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Whistleblower Defense Alert: Ninth Circuit Paves Way for More Qui Tam Lawsuits

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CLIENT ALERT | 7.20.2015

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The Ninth Circuit's recent decision in *U.S. ex rel. Hartpence v. Kinetic Concepts, Inc.*, 2015 U.S. App. Lexis 11643 (9th Cir. July 7, 2015), overruled existing Ninth Circuit precedent regarding the requirements for meeting the public disclosure rule's original source exception, weakening the public disclosure bar in the Ninth Circuit and opening the door for increased *qui tam* activity within that jurisdiction. The Ninth Circuit repudiated its prior holding in *U.S. ex rel. Wang v. FMC Corp.*, 975 F.2d 1412, 1418 (9th Cir. 1992), holding that it does not matter whether a relator played a role in the public disclosure of allegations that are part of his lawsuit, provided that the relator meets the other requirements of the original source exception. This eliminates an additional qualification that has prevented many FCA lawsuits within the Ninth Circuit from moving forward, and is consistent with an overall trend of a gradual erosion of the public disclosure bar. (This trend has been discussed in prior articles earlier [this year](#) and in [2014](#).)

To qualify as an original source (prior to the 2010 amendments to the public disclosure rule), the FCA required that a relator (1) have both "direct" and "independent" knowledge of the information on which their allegations are based, and (2) have voluntarily provided that information to the government prior to filing their lawsuit. The Ninth Circuit, through *Wang* and its progeny, inferred a third requirement based on the FCA's legislative history and a different reading of the statutory text: the relator must also have "had a hand in the public disclosure of allegations that are a part of [their] suit." This is the standard that the *qui tam* relators confronted in *Hartpence*.

Hartpence involved claims brought by two former employees of Kinetic Concepts, Inc., a manufacturer of medical devices used to speed the healing of wounds using Vacuum Assisted Closure Therapy. The relators alleged that Kinetic Concepts submitted false claims for payment to Medicare that did not comply with pertinent coverage requirements. Defendants moved to dismiss the complaints for lack of subject matter jurisdiction under Rule 12(b)(1), arguing that the allegations of Medicare

fraud had been publicly disclosed in a 2007 federal audit report as well as a decision by an Administrative Law Judge, and that relators failed to qualify as “original sources” because they did not have a hand in the public disclosures. The district court granted their motion. On appeal, relators chose not to challenge the district court’s determination that their allegations had been publicly disclosed, but argued that the district court’s reliance upon *Wang* was misplaced, because that decision was wrongly decided.

The Ninth Circuit agreed. Noting that the Fourth and Eighth Circuits had expressly rejected *Wang*’s reasoning, and that language from the United States Supreme Court’s *Rockwell* decision “stands in serious tension” with the hand-in-the-public disclosure requirement, the *en banc* panel “conclude[d] that *Wang*’s hand-in-the-public-disclosure requirement has no textual basis, and we give it a respectful burial.” The court continued, stating that “the original source exception has two, and only two, requirements” and that its prior decision, which was “wrongly decided,” read “a nonexistent, extra-textual third requirement” into the original source exception.

Hartpence addressed only the pre-amendment version of the public disclosure rule and original source exception that existed prior to 2010. Because the 2010 amendments in the Patient Protection and Affordable Care Act altered the test for meeting the original source exception, *Hartpence* has limited application to cases in which the underlying activity occurred after these amendments, which are governed by the new standard. Nonetheless, the Ninth Circuit’s ruling will likely facilitate *qui tam* lawsuits involving activity that occurred prior to the amendments.

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