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HEALTH CARE LAW

Actual Knowledge of False Claim Required

Individuals who learn of fraud through secondary sources cannot bring qui tam claims

By Kerry M. Parker and Daniel R. Levy

The False Claims Act is the federal government's primary weapon in combating healthcare fraud. 31 U.S.C. § 3729, et seq. The FCA imposes liability for treble damages and civil penalties when a person knowingly submits statements to the federal government to secure payment of a false or fraudulent claim, or to conceal, avoid or decrease an obligation to pay or transmit property to the government. 31 U.S.C. § 3729(a).

In addition to allowing civil actions by the attorney general, the FCA permits private whistleblowers, under its powerful qui tam provisions, to sue in the name of the United States and to be awarded 15 to 30 percent of the damages recovered by the government. With regard to qui tam claims, the FCA provides that no court shall have jurisdiction over an action based upon the public disclosure of allegations unless the qui tam relator is an "original source" of the information. 31 U.S.C. § 3730(e)(4)(A). Qui tam litigation in the health care industry is big business and expected to continue. As reported by the Department of Justice, in fiscal 2005 alone, the government obtained over $1.1 billion from qui tam actions, of which the lion's share was from the health care industry. See www.usdoj.gov/opa/pr/2005/November/05_civ_595.html. In the recent decision in *Rockwell Intern. Corp. v. U.S.*, 127 S. Ct. 1397 (March 27, 2007), the United States Supreme Court addressed the meaning of the "original source" requirement under the FCA.

In *Rockwell*, the relator, James Stone, worked as an engineer for Rockwell at a nuclear weapons plant in Colorado from 1980 to March 1986. During Stone's employment, Rockwell investigated the possible disposal of toxic pond sludge by mixing it with cement to form concrete blocks (called "pondcrete"). After reviewing the proposed pondcrete process, Stone advised Rockwell that he believed the process would not work because of a flaw in the equipment that would be used to create pondcrete. In actuality, Rockwell's pondcrete process worked well for several years and then eventually failed, but not for the reasons Stone had asserted. Instead, the pondcrete failed as a result of a formula change that Rockwell implemented after Stone's employment had ended, and Stone had no personal knowledge of the change.

Approximately one year after his employment ended, Stone reported various alleged environmental crimes to the FBI. Search warrants were executed, followed by media coverage of alleged environmental violations. Thereafter, Stone filed a qui tam action under the FCA alleging that Rockwell had concealed environmental, safety and health issues from the government throughout the 1980s. An amended complaint was thereafter filed jointly by Stone and the government, which contained an allegation of leaky pondcrete, but made no mention of Stone's theory as to the cause of the failed pondcrete.

Following a jury verdict against Rockwell and appeals, the issue of whether Stone was an original source came before the Supreme Court. Under the FCA, an original source is defined as a person 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." 31 U.S.C. § 3730(e)(4)(B). The *Rockwell* Court first addressed certain threshold issues, holding that the original source requirement is jurisdictional in nature, and must be determined based upon a relator's

Parker is a shareholder in the health care and life sciences and labor and employment law practices at Epstein Becker & Green of Newark. Levy is an associate with the firm.

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knowledge of facts on which the *relator's allegations* are based.

The Supreme Court found that Stone was not an original source because, having left Rockwell's employ in 1986, he had no personal knowledge of events that occurred during 1987 and 1988, the timeframe upon which the lawsuit and jury verdict were based. Despite the fact that Stone had predicted that the pondcrete would fail, his prediction was based upon an erroneous prediction of the cause of the eventual failure of the pondcrete. Finding Stone was not an original source under the FCA, Justice Antonin Scalia stated that "[e]ven if a prediction can qualify as direct and independent knowledge … it assuredly does not do so when its premise of cause and effect is wrong." As Stone's "prediction" failed, he was not an original source under the FCA.

Rockwell clarifies the definition of "original source" to limit it to an individual with actual knowledge of the facts underlying that individual's false claim allegations. While the holding should reduce parasitic qui tam litigation by individuals who learn of fraud through secondary sources, and arms government contractors with a stronger defense to such claims, it is unlikely that *Rockwell* will significantly lessen the number of qui tam actions under the FCA.

Further, even with the tightening up of the original source definition, the FCA and other laws provide avenues for the prosecution of healthcare fraud and related claims. First, as explained in *Rockwell*, the lack of jurisdiction over a relator's claim does not inhibit the government's ability to proceed in the suit. The Court explained that an action brought by a private person does not become one brought by the government just because the government intervenes to proceed with the action. Nevertheless, where the attorney general intervenes in an action brought by a private person and it is later determined that there is no jurisdiction over the qui tam claims, in certain circumstances the action may be deemed to be one brought by the attorney general under § 3730(a). Thus, as in *Rockwell*, a government contractor continues to be subject to an FCA action where the relator fails to meet the jurisdictional requirements to proceed with the suit, as long as the government has intervened and has a valid claim.

Additionally, the Deficit Reduction Act of 2005, 42 U.S.C. § 1396h(a), (DRA) provides a financial incentive to states to adopt their own false claims acts that substantially mirror the FCA. In the health care industry, for example, Medicaid contractors will be subject to individual state acts that are approved by the Office of Inspector General. To date, 12 states have submitted their acts for approval, and five (Virginia, Illinois, Massachusetts, Texas and Tennessee) have been approved as meeting the DRA's requirements. *See* http://oig.hhs.gov/fraud/falseclaimsact.html#1. That number is expected to rise, thus creating additional exposure for state and federal government contractors to state law false claims litigation.

Contractors also must be cognizant of the FCA's anti-retaliation provision, which protects employee "whistleblowers" from adverse employment consequences as a result of their lawful acts done in furtherance of an action under the FCA. 31 U.S.C. § 3730(h). The FCA does not expressly require that an employee either file a qui tam action or qualify as an original source, and case law generally provides that an individual who is neither a qui tam plaintiff nor an original source may maintain a retaliation action under the FCA. *See United States ex rel. McKenzie v. Bellsouth Telecommunications, Inc.*, 123 F.3d 935, 945 (6th Cir. 1997) (Sixth Circuit affirmed dismissal of relator's *qui tam* action because she was not an original source, but permitted retaliation claim because she had adequately alleged that employer was aware that she was contemplating a qui tam action); *U.S. ex rel. Yesudian v. Howard Univ.*, 153 F.3d 731 (D.C. Cir. 1998) (employee's failure to initiate private qui tam suit did not defeat FCA retaliation claim); *U.S. ex rel. Erickson v. Uintah Special Services Dist.*, 395 F. Supp. 2d 1088, 1102-03 (D. Utah 2005); *U.S. ex rel. Ackley v. IBM Corp.*, 76 F. Supp. 2d 654, 656 (D. Md. 1999) (dismissing relator's *qui tam* action but allowing FCA retaliation count to proceed).

In addition to the FCA's anti-retaliation provisions, government contractors are subject to state whistleblower laws. In New Jersey, for example, the Conscientious Employee Protection Act (CEPA) prohibits employers from retaliating against an employee who discloses, or threatens to disclose, a policy or practice of the employer that may be in violation of a law. Under CEPA, a whistleblower must demonstrate only a reasonable belief that the objectionable activity, policy or practice of the employer violates the law or public policy. *Klein v. University of Medicine & Dentistry of New Jersey*, 377 N.J. Super. 28, 39 (App. Div. 2005).

In conclusion, while *Rockwell* should reduce the number of invalid qui tam actions, the reality is that health care industry fraud litigation will likely continue to grow, and contractors will become subject to increased state enforcement and both federal and state qui tam litigation. ■