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Revisiting The FCA Public Disclosure Bar, Post-Bellevue

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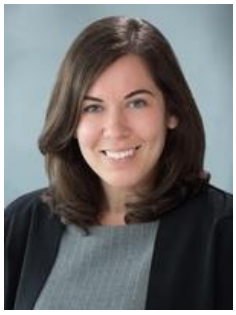

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The Seventh Circuit's recent decision in Bellevue v. Universal Health Services of Hartgrove Inc., 867 F.3d 712 (7th Cir. 2017), has potentially wide-ranging implications for qui tam suits under the False Claims Act. In Bellevue, the court concluded that a relator's allegations were substantially similar to publicly disclosed allegations — and that the suit was therefore precluded by the public disclosure bar — even though the relator's allegations concerned an entirely different time period than the publicly disclosed information.

Courts within the Seventh Circuit are already adopting an expansive view of Bellevue's holding. In United States ex rel. Lisitza v. Par Pharmaceutical Companies, No. 06 C 06131, 2017 WL 3531678 (N.D. Ill. Aug. 17, 2017), the Northern District of Illinois cited Bellevue for the proposition that "expansion of [the] time period over which [a] fraud scheme operated [is] insufficient to clear [the] substantial similarity hurdle." Id. at *13 (granting summary judgment against relator when complaint was based upon publicly disclosed information and relator was not the original source of new material information).

And FCA defendants have been quick to cite Bellevue, even in other circuits. See Brief of Defendant-Appellee at 20, United States v. Amgen Inc., No. 17-1522 (2d Cir. Sept. 5, 2017).

But courts should be careful about adopting an expansive reading of Bellevue and creating a potential for abuse. Under an expansive reading of Bellevue, FCA defendants could use the public disclosure bar to completely shield themselves from qui tam suits — even for their future actions. Because of that potential, courts around the country should be careful not to extend Bellevue beyond its facts.

A forceful means of fighting fraud and abuse in government procurement is the False Claims Act's qui tam provisions, which allow private individuals — relators — to file lawsuits "to recover from persons who make false or fraudulent claims for payment to the United States." Graham Cty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson, 559 U.S. 280, 283 (2010).

But while the FCA permits private individuals to file suit, it seeks to strike a balance between

"encouraging private persons to root out fraud and stifling parasitic lawsuits." Id. at 295. One way to prevent these so-called parasitic suits is through the public disclosure bar which forecloses qui tam suits "based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party." 31 U.S.C. §3730.

In other words, where a public disclosure has occurred, the relevant governmental authority is already in a position to defend the public's interest and a qui tam suit would provide no additional benefit. To successfully bring a qui tam suit, then, the relator must be an original source of new and material information regarding the defendant's misconduct.

The defendant in Bellevue, Hartgrove Hospital, is a psychiatric hospital that received Medicaid reimbursements. Hartgrove's reimbursements were conditioned upon admitted patients being assigned a room and the hospital operating within its census.

State and federal audits conducted in March 2009 revealed that Hartgrove was operating "over census," i.e., newly admitted patients were placed and slept in a dayroom rather than patient rooms, and it admitted more patients than allowed by its state license. Nonetheless, Hartgrove submitted claims to Medicare for inpatient care of these patients.

Relator George Bellevue joined the Hartgrove staff in October 2009 — after the conclusion of the audit — and was employed as a nursing counselor until October 2014. Bellevue filed an FCA suit against Hartgove in August 2011, alleging that Hartgrove knowingly submitted fraudulent claims for reimbursement to Medicaid by admitting new patients in excess of its 150-bed capacity and placing those patients in the dayroom rather than overnight hospital rooms.

In his complaint, Bellevue alleged that Hartgrove engaged in this fraudulent behavior beyond May 2009, when the CMS issued its findings. After Bellevue filed an amended complaint, the district court dismissed his claims with prejudice. The district court declined to hold that Bellevue's claims were precluded by the public disclosure bar, but concluded that Bellevue failed to plead fraud according to the heightened standard of Rule 9(b) of the Federal Rules of Civil Procedure. Bellevue appealed.

On appeal, Hartgrove argued that Bellevue's claims were precluded by the public disclosure bar because the alleged fraud had been publicly disclosed by the CMS audit report from May 2009. Bellevue, 867 F.3d at 718. The Seventh Circuit applied a "three-step framework" to address the issue. Id.

The court considered (1) whether the allegations in the complaint had been publicly disclosed prior to the complaint; (2) whether the lawsuit is "based upon" or "substantially similar to" those publicly disclosed allegations; and (3) whether the relator was an original source of the information upon which the lawsuit is based. Id.

First, Bellevue did not dispute that the information was in the public domain, but asserted that the CMS letter made no reference to a knowing misrepresentation, a critical element of fraud. The court disagreed, and concluded that Hartgrove's "over census" allegations had been publicly disclosed, and that fraud could have been inferred from the publicly disclosed information.

Second, the court concluded that Bellevue's allegations concerning Hartgrove's conduct — even conduct occurring well after the CMS's audit — were substantially similar to the publicly disclosed information because they "pertain to the same entity and describe the same contested conduct as the publicly disclosed information" and because the time periods overlapped. Id. at 720. The court disregarded as

conclusory Bellevue's additional allegations that Hartgrove exceeded capacity as part of a regular business practice.

Third, the court concluded that Bellevue was not an original source of the information upon which the allegations in his complaint were based because he had not "materially add[ed]" to the publicly disclosed information. Id. at 721. Thus, the Seventh Circuit held that Bellevue's allegations fell within the public disclosure bar to the FCA and that his amended complaint was properly dismissed with prejudice.

According to Bellevue's allegations, Hartgrove continued its course of fraudulent conduct beyond the May 2009 CMS letter, at a time when it was presumed to have been operating in compliance with the law. But because Bellevue alleged substantially the same type of conduct as presented in the letter, the court held, he failed to meet the relator requirements.

The court virtually disregarded Bellevue's additional insight that Hartgrove continued its fraudulent practices beyond the May 2009 time period. In the court's view, because that type of conduct had already been disclosed, only the government would be a proper plaintiff in an FCA suit.

Central to Bellevue's holding was the relator's failure to provide substantive allegations about the nature of Hartgrove's alleged fraud. Had Bellevue pleaded facts, rather than conclusions, showing that Hartgrove adopted a business practice of exceeding its capacity, the Seventh Circuit's opinion suggests that the court's holding may have been different. See Bellevue, 867 F.3d at 720.

The district court likewise dismissed Bellevue's complaints because his allegations that expanded the scope of Hartgrove's alleged fraud scheme failed to establish that Hartgrove's operating over census was anything other than a temporary measure resulting from an "unusual emergency." See United States ex rel. Bellevue v. Universal Health Servs. of Hartgrove Inc., No. 11 C 5314, 2015 WL 1915493, at *12 (N.D. Ill. Apr. 24, 2015).

Thus, Bellevue's amended complaint failed to actually expand the timeframe of the alleged fraud with anything other than conclusory allegations. When a plaintiff expands the scope of a publicly disclosed fraud with the particularity required by Rule 9(b), courts should reach a different result.

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