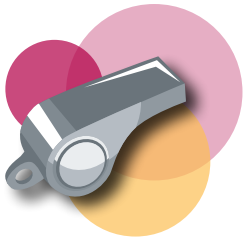
SEYFARTH SHAW



# Workplace Whistleblower

## Ninth Circuit Does An About Face on the Breadth of "Original Source" under the FCA

*By Joseph J. Dyer and Daniel P. Wierzba*

On July 7, 2015, in *United States ex. rel. Hartpence v. Kinetic Concepts, Inc.,* Nos. 12-55396 and 12-56117, 2015 WL 4080739 (9th Cir. July 7, 2015), the Ninth Circuit rejected its own precedent to hold that qui tam plaintiffs need not be the source of a public disclosure in order to qualify as the "original source" under the civil False Claims Act (FCA).

By way of background, the civil False Claims Act allows private persons - referred to as qui tam plaintiffs - to bring suit on behalf of the United States for violations of the Act. 31 U.S.C. § 3730(b). In 1986, Congress amended the Act to limit the right to bring suit where the alleged violations were the subject of a public disclosure. "No court shall have jurisdiction over an action … based upon the public disclosure of allegations … unless … the person bringing the action is an original source of the information." 31 U.S.C. § 3730(e)(4)(A). An "original source" means "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing [his] action…." 31 U.S.C. § 3730(e)(4)(B).

In *Wang ex rel. United States v. FMC Corp.*, 975 F.2d 1412, 1419 (1992), the Court of Appeals for the Ninth Circuit followed lead of the Second Circuit to require also that the plaintiff be directly or indirectly the source of the information to the entity that publicly disclosed the allegations. In contrast, the Courts of Appeals for the First, Fourth, Seventh, Eighth and Eleventh Circuits, adopting a strict interpretation of the statute, have taken the opposite view, holding that the plaintiff need not have been the source of the public disclosure. The plaintiff need only have direct and independent knowledge of his allegations and have disclosed such information to the Government before filing suit. Adopting somewhat of a middle view, the Courts of Appeals for the Sixth Circuit and the District of Columbia hold that the qui tam plaintiff need not been the source of the public disclosure, but must have disclosed the information forming the basis of his allegations prior to the public disclosure.

In *Hartpence*, the Ninth Circuit expressly rejected its earlier logic in *Wang* - "we conclude that *Wang's* hand-in-the-public-disclosure requirement has no textual basis, and we give it a respectful burial." *United States ex. rel. Hartpence v. Kinetic Concepts, Inc.*, 2015 WL 4080739, *5 (2015). By this opinion, the Court joined the First, Fourth and Eighth Circuits to:

> hold that were an FCA claim has been publicly disclosed before a relator filed his complaint, the relator may bring a qui tam suit if he can show that (1) he has direct and independent knowledge of the information on which the allegations in his court-filed complaint are based and (2) he has voluntarily provided the information to the Government before filing his civil action.

*Id.* at *6. The Court dismissed its earlier investigation into the legislative history, stating that "[w]here the statute's language is plain [as the Court found 31 U.S.C. § 3730(e)(4)(A) and (B) to be], we do not consider the 'legislative history…'" *Id.* (Internal citations omitted.)

*Hartpence* is, of course, of great significance to cases brought within the Ninth Circuit. It significantly expands the field of potential qui tam actions. Outside of the Ninth Circuit, *Hartpence* may be significant in persuading other Circuits to join the First, Fourth, Seventh, Eighth, Eleventh and now Ninth Circuits in their view of the matter. It may also be significant in leading the Supreme Court to intervene to clarify the matter. The Supreme Court earlier mentioned the three-way split existing among the Circuits on the issue of the original source exception, but failed to resolve the issue. Perhaps *Hartpence* will give it further reason to do so.

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