Qui Tam Relator Not Original Source; U.S. ex rel. Repko v. Guthrie Clinic

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In *U.S. ex rel. Repko v. Guthrie Clinic et al.*, the Third Circuit recently ended an attempt by Rodney Repko, former general counsel and executive vice president for Guthrie Healthcare System and its related entities, to bring a *qui tam* case against his former employer. After he left his job at Guthrie, Repko allegedly attempted to steal two million dollars by forging the name of Guthrie officials on loan documents. As part of a plea agreement to bank fraud charges, prosecutors required Repko to cooperate by “providing information concerning the unlawful activities of others.” Within months of purportedly informing the government about questionable Guthrie arrangements, Repko filed a *qui tam* action under the federal False Claims Act (FCA), alleging those same Guthrie arrangements violated the Stark and Anti-Kickback statutes, resulting in the filing of false Medicaid and Medicare claims. A District Court Judge dismissed the matter, finding the court lacked subject matter jurisdiction to hear the FCA case because Repko did not qualify as the original source of the information about the alleged FCA violations. Repko appealed.

In affirming the lower court’s dismissal, the Third Circuit agreed that much of the information on which the alleged FCA case was based had been publicly disclosed before Repko’s *qui tam* case was filed, through postings on websites and filings in prior litigation. Under the FCA, prior public disclosure is a jurisdictional bar to pursuing a FCA case unless the *qui tam* relator can show he is the original source of that disclosed information. The FCA defines an original source to include one who, prior to a public disclosure, “has voluntarily disclosed to the Government the information on which the allegations or transactions in a claim are based,” The appellate court was persuaded by the fact Repko had initially disclosed the challenged arrangements to the government under his plea agreement; the disclosure was bargained-for consideration which enabled Repko to obtain a lower sentence on his bank fraud charges. While never mentioning the word “voluntarily,” the court found that since the plea agreement compelled his disclosures to the government, Repko was essentially estopped from invoking the original source exception. Without the exception, the public disclosure bar remained applicable and the lower court correctly ruled that it had no subject matter jurisdiction over the FCA action.

The import of the Third Circuit’s opinion may be limited; indeed, the Third Circuit decision is stamped as “not precedential.” And while many individual plea agreements do not require disclosure of other unlawful activities, diversion agreements or conditions of probation may contain provisions requiring an individual report suspected illegality. So if you face a *qui tam* suit brought by an ex-employee who at one time faced criminal charges, and there is a public disclosure issue, some targeted discovery related to the terms of any agreements with government attorneys, and/or conditions of probation, may be warranted.

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