Whistleblower Defense Alert: The Withering of The Public Disclosure Bar

Related Attorneys

Jacob D. Mahle

Victor A. Walton, Jr.

Related Services

False Claims Act and Qui Tam

CLIENT ALERT | 2.12.2015

By: Joseph W. Harper and Laurie A. Witek

Courts continue to whittle away at the public disclosure bar, historically one of the best ways to dispose of parasitic *qui tam* lawsuits. Most recently, the Eleventh Circuit issued a ruling regarding the impact of the 2010 amendments to the False Claims Act's (FCA) public disclosure rule. In its opinion in *U.S. ex rel. Osheroff v. Humana, Inc.*, the Eleventh Circuit joined the Fourth Circuit in holding that the public disclosure rule, as amended in 2010, is no longer a jurisdictional bar to an FCA action.

The Eleventh Circuit found that the plain language of the statute compelled the conclusion that the amended provision is no longer jurisdictional. The Court noted that the provision, as amended, explicitly instructs courts to "dismiss" an action when the provision applies, , rather than indicating that there is no subject matter jurisdiction in that circumstance. It reasoned that Congress removed the language from the pre-2010 version of the statute that rendered the provision jurisdictional in nature, but did not remove jurisdictional language from other FCA provisions, suggesting that Congress's deletion of the word "jurisdiction" from the amended public disclosure rule was intentional. Finally, the Court noted that the amended provision allows the case to proceed if the government objects to dismissal, even when the public disclosure rule applies—a procedure incompatible with a defense implicating subject matter jurisdiction, which cannot be waived or assented to.

As we have previously discussed, the elimination of the jurisdictional nature of the public disclosure bar has the potential to significantly weaken its utility as a defense to FCA allegations. First, rendering the defense non-jurisdictional shifts the burden of proof from plaintiffs to defendants. When the amended public disclosure provision applies, Rule 12(b)(6)—which places the burden of proof on the moving party—will be the proper procedural mechanism for seeking dismissal. Previously, under the pre-2010 public disclosure rule, FCA defendants could move to dismiss for lack of jurisdiction under Rule 12(b)(1), which

places the burden of proving jurisdiction on the FCA plaintiff.

Second, unlike motions brought under Rule 12b(b)(1), courts typically cannot consider matters outside the pleadings on a Rule 12(b)(6) motion to dismiss, making it more difficult for defendants to establish that the FCA allegations were publicly disclosed. In *Osheroff*, however, the Eleventh Circuit, while acknowledging the general rule that matters outside the pleadings cannot typically be considered on a Rule 12(b)(6) motion to dismiss, held that it was proper for the district court to consider newspaper articles and documents filed in other litigation because those documents were subject to judicial notice. In this respect *Osheroff* may prove to be valuable precedent for defendants seeking to dismiss FCA claims under the amended public disclosure rule as many of the sources that qualify as a public disclosure also often qualify for judicial notice. Another silver lining: while *Osheroff* did not address this issue directly because the relator failed to raise the issue in the district court, the Eleventh Circuit noted that the district court (properly) applied the pre-amendment version of the public disclosure rule to allegations involving conduct that pre-dated the effective date of the amendments. Due to the lengthy investigation period that often precedes litigating FCA claims, many defendants will be able to avail themselves of the older, stronger public disclosure rule in their cases—even if those cases were filed after the effective date of the amendments—provided that the alleged conduct occurred prior to the effective date.