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The FCA and the Ever-Narrowing Public Disclosure Bar

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On February 25, 2015, the Sixth Circuit became the latest federal court of appeals to weigh in on the scope of the False Claims Act's (FCA) public disclosure bar in its decision in *United States ex rel. Whipple v. Chattanooga-Hamilton County Hospital Authority*.¹ Specifically, the Sixth Circuit held that the government's earlier administrative audit and investigation was not a bar to FCA liability, continuing the trend among Courts of Appeal of narrowing the scope of the FCA's public disclosure bar.

FALSE CLAIMS ACT, QUI TAM ACTIONS AND THE PUBLIC DISCLOSURE BAR

The FCA imposes civil liability when false or fraudulent claims for payment are presented to the government.² The Act authorizes "*qui tam*" actions in which private party whistleblowers, known as relators, bring civil actions in the government's name.³ If a *qui tam* action is successful, the relator shares in the proceeds of the action or settlement.⁴ A relator seeking to bring a *qui tam* action under the FCA must first disclose his or her claims to the government. The government may then elect to intervene or to allow the relator to proceed with the lawsuit.⁵

The FCA places several restrictions on a relator's ability to bring a *qui tam* action, including a public disclosure bar, which restricts a relator from bringing an action when the fraud allegations or fraudulent transactions have been publicly disclosed.⁶ The public disclosure bar before 2010 provided a clear and explicit withdrawal of subject matter jurisdiction.⁷ Amendments to the FCA made in 2010 authorize a court to *dismiss* an action or claim if the public disclosure bar applies.⁸ Additionally, the amended public disclosure bar prohibits lawsuits where the allegations in the complaint are "substantially the same" as (rather than "based upon") allegations or transactions

¹ See *United States ex rel. Whipple v. Chattanooga-Hamilton Cnty. Hosp. Auth.*, No. 13-6645 (6th Cir. Feb. 25, 2015) ("*Whipple*").

² 31 U.S.C. § 3729(a)(1).

³ 31 U.S.C. § 3730(b)(1).

⁴ 31 U.S.C. § 3730(d). If the United States elects to intervene in the case, the relator, under most circumstances, can obtain between 15 and 25 percent of the proceeds of the action. *Id.* § 3730(d)(1). If the United States declines to intervene, the relator may obtain between 25 and 30 percent of the proceeds of the action. *Id.* § 3730(d)(2).

⁵ 31 U.S.C. § 3730(b)(2).

⁶ 31 U.S.C. § 3730(e)(4).

⁷ See *Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 467-70 (2007).

⁸ 31 U.S.C. § 3730(e)(4). These amendments were made under the 2010 Patient Protection and Affordable Care Act (PPACA) and (1) limit the term "publicly disclosed" to include only information from federal sources and the news media and thereby exclude other sources such as state or local proceedings; (2) expand the term "original source" from "direct independent knowledge" to include persons with "knowledge that is independent of and materially add to publicly disclosed" information; and (3) give the Department of Justice the discretion to oppose dismissal of *qui tam* actions even if they might otherwise be subject to the public disclosure bar. 31 U.S.C. § 3730(e)(4).

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contained in public disclosures, unless the plaintiff is the original source of the information. Courts generally employ a two-part test to determine whether the public disclosure bar applies⁹: “first whether there has been any public disclosure of fraud [(1) in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party; (2) in a congressional, Government Accountability Office, or other Federal report, hearing, audit or investigation; or (3) from the news media], and second whether the allegations in the instant case are ‘based upon’ the previously disclosed fraud.”¹⁰ If either requirement is not satisfied, the bar does not apply and the relator’s claim may proceed. If both requirements are met, the suit may not proceed unless the relator qualifies as an “original source” under the statute.¹¹

THE UNDERLYING FACTS AND THE DISTRICT COURT DECISION IN *WHIPPLE*

The relator, Whipple, alleged that the defendant hospital violated the FCA by knowingly submitting false or fraudulent claims for reimbursement to federally funded health care programs. Whipple claimed that he discovered the alleged fraud during the six-month period that he worked at the hospital in 2006.

After Whipple left the hospital, the government conducted an audit and investigation into concerns that the hospital had improperly billed Medicare. The audit began in 2006 and an administrative investigation began in 2008, which was resolved without a hearing by the hospital’s payment of a refund to the government in 2009.

Whipple disclosed his *qui tam* complaint to the United States in October 2010. The complaint was filed under seal in March 2011, and the United States declined intervention into Whipple’s action in April 2012. After limited discovery, the hospital moved for partial summary judgment, which the district court granted. The court found that the FCA claims were barred by previous public disclosure because the alleged fraud was disclosed through the prior audit and government investigation. Whipple appealed the district court’s decision to the Sixth Circuit.

THE SIXTH CIRCUIT’S DECISION IN *WHIPPLE*

On appeal, Whipple argued that the information was not *publicly* disclosed because it was not disseminated beyond the participants in the administrative audit and investigation. The Sixth Circuit agreed and found that the district court erred in concluding that there was public disclosure of fraud through the prior audit and investigation of the hospital. In reaching its decision, the Sixth Circuit noted 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.”¹² Ultimately, the Sixth Circuit held that disclosure, beyond the defendant and the government and their respective agents is required to trigger the FCA’s public disclosure bar.

THE CIRCUIT SPLIT

In endorsing this narrow interpretation, the Sixth Circuit became the seventh circuit court to weigh in on the limits of the public disclosure bar as applied to disclosures made to the government. The First,¹³ Fourth,¹⁴ Ninth,¹⁵

⁹ Circuit court decisions addressing the public disclosure bar are predominantly analyzed under the 1986 version of the statute. The relevant circuit court decisions do not address the 2010 amended version of the public disclosure statute, which does not apply retroactively. However, it is unclear whether the amendments may affect the analysis of future courts on this specific issue.

¹⁰ *Whipple*, slip op. at 5 (quoting *United States ex rel. Poteet v. Medtronic, Inc.*, 552 F.3d 503, 511 (6th Cir. 2009)).

¹¹ *Id.*

¹² *Id.* at 10 (citing *United States ex rel. Rost v. Pfizer, Inc.*, 507 F.3d 720, 729 (1st Cir. 2007)).

¹³ See *United States ex rel. Rost v. Pfizer, Inc.*, 507 F.3d 720 (1st Cir. 2007), *overruled on other grounds by Allison Engine Co. v. United*

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Tenth¹⁶ and D.C. Circuits¹⁷ have similarly held that disclosure outside the government is required to trigger the public disclosure bar.

The Seventh Circuit stands as the only circuit court to hold that a disclosure of an alleged fraud to a competent public official with responsibility for the claim constitutes public disclosure.¹⁸ Many of the circuit decisions have confronted and criticized the Seventh Circuit's holding. In *Whipple*, the Sixth Circuit noted that all of the other circuits to interpret "public disclosure" have held that the plain meaning of Section 3730(e)(4) requires some affirmative act of disclosure to the public outside the government, unlike the Seventh Circuit.¹⁹ Similarly, the Fourth Circuit recently noted that the "other five circuits to consider the question have rejected Seventh Circuit's approach" in interpreting public disclosure.²⁰ The First Circuit also expressly rejected the Seventh Circuit's holding, finding "no support in either the language or the history of the statute" for the Seventh Circuit's approach.²¹

KEY TAKEAWAYS

The *Whipple* decision potentially opens the door to more FCA *qui tam* actions in light of the narrowing interpretation of the scope of the public disclosure bar. Additionally, the *Whipple* decision makes greater the weight of authority holding that the public disclosure bar requires some affirmative act of disclosure to the public outside the government. Within the remaining circuits, the Second, Third, Fifth, Eighth and Eleventh, the district courts are split with regard to the Seventh Circuit's position.²² In view of the trend among the circuits to narrow the scope of the public disclosure bar, however, the Seventh Circuit, as the sole outlier, may feel increased pressure to readdress its 1999 holding on this issue in *U.S. ex rel. Mathews v. Bank of Farmington*.²³

States ex rel. Sanders, 553 U.S. 662 (2008) ("*Rost*").

¹⁴ See *United States ex rel. Wilson v. Graham County Soil & Water Conservation Dist.*, No. 13-2345 (4th Cir. Feb. 3, 2015) ("*Wilson*").

¹⁵ See *United States ex rel. Meyer v. Horizon Health Corp.*, 565 F.3d 1195 (9th Cir. 2009).

¹⁶ See *United States ex rel. Maxwell v. Kerr-McGee Oil & Gas Corp.*, 540 F.3d 1180 (10th Cir. 2008).

¹⁷ See *United States ex rel. Oliver v. Philip Morris USA Inc.*, 763 F.3d 36 (D.C. Cir. 2014).

¹⁸ See *United States ex rel. Mathews v. Bank of Farmington*, 166 F.3d 853 (7th Cir. 1999) ("*Farmington*").

¹⁹ See *Whipple*, slip op. at 10 ("Moreover, the Seventh Circuit's interpretation, which equates 'government' with 'public' is inconsistent with the other uses of the term 'government' in the FCA.") (citations omitted).

²⁰ See *Wilson* at *4-5 ("Today we too reject the Seventh Circuit's view, holding instead that a public disclosure requires that there be some act of disclosure *outside of the government*.") (citations and internal quotations omitted) (emphasis in original).

²¹ See *Rost*, 507 F.3d at 730.

²² See, e.g., *United States ex rel. Whitten v. Cmty. Health Sys., Inc.*, 575 F. Supp. 2d 1367, 1381 (S.D. Ga. 2008) (rejecting the Seventh Circuit's reading on the public disclosure bar in *Farmington*); *United States ex rel. Sanchez v. Abuabara*, No. 10-6163-CIV, 2012 WL 1999527, at *3 (S.D. Fla. June 4, 2012) (confronting and refusing to adopt the Seventh Circuit's standard); *United States ex rel. Brennan v. Devereux Found.*, No. CIV.A. 01-4540, 2003 WL 715750, at *3 (E.D. Pa. Feb. 25, 2003) (finding it unlikely that the Third Circuit will adopt the Seventh Circuit's approach); *United States ex rel. Reagan v. E. Texas Med. Ctr. Reg'l Healthcare Sys.*, 274 F. Supp. 2d 824, 850 (S.D. Tex. 2003), aff'd 384 F.3d 168 (5th Cir. 2004) (accepting and applying the Seventh Circuit's definition of "administrative investigation"); *United States ex rel. Cosens v. Yale-New Haven Hosp.*, 233 F. Supp. 2d 319, 327 (D. Conn. 2002) (accepting the Seventh Circuit's standard); *United States ex rel. Ben-Shlush v. St. Luke's-Roosevelt Hosp.*, No. 97 Civ. 3664 LAP, 2000 WL 269895, at *2 (S.D.N.Y. Mar. 10, 2000) ("The allegations or transactions may be deemed public if they are 'disclosed to a public official with direct responsibility for the claim in question.'" (citing *Farmington* at 861)).

²³ Indeed, the Seventh Circuit may have an opportunity to readdress its holding on this issue in the pending appeal of *United States ex rel. Cause of Action v. Chicago Transit Auth.*, No. 12 CV 9673, 2014 WL 5333399

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Finally, the cases suggest that neither a prior government investigation, as in *Whipple*, nor an entity's self-disclosure to the government²⁴ are sufficient to trigger the public disclosure bar. An entity confronted with a private internal or government investigation faces a challenging legal and public relations assessment.: should the entity try to fashion a strategy that seeks to secure protection of the public disclosure bar in later *qui tam* suits or should the entity try to resolve the matter quietly in the hopes that a more conservative route will allow the entity to avoid the complications of a FCA suit? Furthermore, for the entity seeking to get out in front of the public disclosure bar, challenging questions remain as to the mode, form and content of any public disclosure.

Overall, this remains an issue to watch in light of the current circuit split and the potential impacts that the 2010 amendments may have on the FCA's public disclosure bar going forward.

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(N.D. Ill. Oct. 20, 2014), *appeal docketed*, No. 15-1143 (7th Cir. Jan. 23, 2015).

²⁴ See *Wilson*.