an "original source" because they did not disclose the alleged fraud to the government before filing suit. *Goldberg* at 3.

level of generality."[16] The court held that "boosting the level of generality in order to wipe out *qui tam* suits that rest on genuinely new and material information is not sound."[17] Therefore, the court denied the motion to dismiss. This narrow view of what claims are "based upon" a public disclosure opens the door to more claims by relators and will make it more difficult for defendants to dismiss "copycat" FCA lawsuits even when the relator cannot qualify as an "original source."

United States ex rel. Davis v. District of Columbia

Similarly, in *Davis*, the court denied a motion to dismiss and let stand a *qui tam* lawsuit, finding that the relator qualified as an "original source." In *Davis*, the relator, Michael L. Davis, alleged that the District of Columbia Public Schools falsely submitted claims for Medicaid reimbursement for fiscal year 1998 without maintaining the required supporting documentation.[18]

Davis filed his action alleging FCA violations on April 4, 2006. Nearly four years prior to Davis's lawsuit, the office of the District of Columbia Auditor had released to the public a report for fiscal years 1996–98 disclosing the disallowance of Medicaid reimbursement due to the failure to maintain adequate documentation of the services provided. Davis's allegations in support of his FCA action were premised solely on the absence of supporting documentation.[19]

The court noted that, pursuant to 31 U.S.C. § 3730(e)(4)(A), "if a *qui tam* suit is 'based upon' a 'public disclosure,' the suit is barred unless the relator is an 'original source.'"[20] The court noted that a *qui tam* suit is "based upon" a public disclosure "when the allegations in the complaint are 'substantially similar' to those in the public domain."[21] Thus, a *qui tam* action can only be brought by an "original source" "when the government already has enough information 'to investigate the case and to make a decision whether to prosecute' or where the information 'could at least have alerted law-enforcement authorities to the likelihood of wrongdoing.'"[22] The court determined that since the allegations of Davis's *qui tam* complaint were substantially similar to the Auditor's report, the *qui tam* action could proceed only if Davis was an "original source."

Having determined that the *qui tam* suit was "based upon" a public disclosure, the court turned to the question of whether Davis qualified as an original source. The court noted that it was uncontested that Davis "had direct and independent knowledge that the 1998 claim for Medicaid reimbursement lacked documentation."[23] The court also found that Davis "'provided the information to the Government' before filing suit," but presented no evidence that he provided any information to the government before the public disclosure.[24]

16 *Id.* at 6.
17 *Id.*
18 *United States ex rel. Davis v. District of Columbia*, No. 11-7039 (D.C. Cir. May 15, 2012) at 3-4 ("*Davis*").
19 *Id.* at 4.
20 *Id.* at 5.
21 *Id.* at 6.
22 *Id.* at 6-7 (quoting *U.S. ex rel. Springfield Terminal Ry. v. Quinn*, 14 F.3d 645, 654 (D.C. Cir. 1994) (quoting *United States ex rel. Joseph v. Cannon*, 642 F.2d 1373, 1377 (D.C. Cir. 1981))).
23 *Id.* at 8 n.2.
24 *Id.* at 8.

The question before the court was whether the relator, to qualify as an "original source," must provide information to the government before the public disclosure as well as before filing the *qui tam* lawsuit. The DC Circuit in *U.S. ex rel. Findley v. FPC-Boron Employees' Club* had previously interpreted Section 3730(e)(4) to require a relator to "provide his information to the government not only prior to filing suit but 'prior to any public disclosure.'"[25] However, the court noted that a subsequent decision of the Supreme Court *Rockwell International Corp. v. United States*[26] raised doubts concerning the continued viability of *Findley*.[27]

In *Findley*, the court had held that Section 3730(e)(4) required an "original source" to provide his information to the government prior to public disclosure "based on its reading of the statute and a resulting public policy concern."[28] The *Findley* court "determined that the word 'information' in both subparagraphs [(A) and (B) of Section 3730(e)(4)] referred to the information 'on which the [publicly disclosed allegations are based.'"[29] "Under this reading, the information an original source must provide to the government is the information underlying the publicly disclosed allegations."[30] With this understanding of "information" as used in Section 3730(e)(4), the *Findley* court concluded that "the only reading of the statute that accounts for the requirement that an 'original source' voluntarily provide information to the government before filing suit, and Congress' decision to use the term 'original source' … is one that requires an original source to provide the information to the government prior to any public disclosure."[31] "A relator adds little value, so the thinking goes, by repeating [the information] already publicly available and known to the government."[32]

The Supreme Court's decision in *Rockwell*, however, undermined the reasoning underlying *Findley*.[33] In *Rockwell*, the Supreme Court reached a different conclusion than *Findley* regarding the meaning of the word "information" as used in Section 3730(e)(4). The Supreme Court determined that "information" means "the information on which the *relator's allegations* are based[, not] the information on which the *publicly disclosed allegations* that triggered the public-disclosure bar are based."[34] With this new understanding of the meaning of "information," the *Davis* court recognized: "The relator can be an 'original source' to the government of his information even if the publicly disclosed information came from someone else."[35] Moreover, with the understanding that the "information" is the relator's information, not the public information, the *Davis* court concluded that "the relator's information can be different and more valuable than the information underlying the public disclosure."[36] Thus, the *Davis* court reasoned, "*Findley's* requirement no longer has any textual basis, and the policy judgment upon which it relied contradicts *Rockwell's* rationale."[37] Therefore, the DC Circuit announced that "[a]pplying the 1986 version of the [FCA], we will no longer require that a relator

25 *Id.* at 6 (quoting *U.S. ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675 (D.C. Cir. 1997)) ("*Findley*").
26 *Rockwell International Corp. v. United States*, 549 U.S. 457 (2007) ("*Rockwell*").
27 See *Davis* at 8-9.
28 *Davis* at 9.
29 *Davis* at 9 (quoting Findley, 105 F.3d at 690).
30 *Id.*
31 *Findley*, 105 F.3d at 691.
32 *Davis* at 10.
33 *Davis* at 10-11.
34 *Rockwell*, 549 U.S. at 470.
35 *Davis* at 10.
36 *Id.*
37 *Id.* at 11.

provide information to the government prior to any public disclosure of allegations substantially similar to the relator's and will instead enforce only the text's deadline of 'before filing an action.'"[38]

In a footnote, the *Davis* court acknowledged that the result mandated by *Rockwell* is "imperfect because it allows suits in which the relator's information does in fact mirror the publicly disclosed information."[39] However, the *Davis* court noted that the 2010 revisions to the FCA have remedied this imperfection by requiring that the "original source" either (a) voluntarily disclose his information to the government prior to a public disclosure or (b) have information "that is independent of and materially adds to the publicly disclosed allegations or transaction," and provides the information to the government before filing suit.[40]

Conclusion

The courts in these cases interpreted the FCA to allow relators to file "copycat" FCA litigation following a public disclosure of the schemes giving rise to the alleged FCA violations. These cases may make it more difficult to obtain dismissal of "copycat" *qui tam* litigation even when the litigation is filed following the public disclosure of the alleged misconduct at issue.

Please click here for a copy of *United States ex rel. Goldberg v. Rush Univ. Med. Ctr.*, No. 10-3785 (7th Cir. May 21, 2012).[41]

Please click here for a copy of *United States ex rel. Davis v. District of Columbia*, No. 11-7039 (D.C. Cir. May 15, 2012).[42]

38 *Id.*
39 *Id.* at 11, n.4.
40 *Id.* (quoting 31 U.S.C. § 3730(e)(4)(B) (Supp. 2010).
41 http://www.agg.com/media/interior/publications/Danzig-Rissler-When-Is-Qui-Tam-Goldberg-Link.pdf
42 http://www.agg.com/media/interior/publications/Danzig-Rissler-When-Is-Qui-Tam-Davis-Link.pdf