Legal Alert

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9TH CIRCUIT REVERSES 23 YEARS OF CASE LAW REGARDING THE FALSE CLAIMS ACT

The federal False Claims Act ("FCA")[1] authorizes private citizens, known as "relators," to bring whistleblower lawsuits when they discover that the federal government has been defrauded. The fines and penalties can be ruinous for a company that violates the FCA, sometimes reaching billions of dollars. Anyone who does business with the federal government, or with someone working on the federal government's behalf (such as doctors billing state Medicaid agencies), should be aware of the scope of the FCA as well as its dangers.

One of the most effective defenses to an FCA lawsuit is the public disclosure bar.[2] Generally speaking, the court is required to dismiss an FCA action if the suit's allegations have already been publicly disclosed, unless the relator was an original source of that disclosure. Since the 1992 case of *Wang ex rel. United States v. FMC Corp*,[3] courts in the 9th Circuit have held that a relator will not be considered an original source unless: (1) the relator had "direct and independent knowledge" of information supporting her claim; (2) the relator "provided the information to the government" before filing the whistleblower suit; and (3) the relator "had a hand in the public disclosure" of the allegations.

For the past 23 years, defendants in 9th Circuit FCA cases could have the case thrown out due to the public disclosure bar if there was a newspaper article or administrative hearing regarding the same allegations and the relator had not been involved in the disclosure. But on July 7, 2015, the *en banc* 9th Circuit unanimously overruled the *Wang* case and removed the "hand-in-the-public-disclosure" requirement for all cases within the Circuit's borders (Arizona, Alaska, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington).[4] A case will still be thrown out if there is a public disclosure and the relator did not have (1) direct and independent knowledge of the information that she (2) provided to the government before filing her FCA case. The new case is *Hartpence ex rel. United States v. Kinetic Concepts, Inc, et al.* and it can be found at http://cdn.ca9.uscourts.gov/datastore/opinions/2015/07/07/12-55396.pdf.

What does this mean for doctors, hospitals, and others who transact business with the federal government? It just got a little harder to defend against an FCA case. The stakes in FCA cases were already very high, and the *Hartpence* decision reduces the effectiveness of one of the biggest tools in a defendant's toolbox. If your company would like assistance with regulatory compliance in order to avoid an FCA claim, or if a claim has already been brought against your company, please contact Gammage & Burnham.

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1 31 U.S.C. § 3729, *et seq*.
2 Found at 31 U.S.C. § 3730(e)(4).
3 975 F.2d 1412, 1418.
4 The 9th Circuit joins the 4th Circuit (Maryland, North Carolina, South Carolina, Virginia, and West Virginia**)** and the 8th Circuit (Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota) in removing this condition from FCA lawsuits.