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Ninth Circuit Rejects Qui Tam Relator's Original Source Claim

Article By:

Litigation Practice Group McDermott Will and Emery

On July 27, 2016, a three-judge panel of the Ninth Circuit Court of Appeals in California issued a ruling in *United States ex rel. Hastings v. Wells Fargo Bank, NA, Inc.*, affirming the district court dismissal of a *qui tam* suit on the grounds that the relator was not an original source.

The relator had sued Wells Fargo and a number of other lending institutions under the Federal Claims Act (FCA), claiming they had falsely certified to the federal Department of Housing and Urban Development (HUD) that they were in compliance with a regulation requiring borrowers to make a down payment of at least 3%. Federal regulations allow this down payment to be paid via gift, so long as repayment for the gift is not "expected or implied." See *U.S. ex rel. Hastings v. Wells Fargo Bank, Nat. Ass'n (Inc.), 2014 WL 3519129*, at *1 (C.D. Cal. July 15, 2014) (summarizing HUD regulations).

The defendants moved to dismiss, arguing that the gravamen of the allegations (that certain charities were, with the tacit approval the defendants, making "gifts" to borrowers that were ultimately repaid) had already been disclosed in various public documents that predated the *qui tam* suit. Because of these public disclosures, the suit could only proceed if the relator was an "original source" of the information, per 31 U.S.C. § 3730(e)(4)(A). The district court held that the relator, a real estate agent, was not an original source because his knowledge of the charities and their gift programs was secondhand. The court also held the fact that relator had "offered his view to HUD that [the gift programs] violated HUD standards" to be of no moment, because "[i]dentifying the legal consequences of information already in the public domain does not constitute discovery of fraud." 2014 WL 3519129, at *11.

On appeal, the relator argued that the district court incorrectly applied the 1986 FCA definition of "original source" (someone who has "direct and independent knowledge of the information on which the allegations are based") instead of the 2010 definition (someone who "(1) prior to a public disclosure … has voluntarily disclosed to the Government the information on which allegations or transactions in a claim are based, or (2) has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions"). *Compare* 31 U.S.C. § 3730(e)(4)(B) (1986) *with* 31 USC. § 3730(e)(4)(B) (2010). The Ninth Circuit panel unanimously held that the relator was not an original source under either definition. Regarding the former, it held that his knowledge was not "direct and independent" where it was "assembled from information available to all members of

the Multiple State Listing Service." 2016 WL 4011199, at *1. Regarding the latter, it held that the relator had merely provided the government with information that did not "materially add to [the] public disclosures," citing the fact that the gift programs in question "were extensively examined in proposed rules, internal audits, a GAO report, and congressional hearings." *Id.* at *2.

In sum, the FCA's original source requirement represents a high bar for qui tam plaintiffs. Suits brought by relators who are not true insider "whistleblowers" with first-hand knowledge of the alleged fraud are remain highly vulnerable to dismissal on the pleadings.

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