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### Third Circuit Elaborates on the Original Source Exception to the Federal False Claims Act

In *United States of America ex rel. Moore & Company v. Majestic Blue Fisheries LLC*, 812 F.3d 294 (2016), the Third Circuit Court of Appeals recently decided an appeal on the application of original source exception to the public disclosure bar under the 2010 Amendment to the Federal False Claims Act, 31 U.S.C. §§ 3729–3733 (“FCA”). The FCA permits an individual, known as a relator, to sue on behalf of the federal government for fraud in federal contracting. Where the fraud has been publically disclosed, the public disclosure bar prohibits the relator from bringing suit unless the relator falls within the definition of an original source. In *Moore* the court stated that the 2010 changes to the language of the statute “... has radically changed the ‘hurdle for relators’” and announced a rule for examining whether a relator has independent and material information that was not publically disclosed about a fraud.

*Moore* involved allegations of false certifications to receive fishing licenses under the South Pacific Tuna Treaty. In the discovery process in a wrongful death lawsuit, the relator, happened to be a law firm, learned that the defendant was submitting false claims to the federal government to obtain fishing licenses. What made the case interesting is that some of the allegations of false certification were made public in news reports in online blogs and Freedom of Information Requests made by the relator. The Third Circuit was left with the issue of whether the information about the fraud learned in the discovery process was independent of the news reports and FOIA request and independent of and material to the fraud.

The FCA was passed during the Civil War to address issues of fraud in government contracting. Under the original act, it did not require the relator to have first-hand knowledge of the fraud. Over time the act became a vehicle for individuals to file a lawsuit based on information revealed in a criminal indictment or even a congressional hearing. To address this problem, Congress enacted a government knowledge defense, which denied jurisdiction if the FCA actions were based on evidence or information in possession of the United States Government, or any agency, officer or employee of the federal government at the time the suit was brought.

The FCA has been amended on several occasions to balance the issue of the relator’s independent knowledge of fraud. In 2010, the Patient Protection and Affordable Care Act amended the public disclosure bar by removing the language that explicitly stated the court was denied jurisdiction if the bar applied to the action; reduced the number of statutorily enumerated sources; and expanded the definition of original source by allowing a relator with knowledge independent of the public disclosure and materially added allegations to the fraud to bring suit.

In *Moore*, the defendant argued that the public disclosure bar applied because the news articles and the FOIA disclosed elements of the fraud to the public. The FCA has several statutorily enumerated provisions that identify what is considered a public disclosure. In evaluating the allegations of fraud, the Court stated that formulaically the allegations appears as

follows “X (misrepresented state of facts) + Y(true state of facts)= Z(fraud).” The Court stated that the defendant must show that the allegation or transaction of fraud was publically disclosed through the statutory enumerated sources. The Court agreed with the defendant that the news articles and FOIA request fell within the statutory enumerated provisions of a public disclosure.

The Court then evaluated whether the law firm in *Moore* qualified as an original source of the information. In addressing this, the Court stated that the salient question is no longer whether the relator has direct and independent knowledge of the information as required under earlier versions of the FCA, but rather, whether the relator has direct and independent knowledge of information that materially adds to the publicly disclosed allegations. The Court stated that the new definition of original source requires an entirely different analysis than under the earlier FCA.

The Court determined that original source definition under the FCA“... states that a relator's knowledge must be independent of, and materially add to, not all information readily available in the public domain, but, rather, only information revealed through a public disclosure source.” In evaluating whether the information is independent of the public disclosure, the Court stated the statute “... requires courts to compare the relator’s knowledge with the information that was disclosed through the public disclosure sources enumerated in § 3730(e)(4)(A). The Court determined that information disclosed in discovery about how the defendants established and controlled their enterprises was sufficient to meet this requirement.

The Court then interpreted the “materially adds” requirement under the 2010 Amendment. The Court stated that it had not previously interpreted the term materially adds. The defendants argued that the original elements of the fraud were publically disclosed and the relator’s details as to how the fraud originated and transpired did not materially add to the publically disclosed elements. The Court rejected the defendant’s argument and stated that the salient issue is distinguishing between immaterial and material information that adds to the publically disclosed elements of fraud. To distinguish between immaterial and material information, the Court looked to Rule 9(b) and *In re Rockefeller Ctr. Props., Inc. Securities Litig.*, 311 F.3d 198 (3<sup>rd</sup> Cir. 2002). The Court stated that the rule in *Rockefeller* provides a helpful benchmark to determine what information materially adds to an FCA complaint. The Court stated that a relator materially adds to the publically disclosed allegations or transaction of fraud when it contributes information distinct from what was publically disclosed that adds in a significant way to the essential background: the who, what, when, where and how of the events at issue. The Court concluded that public disclosures in the instant case provided the basic elements of the fraud’s transaction, but the information from the wrongful death action provided signification details to the essential factual background.

The decision in *Moore* comes several years after the passage of the 2010 Amendment to the Federal False Claims Act. The standard stated in *Moore* provides relators and defendants with understanding of what information will survive the public disclosure bar to the FCA. It will likely assist relators in bringing claims of fraud in government contracting where they have independent and material knowledge of activities that may have been publically disclosed.

Because of the generality of this update, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations.