

Qui Tam Case Study: Dismissal Based on Whistleblower's Lack of Standing

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Qui tam lawsuits — cases brought by private whistleblowers on behalf of the government — represent a growing risk for businesses that contract with the government or make claims as part of a government program, such as Medicare or Medicaid. This case study discusses Carlton Fields' recent successful defense of a physician group in a qui tam case, and some of the legal issues involved. The federal False Claims Act makes it unlawful to knowingly present or cause to be presented “a false or fraudulent claim for payment or approval” to the government.^[i] Section 3730 of the False Claims Act allows private individuals (referred to as “relators” or “whistleblowers”) to file False Claims actions on behalf of the government under the ‘qui tam’ provision. The whistleblower must make a disclosure of the allegations and evidence to the government, and file a complaint under seal. The government then determines whether it will intervene in the case. Some qui tam actions can be successfully defended against based on the whistleblower's lack of standing. A recent case from the Southern District of Florida serves as a case study. In that case, Carlton Fields defended a physician group and its physicians in a qui tam action brought by a whistleblower who was a former physician-employee of the group. The whistleblower claimed he brought suit based on his knowledge of the physician group's over-utilization of diagnostic testing and improper compensation practices. He claimed these actions violated the Stark and Anti-Kickback statutes. Carlton Fields investigated the facts and circumstances. The firm determined that, while the qui tam action was under seal in the federal district court, the former physician-employee had signed a broad release of claims against his employers while settling a separate legal proceeding in Florida state court regarding his employment contract and non-competition provisions. Carlton Fields successfully argued to the Court for an extension of the law. The firm posited that where a plaintiff suing as a qui tam whistleblower on behalf of the federal government has signed a global release of all his personal claims and the government has ample time to investigate the claims and has been notified of the release, the whistleblower lacks standing to prosecute claims under the False Claims Act even when the release was signed when the action was under seal. The Court agreed, ruling that, where a whistleblower signs a general release encompassing False Claims Act claims, that

whistleblower lacks standing to pursue those claims on behalf of the United States.^[ii] The Court found that in this case, the government had an opportunity to investigate the case in the 10-month period between the filing of suit and the signing of the release. The Court also noted that the government was aware of and reviewed the release before it was signed. The case was dismissed for lack of subject matter jurisdiction, but without prejudice to the government bringing its own independent action should it choose. The government declined to intervene or bring an independent action.

[i] 31 U.S.C. § 3729(a)(1)(A).

[ii] The Court cited: *United States ex. rel. Hall v. Teledyne Wah Chang Albany*, 104 F.3d 230, 231 (9th Cir. 1997), *United States ex rel. Chandler v. Swords to Plowshares*, 242 F.3d 385, 2000 WL 1529235 (9th Cir. 2000) and *United States ex. rel Whitten v. Triad Hosp., Inc.*, 2005 WL 3741538, *4-5 (S.D. Ga. Oct. 25, 2005), *rev'd on other grounds*, 210 Fed. Appx. 878, 2006 WL 3626992 (11th Cir. Dec. 13, 2006).

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