Qui Tam? Now More Plaintiffs Will Qualify

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An important mechanism for bringing suit against healthcare providers and pharmaceutical and medical device companies – the Qui Tam Action – has been expanded as part of the Patient Protection and Affordable Care Act (Pub. L. No. 111-148) (the "PPACA").

Through a Qui Tam Action, a private Plaintiff may bring suit alleging violations of the Federal False Claims Act (the "FCA"). The FCA, 31 U.S.C. §§ 3729-3733, prohibits the submission of false claims for payment of government funds, or causing others to submit such claims. While the FCA covers any federally funded contract or program (with the exclusion of tax programs), the largest number of recent actions has been aimed at fraudulent claims under the Medicare program and other federally funded healthcare programs.

A major feature of the FCA is its Qui Tam provisions. Under these provisions, a Qui Tam Plaintiff may bring suit under the FCA alleging healthcare fraud and thereafter, should the government intervene and succeed, collect a portion of the funds recovered by the government. Tellingly, Qui Tam is an abbreviation for the phrase "*qui tam pro domino rege quam pro se impso in hac parte sequitur*," which means "who pursues this action on our Lord the King's behalf as well as his own."

There is a two-pronged test for a Qui Tam Plaintiff under 31 U.S.C. § 3730(e)(4):

- A Qui Tam Plaintiff must provide information that has not yet been publicly disclosed; or
- If the information has been publicly disclosed, the Qui Tam Plaintiff must be an "original source" of the information.

Under the PPACA, both of these prongs have been amended in ways that expand the potential pool of Qui Tam Plaintiffs.

Moreover, Section 3730(e) originally provided that the failure of a Qui Tam Plaintiff to meet the statutory requirements would deprive the court of jurisdiction over the action. This provision was amended under the PPACA in two ways. First, the failure to meet the Section 3730(e) requirements will no longer serve as a jurisdictional bar to suit. Second, even if the Qui Tam Plaintiff fails the Section 3730(e) requirements, dismissal may be "opposed by the Government" and the action may proceed.

While the PPACA has come into effect, the prior provisions and the cases construing them are not entirely irrelevant as the new provisions do not apply retroactively. Accordingly, all actions filed before the PPACA's passage are bound by the prior provisions and the case law construing them.

The following summarizes the PPACA changes that relate to Qui Tam Actions:

JURISDICTIONAL BAR ELIMINATED - THE ACTION MAY PROCEED IF GOVERNMENT OPPOSES THE BAR

- *Old Language*: "No court shall have jurisdiction over an action under this section ... "
- *New Language*: "The court shall dismiss an action or claim under this section, unless opposed by the Government ... "

NARROWER DEFINITION OF "PUBLIC DISCLOSURE BAR"

- *Old Language*: Bar construed to apply to public disclosures incounty, state, and federal1 forums and publications, as well as news media.
- *New Language*: Bar's application explicitly limited to public disclosures inonly federalforums and publications, as well as news media.

BROADER "ORIGINAL SOURCE" EXCEPTION TO THE PUBLIC DISCLOSURE BAR

- *Old Language*: One way of qualifying: "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 ..."

- *New Language*: Two ways of qualifying: (1) "prior to public disclosure ... voluntarily disclos[ing] to the Government the information on which allegations or transactions in a claim are based," or (2) sharing "knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions ..."

Just a week after the President signed the PPACA into law, the Supreme Court decided Graham County Soil and Water Conservation District et al v. United State ex rel. Wilson, No. 08-304, slip op. (U.S. Mar. 30, 2010) (holding that the public disclosure bar applies to county and state administrative reports, audits, and investigations).

The foregoing changes leave open for interpretation a number of areas particularly relevant to defendants in Qui Tam Actions including:

- Will any Government opposition suffice to undercut a bar to a Qui Tam Action? Must the Government provide a basis for its opposition? When must the Government assert its opposition?
- If the bar is not jurisdictional, how will this change the nature of the defense? Will actions be permitted to proceed if a defendant fails to raise the defense at the outset?
- Will the narrower definition of public disclosure lead Qui Tam Plaintiffs to tag-team state and federal actions? Or will Qui Tam Plaintiffs file a number of state actions and if they do not have good results, file a federal action?
- What type of knowledge will be found to be "independent of and materially add" to publicly disclosed information? Will creative lawyering make the difference?

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