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False Claims Act

Recent Developments Under FCA's Public Disclosure Bar: What is 'Public,' Anyway?



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The False Claims Act ("FCA") allows private persons to bring suit under its *qui tam* provisions, 31 U.S.C. § 3730 (2012). These "relators" are generally barred from bringing suit, however, if their complaint is substantially the same as allegations or transactions that have been publicly disclosed. *Id.* § 3730(e)(4)(A). The statute prescribes which types of disclosures qualify under this "public-disclosure bar," such as federal hearings, investigations, and audits, as well as news media. *See id.* § 3730(e)(4)(A)(i)-(iii). If substantially similar allegations or transactions have been made public in one of these categories, the relator must qualify as an "original source" in order to proceed. *Id.* § 3730(e)(4)(B).

Whatever the *type* of disclosure, the requirement that the allegations or information must be "publicly disclosed" is not always a straightforward inquiry. 31 U.S.C. § 3730(e)(4)(A). What exactly does "publicly disclosed" mean under the FCA? Courts have come to recognize disclosures as being made "public" through FOIA responses[1] and blog posts (no matter how obscure),[2] and even where disclosure occurs to just one individual—provided he or she is a "stranger to the fraud."[3]

To that end, one question that has generated dispute among the courts is whether disclosure to the government constitutes a "public" disclosure. Some years ago, the Seventh Circuit held that "[d]isclosure to an official

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[1] *United States ex rel. Kirk v. Schindler Elevator Corp.*, 601 F.3d 94, 104 (2d Cir. 2010); *United States ex rel. Ondis v. City of Woonsocket*, 587 F.3d 49, 55 (1st Cir. 2009); *United States ex rel. Reagan v. E. Tex. Med. Ctr. Reg'l Healthcare Sys.*, 384 F.3d 168, 175-76 (5th Cir. 2004); *United States ex rel. Mistick PBT v. Hous. Auth. of Pittsburgh*, 186 F.3d 376, 383 (3d Cir. 1999); *United States ex rel. Burns v. A.D. Roe Co., Inc.*, 186 F.3d 717, 723-24 (6th Cir. 1999); *United States ex rel. Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512, 1519-20 (9th Cir. 1995), *vacated on other grounds*, 520 U.S. 939 (1997).

[2] *United States ex rel. Beauchamp v. Academi Training Ctr., Inc.*, No. 1:11-cv-371 (E.D. Va. Mar. 21, 2013); *Cf. United States ex rel. Green v. Service Contract Educ. and Training Trust Fund*, 843 F. Supp. 2d 20, 32-33 (D.D.C. 2012) (holding that webpages may qualify as news media under the FCA public disclosure bar); *United States ex rel. Repko v. Guthri Clinic, P.C.*, No. 3:04cv1556, 2011 WL 3875987, (M.D. Pa. Sept. 1, 2011) (same).

[3] *United States ex rel. Ramseyer v. Century Healthcare Corp.*, 90 F.3d 1514, 1521 (10th Cir. 1996); *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 322-23 (2d Cir. 1992).

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authorized to act for or to represent the community on behalf of the government can be understood as public disclosure.'' *United States ex rel. Matthews v. Bank of Farmington*, 166 F.3d 853, 861 (7th Cir. 1999). In spite of this, every other circuit to reach the question has required that the information somehow reach the general public—as opposed to merely the governmental—domain to be ''public.''

Two more circuits recently joined the majority, further isolating the Seventh Circuit on this issue. On February 3, 2014, the Fourth Circuit handed down its fifth opinion in the long-running *United States ex rel. Wilson v. Graham County Soil & Water Conservation District*, 777 F.3d 691 (4th Cir. 2015). It considered whether two reports that were delivered to various county, state, and federal agencies had been ''publicly disclosed.'' *Id.* at 694. The district court, relying on *Bank of Farmington*, held that they were. *Id.* at 696. The Fourth Circuit reversed. *Id.* at 697. Cataloguing the other courts to have repudiated *Bank of Farmington*, the court agreed that ''a public disclosure must somehow reach the public domain and the Government is not the equivalent of the public domain.'' *Id.* at 697 (quoting *Kennard v. Comstock Res., Inc.*, 363 F.3d 1039, 1043 (10th Cir. 2004) (internal quotation marks omitted)). Neither the sharing of information among state and local governments nor that information's availability through public-information laws persuaded the Fourth Circuit to hold otherwise. *Wilson*, 777 F.3d at 698-99.

The Sixth Circuit in *United States ex rel. Whipple v. Chattanooga-Hamilton County Hospital Authority* joined in renouncing the Seventh Circuit just a few weeks ago. —- F.3d ——, 2015 WL 774887 (6th Cir. Feb. 25, 2015). In *Whipple*, the court considered whether the disclosure of a company's internal investigation to the Office of the Inspector General made it ''public.'' For the Sixth Circuit, too, this was a matter of first impression. *Id.* at *6. The court said ''no,'' holding ''that [the defendant's] disclosure of information to the government in the administrative audit and investigation did not constitute a public disclosure that would trigger the public-disclosure bar.'' *Id.* In so doing, the *Whipple* court expressly rejected *Bank of Farmington*. *Id.*

Should Disclosure to the Government Be Deemed 'Public' for Purposes of the FCA's Public Disclosure Bar? *Bank of Farmington* stands alone among the Circuit Courts, as the recent *Whipple* and *Wilson* decisions are part of a now overwhelming majority comprising the First, Fourth, Sixth, Ninth, Tenth, Eleventh, and D.C. Circuits holding that disclosure to the government, without more, is not ''public'' under the FCA.[4] The Tenth Circuit for its part has struck what might be considered a middle ground, holding that the sharing of information between state and federal governments constitutes a 'public disclosure' unless the recipient is subject to a duty of confidentiality. *United States ex rel. Fine v. MK-Ferguson Co.*, 99 F.3d 1538, 1545 (10th Cir. 1996); *but see Kennard v. Comstock Res., Inc.*, 363 F.3d 1039, 1043 (10th Cir. 2004) (rejecting the equivalence between ''the public domain'' and the government).

But is the majority's criticism well placed? Does the Seventh Circuit's opinion truly conflict with the purpose of the public disclosure bar? To answer that question, we must first consider the precise holding in *Bank of Farmington*. Other courts have mischaracterized it as saying that ''[t]he mere fact that the disclosures are contained in government files someplace'' means that they are ''public.'' *Whipple*, at *6 (quoting *United States ex rel. Rost v. Pfizer, Inc.*, 507 F.3d 720, 728-30 (1st Cir. 2007)). That is not what the Seventh Circuit held. In *Bank of Farmington*, the disclosure was held to be ''public'' because ''a public official in his official capacity is authorized to act for and to represent the community'' and thus ''disclosure to a public official responsible for the claim effectuates the purpose of disclosure to the public at large.'' *Id.* at 861. In so reasoning, the court set up a sliding scale of sorts: ''The more open a disclosure is, the less any public official need be specifically informed.'' *Bank of Farmington*, 166 F.3d at 861. ''If the disclosure is made,'' however, ''to precisely the public official responsible for the claim, it need not be disclosed to anyone else to be public.'' *Id.* It is wrong to suggest that under *Bank of Farmington*, then, *any* disclosure to the government is ''public.'' Under the Seventh Circuit's framework, for a disclosure to the government alone to qualify, it must go precisely to the public official who can act on it. The *Farmington* court was hardly bent on stifling *qui tam* litigation generally.[5]

1. Which View Best Serves the Purpose of the Bar? The chief criticism of *Bank of Farmington* is that it conflicts with the purposes of the public disclosure bar. Whether that is a fair criticism is open to debate.

[4] *United States ex rel. Whipple v. Chattanooga-Hamilton County Hospital Authority*, —- F.3d ——, 2015 WL 774887 (6th Cir. Feb. 25, 2015); *U.S. ex rel. Wilson v. Graham Cnty. Soil & Water Conservation Dist.*, 777 F.3d 691, 697 (4th Cir. 2015); *United States ex rel. Oliver v. Philip Morris USA, Inc.,* 763 F.3d 36, 42 (D.C. Cir. 2014); *United States ex rel. Meyer v. Horizon Health Corp.,* 565 F.3d 1195, 1200 & n. 3 (9th Cir. 2009); *United States ex rel. Rost v. Pfizer, Inc.,* 507 F.3d 720, 730 (1st Cir. 2007), *overruled on other grounds by Allison Engine Co. v. United States ex rel. Sanders,* 553 U.S. 662, 128 S.Ct. 2123, 170 L.Ed.2d 1030 (2008); *Kennard v. Comstock Res., Inc.*, 363 F.3d 1039, 1043 (10th Cir. 2004); *United States ex rel. Williams v. NEC Corp.,* 931 F.2d 1493, 1499–1500 (11th Cir. 1991).

[5] In the very same opinion, the Seventh Circuit refused to adopt a broad view of public disclosure espoused by the Second and Third Circuits, which had held that even *un-filed* discovery was nonetheless ''publicly disclosed'' on the theory that ''information disclosed in discovery is potentially accessible to the public.'' *Bank of Farmington*, 166 F.3d at 860 (quoting *Stinson*, 944 F.2d at 1158). Citing dictionary definitions of ''public,'' the Seventh Circuit denied that ''something is publicly disclosed even if it is not in fact open to general observation or actually opened up to view, but is only potentially so.'' 166 F.3d at 860.

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Courts have ascribed various purposes to the public disclosure bar. The Supreme Court has described the 1986 version as meant ''to strike a balance between encouraging private persons to root out fraud and stifling parasitic lawsuits.'' *Graham Cnty.*, 559 U.S. at 295. But the reason for stifling parasitic lawsuits is not merely to avoid rewarding parasites. It is also that Congress no longer *needs* the parasites once the information is already at the government's fingertips. *See United States ex rel. Doe v. Staples, Inc.*, 773 F.3d 83, 87 (D.C. Cir. 2014) (inquiring whether a putative public disclosure ''was sufficient to set the government investigators on the trail of fraud'') (quotation marks omitted); *United States ex rel. Jamiesen v. McKesson Corp.*, 649 F.3d 322, 329 (same) (citing *In re Natural Gas Royalties*, 562 F.3d 1032, 1042-43 (10th Cir. 2009)); *United States ex rel. Dingle v. Bioport Corp.*, 388 F.3d 209, 214-15 (6th Cir. 2004) (''So long as the government is put on notice to the potential presence of fraud, even if the fraud is slightly different than the one alleged in the complaint, the *qui tam* action is not needed.''); *Graham Cnty.*, 559 U.S. at 291 (holding that legislative hearings and reports should be considered ''public,'' by reasoning that they were ''just as likely to put the Federal Government on notice of a potential fraud'' as their administrative counterparts). The ultimate purpose of the bar, therefore, is to preclude private suits (at least by those who are not original sources) when the government is already on notice and in a position to vindicate its own interests—without having to deprive the public fisc of the percentage of any eventual recovery that a relator would receive.

In both *Wilson* and *Whipple*, the government was already on notice of the alleged fraud in question. In *Wilson*, Ms. Wilson was a part-time secretary for three years at the Graham County Soil and Water Conservation District. *Id.* at 694. She was present when county auditors formalized and submitted their report to Graham County and the U.S. Department of Agriculture. *Id.* at 694. She previously had written a letter ''outlining her concerns,'' but it was not until five years *after* the audit report was disclosed that she filed her suit. *Id.* By that time, the government had also received a Report of Investigation from the USDA. *Id.* In the *Whipple* case, the relator ''maintained that he discovered the alleged fraud during the *six-month period* that he worked at [the defendant] in early 2006.'' *Whipple*, at *1 (emphasis added). He filed his suit four years later, *after* an administrative investigation had been opened, conducted, and resolved. *Id.*

Both relators worked for short periods of time in offices where detailed reports of allegations, complete with findings, were submitted to the government. In short, their *qui tam* cases were tailor-made for them. Neither filed suit until years after the government had been told about the alleged fraud at issue. The holdings in *Wilson* and *Whipple*, then, are seemingly at odds with a central purpose of the public disclosure bar.

The Sixth Circuit in *Whipple* reasoned that ''[i]f a disclosure to the government in an audit or investigation would be sufficient to trigger the bar, the term 'public' would be superfluous.'' *Whipple*, at *6. In other words, Congress could not have intended as a policy matter that *all* governmental investigations be considered ''public.'' But that was not the Seventh Circuit's view. Again, not all governmental investigations are ''public'' under *Bank of Farmington*. The vast majority of government reports, audits, and investigations likely do not reach ''precisely the public official responsible'' for prosecuting the fraud. The Seventh Circuit adopted a narrow view of whether a disclosure to the government is ''public'' under the FCA.[6]

2. Which View is Most Consistent with Precedent? The *Bank of Farmington* view that certain disclosures to the government should constitute a public disclosure appears all the more reasonable when one considers the purpose of the public disclosure bar in light of other precedent on the level of disclosure required to qualify as ''public'' under the FCA. Courts have held that disclosures to individual members of the public trigger the bar (and therefore are presumably situations in which the government is reasonably on notice). For instance, in *Schindler Elevator Corp. v. United States ex rel. Kirk*, 601 F.3d 94, 104 (2d Cir. 2010), an agency's response to a FOIA request submitted by the relator's wife constituted a public disclosure. In that case, there was no indication that the FOIA responses were disclosed through any medium to anyone other than her. *Id.* The Second Circuit observed that ''every circuit to have considered this issue has determined that information produced in response to a FOIA request becomes public once it is received by the requester.'' *Id.*

As another example, courts have held that un-filed discovery documents can be ''publicly disclosed.'' *See United States ex rel. Kreindler & Kreindler v. United Technologies Corp.*, 985 F.2d 1148, 1158 (2d Cir. 1993); *United States ex rel. Stinson v. Prudential Ins.*, 944 F.2d 1149 (3d Cir. 1991). While these rulings have their own import in preventing parasitic suits, they also beg the question why, if turning over an internal investigation solely to a private plaintiff in a medical malpractice suit is ''public'' and suffices to put the government on notice, turning over the same investigation to the local U.S. Attorney is not?

3. Which View Creates The Best Incentives? One indisputable upside of the *Bank of Farmington* view is that it provides additional incentives for defendants themselves to voluntarily disclose suspected fraud. Under the Seventh Circuit's holding, a defendant that makes a sufficient disclosure of potential FCA conduct to the government official empowered to act on that information would partially shield itself from whistleblower suits at the same time it exposed its conduct to the government itself. In *Whipple*, the defendant tried to do just that. When an anonymous tip made its way to the Inspector General, the government undertook an administrative audit and investigation through a third-party ''program safeguard contractor.''. *Whipple*, at *4. A report was issued to the defendant's chief compliance officer. *Id.* In response, the defendant undertook an internal investigation, retaining both outside counsel and an outside auditor. *Id.* at *5. When it found evidence that it ''had improperly billed for inpatient services . . .

[6] It is worth asking whether ''publicly'' should be a separate analysis at all. Two of the three categories of disclosures—federal litigation and federal reports/hearings/audits/investigations—are presumptively public to begin with. 31 U.S.C. § 3730(e)(4)(i-ii). And the third, ''news media,'' is conclusively so (there is no non-public news media). *Id.* § 3730(e)(4)(iii). It is at least plausible, therefore, that Congress considered the statutory list of disclosures as inherently ''public'' to begin with.

and for observation services after outpatient same-day surgeries,'' the defendant ''offered explanations for the errors and estimated the amount of the overpayment it had received as a result.'' *Id.* It then willingly paid the full amount of the ''voluntary refund'' demanded by the safeguard contractor. *Id.* In short, the defendant did everything that could be expected of it. But in *Whipple*, despite having admitted its own culpability to the Inspector General and the U.S. Attorney and offering to pay remuneration, the court ruled that the government's administrative audit and investigation were not ''public'' disclosures. Thus, the defendant still found itself subject to a *qui tam* suit without requiring the relator to meet the original source requirement of the bar. This hardly seems a just result..

Conclusion. The current tally is beyond debate: of the circuits to directly address the issue, every circuit but one holds that disclosure to the government of actionable fraud is not ''public'' under the FCA's public disclosure bar. Whether this is what Congress intended is open to debate. For now, though, defendants are themselves on notice that actual notice to the government does not narrow the pool of prospective relators; only a disclosure that the courts find to be ''public'' will serve that end.

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