
False Claims Act Developments

2008-02-29

In 2007, reported settlements in False Claims Act (FCA) cases topped \$2 billion. Because trends in this area may be of interest to you, we will periodically provide reports on (i) developments in the courts, (ii) developments in Congress, and (iii) developments in the States.

Developments in the Courts

- **Supreme Court argument on government presentment requirement.** On Tuesday, February 26, 2008, the Supreme Court heard argument in *Allison Engine Co. v. United States ex rel. Sanders*, No. 07-214. The issue presented is whether, for purposes of liability under the false records and conspiracy provisions of the FCA, a plaintiff must show that the allegedly false claims were actually presented to a government employee, or whether it suffices that they were presented to some non-governmental intermediary, such as a government contractor or grantee, who was ultimately paid with government funds. The outcome of the case will be of particular importance to companies that serve as subcontractors on government-funded projects to companies that do work for government corporations or government grantees.

In the decision under review, the Sixth Circuit held that the false records and conspiracy provisions of the FCA do not include a government-employee presentment requirement. In 2004, in a decision written by then-Judge (now Chief Justice) John Roberts, the DC Circuit reached the opposite conclusion with respect to the FCA's false records provision in *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488 (D.C. Cir. 2004). Although the questions presented to the Supreme Court do not expressly include the basic submission-of-false-claims basis for liability under the FCA, the Supreme Court may well discuss whether presentment to the government is required to establish that form of FCA liability as well.

Use of the public disclosure bar as a means to gain early dismissal. The FCA's public disclosure bar, 31 U.S.C. 3730(e)(4), provides for dismissal of qui tam actions for lack of subject matter jurisdiction where the "allegations or transactions" are (i) "based upon" (ii) information available in "public disclosure[s]" made in certain enumerated settings, (iii) unless the relator is "an original source of the information." Courts continue to debate the

exact scope of each of the public disclosure bar's elements. Some recent noteworthy decisions include:

- **"based upon"**
 - *United States ex rel. Fowler v. Caremark RX LLC*, 496 F.3d 730 (7th Cir. 2007): reaffirms that, contrary to the majority view, a relator's allegations must actually be derived from public disclosures for the bar to apply (collects decisions from other Circuits, the 4th being the only one agreeing with the 7th)
 - *United States ex rel. Duxbury v. Ortho Biotech Products*, Civ. No. 03-12189-RWZ, 2008 WL 244304 (D. Mass. Jan. 25, 2008): follows the majority view that "based upon" means simply similar to publicly disclosed allegations and not that allegations be need be derived from disclosures; notes disagreement even among district court judges within District of Massachusetts
- **"public disclosure"**
 - *United States ex rel. Rost v. Pfizer*, 507 F.3d 720 (1st Cir. 2007): disclosures made by defendant company to government investigators do not constitute public disclosures without further disclosure to some portion of the public
 - *United States ex rel. Fowler v. Caremark RX LLC*, 496 F.3d 730 (7th Cir. 2007): disclosures made by defendant company to government investigators do constitute public disclosures
 - *United States ex rel. Montgomery v. St. Edward Mercy Medical Center*, No. 4:05-CV-899, 2007 WL 2904111 (E.D. Ark. Sept. 28, 2007): Assistant US Attorney's release of letter to defendant's counsel along with a summary of government's investigation constitutes public disclosure
 - *R.A. McElmurray v. Consolidated Government of Augusta-Richmond County*, 501 F.3d 1244 (11th Cir. 2007): materials produced in discovery in state-court suit constitute public disclosures
 - *United States ex rel. Rose v. East Texas Medical Center Regional Healthcare System*, No. 05-CV-216, 2007 WL 2350648 (E.D. Tex. Aug. 14, 2007): open, public board meetings of county hospital authority in which transactions were discussed did not constitute "administrative hearings" within meaning of public disclosure bar, where there was no evidence that the meetings were extensive or part of other ongoing proceedings, or that the meeting participants invited or received public comment, or that the relevant documents were openly distributed
 - *United States ex rel. Smith v. New York Presbyterian Hospital*, No. 06-Civ.-4056 (NRB), 2007 WL 2142312 (S.D.N.Y. July 18, 2007): disclosures of similar practices at different hospital not sufficient to bar claims.
- **"original source":**
 - *R.A. McElmurray v. Consolidated Government of Augusta-Richmond County*, 501 F.3d 1244 (11th Cir. 2007): to be original source, not sufficient to have knowledge about general conditions at facility giving rise to claims
 - *United States ex rel. Wilson v. Maxxam Inc.*, No. C 06-7497, 2007 WL 2781169 (N.D.

Cal. Sept. 20, 2007): state official who is not compelled by the terms of his employment to disclose fraud to the federal government may be an original source

Developments in Congress

— Senate Judiciary Committee hearing on and likely markup of False Claims Act

Correction Act: Congress is considering pro-plaintiff amendments to the FCA that would address both government presentment and the public disclosure bar, as well as other issues. On Wednesday, February 27, the full Senate Judiciary Committee held a hearing on the False Claims Act Correction Act of 2007 (S. 2041), introduced by Charles Grassley (R-IA) and Dick Durbin (D-II) in September 2007. Full Committee markup is expected by next week. The Correction Act would amend the FCA:

- to make clear that a false claim need not be presented to a government employee, but need only be "for Government money or property." The Correction Act would define that phrase to include government money used to reimburse contractors, grantees, or other government agents
- to reject an interpretation handed down by the Supreme Court last year in *Rockwell International Corp. v. United States*, 127 S.Ct. 1397 (2007), and make it easier for whistleblowers to bring suits by narrowing the scope of the public disclosure bar and leaving solely in the government's hands whether to seek dismissal on public disclosure grounds
- to make clear that the FCA applies to funds held by the United States in trust for third parties-such as the Iraqi government
- to clarify the statute of limitations provisions of the FCA to make it more difficult to secure dismissals of claims on timeliness grounds

The Senate bill also has the co-sponsorship of both the Chairman and the Ranking Member of the Senate Judiciary Committee, Patrick Leahy (D-VT) and Arlen Specter (R-PA). But, according to the testimony of Deputy Assistant Attorney General Michael Hertz, the Administration opposes significant parts of the bill, including its revision of the public disclosure bar. The House version (H.R. 4854) was introduced by Howard Berman (D-CA) in December 2007. It has the co-sponsorship of the Ranking Member on the House Judiciary Committee, James Sensenbrenner (R-WI), to which it has been referred.

Developments in the States. On January 13, 2008, New Jersey became the 22nd state to enact its own False Claims Act. The law takes effect on March 13, 2008. During 2007, New York, Georgia, and Oklahoma joined the ranks of states with their own false claims statutes.