

COURT AFFIRMS JUDICIAL AUTHORITY TO LIMIT DISCOVERY IN FALSE CLAIMS SUITS

by

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In June 2013, the United States Court of Appeals for the First Circuit in *United States ex rel. Duxbury v. Ortho Biotech Products, L.P.*, No. 12-2141, 2013 WL 2501930 (1st Cir. June 12, 2013) (“*Duxbury II*”) affirmed the district court’s limitation of discovery concerning publicly disclosed False Claims Act (“FCA”) allegations to the time period and geographic region over which relator qualified as an original source. Notably, however, the court deflected the question of whether the pre-amendment original source exception to the public disclosure bar applied, and instead ruled on the alternate ground that the district court’s actions fell within its broad discretion to manage discovery. By declining to rule on jurisdictional grounds, the court reaffirmed the power of district courts to limit the scope of discovery in FCA cases, regardless of whether the public disclosure bar applies.

Background and Procedural History. Relator, a former sales manager for defendant OBP, filed his original complaint in 2003 and amended it in 2006. Count I, the subject of this recent appeal, alleged that defendant had engaged in a nationwide kickback scheme to market the drug Procrit, which in turn “caused” healthcare providers to submit false claims to Medicare.

In 2007, the district court granted OBP’s motion to dismiss. With respect to Count I, the court found that: 1) the kickback allegations had already been publicly disclosed; 2) relator was an original source for the time of his employment by OBP (1992 to 1998); and 3) none of these allegations satisfied Rule 9(b). On appeal, the First Circuit agreed with the first two findings, but held that allegations concerning eight accounts relator had serviced in one state during his tenure at OBP satisfied Rule 9(b). *United States ex rel. Duxbury v. Ortho Biotech Products, L.P.*, 579 F.3d 13, 21-32 (1st Cir. 2009) (“*Duxbury I*”).

On remand, the district court limited discovery to the allegations for which relator was an original source and that were not time-barred. See *United States ex rel. Duxbury v. Ortho Biotech Products, L.P.*, No. 03-12189-RWZ, 2010 WL 3810858, at *3 (D. Mass. Sept. 27, 2010). After eight months of discovery, the parties stipulated that relator could not proffer any evidence to support his allegations and the district court granted summary judgment to OBP.

First Circuit Decision. On appeal, relator attacked the district court’s discovery order, arguing: 1) the district court had misapplied the original source exception; and 2) the discovery order contradicted the First Circuit’s ruling in *Duxbury I*. The First Circuit’s decision in *Duxbury II* did not address the merits of relator’s jurisdictional argument. Instead the court held that, even assuming that the district court had subject matter jurisdiction over all of relator’s kickback claims, the limitations imposed on discovery were consistent with the

holding in *Duxbury I* and within the district court’s “broad discretion in managing discovery.” *Duxbury II*, 2013 WL 2501930, at *6. Citing the Sixth Circuit, the court explained that the district court appropriately limited discovery to only those portions of the complaint that satisfied Rule 9(b).

Conclusion. In *Duxbury II*, the First Circuit declined the opportunity to address the scope of the pre-amendment original source exception, and instead offered FCA defendants a victory with potentially longer-term impact. If the district courts take up the First Circuit’s invitation here, this may lead to more limited, or staged discovery in those FCA cases that do survive a motion to dismiss.

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