

False Claims Act Alert

DWYER & COLLORA ATTORNEYS WIN FIRST CIRCUIT CASE THAT LIMITS WHO MAY BRING CLAIMS AGAINST FEDERAL CONTRACTORS UNDER THE FEDERAL FALSE CLAIMS ACT

***United States ex rel. Gordon F.B. Ondis v. City of Woonsocket et al.,*
2009 WL 3838803 (1st Cir. Nov. 18, 2009)**

Summary

A recent decision by the United States Court of Appeals for the First Circuit imposed significant limits on who may bring a federal False Claims Act (FCA) lawsuit against a federal contractor. The Court of Appeals ruled in favor of defendant City of Woonsocket, Rhode Island, which was represented by Dwyer & Collora attorneys Michael Galvin and Justin O'Brien. The decision resolved several open issues in the First Circuit concerning the scope of the FCA "public disclosure" provision.

The Lessons

- It is now the law in the First Circuit (which covers Massachusetts, Maine, New Hampshire, Rhode Island, and Puerto Rico) that the FCA "public disclosure" provision prohibits an FCA lawsuit if the information in the complaint is "substantially similar to" information already in the public domain. Information in the public domain includes information contained in a federal agency's response to a Freedom of Information Act (FOIA) request.
- Any entity or individual faced with a lawsuit under the FCA should closely examine whether the FCA "public disclosure" provision prohibits the lawsuit.

The False Claims Act

The federal civil False Claims Act (FCA), 31 U.S.C. §§ 3729-3733, prohibits federal contractors from knowingly submitting false or fraudulent claims for payment to the federal government. The FCA provides for civil penalties plus three times the amount of any damages that the government has sustained from the fraud alleged.

The FCA also allows a private plaintiff (called a "relator") to bring a lawsuit on behalf of the federal government and, if the lawsuit is successful, to collect a percentage of any damages awarded. In this way, the FCA encourages and rewards whistleblowers who uncover fraud against the federal government. The FCA, however, also aims to prevent lawsuits brought by opportunistic outsiders solely to obtain the potential financial reward. The FCA does so through its "public disclosure" provision, which precludes federal court jurisdiction over a lawsuit that is "based upon the public disclosure" of information in certain sources (such as news media or congressional hearings) unless the relator is an "original source" of that information.

The Case

Defendant City of Woonsocket annually applies to the U.S. Department of Housing and Urban Development (HUD) for housing-related program grants. In 2005, Gordon Ondis, a local developer, brought an FCA lawsuit against the City and various city officials. Ondis claimed that the City had falsely represented to HUD in its grant applications that the City supported affordable housing when, Ondis alleged, the City actually pursued policies hostile to such housing. Ondis claimed that the City had thus fraudulently obtained \$15 million in HUD grants from 2000 to 2005. He sought triple damages of \$45 million.

The City's relevant housing programs, including those cited in the complaint, were nearly all the subject of local newspaper coverage. Ondis's allegations, he claimed, were the product of an extensive private investigation that he had commissioned. The investigation included obtaining copies of the City's grant applications through a FOIA request to HUD.

In 2008, citing the "public disclosure" provision of the FCA, the United States District Court for the District of Rhode Island dismissed Ondis's complaint. Ondis appealed. In its November 2009 decision, the United States Court of Appeals for the First Circuit ruled that (a) Ondis's allegations were based upon public disclosures; (b) Ondis was not an original source of the relevant information; and therefore (c) Ondis could not pursue his lawsuit. In its decision, the court addressed several issues it had not addressed previously:

1. **Based Upon** – The Court of Appeals agreed with nearly every other federal appeals court, and resolved a split among federal district courts within the First Circuit, by interpreting the statute to mean that a relator's allegations are "based upon" public disclosures if those allegations are "substantially similar to allegations or transactions already in the public domain." In Ondis's case, the "public disclosure" provision applied, regardless of whether Ondis actually derived his allegations from public disclosures, because the information in Ondis's allegations was "substantially similar to" the information in those public disclosures.
2. **FOIA Request** – The Court of Appeals also weighed in on a split among other federal courts and concluded that a federal agency's response to a FOIA request constitutes a "public disclosure" under the FCA. In Ondis's case, the FCA "public disclosure" provision applied because Ondis obtained the information in his complaint regarding the representations that the City had made to HUD by acquiring the City's HUD filings through a FOIA request.
3. **Original Source** – The court ruled that Ondis's "background and experience" in housing issues, which Ondis asserted had uniquely enabled him to recognize the alleged fraud, did not qualify Ondis as an "original source" of his allegations. Therefore, the case could not proceed under the "original source" exception in the "public disclosure" provision.

The court's rulings significantly expand the circumstances under which the FCA "public disclosure" provision prevents a potential relator from pursuing an FCA lawsuit. The Court of Appeals decision thus limits the ability of "whistleblowers" to bring such claims in federal courts within the First Circuit.

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