Ninth Circuit Invites More Qui Tam Cases

July 2015

The US Court of Appeals for the Ninth Circuit has opened the door significantly wider for those who wish to pursue qui tam False Claims Act suits by reversing a dismissal of two such matters. Ruling en banc in United States ex rel. Hartpence v. Kinetic Concepts, Inc., the Ninth Circuit has removed a prior restriction that any prior public disclosure must have originated from the whistleblower as well.

As a bit of background, qui tam is an abbreviation of the Latin phrase "qui tam pro domino rege quam pro se ipso in hac parte sequitur", which roughly translates into "he who brings a case on behalf of the King, as well as for himself". The False Claims Act contains a qui tam provision, an interesting mechanism which allows a private person, called a "relator", to bring suit on the government's behalf, despite having suffered no direct harm personally. In a successful suit, the relator receives up to 30% of the litigation recovery. It is the qui tam provision that has been the impetus for impressive recovery levels under the False Claims Act.

Prosecution under the qui tam provision must adhere to the following process:

1. The relator must be represented by an attorney.
2. The qui tam complaint must be filed under seal and remain there for at least 60 days (and often significantly longer).
3. The relator must prepare a disclosure statement for the Department of Justice which reflects all the evidence known to or in the possession of the relator regarding the allegations (notably, this is not filed or otherwise made available to the defendant).
4. The relator must provide original information or otherwise qualify as the "original source" of publicly disclosed information regarding the fraud.

The Ninth Circuit in this matter held that there are "two, and only two" requirements for a whistleblower to qualify as an "original source" based on the language of the statutory text:

"(1) Before filing the action, the whistleblower must voluntarily inform the government of the facts which underlie the allegations of the complaint; and

(2) the whistleblower must have direct and independent knowledge of the allegations underlying the complaint."

By asserting only these two requirements, the Ninth Circuit abrogated its earlier precedent maintained over 23 years that there is a third requirement to qualify as an original source: that the whistleblower must have played a role in the public disclosure of the allegations that are part of his suit. This third requirement, which the Ninth Circuit notes was not sourced from the text but based on inference from the FCA's legislative history, is now eliminated.

This change brings the Ninth Circuit in line with many of its sister circuits and underscores that the rewards are available to those who "*assume responsibility for prosecuting, on the government's behalf, fraud claims about which they have direct and independent knowledge*". It will no doubt encourage even more qui tam suits and therefore companies would be wise to make every effort to support and encourage internal reporting mechanisms for whistleblowers. This related article provides information on whistleblower best practices.

Fulcrum Inquiry performs forensic accounting investigations and provides whistleblower reporting solutions for corporations and non-profit organizations.