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Articles in Legal Industry Publications Continue to Qualify as Public Disclosure Under the False Claims Act

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A **Texas** federal judge recently tossed a **Federal False Claims Act (FCA)** *qui tam* because the substance of the underlying allegations was previously disclosed in several legal industry publications, *U.S. ex rel*. ***Pharma Fraud Watch LLC v. Bayer*** (EDTX, Action 1:10-CV-669 8/31/12). Before ruling, the Judge examined the FCA's public disclosure bar as it existed before and after the 2010 FCA amendments.

The *qui tam* case was brought by Pharma Watch LLC (Pharma) and centered on Bayer's off-label marketing of its oral contraceptives YAZ and Yasmin, which allegedly caused Medicaid to pay false claims for the products. The marketing was initially disclosed in a patent infringement case Bayer itself brought against other drug manufacturers seeking FDA approval to market generic versions of the two drugs. As part of its legal claim in the patent case, Bayer submitted its own marketing materials showing Bayer was marketing the drugs for uses other than oral contraception. In September 2010, Bayer lost the patent case when the court found that Bayer's marketing of the drugs for other uses was not FDA-approved. The patent decision was reported in multiple legal publications, including Mealey's Daily News Update and Law 360.

In October 2010, Pharma was formed, and nine days later it filed suit in Texas. The government declined intervention in December 2011; the complaint was then unsealed and served on Bayer. Earlier this year, Bayer moved to dismiss the case on multiple grounds, including public disclosure.

Before 2010, the FCA's public disclosure bar was jurisdictional. A court could not proceed on an FCA action brought by a *qui tam* relator if the matter had been publicly disclosed in, for example, legal proceedings or in the news media, unless the relator was the original source of the disclosure – a standard previously discussed in my recent blog post. The 2010 FCA amendments replaced the jurisdictional language and narrowed the scope of what qualified as a disclosure: the court "shall dismiss" a *qui tam* action if substantially the same allegations or transactions were publicly disclosed in legal proceedings "where the Government or its agent is a party," or in the news media, unless the relator qualifies as an original source.

The court found that the earlier version of the statute applied to Medicaid claims filed pre-2010, and the new language applied to claims filed post-2010. The court also found that the FCA's amended language on jurisdiction didn't alter the analysis: if the public disclosure bar applied, the case had to

be dismissed under either version of the statute.

One difference in the two versions of the statute was initially of import. Bayer's disclosure of the marketing in the patent litigation was found to be a public disclosure under the earlier version of the statute but not under the amended version because the government was not a party to that action. But in the end it didn't matter. The court found that the legal articles on the patent decision qualified as a public disclosure under both versions of the statute.

Pharma asserted that the reports on the patent case were merely technical litigation updates, not real news articles, and further that the articles never discussed Medicaid payments so did not disclose the "substance" of its *qui tam* action for causing false claims. But the court found that that articles in legal publications qualified as news media reports. And while the articles did not specifically mention Medicaid claims, the court found that point unpersuasive: the question was whether the disclosure of the allegations was sufficient to raise an inference of fraud for the government. And just as Pharma was able to conclude that Bayer's disclosed off-label marketing allegedly resulted in false Medicaid claims, the same information was available to the government to reach that same conclusion. Finding the legal articles constituted public disclosure under either version of the FCA, the court dismissed the case.

When it comes to news media reports, the 2010 FCA amendments apparently do not materially change the analysis for public disclosure purposes. Prior media reports on the substance of the allegations that form the basis of a *qui tam* case alleging false claims, even in technical publications, should warrant dismissal of the *qui tam.*

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