The Legal Intelligencer

White-Collar Law

Court Limits Ability to Allege FCA Violations Over Post-Employment Conduct

David M. Laigaie and Casey A. Coyle, The Legal Intelligencer

June 29, 2015

The False Claims Act allows private whistleblowers to bring actions on behalf of the United States against any person who knowingly submits false or fraudulent claims to the government. The FCA prohibits such actions if they are based upon publicly available information, unless the whistleblower is an "original source" of the information. In order to be an "original source," the whistleblower must have "knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions."

Courts are asked frequently to determine who qualifies as an "original source" for purposes of the FCA. In many cases, whistleblowers file such suits against former employers, alleging conduct that occurred both during their employment and after. Several district courts have recently wrestled with a thorny question: Despite the prior public disclosure of the challenged conduct, can a former-employee whistleblower qualify as an "original source" as to conduct that took place after they left their employment? The majority of these courts have concluded that a whistleblower cannot reasonably be considered an "original source" as to conduct that occurred after he or she left the company. One court, however, has recently bucked this trend and concluded to the contrary, at least so as to enable the whistleblower to take discovery concerning such post-employment conduct.

In *United States ex rel. Galmines v. Novartis Pharmaceuticals*, ___ F. Supp. 3d ___ (E.D. Pa. 2015), the U.S. District Court for the Eastern District of Pennsylvania held that the relator, Donald Galmines, qualified as an "original source" even though the conduct at issue allegedly took place after Galmines ceased working for the defendant, Novartis Pharmaceuticals Corp. Galmines alleged that Novartis engaged in "off-label" marketing of the drug Elidel, thus encouraging physicians to prescribe Elidel for purposes that the U.S. Food and Drug Administration had not approved. Galmines contended this marketing campaign resulted in submissions to the government, including Medicare and Medicaid, of false claims for reimbursement for the unapproved prescriptions of Elidel.

Galmines subsequently sought discovery relating to Novartis' conduct following the filing of the initial complaint, which took place July 21, 2006. Novartis opposed the discovery. The court ruled that, in order for Galmines to obtain discovery for conduct after the date of the initial complaint, Galmines would need to allege wrongful conduct continuing after July 21, 2006. Galmines then filed a motion for leave to file a fourth amended complaint and attached a copy of a proposed fourth amended complaint in which he alleged that Novartis' wrongful conduct continued through at least 2009. Novartis filed an opposition brief, claiming that the proposed amendment was futile because, among other reasons, Galmines was not an "original source" of the new allegations.

The court, however, disagreed, holding that, since Galmines qualified as an original source of the underlying scheme, "he is also an original source of these additional allegations that the same underlying scheme is continuing." In reaching this conclusion, though, the court acknowledged that there is no controlling Third Circuit law on the issue. Even so, pursuant to *Galmines*, a whistleblower could be deemed an "original source" (and to have "direct and independent knowledge") of information concerning conduct that occurred after his or her employment ended.

Galmines, however, directly conflicts with numerous other courts that have determined that a whistleblower could not logically be an "original source" as to events that took place in the workplace after employment ended. For example, *Galmines* is at odds with the District of New Jersey's decision in *United States ex rel. Tahlor v. AHS Hospital* (D. N.J. Oct. 31, 2013), as well

as the District of Massachusetts' ruling in *United States ex rel. Duxbury v. Ortho Biotech Products L.P.* (D. Mass. Sept. 27, 2010). Both of these cases held that a whistleblower was not an "original source" as to events that occurred in the workplace after he or she left his or her employment.

Galmines is also inconsistent with the Central District of Illinois' recent opinion in *United States ex rel. Gravett v. Methodist Medical Center of Illinois* (C.D. Ill. Mar. 4, 2015), which concluded that "it is not possible for [the relator] to have direct knowledge of the specific patients and treatments provided after his termination from employment ... as he would not have been present to personally observe these situations." The *Gravett* court was not impressed by the whistleblower's belief that the alleged fraudulent billing practices that he observed during his employment carried on after his termination, noting that such belief does not amount to direct or independent knowledge.

In addition to conflicting with the above cases, the rationale underlying *Galmines* is questionable, as it permits a whistleblower to use discovery to obtain "direct and independent" knowledge of alleged false or fraudulent claims about which the whistleblower was otherwise ignorant. In that way, *Galmines* turns the "original source" requirement on its head.

That said, the precedential reach of *Galmines* should be limited, as the case was decided in the context of a motion for leave to amend a complaint, which are liberally granted. Future courts, therefore, can be expected to follow the weight of authority on this issue, not *Galmines*.

David M. Laigaie *is a member at Eckert Seamans Cherin & Mellott and focuses his practice on internal corporate investigations, health care litigation and complex civil litigation. He handles cases involving health care fraud, securities fraud, tax fraud, export violations, pharmaceutical marketing fraud, municipal corruption, defense procurement fraud and public finance fraud. He can be reached at 215-851-8386 or dlaigaie@eckertseamans.com.* ***Casey A. Coyle*** *is an associate at the firm and focuses his practice on complex commercial litigation, legal issues litigation and appellate law. He can be reached at 215-851-6626 or ccoyle@eckertseamans.com.* •
