An important provision of the federal False Claims Act (FCA) prohibits citizen, i.e. whistleblower, lawsuits from moving forward if the information in the lawsuit is based on public documents contained “in a congressional, administrative, or Government Accounting Office report, hearing, audit or investigation.” Until last month, federal courts were split regarding whether that ban applied only to federal reports or blocked claims based on information published in state and local reports as well. Last month, retiring U.S. Supreme Court Justice John Paul Stevens answered that question when he penned an opinion expanding the ban to include cases involving local and state government misappropriation of federal money. However, a provision in the recently-passed health care reform legislation dictating that the ban only apply to federal reports has created uncertainty for those cases with the same or similar issues already in the pipeline. Justice Stevens wrote in the opinion that Congress’ provision in the bill does not apply to pending cases because the “legislation makes no mention of retroactivity.”

Background

The False Claims Act (FCA) imposes liability on “[a]ny persons who… knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval.” Additionally, liability is imposed in six other categories, including when a person “knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government…,” and when a person conspires with others to defraud the Government in any of the other sub-categories. Offenders may be liable for penalties ranging from $5,000 to $10,000 plus three times the amount of damages the government sustains because of the act.

The requisite intent for proving an individual “knowingly” submitted a false claim involves showing that the person has (a) actual knowledge of the falsity; (b) acts in deliberate ignorance of the truth or falsity; or (c) acts in reckless disregard of it. There is no requirement that a person have a specific intent to defraud for a case to move

---

1 Id. at *3; 31 U.S.C. §3730(e)(4)(A) (2009).
In *United States v. Krizek*, a psychiatrist failed to pay close attention to the billing practices used by his staff who were incorrectly coding treatment sessions and, as a result, receiving larger financial reimbursement amounts from the government. The Court found the psychiatrist’s lack of knowledge to be “reckless disregard,” and imposed significant fines.

Commencing an FCA action can be done in one of two ways. First, the Government may bring an action against a claimant directly. Second, a private individual – often a “whistle-blower” from a company – may bring a *qui tam* action “for the person and for the United States Government” against the alleged false claimant. The federal government has the prerogative to intervene in a *qui tam* action, but is not obligated to do so. A whistle-blower, also referred to as a “relator,” will receive a percent share of the proceeds recovered from a successful action, depending on whether or not the government has actively participated in the case.

One of the most serious consequences for healthcare providers and physicians found guilty of fraud is the possibility of mandatory exclusion from participating in the Federal healthcare reimbursement programs, including Medicare. Section 1128 of the Social Security Act imposes mandatory exclusion from the program for four areas of wrongdoing including felony conviction relating to health care fraud.

As originally enacted, the FCA did not limit the sources from which a relator could acquire information to bring a *qui tam* action. In *United States ex rel. Marcus v. Hess*, the Supreme Court upheld the relator’s recovery even though he discovered the fraud by reading a federal criminal indictment. However, Congress subsequently amended the FCA to preclude *qui tam* actions based upon information that was in the hands of the United States or agency thereof, at the time the suit was brought. Since that time, Congress has replaced that portion of the FCA with the “public disclosure” bar in an effort to “make the FCA a more useful tool against fraud in modern times.”

---

13 31 U.S.C. § 3730(c)(1) and (2) (2009).
14 See 31 U.S.C. §§ 3730(d)(1)-(2); Typically, a relator may receive a 15 to 25 percent share of proceeds recovered if the Government intervenes and as much as 25 to 30 percent if the Government does not.
16 317 U.S. 537 (1943).
18 *Id.* at *13 (citing Act of Dec. 23, 1943, 57 Stat. 609 (codified at 31 U.S.C. § 232(C) (1946 ed.)). This amendment was thereafter known as the Government knowledge bar, i.e., once the United States learned of a false claim, only the Government could assert its rights under the FCA against the false claimant. See *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 949 (1997).
Categories That Bar a “Public Disclosure” Qui Tam Action

The FCA contains three categories of cases which deprive a court of jurisdiction over *qui tam* suits when the pertinent information has already entered the public domain. Those informational avenues that bar such a suit from moving forward include those:

…based upon the public disclosure of allegations or transactions [1] in a criminal, civil, or administrative hearing, [2] in a congressional, administrative, or Government Accounting Office [(GAO)] report, hearing, audit, or investigation, or [3] from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.20

To date, healthcare attorneys and other practitioners have been unclear whether state and local reports fell under the FCA’s public disclosure bar to filing a claim or whether the statute was meant to apply only to *federal* reports. Due to a split among the courts, the Supreme Court recently resolved the dispute and expanded the reach of the FCA to include public disclosures at the state and local level in the bar to filing an FCA action.

**Graham County Soil and Water Conservation District et al. v. United States ex rel. Wilson**

*Overview*

In 1995, the U.S. Department of Agriculture (USDA) entered into contractual agreements with two North Carolina counties authorizing them to perform cleanup and repair work in areas affected by severe flooding. Karen Wilson was an employee of the Graham County Soil and Conservation District, a quasi-governmental entity that had partial responsibility for organizing and performing the designated work. After Wilson spoke out to county officials and officials at the USDA that she suspected possible fraud in association with the work, Graham County officials began an investigation.

In 1996, an independent accounting firm hired by the county issued a report containing irregularities in the administration of the USDA contracts. Subsequently, the North Carolina Department of Environment, Health, and Natural Resources also issued a report revealing similar problems. Finally, the USDA’s Office of Inspector General issued a third report containing additional negative findings. Wilson relied on data contained in these reports when she filed a False Claims Act (FCA) action in 2001.

*Procedural History*

Wilson’s lawsuit was initially thrown out by the federal district court because the “administrative reports, … audits, …or investigations” prepared by Graham County and the State of North Carolina on which she relied fell under the statute’s bar to filing a

---

claim. However, the Court of Appeals for the Fourth Circuit reversed, highlighting that “[o]nly federal administrative reports, audits, or investigations,” qualify as public disclosures under the FCA and, thus, bar a claim. Due to a lack of consensus among the federal courts on the issue, the Supreme Court agreed to decide the matter.

The Court’s Analysis

In an artfully-written opinion by Justice Stevens on statutory construction, the debate centered on the meaning and context of the word “administrative” in the law and whether the Court should rely on the actual text of the statute, as argued by the Graham County Soil and Conservation District, or whether considerations of history and policy should prevail, as argued by Karen Wilson. Justice Stevens expounded on both aspects – extensively and logically.

The Court noted that the term “administrative,” when used to modify “report, hearings, audit or investigation,” may logically and arguably be read to describe the activities of governmental agencies. Further, the placement of the word “administrative” in the middle of a list of federal sources “strongly suggests that [it] should be likewise restricted to federal administrative reports, hearing, audits, or investigations.” Both the federal district court as well as the Court of Appeals found “it hard to believe that the drafters of this provision intended the word ‘administrative’ to refer to both state and federal reports when it lies sandwiched between modifiers which are unquestionably federal in character.” However, Justice Stevens did not buy it. He noted that the “connection, or fit, between the terms ‘congressional,’ ‘administrative,’ and ‘GAO’ is not so tight or so self-evident as to demand that we ‘rob’ any one of them ‘of its independent and ordinary significance.’” More importantly to the Court, the context of the provision must be considered in its entirety. For example, wrote Justice Stevens, the “news media” referenced in Category 3 has a broader sweep that does not necessarily rely on a federal government focus; additionally, there is “no textual basis for assuming that the ‘criminal, civil, or administrative hearing[s]’ listed in Category 1 must be federal hearings.”

Moreover, wrote Justice Stevens, the Court’s ruling in favor of broadening the public disclosure bar to apply to state and local administrative reports has no bearing on disclosures made in other contexts, “and it leaves intact the ability of original sources to prosecute qui tam actions irrespective of the state of Government knowledge.”

22 Id. at *5.
23 Id. at *6 (citing United States ex rel. Wilson v. Graham County Soil and Water Conservation Dist., 528 F.3d 292, 302 (2008) (emphasis added)).
24 Id.
25 Id. at *7 (citing Reiter v. Sonotone Corp., 442 U.S. 330, 338-39 (1979)).
26 Id. at *8.
27 Id. at *20.
In concluding that the information contained in the Graham County and State of North Carolina reports barred Karen Wilson’s FCA action, Justice Stevens gave a brief nod to the recent health care reform legislation passed by Congress which amended the FCA to apply only to public disclosure of federal information – effectively overturning the Court’s decision. He wrote:

On March 23, 2010, the President signed into law the Patient Protection and Affordable Care Act…Section 10104(j)(2) of this legislation replaces the prior version of 31 U.S.C. § 3730(e)(4) with new language. The legislation makes no mention of retroactivity, which would be necessary for its application to pending cases given that it eliminates petitioners’ claimed defense to a qui tam suit.\(^{28}\)

In her first written dissent as a Justice on the bench, Justice Sonya Sotomayor, joined by Justice Breyer, rejected the majority’s interpretation of the public disclosure bar provision of the FCA.

**Justice Sotomayor Dissents**

Justice Sotomayor wrote that the majority of the Court misread the statutory text of the pertinent FCA provision and believes that the word “administrative” should apply only to federal government sources. After acknowledging that the word “administrative” is more capacious, with potential to reach not only federal, state, and local government sources but also disclosures by private entities, Justice Sotomayor wrote that she agreed with the Court of Appeals’ interpretation that “clearly federal terms [to] bookend the not-so-clearly federal term” is a “very strong contextual cue about the meaning of ‘administrative.’”\(^{29}\) Further, wrote Justice Sotomayor, if Congress had intended to include state or local government administrative materials, it could have said so.\(^{30}\)

**Health Care Reform Legislation Mutes Court’s Decision**

In the recently-passed health care reform legislation, Congress changed the language of the FCA that was at issue in *Graham County*. It clarified that a private lawsuit under the Act is blocked only if the prior public disclosure came in a “federal” proceeding in which the federal government is a party, or in a report, audit, or investigation that was itself “federal.”\(^{31}\) More specifically, the new legislation states:

\[\ldots\text{Section 3730(e) of title 31, United States Code, is amended by striking paragraph (4) and inserting the following:\}^{28}\]

\(^{28}\) *Id.* (citing fn. 1 at *1, supra).


\(^{30}\) *Id.* at p. 3.

(4)(A) The court shall dismiss an action or claim under this section, unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed—

‘(i) in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party;

‘(ii) in a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation; or

‘(iii) from the news media,

unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.”

Thus, on its face, the new law appears to clear the way for *qui tam* FCA actions to proceed based on publicly disclosed information at the state and local level.

**Conclusion**

The Supreme Court did not rule directly on whether the new, amended FCA provision could be understood to apply to pending cases that originated before the law was changed, or how pending cases hinging on state and/or local information may be resolved in the future. Mark T. Hurt, attorney for Karen Wilson, wrote to the Supreme Court after passage of the health care reform legislation. He said that “the elimination of the jurisdictional status of the public disclosure bar in the legislation raises complex issues as to its retroactive effect.” Undoubtedly, the applicability of the new law on pending and future FCA cases will be soon be argued in the courts.

**Health Law Perspectives (April 2010)**

Health Law & Policy Institute  
University of Houston Law Center  
http://www.law.uh.edu/healthlaw/perspectives/homepage.asp

The opinions, beliefs and viewpoints expressed by the various Health Law Perspectives authors on this web site do not necessarily reflect the opinions, beliefs, viewpoints, or official policies of the Health Law & Policy Institute and do not constitute legal advice. The Health Law & Policy Institute is part of the University of Houston Law Center. It is guided by an advisory board consisting of leading academicians, health law practitioners, representatives of area institutions, and public officials. A primary mission of the Institute is to provide policy analysis for members of the Texas Legislature and health and human service agencies in state government.

---

32 *Id.*