Congress shortens the shelf life of the FCA public disclosure bar holding in *U.S. ex rel. Wilson v. Graham County*

By Joshua Orr

A recent Supreme Court decision expands the scope of the “public disclosure” bar on *qui tam* actions under the False Claims Act (the “FCA”), and provides many defendants with a new weapon in combating *qui tam* lawsuits. In *United States ex rel. Wilson v. Graham County Soil and Water Conservation District*, 2010 U.S. LEXIS 2927 (2010), the Court held that the public disclosure bar under § 3730(e)(4)(A) of the FCA (31 U.S.C. §§ 3729 – 3733) applies to disclosures made in state and local proceedings as well as those in federal hearings, reports, audits, and investigations.\(^1\) The impact of this decision will be blunted, however, as Congress effectively overrode it in the recent health care bill.

The FCA, a far-reaching federal anti-fraud statute, permits private plaintiffs, known as “relators” or “whistleblowers” to bring a private cause of action, known as a *qui tam* action, on behalf of the government. The FCA provides powerful financial incentives to whistleblowers; successful relators are entitled to 15 – 30 percent of the amount recovered by the government. To strike a balance between encouraging those with inside information to come forward and preventing “parasitic” lawsuits based solely upon publicly available information, Congress imposed a public disclosure bar on *qui tam* actions.

The public disclosure bar in the current version of the FCA prevents private plaintiffs from bringing *qui tam* lawsuits if the lawsuit is 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 unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.” (31 U.S.C. § 3730(e)(4))

In *Graham County*, the Department of Agriculture agreed to reimburse two North Carolina counties for a portion of the costs associated with cleanup and repairs in areas that suffered flood damage. The relator, a former employee of the Soil and Water Conservation District, brought a *qui tam* complaint under the Act, alleging that the district submitted false claims for payment to the department. The facts that formed the basis of the relator’s complaint had been previously disclosed in a county audit report and a state environmental report. The district moved to dismiss the claims under the public disclosure bar.

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1. The Court resolved a split among the circuits. The Third and Fourth Circuits had held the bar applied only to federal sources, while the Eighth, Ninth, and Eleventh Circuits had held that the bar included at least some state and local sources.
bar, as the allegations were based upon information disclosed in county and state reports. The district court dismissed the action. The Fourth Circuit reversed the district court, holding that the public disclosure bar applied only to information disclosed in federal sources.

The Supreme Court reversed. Relying upon the text and history of the statute, and the policy underlying the public disclosure bar, the Court concluded that the phrases “criminal, civil, or administrative hearing” and “administrative … report, hearing, audit, or investigation” applied to state as well as federal hearings, reports, audits, and investigations. Neither the district court nor the Fourth Circuit addressed whether the relator could continue to pursue her claims as an “original source” of the information, an issue the Supreme Court left open on remand.

The expanded defenses available under Graham County appear to be short-lived. As the Court noted in its opinion, the recently enacted Patient Protection and Affordable Care Act amended the public disclosure bar under § 3730(e)(4)(A) to apply only to information disclosed in federal hearings, reports, audits, or investigations:

The court shall dismiss an action or claim under this section, unless opposed by the [g]overnment, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed—

(i) in a [f]ederal criminal, civil, or administrative hearing in which the [g]overnment or its agent is a party;

(ii) in a congressional, Government Accountability Office, or other [f]ederal 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.

(emphasis added). The Court noted that the amended language did not apply retroactively. Therefore, in cases brought before May 23, 2010 (when the Patient Protection and Affordable Care Act goes into effect), defendants can take advantage of this expanded bar on qui tam actions.

Graham County and other recent Supreme Court decisions such as Allison Engine illustrate the significant uptick in litigation under the FCA. Congress has shown similar interest; two major recent pieces of legislation, the Fraud Enforcement Recovery Act and Patient Protection and Affordable Care Act, have significantly amended the FCA. [http://www.nixonpeabody.com/publications_detail3.asp?ID=2742] Nixon Peabody will continue to monitor this rapidly developing area of the law.
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