Proving Original Source Status: The Forgotten Half

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Given the enormous increase in the number of *qui tam* or "whistleblower" suits initiated under the False Claims Act, 31 U.S.C. §§ 3729-33 ("FCA"), a substantial amount of litigation has ensued over the somewhat cryptic language found in § 3730(e)(4)(A) & (B) regarding "public disclosure" and "original source." It seems safe to suggest that no other provision of the FCA has generated so much litigation as that involved in attempting to decipher these mystical incantations. And it is easy to see why, since the district court does not have subject matter jurisdiction if it can be demonstrated that the complaint, to any extent, is based upon information contained in "public disclosures," and the relator cannot satisfy the safety net "original source" criteria. *United States ex rel. Phipps v. Comprehensive Community Development Corp.*, 152 F. Supp.2d 443, 454 (S.D.N.Y. 2001).

Surprisingly, the case law indicates that while much energy has been expended in litigating the first prong of the original source test (i.e., that the relator have "direct and independent knowledge" of the facts upon which the allegations are based), relatively little attention has been devoted to the second prong. Specifically, a budding original source must demonstrate that he "voluntarily provided the information [upon which his complaint is based] to the Government before filing an action under this section [i.e., § 3730) which is based on the information." Both criteria *must* be satisfied to secure original source status.

Many relators' counsel (not to mention their defense bar counterparts) are not even aware of this requirement. The reason lies in the organization of the *qui tam* section of the FCA. It is not until subsection (e) that this requisite appears; the earlier subsections of § 3730, that lay down procedures for instituting an action, are silent on this hurdle. Therefore, it appears, relators' counsel may not even focus on this requirement until they confront the almost mandatory "public disclosure bar" challenge asserted in a motion to dismiss or for summary judgment. By then, it is too late to reconstitute history. Therefore, this article argues, the defense bar should be much more attentive to invoking the "government disclosure bar" in defending against these actions. Toward this end, a brief introductory overview follows.

Relationship To Disclosure Statement Requirement

Every relator is mandated by the FCA

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(§ 3730(b)(2)) to serve the Department of Justice ("DOJ") not only with the *qui tam* complaint but also with a "written disclosure of substantially all material evidence and information that the person possesses." It is important to note at the outset that serving an appropriate disclosure statement on DOJ does *not* satisfy the original source criterion of government disclosure. *United States ex rel. King v. Hillcrest Health Center, Inc.*, 264 F.3d 1271, 1280-81 (10th Cir. 2001), *cert. denied*, 535 U.S. 905 (2002). These are two separate requirements governed by two distinct schedules.

What Must The Government Disclosure Include?

To be safe, the relator must have disclosed "all the information he possessed prior to filing his complaint." *United States ex rel. Barajas v. Northrop Corp.*, 5 F.3d 407, 411 (9th Cir. 1992), *cert. denied*, 511 U.S. 1033 (1994). However, a lesser standard may satisfy this requirement as well. For example, in *Minnesota Ass'n of Nurse Anesthetists v. Allina Health System Corp.*, 276 F.3d 1032, 1050 (8th Cir.), *cert. denied,* 537 U.S. 944 (2002), the relator was held to have met this obligation by furnishing a copy of a related antitrust complaint it had filed to the local Medicare contractor. This standard is also rendered more fluid by the fact that the language of the statute only mandates disclosure of the underlying "information" upon which the allegations are based, not the allegations themselves. While the disclosure need not be in writing, it must be inclusive of all the relator's information. *United States ex rel. Detrick v. Young*, 909 F. Supp. 1010, 1017 & n. 21 (E.D.Va. 1995). However, more disclosure of unsubstantiated suspicions alone will not do the trick. *Id.* at 1022.

At What Point In Time Must The Disclosure Be Made?

This element involves several separate issues. First, the FCA mandates that the disclosure occur prior to filing the action. However, some Circuits have held that this requirement really means that the government disclosure must occur not only prior to filing the complaint, but also prior to any "public disclosure" occurring. *See, e.g., United States ex rel. Jones v. Horizon Healthcare Corp.*, 160 F.3d 326, 334 (6th Cir. 1998); *United States ex rel. Findley v. FPC-Boron Employees's Club*, 105 F.3d 675, 690-91 (DC Cir.), *cert. denied,* 522 U.S. 865 (1997). Most circuits, however, only require that the disclosure occur prior to filing the complaint.

A related issue is how long can the relator "sit" on the "information" before disclosing it? Basically, it appears, the longer a relator is in possession of the information before filing his complaint, the more potential jeopardy he faces. Particularly if public disclosures by other sources occur in the interim, he could well be held to have failed to make an adequate government disclosure by his dallying. *Wang v. FMC Corp.*, 975 F.2d 1412, 1419-20 (9th Cir. 1992) ("A 'whistleblower' sounds the alarm; he does not echo it"). Relators have an obligation to bring forward their information to the government "at the earliest possible time." *United States ex rel. Barth v. Ridgedale Electric, Inc.*, 44 F.3d 699, 704 (8th Cir. 1994). The disclosure must occur "sufficiently in advance of the time of filing to permit the Government to commence its analysis of the proposed litigation." *United States ex rel. Ackley v. IBM,* 76 F. Supp.2d 654, 668 (D. Md. 1999).

To Whom Must The Disclosure Be Made?

The disclosure can be made to "the United States Attorney, FBI, other suitable law enforcement office, or the agency or official responsible for the particular claim in question." *United States ex rel. Reagan v. East Texas Med. Center*, 384 F.3d 168, 175 (5th Cir. 2004). *See also, United States ex rel. Matthews v. Bank of Farmington*, 166 F.3d 853, 866 (7th Cir. 1999). Therefore, as long as the disclosure is to an employee of the federal government, and that agency has a connection with the purported federal claims, or in some instances is a contractor for the government (especially relative to Medicare claims), then the putative relator has satisfied the burden. *See Minnesota Ass'n of Nurse Anesthetists*, *supra.* Disclosure to state and local enforcement officials (with the possible exception of Medicare/Medicaid claims) will not discharge this obligation.

What Is A "Voluntary" Disclosure?

Demonstrating that the disclosure was voluntary is one of the biggest hurdles facing a prospective original source. The courts have imposed a very high standard for satisfying this element of original source status. Clearly, information provided in response to a subpoena is not voluntary. *United States ex rel. Fine v. Chevron, U.S.A., Inc.*, 72 F.3d 740, 743-45 (9th Cir. 1995), *cert. denied,* 517 U.S. 1233 (1996). The same rule would logically seem to apply to Civil Investigative Demands under the FCA (31 U.S.C. § 3733). Even if the potential relator merely is contacted by a government investigator, and asked questions, any information that is disclosed does not constitute a voluntary government disclosure under this section. *Barth*, 44 F.3d at 704.

The most significant application of the tough "voluntary" standard has been to disqualify most federal government employees from becoming relators. Under this approach, the courts have concluded that while especially investigative and audit employees have a duty to disclose information relating to fraud, so too do most federal government employees as a result of various regulations and executive orders. *United States ex rel. Biddle v. Stanford University*, 161 F.3d 533, 540-43 (9th Cir. 1998), *cert. denied*, 526 U.S. 1066 (1999). Especially this is true if the employee has any managerial responsibilities. *See, e.g., Chevron, id.* at 744. Government contractors as well may bear an obligation to report suspected fraud. *United States ex rel. Foust v. Group Hospitalization and Medical Services, Inc.*, 26 F. Supp.2d 60, 73-74 (D.DC 1998).

How Does A Challenged Relator Demonstrate Government Disclosures?

Indisputably, it is the responsibility of the relator to establish that a suitable pre-filing government disclosure was made. *United States ex rel. Kinney v. Stoltz*, 2002 WL 523869 at *7 (D. Minn. April 5, 2002), *aff'd,* 327 F.3d 671 (2003), *cert. denied,* 540 U.S. 1105 (2004). Whether responding to motions to dismiss, strike, or for summary judgment, the burden is on the relator to bring forward "competent evidence" demonstrating that suitable disclosures occurred. *Ackley*, 76 F. Supp.2d at 669. Even should the relator assert that this obligation has been satisfied in his original complaint, when dealing with jurisdictional arguments, the district court passing upon a motion to dismiss can appropriately go outside the record to determine relevant facts. *United States ex rel. Dingle v. BioPort Corp.*, 270 F. Supp.2d 968 (W.D. Mich. 2003), *aff'd*, 388 F.3d 209 (6th Cir. 2004); *cert. denied*, 125 S.Ct. 1708 (2005).

In responding to a motion for summary judgment, appropriate material facts need to be offered by the relator that can serve as a "roadmap" for the district court in reviewing the record. *United States ex rel. Coleman v. Indiana*, 2000 WL 1357791 at *16 (S.D. Ind. Sept. 19, 2000). One effective device is submission of affidavits/declarations from the individuals to whom the disclosures were made. *United States ex rel. Wright v. Cleo Wallace Centers,* 132 F. Supp.2d 913, 923-24 (D. Colo. 2000). Deposition testimony by the relator is another alternative. *United States ex rel. Precision Co. v. Koch Industries, Inc.,* 1990 WL 422422 at * 3 (N.D. Okla. Nov. 27, 1990), *aff'd*, 971 F.2d 548 (10th Cir. 1992), *cert. denied*, 507 U.S. 951 (1993).

If the relator cannot meet this obligation, or fails to even try, then the district court must dismiss the complaint for lack of subject matter jurisdiction. *United States ex rel. Settlemire v. District of Columbia*, 198 F.3d 913, 920 (DC Cir. 1999).

Is There Yet A Third Prong For Establishing Original Source Status?

It should also be mentioned that some circuits have added yet a further hurdle to those relators seeking to establish original source status. These circuits mandate that a third prong must also be satisfied: the relator must have "directly or indirectly been a source to the entity that publicly disclosed the allegations on which the suit is based." *See, e.g., United States v. New York Medical College*, 252 F.2d 118, 120 (2d Cir. 2001). Other circuits have rejected this additional requirement because it is absent from the text of the FCA and is not supported by the legislative history.

The government disclosure requirement is another example of how detailed familiarity with the FCA can yield substantial advantages to the defense bar.

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