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Whistleblower Defense Client Alert – Fourth Circuit: Amended Public Disclosure Bar No Longer Jurisdictional

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Recently, the Fourth Circuit became the first court of appeals to address whether the public disclosure bar, as amended in 2010 by the Affordable Care Act, remains a jurisdictional defense to False Claims Act allegations. The opinion in *U.S. ex rel. Radcliffe v. Purdue Pharma L.P.* is significant because the district courts are divided on whether the public disclosure bar remains jurisdictional after the amendment.

The Fourth Circuit's decision in *Radcliffe* could have a considerable impact on the strength of the public disclosure defense going forward if other courts follow the Fourth Circuit's lead and likewise hold that the amended public disclosure bar is non-jurisdictional. If public disclosure challenges are presented prior to discovery as 12(b)(6) motions, courts will not be permitted, as they would be on a motion challenging jurisdiction, to consider evidence outside the pleadings. Moreover, the defendant will have the burden of showing that the statute requires dismissal, whereas, under the pre-2010 version of the statute, the plaintiff bore the burden of proving that the court had jurisdiction.

With respect to jurisdiction, the Court held that it was "apparent ... that the public-disclosure bar is no longer jurisdictional." The Fourth Circuit reasoned that the removal of the word "jurisdiction" from the prior version of the statute clearly indicates "that the public-disclosure bar is no longer a jurisdiction-removing provision." The court also cited the government's veto power under the new version of the rule, stating that "it is difficult to understand how the amended public-disclosure bar could be jurisdictional when the government has the ability to veto a dismissal under that section."

In addition, the Fourth Circuit also held that the amended version of the public disclosure bar could not be applied retroactively because it would "change the substance of the existing cause of action" by depriving the defendant "of the previously available jurisdictional defense and replac[ing] it with a non-jurisdictional defense that is triggered by a substantially narrower range of public disclosures and is, even then, subject to veto by the government." The court also clarified that the date the alleged wrongful conduct occurred, rather than the

date the complaint was filed, is the relevant date for determining whether the amended public disclosure statute applies. Because the conduct at issue in *Radcliffe* occurred prior to the 2010 amendments to the public disclosure bar, the 1986 formulation of the rule applied, even though the case was commenced after the statute was amended.