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COMMENTARY

Defining the Bounds of the Public Disclosure Bar and the Scope of "News Media"

On March 3, 2015, a court in the Southern District of Texas granted a defendant pharmaceutical company's motion for summary judgment on claims brought under the False Claims Act for alleged false claims made through various government programs, including Medicaid and Medicare, for reimbursement for prescription drugs. *United States ex rel. King v. Solvay S.A.*, No. 4:06-cv-02662 (S.D. Tex. Mar. 3 2015). The court held that the relators' claims were barred by the False Claims Act's public disclosure bar because the fraud alleged by the relators, specifically off-label marketing, was publicly disclosed in a 2002 *New Yorker* article that discussed generally the possibility of the type of off-label marketing scheme described in the complaint. The court found that a public disclosure need "not perfectly mirror everything alleged in the original complaint …. [I]t just has to set the government on the trail of fraud." This decision is one of several recent decisions exploring the outer bounds of the public disclosure bar in an effort to determine the required form and substance of a public disclosure.

Relevant History of the False Claims Act and the Public Disclosure Bar

The False Claims Act ("FCA") was passed in 1863, during the Civil War, to combat fraud by defense contractors and has been amended several times since then. The FCA was most recently amended in 2010 by the Patient Protection and Affordable Care Act ("ACA"), which narrowed the FCA's public disclosure bar, defined health care claims that included kickbacks as "false claims" under the FCA, and imposed a 60-day time limit on repaying overpayments, after the ACA itself provided that retention of the overpayment could trigger FCA liability.

Prior to the passage of the ACA, the FCA contained a jurisdictional bar to *qui tam* actions "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."[1] The FCA also contained an exception to the public disclosure bar for relators who were the "original source" of the information upon which the FCA action was based. "Original source" was 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."[2]

The ACA amended the public disclosure bar so that it now provides:

> 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.[3]

The ACA narrowed the bar by permitting *qui tam* actions based on publicly disclosed information to proceed unless the disclosure came from a *federal* criminal, civil, or administrative hearing, in which the government or its agent is or was a party, or a *federal* report, hearing, audit, or investigation. The ACA also added a government veto to the public disclosure bar,[4] which the government has used sparingly to date.

The ACA also changed the definition of "original source." After the ACA, an "original source" is defined as:

> 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 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 an action under this section.[5]

After the ACA, the relator is no longer required to have "direct and independent knowledge" of the information on which the claims are based to qualify as an original source. In addition, the relator no longer needs to provide the information on which the action is based to qualify as an original source. He or she merely needs to "materially add" to the publicly disclosed allegations or transactions.

King's Factual Background and Analysis

The relators in *King* initially filed suit, under seal, on June 10, 2003, just one day after bringing their allegations of fraud to the Food and Drug Administration, asserting claims on behalf of the United States, 28 states and municipalities, and the District of Columbia. The relators were former district sales managers for defendant Solvay Pharmaceuticals, Inc. and a related entity ("SPI"). Their claims resulted from SPI's marketing of the prescription drug AndroGel. The second amended complaint was unsealed on December 7, 2009, and the summons was served on SPI on January 12, 2010.

SPI moved for summary judgment arguing, among other things, that the relators' claims regarding the marketing of AndroGel were disclosed to the public, prior to the filing of the lawsuit, in a 2002 article in the *New Yorker* that discussed, among other things, the possibility of the pharmaceutical industry inventing diseases and funding (i) advertising that encouraged patients to be checked for them and (ii) educational programs for physicians to prescribe AndroGel to treat those diseases. The article made clear that treatment of these diseases was not an FDA-approved use for AndroGel.

The relators argued that none of the behavior described in the article came close even to implying that the behavior highlighted resulted in fraud against the government. They claimed that SPI marketed AndroGel to physicians for off-label uses and provided a variety of kickbacks to physicians to convince them to use its drugs.

The court noted that the *New Yorker* article indicated that SPI was promoting AndroGel for off-label uses and implied that kickbacks were provided. This, the court found, was sufficient to meet the public disclosure threshold. The court held:

> While this does not perfectly mirror everything alleged in the original complaint, and it does not directly state that the highlighted activities could result in false claims, there are certainly enough similarities for the court to conclude that the allegations are based on public disclosure. It is not necessary for the disclosure to connect all the dots or reach legal conclusions, it

just has to set the government on the trail of fraud. Being on the trail of fraud is not the same as highlighting exactly how the alleged wrongdoing resulted in defrauding the government.

The court went on to hold that the relators were not original sources because they failed to meet the necessary voluntary pre-filing disclosure requirements by disclosing information about the alleged fraud to the FDA only *one day* prior to filing the complaint.

Implications

The *King* court broadly defined the public disclosure requirements for "news media" sources.[6] This approach is consistent with other recent cases interpreting public disclosures via the "news media." Earlier this year, the Third and Eleventh Circuits and the Northern District of Illinois decided cases embracing the broad sweep of news media, relying on news articles, advertisements, and even websites with information generally related to the complaint to support dismissal of actions under the public disclosure bar.[7] Notably, in *United States ex rel. Osheroff v. Humana, Inc.*,[8] the Eleventh Circuit acknowledged the expansive sweep of "news media" and concluded that newspaper advertisements and information on publicly available websites qualify as news media for purposes of the public disclosure bar, noting that its holding was consistent with those of several district courts across the country.[9] These rulings illustrate that courts continue to apply the public disclosure bar's terms in varied cases, and often must consider its terms in light of changing technology. Indeed, Americans receive "news media" today from a variety of sources beyond just traditional print newspapers, and these courts have understood that Congress's continued use of the term "news media" in the public disclosure bar (as opposed to just "newspapers") recognizes that reality.[10] As the answer to what comprises a sufficient trail of breadcrumbs continues to evolve, it is important for relators and defendants alike to examine the vast universe of news media when considering the viability of an FCA action.

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Endnotes

1 31 U.S.C. § 3730(e)(4)(A) (2009).

2 31 U.S.C. § 3730(e)(4)(B) (2009).

3 31 U.S.C. § 3730(e)(4)(A) (2012).

4 *Id.* ("The court shall dismiss an action or claim under this section, *unless opposed by the Government* ...." (emphasis added)).

5 31 U.S.C. § 3730(e)(4)(B) (2012).

6 The *King* court's holding is consistent with another Southern District of Texas case decided in January 2015. In *United States ex rel. Sonnier v. Std. Fire Ins. Co.*, 2015 U.S. Dist. LEXIS 10006 (S.D. Tex. Jan. 29, 2015), the court relied, in part, on media reports regarding the alleged fraud in holding that the relator's claims were barred by the public disclosure bar.

7 *See United States v. Express Scripts, Inc.*, 2015 U.S. App. LEXIS 2586 (3d Cir. Feb. 20, 2015) (affirming the district court's dismissal of an action as barred by the public disclosure bar, based, in part, on news articles); *United States ex rel. John v. Hastert*, 2015 U.S. Dist. LEXIS 25783 (N.D. Ill. Mar. 4, 2015) (holding that *Chicago Tribune* articles that "report[ed] generally" the activities giving rise to the allegations in the complaint were sufficient evidence that the information contained in the complaint had previously been publicly disclosed and was in the public realm).

8 776 F.3d 805 (11th Cir. 2015).

9 "District courts in the Eleventh Circuit and in other circuits have determined that the term includes publicly available websites. *See, e.g., United States ex rel. Simpson v. Bayer Corp.*, No. 05-3895, 2013 U.S. Dist. LEXIS 124928, 2013 WL 4710587, at *7 (D.N.J. Aug. 30, 2013) ('[P]romotional website[s] geared toward the dissemination of information' could qualify as news media); *United States ex rel. Green v. Serv. Contract Educ. & Training Trust Fund*, 843 F. Supp. 2d 20, 32-33 (D.D.C. 2012) ('readily accessible' promotional websites qualified as news media); *see also United States ex rel. Brown v. Walt Disney World Co.*, No. 6:06-cv-1943, 2008 U.S. Dist. LEXIS 116832, 2008 WL 2561975, at *13 (M.D. Fla. June 24, 2008) (Wikipedia pages and legal notices in newspapers constitute 'news media'). District courts in other circuits have found that advertisements in a newspaper also qualify. *See, e.g.*, *United States ex rel. Colquitt v. Abbott Labs.*, 864 F. Supp. 2d 499, 519 (N.D. Tex. 2012); *United States ex rel. Ondis v. City of Woonsocket, R.I.*, 582 F. Supp. 2d 212, 217 (D.R.I. 2008)." *Id.* at 813.

10 Moreover, in the Supreme Court's most recent decision involving the public disclosure bar, it continued to emphasize the bar's "broad scope" while holding that a response to a FOIA request constitutes a "report" that triggers the bar. *Schindler Elevator Corp. v. U.S. ex rel. Kirk*, 131 S. Ct. 1885, 1891 (2011) (applying the statute's pre-ACA version).