Annals of Health Law

Volume 17
Issue 1 *Winter 2008*

Article 6

2008

The Jurisdictional Bar Provision: Who Is an Appropriate Relator?

Carolyn V. Metnick
Barnes & Thornburg LLP

The Jurisdictional Bar Provision: Who is an Appropriate Relator?

Carolyn V. Metnick, J.D., LL.M.[*]

I. INTRODUCTION

Health care is a distinctive industry in the United States because the state and federal governments incur a substantial portion of consumer costs. In 2006 the U.S. Department of Health & Human Services ("HHS") operated on a budget of approximately $660 billion of which $565 billion was set aside for Medicare and Medicaid related reimbursement.[1] In 2007, $597 billion of HHS's $696 billion budget was allocated for Medicare and Medicaid related reimbursement.[2] Because of the U.S. Government's direct and substantial financial interest in the healthcare industry, it is naturally mindful of reducing economic losses. The greatest sources of economic loss for some time have been fraud and abuse.[3]

In recent years, great strides have been made in combating fraud and abuse and in trimming losses. For example, in 2007, through settlements and judgments, the Department of Justice recovered $2 billion for the federal government of which $1.54 billion was from health care cases.[4] Additionally, the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") established the Health Care Fraud and Abuse Control

---

[*] Carolyn V. Metnick is an attorney in the Chicago office of Barnes & Thornburg LLP, where she practices healthcare law. Ms. Metnick received her LL.M. in health law from Loyola University Chicago in 2007. She obtained her J.D. from Santa Clara University and her B.A. from the University of Chicago.

1. U.S. DEP'T HEALTH & HUMAN SERVS., BUDGET IN BRIEF FISCAL YEAR 2006, ADVANCING THE HEALTH, SAFETY, AND WELL-BEING OF OUR PEOPLE 1, 8 (2006), *available at* http://www.hhs.gov/budget/06budget/FY2006BudgetinBrief.pdf.

2. U.S. DEP'T HEALTH & HUMAN SERVS., BUDGET IN BRIEF FISCAL YEAR 2007, ADVANCING THE HEALTH, SAFETY, AND WELL-BEING OF OUR PEOPLE 4, 12 (2007), *available at* http://www.hhs.gov/budget/07budget/2007BudgetInBrief.pdf.

3. Marilyn Hanzal, *Understanding the Need for a Corporate Compliance Program, in* THE RISK MANAGER'S DESK REFERENCE 107, 107 (Barbara J. Youngberg ed., Aspen 1998).

4. *Health Care Cases Account for Bulk of Federal Recoveries in 2007, DOJ Says*, 16 BNA'S HEALTH CARE FRAUD REPORT 1338, Nov. 8, 2007.

Program ("HCFAC").[5] Since HCFAC's organization in 1997, $8.85 billion has been returned to the federal government's healthcare budget.[6] Although the government continues to make progress in fighting fraud and abuse, future success depends on the continuous identification of novel and complex forms of illegal action, the prosecution of these actions, and the adoption of preventative measures by healthcare entities. Success will also depend on a steady stream of *qui tam* recoveries: actions brought on the government's behalf by private individuals against perpetrators of fraud and abuse.

Qui tam recoveries constitute a significant portion of the money restored to the government.[7] Q*ui tam* provisions allow "private actors to act as attorneys general and pursue cases of alleged fraud."[8] In 2005 alone, the federal government recovered $1.4 billion through False Claims Act ("FCA") *qui tam* litigation of which approximately eighty percent resulted from healthcare fraud.[9] It is estimated that from 1986 to 2005, the United States has recovered more than $9.6 billion from FCA *qui tam* litigation.[10] The recovery numbers continue to grow and there is little reason to expect this growth to subside.[11] In an effort to leverage these successes, the government has promoted fraud awareness that encourages *qui tam* lawsuits; the 2005 Deficit Reduction Act now requests that companies billing Medicaid more than $5 million annually develop a policy to inform their employees of policies and procedures used by the organization to detect fraud and abuse.[12]

Given the increasing importance of *qui tam* litigation in fighting fraud and abuse and the generous rewards bestowed upon successful relators,[13] it is crucial that FCA *qui tam* litigants understand the common and contentious statutory pitfall: the jurisdictional bar provision.[14] In general, the jurisdictional bar provision places exacting yet ambiguous conditions on

5. HEALTH CARE FRAUD & ABUSE CONTROL PROGRAM, U.S. DEP'T OF HEALTH & HUMAN SERVS. AND THE DEP'T OF JUSTICE, ANNUAL REPORT FOR FY 2005 1 (2006), *available at* http://www.usdoj.gov/dag/pubdoc/hcfacreport2005.pdf.

6. *Id.*

7. Judith A. Thorn, *Most Recoveries from Qui Tam Actions Come from Health Care Industry, DOJ Says,* 10 BNA'S HEALTH CARE FRAUD REPORT 702, 702 (2006).

8. Patricia Meador & Elizabeth S. Warren, *The False Claims Act: A Civil War Relic Evolves into a Modern Weapon*, 65 TENN. L. REV. 455, 456 (1998).

9. Thorn, *supra* note 7, at 702.

10. Meador & Warren, *supra* note 8, at 456.

11. *See* Thorn, *supra* note 7, at 702.

12. Robert Pear, *At Hospitals, Lessons in Detection of Fraud*, N.Y. TIMES, Dec. 24, 2006, at A14.

13. In this article, a "relator," sometimes known as a whistleblower, is an interested person who brings the action on behalf of the government.

14. 31 U.S.C. §§ 3730 (e)(4)(A)-(B) (2000).

a litigant's ability to bring a *qui tam* claim before a court. Moreover, the ability to satisfy this standard varies based on each jurisdiction's interpretation of the FCA. As a result, the evaluation of a potential case requires a thorough investigation of the facts as well as an analysis of the applicable jurisdictional law where a case will be filed. In some circumstances where a large, national healthcare entity is involved, multiple courts may have jurisdiction and venue to hear a given case. A relator or his attorney should determine which court will view his case most favorably based on the governing law and procedure of the various jurisdictions.

Specifically, a relator should consider each jurisdiction's interpretation of the FCA and its respective analysis of the jurisdictional bar provision. The jurisdictional bar provision of the FCA prevents an action from proceeding if it is "based upon the public disclosure of allegations or transactions" in a hearing or other specified venue or source, unless the relator is the original source of the information.[15] A thorough evaluation of the law of all applicable jurisdictions prior to filing will help the relator choose the most favorable jurisdiction and increase the likelihood of a successful *qui tam* action.

For example, in the Third Circuit, it is difficult for a relator to avoid falling victim to the jurisdictional bar provision.[16] The Third Circuit interprets several elements in the jurisdictional bar provision broadly, increasing the chance that a relator's action will be jurisdictionally barred.[17] Similarly, in the Tenth Circuit, it is difficult for a relator to qualify as an "original source," which is required for a court to have jurisdiction if allegations or transactions have been publicly disclosed.[18]

However, the Ninth and D.C. Circuits tend to favor relators.[19] The Ninth and D.C. Circuits interpret elements of the jurisdictional bar provision narrowly, thereby limiting the chance that the jurisdictional bar provision will be invoked.[20] Likewise, the Eleventh Circuit broadly interprets the "original source" requirement such that if the public disclosure prong of the jurisdictional bar provision is not satisfied, it will be easier for a relator to

15. *Id.*

16. *See* United States *ex rel.* Mistick PBT v. Housing Auth., 186 F.3d 376 (3d Cir. 1999); United States *ex rel.* Precision Co. v. Koch Indus., Inc., 971 F.2d 548 (10th Cir. 1992).

17. *See Mistick PBT*, 186 F.3d 376.

18. *See Precision Co.*, 971 F.2d 548.

19. *See* United States *ex rel.* Found. Aiding the Elderly v. Horizon West Inc., 265 F.3d 1011 (9th Cir. 2001); United States *ex rel.* Springfield Terminal Ry. Co. v. Quinn, 14 F.3d 645 (D.C. Cir. 1994).

20. *See Found. Aiding the Elderly*, 265 F.3d 1011; *Springfield Terminal Ry. Co.*, 14 F.3d 645.

prove that he or she is the "original source," avoiding the jurisdictional bar.[21]

This article provides an introduction to the FCA and its legislative history with a focus on the variety of existing interpretations of the jurisdictional bar provision. For clarity, the jurisdictional bar provision has been broken down into its two constituent parts: the general exclusion and the original source exception, each with its own conditions.

The general exclusion of the jurisdictional bar provision provides that a relator may not bring an action if the information on which he bases his claim has been publicly disclosed prior to the relator's filing. This article explores the general exclusion by analyzing applicable circuit court decisions interpreting the exclusion's key conditions: "public disclosure" and "based upon."

The jurisdictional bar provision also contains an exception that a relator may bring an action even if the information forming the basis of the claim was previously publicly disclosed, provided the relator was the original source of such information. Applicable circuit decisions are examined herein with particular regard to judicial interpretations of "original source."

An analysis of the circuit court decisions demonstrates that the circuits are split regarding the interpretation of the jurisdictional bar provision of the FCA. This is significant because an action filed in one circuit may result in a successful resolution for the relator while the same action filed in a different circuit may be dismissed for lack of jurisdiction. Although the United States Supreme Court's recent decision in *Rockwell International Corp. v. United States* provides clarity on the "information on which allegations are based" condition of the original source exception under the jurisdictional bar provision, a number of other conditions of both the general exclusion and the original source exception to the jurisdictional bar provision remain unclear.[22] This article concludes that Congress should revisit the jurisdictional bar provision of the FCA and amend its language to reflect the provision's purpose in order to offer greater guidance, thereby preventing divergent interpretations of the FCA.

II. THE FALSE CLAIMS ACT

While the number of *qui tam* fraud and abuse actions has escalated in recent years, such problems are not novel, and *qui tam* provisions have provided statutory solutions for some time. "*Qui tam*" is an abbreviation

21. *See* United States *ex rel.* Cooper v. Blue Cross & Blue Shield of Fla., Inc., 19 F.3d 562 (11th Cir. 1994).

22. Rockwell Int'l Corp. v. United States, 127 S. Ct. 1397, 1400 (2007).

for "*qui tam pro domino rege quam pro seipso*," which translates from Latin to "he who as much for the king as for himself."

A. Legislative History of the False Claims Act

Qui tam actions first arose under English common law in the thirteenth century:

> . . .[T]he *qui tam* suit became a popular means of forum shopping. Private parties could receive relief for their injuries by bringing a suit in the King's name and attaining access to the royal courts. In doing so, they could avoid ineffective and unjust local courts. Informers, or persons lacking personal injury, could also bring *qui tam* actions in the King's name and receive part of the penalty imposed on the wrongdoer. Statutes eventually replaced these common law actions, but the *qui tam* suit became less popular as England developed an effective public police force.[23]

In the United States, the earliest federal anti-fraud law was the Informer's Act, the precursor to the FCA. The Informer's Act was established during the Civil War to combat fraud perpetrated by merchants who sold supplies to the Union Army. Supported by President Abraham Lincoln and passed by Congress in 1863, the Informers Act prosecuted those who contracted to sell specific items to the government but instead intentionally delivered worthless goods.[24] The Civil War period was replete with such instances of fraudulent trading. "[F]or sugar [the government] often got sand; for coffee, rye; for leather, something no better than brown paper; for sound horses and mules, spavined beasts and dying donkeys; and for serviceable muskets and pistols, the experimental failures of sanguine inventors, or the refuse of shops and foreign armories."[25] To combat these occurrences, the Informer's Act included a *qui tam* provision that allowed private citizens to bring suit on the government's behalf against individuals or companies who were defrauding the government.[26]

> Congress drafted the Act broadly so that it applied to all types of fraud on the government. The Act required a $2000 penalty for each false claim by a government contractor and double damages. A private *qui tam*

23. Meador & Warren, *supra* note 8, at 458.

24. Phillips & Cohen LLP, History of the Law, http://www.phillipsandcohen.com/CM/FalseClaimsAct/hist_f.asp (last visited Nov. 23, 2007).

25. *Construction and Application of "Public Disclosure" and "Original Source" Jurisdictional Bars Under 31 U.S.C.A. § 3730(e)(4) (Civil Actions for False Claims)*, 117 A.L.R. FED 263 (1994) (citing FRED SHANNON, THE ORGANIZATION AND ADMINISTRATION OF THE UNION ARMY, 1861-1865, 58 (Reprint Services Company 1965), *available at* http://www.questia.com/PM.qst?a=o&d=23414435#).

26. *Id.*

> relator could bring an action on behalf of the government and receive fifty percent of the damages and forfeitures. Once the relator filed suit, the government did not have a right to take over the action; however, the relator had to bear the cost of pursuing the suit.[27]

In 1943, the United States Supreme Court's interpretation of the Informer's Act (renamed the FCA) in *United States ex rel. Marcus v. Hess* permitted an informer (relator) to bring a *qui tam* False Claims action based on public information.[28] In *Hess* the public information was a previous criminal indictment.[29] The Court reasoned that although the plaintiff did not contribute new information to the investigation, the FCA did not require a *qui tam* plaintiff to aid in the discovery of fraud.[30] Indeed, the ruling "permitted relators to copy criminal indictments into their civil actions and request half of any civil judgment. Thus, *qui tam* plaintiffs could receive fifty percent of the government's recovery without aiding in the fight to uncover fraud."[31]

Within months of *Hess*, Congress amended the FCA to bar courts from having jurisdiction over any suit based on information or evidence already possessed by the government. The 1943 "amendments included other provisions unfriendly to *qui tam* relators and resulted in fewer *qui tam* actions brought under the Act [FCA]."[32] Nonetheless, the amendments proved too restrictive in 1984 when the Seventh Circuit denied jurisdiction in *United States ex rel. Wisconsin v. Dean*.[33] In *Dean*, the State of Wisconsin had been the source of the government's information concerning fraud, yet the court denied Wisconsin jurisdiction as a relator, stating that its *qui tam* action was based upon evidence already in possession of the United States.[34] To lawyers and legislators, this result seemed unjust as Wisconsin had been the source of the information and had been required to inform the federal government of the fraud allegations as part of its participation in the Medicare reimbursement program.[35]

In reaction to *Dean*, and mounting inundation with fraud related issues, Congress again amended the FCA to encourage private enforcement. Moreover, Congress sought to mitigate the restrictive effect of the 1943 amendments and to expand the availability of *qui tam* actions without

27. Meador & Warren, *supra* note 8, at 459.
28. United States *ex rel.* Marcus v. Hess, 317 U.S. 537 (1943).
29. *Id.*
30. *Id.*
31. Meador & Warren, *supra* note 8, at 459.
32. *Id.* at 460.
33. United States *ex rel.* Wisconsin v. Dean, 729 F.2d 1100 (7th Cir. 1984).
34. *Id* at 1106.
35. S. REP. NO. 99-345, at 13, *as reprinted in* 1986 U.S.C.C.A.N. 5266, 5278.

restoring the opportunity to bring the sort of "copy-cat" *qui tam* suits permitted under *Hess*.[36] As such, the 1986 amendments "provided incentives for private enforcement, including increased monetary awards, . . . a lower burden of proof, and allow[ing] the *qui tam* plaintiff to remain a party in the action even if the Government intervenes."[37] The original source exception was also created as part of these amendments.

B. Procedural Issues Related to Qui Tam Filings

The statutory language of the FCA has remained essentially unchanged since the 1986 amendments. Since those revisions, *qui tam* filings and recoveries have been on the rise. Prior to filing a *qui tam* suit, a relator must tender a copy of the complaint and all material information and evidence within his possession to the government in the form of a written disclosure.[38] The primary purpose of the written disclosure "is to provide the United States with enough information on the alleged fraud to be able to make a well reasoned decision on whether it should participate in the filed lawsuit, or allow the relator to proceed alone."[39] The complaint is then sealed for sixty days or more for the government to determine whether it will intervene.[40] Should the government decide not to intervene during the sixty days, it may still join later if it demonstrates "good cause."[41]

C. The Jurisdictional Bar Provision

The FCA's jurisdictional bar provision includes both a general exclusion for publicly disclosed information as well as an exception to that rule where the *qui tam* plaintiff was the original source of the information.[42] Perhaps the most litigated part of the FCA, the jurisdictional bar provision sets forth specific conditions under both the general exclusion and the original source exception. The jurisdictional bar provision was added to the FCA following *United States ex rel. Marcus v. Hess*[43] in 1943 and was rewritten in 1986 after Wisconsin was dismissed as a *qui tam* plaintiff in *United*

36. *Id.*

37. United States *ex rel.* Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co., 944 F.2d 1149, 1154 (3d Cir. 1991).

38. 31 U.S.C. § 3730(b)(2) (2000).

39. Joel M. Androphy & Mark A. Correro, *Federal Qui Tam (False Claims) Litigation: The Government's Watchdog*, 42 HOUS. LAW. 18, 19 (Feb. 2005) (quoting United States *ex rel.* Woodard v. Country View Care Ctr., Inc., 797 F.2d 888, 892 (10th Cir. 1986)).

40. *Id.* at 19-20.

41. 31 U.S.C. § 3730(b)(3) (2000).

42. 31 U.S.C. §§ 3730(e)(4)(A)-(B) (2000).

43. *See* United States *ex rel.* Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co., 944 F.2d 1149, 1153 (3d Cir. 1991).

States ex rel. Wisconsin v. Dean.[44] The current jurisdictional bar provision provides that:

> (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, "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 an action under this section which is based on the information.[45]

Courts have suggested that the jurisdictional bar provision has two basic goals: "(1) to encourage private citizens with first-hand knowledge to expose fraud; and (2) to avoid civil actions by opportunists attempting to capitalize on public information without seriously contributing to the disclosure of the fraud."[46]

In a *qui tam* action, the relator has the burden of demonstrating that a court has jurisdiction over the case.[47] In deciding whether it has jurisdiction, a court must determine whether the allegations underlying the action have been previously disclosed to the public.[48] If the court finds the allegations have been previously disclosed in public, triggering the general exclusion, it must determine whether the relator was the "original source" of the information.[49] If the relator *was* the original source of the information, the relator may continue with the suit despite the public disclosure under the original source exception.[50] However, if the relator was not the original source, he may not bring the action as a *qui tam*

44. *Id.* at 1153-54 (citing S. REP. NO. 99-345, at 13, *as reprinted in* 1986 U.S.C.C.A.N. 5266, 5278).

45. 31 U.S.C. § 3730(e)(4) (2000).

46. United States *ex rel.* Precision Co. v. Koch Indus., Inc., 971 F.2d 548, 552 (10th Cir. 1992) (citing *Prudential,* 944 F.2d at 1154).

47. United States *ex rel.* Herbert v. Nat'l Acad. of Sci., No. 90-2568, 1992 WL 247587, at *4 (D.D.C. Sept. 15, 1992) (citing Moir v. Greater Cleveland Reg'l Transit Auth., 895 F.2d 266, 269 (6th Cir. 1990)).

48. 31 U.S.C. § 3730(e)(4)(A) (2000).

49. 31 U.S.C. §§ 3730(e)(4)(A)-(B) (2000).

50. *Id.*

plaintiff.[51] In order for an action to continue under the latter scenario, a state's attorney general's office would have to intervene on the plaintiff's behalf.[52]

The language of the FCA has posed interpretational problems for the courts, counsel, and parties. The circuit court decisions, which greatly vary in their interpretations of the jurisdictional bar provision, exemplify this. Whether an individual will qualify as an appropriate relator or will be barred from bringing a *qui tam* suit in an FCA action depends entirely on the circuit in which the action is filed and how that circuit interprets each condition of both the general exclusion and the original source exception.

III. THE GENERAL EXCLUSION

In determining whether an action is barred, a court will first consider whether there has been public disclosure pursuant to section 3730(e)(4)(A) of the United States Code:

> No court shall have jurisdiction over an action . . . *based upon* the *public disclosure* of *allegations or transactions* in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an *original source* of the information.[53]

Legal experts have interpreted this language to mean that "[i]f the information in the FCA suit has been publicly disclosed and the *qui tam* plaintiff is not the original source of the information, the suit is barred."[54] To determine whether a public disclosure has been made by an individual or entity, courts evaluate each of the four conditions placed on the general exclusion of the jurisdictional bar provision: (1) public; (2) source; (3) based upon; and (4) allegations or transactions.[55]

The circuit courts differ in their interpretation of each of these conditions. In determining whether a disclosure is "public," courts have interpreted "public" differently.[56] The phrase "based upon" has also been a source of ambiguity for the circuits and has been interpreted differently

51. *Id.*

52. 31 U.S.C. §3730(b)(5).

53. 31 U.S.C. § 3730(e)(4)(A) (2000) (emphasis added).

54. ROBERT FABRIKANT ET AL., HEALTH CARE FRAUD ENFORCEMENT & COMPLIANCE § 4, at 35 (ALM Media 2007) (1996).

55. 31 U.S.C. § 3730(e)(4)(A) (2000).

56. *See, e.g.*, United States *ex rel.* Mistick PBT v. Housing Auth., 186 F.3d 376 (3d Cir. 1999); United States *ex rel.* Schumer v. Hughes Aircraft Co., 63 F.3d 1512 (9th Cir. 1995); United States *ex rel.* Springfield Terminal Ry. Co. v. Quinn, 14 F.3d 645 (D.C. Cir. 1994).

depending on the locale. Additionally, the expression "allegations or transactions" has posed problems, leading some circuits to ignore this language in the jurisdictional bar provision altogether.[57] Other circuits have taken a strict approach, holding that the jurisdictional bar provision does not apply to a disclosure that does not constitute an "allegation or transaction."[58]

In general, broad interpretations of the conditions in the general exclusion correspond with courts precluding a greater range of cases under the jurisdictional bar provision. Narrow interpretations of these conditions, however, tend to favor relators because fewer cases will be barred. The opposite is true for the original source exception. Broad interpretations of the original source exception's conditions tend to favor *qui tam* plaintiffs while narrow interpretations of these conditions tend to disfavor *qui tam* plaintiffs. By employing various combinations of broad or narrow interpretations of the general exclusion and the original source exception, each circuit court has been able to finely hone the balance between encouraging enforcement through *qui tam* litigation and discouraging predatory *qui tam* suits by plaintiffs uninvolved in discovering the fraud. Although the language of the jurisdictional bar provision has allowed courts to carefully weigh these considerations, this approach has led to a bewildering diversity of holdings across the different circuits.

A. Interpretations of the "Public" Condition of the General Exclusion

Since Congress enacted the FCA, the meaning of the first condition, "public," has been interpreted differently in the various circuit courts.[59]

In *United States ex rel. Doe v. John Doe Corp.*, the Second Circuit considered the meaning of "public" within the jurisdictional bar provision.[60] In *Doe*, federal investigators arrived at a corporate office with a search warrant.[61] The government had received information from an informant that the company, which performed services for the military under several defense contracts, was defrauding the government.[62] When the government raided the corporate office, employees and several customers were

57. United States *ex rel.* S. Prawer & Co. v. Fleet Bank of Me., 24 F.3d 320, 326 (1st Cir. 1994).

58. United States *ex rel.* Doe v. John Doe Corp., 960 F.2d 318, 322 (2d Cir. 1992); United States *ex rel.* Hansen v. Cargill, Inc., 107 F. Supp.2d 1172, 1181 (N.D. Cal. 2000); *Springfield Terminal Ry. Co.*, 14 F.3d at 645.

59. *See, e.g.*, United States *ex rel.* Mistick PBT v. Housing Auth., 186 F.3d 376 (3d Cir. 1999); United States *ex rel.* Schumer v. Hughes Aircraft Co., 63 F.3d 1512 (9th Cir. 1995); United States *ex rel.* Springfield Terminal Ry. Co. v. Quinn, 14 F.3d 645 (D.C. Cir. 1994).

60. United States *ex rel.* Doe v. John Doe Corp., 960 F.2d 318, 322 (2d Cir. 1992).

61. *Id.* at 319.

62. *Id.*

present.[63] As the federal investigators seized documents and data, they informed the employees that they were investigating the company for fraud.[64]

For the purposes of interpreting the jurisdictional bar provision, the Second Circuit considered whether a public disclosure had occurred when the federal investigators divulged the allegations of fraud to the observing employees while the raid was in progress.[65] The Second Circuit held that the disclosure was public, reasoning that the employees were members of the public and had no obligation to keep the information confidential.[66] Taking a broad approach to this condition, the court noted that there was no significant distinction between company employees and outsiders as both groups were members of the public.[67]

The Third Circuit analyzed the meaning of "public" in *United States ex rel. Mistick PBT v. Housing Authority*.[68] In *Mistick*, a local construction company filed a *qui tam* action against the Housing Authority of the City of Pittsburgh ("HACP") and an architectural firm.[69] The *qui tam* complaint alleged that the defendants made false claims to the U.S. Department of Housing and Urban Development ("HUD") regarding the cost of work involving lead-based paint abatement at HACP housing projects.[70]

As of 1986, lead based paint abatement was required on all HUD-associated housing; one way to fulfill the requirement was to cover the paint with an encapsulant to prevent lead exposure.[71] The architectural specifications of the subject HACP housing projects called for the use of Glid-Wall as the encapsulant.[72] However, Glid-Wall was not a proper encapsulant as reported by its manufacturer, Glidden.[73] Although the architect and HACP were aware of this information when the specifications were submitted in 1989, they intended to use Glid-Wall and misrepresented to HUD that it was an appropriate encapsulant.[74] A year later, after information surfaced regarding the misrepresentation, the architect had no choice but to revise the specifications for the use of a proper encapsulant

63. *Id.*
64. *Id.* at 320.
65. *Doe*, 960 F.2d at 322.
66. *Id.* at 323
67. *Id.*
68. United States *ex rel.* Mistick PBT v. Housing Auth., 186 F.3d 376, 383 (3d Cir. 1999).
69. *Id.* at 379.
70. *Id.*
71. *Id.*
72. *Id.*
73. *Mistick PBT*, 186 F.3d at 379.
74. *Id.*

known as Zomat.[75] HACP then sought an additional $750,000 from HUD to fund the cost increase associated with Zomat's use.[76] HACP informed HUD that Glidden no longer recommended Glid-Wall as an encapsulant, falsely implying that when the specifications were submitted to HUD, Glidden had recommended Glid-Wall as an encapsulant.[77]

Eventually, Mistick, the general contractor for the HACP, sued HACP, claiming damages due to the delay resulting from the change in the lead-abatement specifications.[78] Mistick sought information from HUD pursuant to the Freedom of Information Act ("FOIA"), and the documents produced evidence of false claims regarding the Glid-Wall matter.[79] After obtaining the FOIA documents, Mistick filed a *qui tam* action.[80]

The key issue presented to the Third Circuit in *Mistick* was whether the FOIA response produced by HUD constituted a public disclosure under the jurisdictional bar provision.[81] The court held that the FOIA response was a public disclosure, reasoning that the information was accessible to members of the public upon request.[82]

> Information may be publicly disclosed— for example, it may appear buried in an exhibit that is filed in court without fanfare in an obscure case— and yet not be readily accessible to the general public. And information may be easily accessible to the public— it may be available under FOIA to anyone who simply files a request— but unless there has been a request and the information is actually produced, it is not publicly disclosed.[83]

Thus, the court's decision suggests that although documentation and information may be available to the public or potentially disclosed, there is no public disclosure until that information is requested and produced.[84] In *Mistick*, when HUD produced the requested FOIA documents, the information became "public" within the meaning of the jurisdictional bar provision.[85]

Despite the Third Circuit's narrow reading of the term "public" in the jurisdictional bar provision, in *United States ex rel. Stinson, Lyons, Gerlin*

75. *Id.*
76. *Id.* at 380.
77. *Id.*
78. *Mistick PBT*, 186 F.3d at 381.
79. *Id.*
80. *Id.*
81. *Id.* at 382.
82. *Id.* at 383.
83. *Mistick PBT*, 186 F.3d at 383.
84. *Id.*
85. *Id.* at 384.

& Bustamante, P.A. v. Prudential Insurance Co., the court broadly construed the term "hearing" which appears in the same statutory language.[86] Pursuant to section 3730(e)(4)(A) of the United States Code, the "public" condition of the general exclusion of *qui tam* actions is dependent on whether allegations or transactions have been disclosed in a "hearing," among other proceedings.[87] The Third Circuit held that "hearing" is to be interpreted so as to include the discovery phase of litigation.[88] The dicta in *Stinson* have also been understood to mean that the potential for disclosure will satisfy the public disclosure condition of the jurisdictional bar provision, and that actual disclosure is unnecessary.[89]

In contrast, the Seventh, Ninth, Tenth, and D.C. Circuits will not invoke the jurisdictional bar provision unless there has been actual public disclosure.[90] The narrow interpretation of this condition of the general exclusion applicable in these courts favors *qui tam* plaintiffs. In *United States v. Bank of Farmington*, the Seventh Circuit took a position contrary to that of the Third Circuit in *Stinson*: "We think, however, that the reasoning of the Third Circuit is unsound. The interpretation of 'public disclosure' adopted there runs contrary to the plain meaning of the words."[91] Furthermore, the Seventh Circuit opted for a strict interpretation of "public," holding that discovery material, which has not been filed with the court, has not been publicly disclosed.[92] Similarly, in *United States ex rel. Springfield Terminal Railway Co. v. Quinn*, the D.C. Circuit also took a position differing from that of the Third Circuit.[93] It held that discovery material, which has actually been made public through filing with the court, is "public" for the purposes of the jurisdictional bar provision.[94]

Furthermore, the Ninth Circuit came to an opposite holding of the

86. United States *ex rel.* Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co., 944 F.2d 1149, 1157 (3d Cir. 1991).

87. *See* 31 U.S.C. § 3730(e)(4)(A) (2000).

88. *Prudential*, 944 F.2d at 1156.

89. *Id.* at 1159 ("we look not to whether the specific documents must be or have been filed but whether there is a recognition that they can be filed and hence available for public access.").

90. *See* United States *ex rel.* Ramseyer v. Century Healthcare Corp., 90 F.3d 1514, 1519 (10th Cir. 1996); United States *ex rel.* Schumer v. Hughes Aircraft Co., 63 F.3d 1512, 1520 (9th Cir. 1995) *vacated in part,* 520 U.S. 939; United States v. Bank of Farmington, 166 F.3d 853, 860 (7th Cir. 1999); United States *ex rel.* Springfield Terminal Ry. Co. v. Quinn, 14 F.3d 645, 652 (D.C. Cir. 1994).

91. *Bank of Farmington,* 166 F.3d at 860 (7th Cir. 1999).

92. *Id.*

93. United States *ex rel.* Springfield Terminal Ry. Co. v. Quinn, 14 F.3d 645, 653 (D.C. Cir. 1994); United States *ex rel.* Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co., 944 F.2d 1149, 1158 (3d Cir. 1991).

94. *Springfield Terminal Ry. Co.*, 14 F.3d at 653.

Second Circuit in *Doe*.[95] In *United States ex rel. Schumer v. Hughes Aircraft Co.*, the Ninth Circuit held that disclosure to company employees, who like the employees in *Doe* were also government defense contractors, did not constitute "public" disclosure within the jurisdictional bar provision.[96]

> We decline to adopt the rule of *Doe* for application in this circuit. At one level, the *Doe* court's treatment of company employees as members of the public is unrealistic. Unlike others who come across information related to fraud, an "innocent employee who comes forward with allegations of fraud by her employer knows that her job may be in jeopardy." *Doe*, 960 F.2d at 325 (Walker, J., dissenting). Because the employee has a strong economic incentive to protect the information from outsiders, revelation of information to an employee does not trigger the potential for corrective action presented by other forms of disclosure.[97]

The Ninth Circuit reasoned that treating employees as members of the public to whom "public disclosure" can occur would defeat Congress's intent for the FCA by allowing the government "to sit on, and possibly suppress, allegations of fraud when inaction might seem to be in the interest of the government."[98]

In *United States ex rel. Ramseyer v. Century Healthcare Corp.*, the Tenth Circuit agreed with the Ninth Circuit's interpretation in *Schumer*, holding that the potential for disclosure does not satisfy the jurisdictional bar provision.[99] *Ramseyer* concerned an Oklahoma Department of Human Services ("DHS") report, known as the Hughes Report, that had been prepared after DHS audited a mental health facility and uncovered fraud.[100] Only three copies of this report were made.[101] The Hughes Report detailed the facility's compliance problems and was kept by the defendants, DHS, and a DHS administrator.[102] Moreover, the report was not released to the general public and was only available to the public upon a written request

95. *See Id.* at 1519; United States *ex rel.* Doe v. John Doe Corp., 960 F.2d 318 (2d Cir. 1992).

96. United States *ex rel.* Schumer v. Hughes Aircraft Co., 63 F.3d 1512, 1519 (9th Cir. 1995).

97. *Id.* at 1518.

98. *Id.* at 1519 (citing *Doe*, 960 F.2d at 323).

99. United States *ex rel.* Ramseyer v. Century Healthcare Corp., 90 F.3d 1514, 1519 (10th Cir. 1996).

100. *Id.* at 1517.

101. *Id.*

102. *Id.*

for the specific record and with approval of the DHS legal department.[103] The court held that the mere placement of the Hughes Report in DHS' files did not constitute public disclosure even if members of the public could have obtained copies of the Hughes Report by request.[104] The Tenth Circuit reasoned that in order for a member of the public to request the Hughes Report, he or she would have to know that DHS conducted an inspection in 1991 and that the documented findings were available to the public upon request.[105] The court held that this called for too much speculation.[106] Accordingly, the court ruled that in order to be publicly disclosed, the allegations or transactions upon which a *qui tam* suit is based must have been made known to the public through some affirmative act or disclosure.[107]

B. Interpretations of the "Source" Condition of the General Exclusion

The second condition on the general exclusion of the jurisdictional bar provision is the "source" of the disclosure. As with much of the language in the jurisdictional bar provision, there is considerable ambiguity. Section 3730(e)(4)(A) of the United States Code provides in part that:

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a *criminal, civil, or administrative hearing, in a congressional, administrative or Government Accounting Office report, hearing, audit or investigation, or from the news media* . . . .[108]

Circuits differ over whether the suit will be barred if the source of the disclosure is not explicitly listed in the statute. The exhaustive position takes the view that if a source of the disclosure is *not* listed in the statute, a court will not necessarily bar the suit.[109] Because the exhaustive approach narrowly limits the sources of the public disclosure to the items listed in the statute, circuits that endorse this approach should be regarded as favorable to *qui tam* plaintiffs.

In *United States ex rel. Paranich v. Sorgnard*, the Third Circuit interpreted the list of sources in the jurisdictional bar provision as exhaustive.[110] However, despite the fact that the Third Circuit takes the

103. *Id.*
104. *Ramseyer*, 90 F.3d. 1514 at 1521.
105. *Id.*
106. *Id.*
107. *Id.* at 1517 (internal citations omitted).
108. 31 U.S.C. § 3730(e)(4)(A) (2000) (emphasis added).
109. *Id.*
110. United States *ex rel.* Paranich v. Sorgnard, 396 F.3d 326, 332-33 (3d Cir. 2005).

narrow view towards classes listed in the jurisdictional bar provision, a relator-friendly position, it interprets the term "hearing" broadly, thereby expanding the applicability of the general exclusion and undercutting the *qui tam* friendly tendencies of the exhaustive view on sources.[111]

In *Stinson*, a case brought before the Third Circuit, the appellant argued that the term "hearing" should be defined as "some sort of live, relatively formal proceeding before a decisionmaking [sic] body, with question of law or fact to be tried."[112] However, the Third Circuit noted that it found the plaintiff's theory unpersuasive because this definition would exclude information publicly disclosed in a criminal indictment, which was held admissible by the Supreme Court in *United States ex rel. Marcus v. Hess*.[113] "Only if the criminal 'hearing' to which the subsection (e)(4)(A) refers is broad enough to cover the full range of proceedings in the course of civil, criminal, or administrative litigation would the type of lawsuit represented by *Marcus* and deemed parasitic by Congress be barred."[114] According to the Third Circuit, "to qualify as a public disclosure under the FCA, a disclosure must . . . issue from a source or occur in a context specifically recognized by the Act."[115]

Likewise, in *United States ex rel. Hansen v. Cargill, Inc.*, the Northern District of California, which sits within the Ninth Circuit, came to the same finding as the Third Circuit.[116] The Northern District of California opined that public disclosure requires that the information originate in a forum listed by the FCA, and that the context of the disclosure identify either the allegations or the transactions alleged in the *qui tam* complaint.[117] "If there has been public disclosure through one of these sources, [the Court] must then determine whether the content of the disclosure consisted of the 'allegations or transactions' giving rise to the relator's claim, as opposed to 'mere information.'"[118] Thus, the Northern District interprets the first condition of the general exclusion of the jurisdictional bar provision narrowly such that there is no "public disclosure" unless the disclosure is specifically an allegation or transaction: a position favoring the relator.

The *Hansen* court also expressly adopted another related Third Circuit

111. United States *ex rel.* Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co., 944 F.2d 1149, 1157 (3d Cir. 1991).

112. *Id.* at 1155.

113. *Prudential,* 944 F.2d 1149 at 1155 (citing United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 541 (1943)).

114. *Id.*

115. United States *ex rel.* Paranich v. Sorgnard, 396 F.3d 326, 332 (3d Cir. 2005).

116. United States *ex rel.* Hansen v. Cargill, Inc., 107 F. Supp.2d 1172, 1181 (N.D. Cal., 2000).

117. *Id.* at 1177.

118. *Id.*

holding in *United States ex rel. Dunleavy v. County of Delaware*; this case holds that the second category of sources listed in the jurisdictional bar provision precludes documents produced by a non-federal government source or agency.[119]

> [T]he phrase "administrative . . . report, hearing, audit or investigation" in the second category of the FCA fora does not include non-federal agency actions. To hold otherwise would lead to the anomalous result that disclosure of a state administrative report implicates the FCA jurisdictional bar while disclosure of a state legislative report – a report which is neither congressional, administrative or from the General Accounting Office- does not raise the jurisdictional bar. [120]

C. Interpretations of the "Based Upon" Condition of the General Exclusion

Unsurprisingly, the circuits have also developed various interpretations for the meaning of "based upon" as it is used in the general exclusion to the jurisdictional bar provision. In *United States ex rel. Doe v. John Doe Corp.*, the Second Circuit took a relator-friendly view, holding that claims are "based upon" publicly disclosed allegations or transactions if they "are the same as those that had been publicly disclosed prior to the filing of the *qui tam* suit."[121] In *United States ex rel. Siller v. Becton Dickinson & Co.*, the Fourth Circuit also took a relator-friendly view of the "based upon" language, holding that "based upon" means "derived from."[122] More specifically, the Fourth Circuit held that "a relator's action is 'based upon' a public disclosure of allegations only where the relator has actually derived from that disclosure the allegations upon which his *qui tam* action is based."[123]

> We are unfamiliar with *any* usage, let alone a common one or a dictionary definition, that suggests that "based upon" can mean "supported by." Preferring the plain meaning of the words enacted by Congress over our sister Circuits' as-yet unconsidered assumptions as to the meaning of those words, and over the Second Circuit's considered but unsupported interpretation, we

119. *Id.* at 1179-80 (citing United States *ex rel.* Dunleavy v. County of Delaware, 123 F.3d 734 (3d Cir. 1997)).

120. *Hansen*, 107 F. Supp.2d at 1180 (referring to *Dunleavy*, 123 F.3d 734).

121. United States *ex rel.* Doe v. John Doe Corp., 960 F.2d 318, 324 (2d Cir. 1992).

122. United States *ex rel.* Siller v. Beckton Dickinson & Co., 21 F.3d 1339, 1348-49 (4th Cir. 1994) (referring to United States *ex rel.* Precision Co. v. Koch Indus., Inc., 971 F.2d 548 (10th Cir. 1992)).

123. *Id.* at 1348.

> hold that Siller's action was "based upon" the disclosures in the SSI lawsuit if Siller actually derived his allegations against BD from the SSI complaint.[124]

Under the Fourth Circuit's interpretation, "two identical suits could proceed so long as each relator did not derive his or her claim from the other."[125]

The Eighth Circuit also addressed this issue in *Minnesota Association of Nurse Anesthetists v. Allina Health System Corp.*[126] The Minnesota Association of Nurse Anesthetists ("Association") filed a *qui tam* action against defendant hospitals and anesthesiologists, alleging that they had mischaracterized services provided to Medicare patients to the U.S. Government.[127] Specifically, the Association claimed that defendants' violations fell into four categories: (1) billing on a reasonable charge basis when the services provided did not meet reasonable charge criteria; (2) billing for personally performed services when the services did not meet personally performed criteria; (3) billing as if the anesthesiologist involved were directing fewer concurrent cases than he or she actually was; and (4) certifying that it was medically necessary for both an anesthesiologist and an anesthetist to personally perform cases routinely performed by an anesthetist alone.[128]

Seven weeks before filing the *qui tam* action, the Association sued many of the same defendants for antitrust and state law violations connected with billing practices.[129] The antitrust complaint alleged that defendants were engaged in the widespread practice of fraudulent billing for anesthesia, including "billing for services not rendered, billing for operations at which they were not present, and inaccurately designating operations as one-on-one for Medicare purposes."[130]

One issue considered by the Eighth Circuit was whether the allegations in the *qui tam* action were "based upon" public disclosure.[131] The Eighth Circuit followed the approach of the Second, Third, and Tenth Circuits, concluding that the reading of section 3730(e)(4) by these circuits was more consistent with Congress' intended policy.[132]

---

124. *Id.* at 1349.

125. United States *ex rel.* McKenzie v. Bellsouth Telecomm., Inc., 123 F.3d 935, 940 (6th Cir. 1997) (citing *Siller*, 21 F.3d 1339).

126. Minn. Ass'n of Nurse Anesthetists v. Allina Health Sys. Corp., 276 F.3d 1032, 1036 (8th Cir. 2002).

127. *Id.*

128. *Id.* at 1037.

129. *Id.* at 1040.

130. *Id.*

131. *Minn. Ass'n of Nurse Anesthetists*, 276 F.3d at 1043.

132. *Id.* at 1047.

> Congress's [sic] fairness concern is not effectuated by each part of the statute read in isolation, but rather by the statute as a whole. The "based upon" clause serves the concern of utility, that is of paying only for useful information, and the "original source" exception serves the concern of fairness, that is of not biting the hand that fed the government information. If the "based upon" clause threatens to kick relators out of court because the government does not need them, the "original source" exception reopens the courthouse door for certain deserving relators. Therefore, the majority view reaches the correct result, not because Congress cared nothing for fairness and everything for utility, but because it used two different provisions to strike a balance between these concerns.[133]

As such, the Eighth Circuit held that the allegations in the *qui tam* action were "based upon" the antitrust case and newspaper articles.[134]

In *United States ex rel. Precision Co. v. Koch Industries, Inc.*, the Tenth Circuit held that a plaintiff whose *qui tam* action is *based in any part* upon publicly disclosed allegations or transactions must be the original source of the information in order to avoid being jurisdictionally barred.[135] Precision filed a *qui tam* action, alleging that the defendants understated the quantity of crude oil and natural gas produced from federal and Indian lands to the U.S. Government.[136] The Tenth Circuit found that Precision's allegations were "based upon" publicly disclosed allegations; therefore, Precision's *qui tam* action was jurisdictionally barred.[137] In finding that Precision's allegations had already been publicly disclosed, the court relied on the fact that Precision's majority shareholder had raised allegations of crude oil theft in three previously filed lawsuits.[138] The court also noted that allegations of crude oil and natural gas theft had been disclosed during a public hearing of the Senate Select Committee on Indian Affairs and in countless news releases.[139] As a result, the court took a restrictive interpretation of the phrase "based upon," equating it with "supported by," reasoning that its interpretation is consistent with the goals of the jurisdictional bar provision.[140]

The Tenth Circuit subsequently clarified the *Precision* finding in *United States ex rel. Fine v. Advanced Sciences, Inc.*, explaining that a court "must

133. *Id.*

134. *Id.*

135. United States *ex rel.* Precision Co. v. Koch Indus., Inc., 971 F.2d 548, 553 (10th Cir. 1992).

136. *Id.* at 550.

137. *Id.* at 554.

138. *Id.* at 553.

139. *Id.* at 553-54.

140. *Precision Co.*, 971 F.2d at 552-53.

determine whether a 'substantial identity' exists between the publicly disclosed allegations or transactions and the *qui tam* complaint."[141] Prior to *Fine*, any *qui tam* action remotely based upon a public disclosure in the Tenth Circuit would have been barred under the general exclusion of the jurisdictional bar provision. However, *Fine* qualified this interpretation, allowing actions to proceed that may be remotely based upon a public disclosure, so long as the action and the public disclosure are not substantially identical.

Moreover, the Sixth Circuit adopted the position of the Tenth Circuit, construing "based upon" to mean "supported by," thereby precluding individuals "who base any part of their allegations on publicly disclosed information" from bringing an action under the FCA.[142] The Eleventh Circuit followed suit, noting however that it does not give significant weight to the "based upon" element of the jurisdictional bar provision and instead emphasizes the "original source" inquiry as the focus of the jurisdictional bar provision.[143] The court referred to the Tenth Circuit's reasoning in *Precision* where the *Precision* court concluded the "based upon" test is a "quick trigger to get to the more exacting original source inquiry."[144]

D. Interpretations of the "Allegations or Transactions" Condition of the General Exclusion

The fourth and final condition of the general exclusion of the jurisdictional bar provision is "allegations or transactions." In some circuits, a finding that information was publicly disclosed is insufficient to end the inquiry, as the statute precludes actions "based upon the public disclosure of *allegations or transactions*."[145] The Second, Ninth, and D.C. Circuits interpret this phrase strictly, favoring the relator. However, the First Circuit ignores the phrase altogether, focusing instead on whether the purpose of the FCA will be served if the action is not impeded by the jurisdictional bar provision. Although very different than the approach of other circuits, this interpretation also favors the relator.

In *United States ex rel. S. Prawer & Co. v. Fleet Bank of Maine*, the First Circuit noted that the phrase "allegations or transactions" is ambiguous, and therefore, courts must look at the entire statute and the history of its

141. United States *ex rel.* Fine v. Advanced Sci., Inc., 99 F.3d 1000, 1006 (10th Cir. 1996).

142. United States *ex rel.* McKenzie v. Bellsouth Telecomm., Inc., 123 F.3d 935, 935 (6th Cir. 1997).

143. United States *ex rel.* Cooper v. Blue Cross & Blue Shield of Fla., Inc., 19 F.3d 562, 568 (11th Cir. 1994).

144. *Id.* (citing *Precision Co.*, 971 F.2d at 552).

145. 31 U.S.C. § 3730(e)(4)(A) (2000).

enactment to understand congressional intent.[146] The First Circuit reviewed circumstances that the jurisdictional bar provision seeks to avoid: "circumstances involving 'parasitic' *qui tam* actions."

> [W]hen it is not clear whether or not a *qui tam* action should be barred by the ambiguous provision precluding the action if it is "based upon transactions or allegations which are the subject of" another suit or proceeding in which the government is a party, we think that a court should look first to whether the two cases can properly be viewed as having the qualities of a host/parasite relationship.[147]

To determine whether a "parasitic" relationship exists between a *qui tam* action and another suit in which the government is a party, the court considered whether the *qui tam* case receives "support, advantage or the like" from the original case "without giving any useful or proper return."[148] If support is provided without a "useful or proper return," then there is an identity between the basis of the *qui tam* action and the subject of the other action.[149] The court concluded that what is a "useful or proper return" should be determined on a case-by-case basis.[150] In concluding that the *qui tam* action at issue resulted in a "useful or proper return," the court noted that the action sought recovery for fraud that had not yet been the subject of an action by the government and had the potential to restore money to the public that would not have otherwise been restored.[151]

> As such, we do not think that [the action] can be characterized as "parasitic." Therefore, we believe that it would undermine the purposes of the 1986 amendments to construe this action as being "based upon allegations or transactions which are the subject of" the Collection case.[152]

In *United States ex rel. Doe v. John Doe Corp.*, the Second Circuit also examined whether a relator's argument was based upon publicly disclosed allegations or transactions.[153] The relator, an attorney, claimed that his action was based upon allegations he had learned while representing his client.[154] The allegations were that John Doe Corp. had committed fraud by

146. United States *ex rel.* S. Prawer & Co. v. Fleet Bank of Me., 24 F.3d 320, 326 (1st Cir. 1994).
147. *Id.* at 327.
148. *Id.*
149. *Id.* at 328.
150. *Id.*
151. *S. Prawer & Co.*, 24 F.3d at 329.
152. *Id.*
153. United States *ex rel.* Doe v. John Doe Corp., 960 F.2d 318, 322 (2d Cir. 1992).
154. *Id.* at 319.

overcharging the government for defense contracts.[155] However, the court held that the "allegations in [the] complaint [were] the same as those that had been publicly disclosed prior to the filing of the *qui tam* suit."[156] The court stated that the same allegations that had previously been published would divert the court's jurisdiction regardless of the source of the relator's information.[157] Ultimately, the court held that the attorney's complaint was jurisdictionally barred.[158] However, although the court found that the disclosure by the federal investigators to John Doe's employees constituted an allegation or transaction, the court did not analyze the significance of the language "allegations or transactions" in its written opinion. It is not clear whether this was because the statements made to the employees were unproven and oral in nature. Perhaps, the court believed that there was no reason to consider the statements anything other than allegations.

In *United States ex rel. Springfield Terminal Railway Co. v. Quinn*, the D.C. Circuit Court of Appeals also considered the meaning of "allegations or transactions."[159] In *Springfield*, a company brought a *qui tam* action against an arbitrator with whom it had been involved in earlier litigation.[160] The *qui tam* complaint alleged that the arbitrator fraudulently billed the government for his services when, in fact, he had not actually performed arbitration services on that day.[161] During the arbitration, the company obtained copies of the arbitrator's pay vouchers and discovered the fraudulent billing.[162] The company also obtained the arbitrator's telephone records for the day in question and discovered that the arbitrator had attended a three-day conference in Canada during the period for which he billed the government for services rendered.[163] The D.C. Circuit Court noted that "the Act bars suits based on publicly disclosed 'allegations or transactions,' not information."[164] The court based this finding on the plain meaning of the terms and its interpretation of the FCA.[165] The opinion suggested an algebraic framework by which the issue of what constitutes a relevant allegation or transaction under the FCA could be determined:

155. *Id.* at 320.
156. *Id.* at 324.
157. *Id.*
158. *Doe*, 960 F.2d at 324.
159. *See* United States *ex rel.* Springfield Terminal Ry. Co. v. Quinn, 14 F.3d 645, 653-54 (D.C. Cir. 1994).
160. *Id.* at 648.
161. *Id.*
162. *Id.*
163. *Id.*
164. *Springfield Terminal Ry. Co.*, 14 F.3d at 648
165. *Id.* at 653.

> [I]n common parlance, the term "allegation" connotes a conclusory statement implying the existence of provable supporting facts. . . . The term "transaction" suggests an exchange between two parties or things that reciprocally affect or influence one another. . . . On the basis of plain meaning . . . if X + Y = Z, Z represents the *allegation* of fraud and X and Y represent its essential elements. In order to disclose the fraudulent *transaction* publicly, the combination of X and Y must be revealed, from which readers or listeners may infer Z, *i.e.*, the conclusion that fraud has been committed. The language employed in § 3730(e)(4)(A) suggests that Congress sought to prohibit *qui tam* actions *only* when either the allegation of fraud or the critical elements of the fraudulent transaction themselves were in the public domain.[166]

Accordingly, the court held that the information disclosed during discovery did not rise to the level of "allegations or transactions" so as to bar jurisdiction.[167] Thus, the court provided a very narrow interpretation of the "allegations or transactions" condition of the general exclusion.[168]

IV. ORIGINAL SOURCE EXCEPTION

"Even if the first prong of the jurisdictional bar provision is met and the *qui tam* lawsuit is 'based upon' publicly disclosed allegations or transactions," the *qui tam* plaintiff is not jurisdictionally barred if he or she is the "original source" of the information.[169] An "original source" is defined in the statute as "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 an action under this section which is based on the information."[170] Controversies identified by legal scholars pertaining to the "original source" element of the jurisdictional bar provision include: "(1) the interpretation of 'direct and independent'; (2) whether the *qui tam* plaintiff had to disclose information to the source that publicly disclosed the information in order to qualify as an 'original source'; and (3) the definition of the phrase "information on which the allegations are based."[171]

166. *Id.* at 653-54.

167. *Id.* at 655.

168. *E.g.*, United States *ex rel.* Found. Aiding the Elderly v. Horizon West Inc., 265 F.3d 1011 (9th Cir. 2001).

169. FABRIKANT, *supra* note 54, § 4, at 42.

170. 31 U.S.C. § 3730(e)(4)(B) (2000).

171. FABRIKANT, *supra* note 54, § 4, at 42.

A. Interpretations of the "Direct and Independent" Condition of the Original Source Exception

The key factors regarding a *qui tam* plaintiff's qualification as an original source and whether the plaintiff obtained the information 'directly and independently' are "[t]he specificity and uniqueness of the information and the manner and timing in which the *qui tam* plaintiff obtained the information."[172] In *United States ex rel. Precision Co. v. Koch Industries, Inc.*, the Tenth Circuit ruled that Precision was not an original source.[173] The court noted that Precision Company's claim was based on three categories of information: information gathered by William Koch, a major shareholder of Precision who participated in previous Racketeer Influenced and Corrupt Organizations Act ("RICO") suits; information gathered by William Presley, President of Precision, from January to June of 1988; and information gathered by William Presley after July of 1988.[174] Having reviewed the information under the "based upon" test, the court found that neither Koch nor Presley could be the plaintiff of the *qui tam* suit.[175] Moreover, the court concluded that Precision was not the original source because Precision did not exist as a corporate entity until June 1988 and Precision made no showing that it was legitimately entitled to the information prior to its formation as an entity.[176] The court found that the remaining information gathered by Precision (an affidavit, nineteen unsworn statements, and interview summaries) was "best characterized as a continuation of, or derived from Mr. Presley's and Mr. Koch's individual investigations," and as "weak, informal and strikingly redundant."[177] Accordingly, the court concluded that the plaintiff, Precision Co., had not obtained the information directly and independently.

In *United States ex rel. Cooper v. Blue Cross and Blue Shield of Florida, Inc.*, the Eleventh Circuit Court of Appeals found that an employee was the "original source" of information where he had direct and independent knowledge of the wrongdoing.[178] Cooper was over the age of sixty-five but remained employed with the U.S. Census Bureau, and as a "working aged," Cooper qualified for both Medicare and federal benefits through Blue Cross

172. FABRIKANT, *supra* note 54, § 4, at 43.

173. United States *ex rel.* Precision Co. v. Koch Indus., Inc., 971 F.2d 548, 554 (10th Cir. 1992).

174. *Id.*

175. *Id.* at 553-54.

176. *Id.*

177. *Id.*

178. United States *ex rel.* Cooper v. Blue Cross & Blue Shield of Fla., Inc., 19 F.3d 562, 568 (11th Cir. 1994).

and Blue Shield of Florida ("BCBSF").[179] Because of his status as a "working aged," Medicare Secondary Payer laws required BCBSF, as Cooper's primary insurer, to first make payments on claims before sending the balance to Medicare.[180] Yet, Medicare ended up paying most of Cooper's medical bills, as BCBSF returned claims to Cooper with a note that Medicare must pay first.[181] Cooper instituted a *qui tam* action under the FCA, claiming that BCBSF committed fraud against the U.S. Government by submitting claims to Medicare without making the first payment.[182]

The Eleventh Circuit considered whether Cooper was the original source of the *qui tam* suit allegations.[183] The court concluded that Cooper's knowledge was direct, reasoning that Copper acquired information regarding BCBSF's wrongdoing through three years of his own claims processing, research and correspondence with members of Congress and the Health Care Financing Administration ("HCFA").[184] Cooper had specifically asked HCFA to investigate BCBSF's claims processing.[185] The court further held that Cooper's knowledge was obtained independently.[186] Furthermore, the court described Cooper's information as "specific, direct evidence of fraudulent activity by BCBSF . . . Cooper's information is more than background information which enables him to understand the significance of a more general public disclosure. It is 'direct' and 'independent' within the meaning of the FCA."[187]

Yet, in *Hays v. Hoffman*, the Eighth Circuit found that a *qui tam* plaintiff did not have direct and independent knowledge of the information on which most of the allegations were based, and, as a result, was not the original source of the information.[188] Hays, a former employee of St. Francis Health Services of Morris, Inc. ("SFHS"), argued that he was the original source of the information because his letters to the Department of Human Services ("DHS") precipitated the DHS investigation.[189] The Eighth Circuit disagreed with this argument, referred to as the catalyst theory, stating that "'direct' knowledge is knowledge 'marked by the absence of an intervening agency.'"[190]

179. *Id.* at 564.
180. *Id.*
181. *Id.*
182. *Id.* at 564-65.
183. *Cooper*, 19 F.3d at 565.
184. *Id.* at 568.
185. *Id.*
186. *Id.*
187. *Id.*
188. Hays v. Hoffman, 325 F.3d 982, 990 (8th Cir. 2003).
189. *Id.* at 896, 990.
190. *Id.* (citing United States *ex rel.* Barth v. Ridgedale Elec., Inc., 44 F.3d 699, 703 (8th

The court found that Hays was the original source of only one out of the eleven allegations.[191] Hays was the original source of the allegation that SFHS had been claiming apples, given as gifts to SFHS employees, as a Medicaid-reimbursable food expense.[192] This allegation was confirmed by DHS in its investigation.[193] However, Hays failed to establish that he was an original source of any of the other claims.[194] In fact, the court found that "most of the other claims were not volunteered by Hays in his whistleblower letters to DHS."[195]

As to the other claims, Hays argued that "he was a 'close observer' of the information provided because he obtained that information from SFHS's former finance director who was himself unwilling to come forward as a whistleblower."[196] Yet, the court opined that such knowledge was neither direct nor independent.[197] "[A] person who obtains secondhand information from an individual who has direct knowledge of the alleged fraud does not himself possess direct knowledge and therefore is not an original source."[198] "[T]o be independent, the relator's knowledge must not be derivative of the information of others, even if those others may qualify as original sources."[199] As such, the court concluded that Hays was only the original source of the apples allegation.[200]

B. Different Approaches to What is Necessary for Adequate Disclosure

In order to qualify for the original source exception, a relator must not only be the "original source," but the relator's disclosure must also be adequate. The circuit courts, however, diverge substantially over what is needed for adequate disclosure. The Second and Ninth Circuits have interpreted this requirement narrowly while the Fourth, Seventh, and Eleventh Circuits have taken a broad approach.[201]

The Second Circuit has interpreted the original source exception narrowly, finding that to qualify as an original source, a relator must

---

Cir.1995)).

191. *Id.* at 990.

192. *Id.*

193. *Hays*, 325 F.3d at 990.

194. *Id.*

195. *Id.*

196. *Id.* at 990-91.

197. *Id.* at 991.

198. *Hays*, 325 F.3d at 990 (quoting United States *ex rel.* Barth v. Ridgedale Elec., Inc., 44 F.3d 699, 703 (8th Cir. 1995)).

199. *Id.* (quoting United States *ex rel.* Fine v. Advanced Sci., Inc., 99 F.3d 1000, 1007 (10th Cir.1996)).

200. *Id.* at 991.

201. FABRIKANT, *supra* note 54, § 4, at 44.

demonstrate that he revealed the information to the entity that publicly disclosed it.[202] In *United States ex rel. Dick v. Long Island Lighting Co.*, the Second Circuit held that plaintiffs were jurisdictionally barred from bringing a *qui tam* action because they were not the original source of the publicly disclosed information on which their suit was based.[203] Plaintiffs were engineers who worked as mid-level managers at a nuclear power station.[204] Through their work at the power station, they were aware of the station's construction status.[205]

Specifically, plaintiffs learned that Long Island Lighting Co. ("LILCO") "had lied to the state's Public Service Commission about the construction status of" the nuclear power station "thereby obtaining higher rates and defrauding the United States as a ratepayer."[206] Sixteen months prior to the filing of the *qui tam* action, the county filed a suit against the LILCO, claiming it violated RICO on rate overcharges.[207] The county's RICO action was widely reported in the news media.[208] The later *qui tam* action filed by plaintiffs included allegations set forth in the RICO action.[209] However, the plaintiffs did not provide the county with the information for the RICO action.[210] Rather, the RICO complaint was based on information derived from the county's independent investigation of possible wrongdoing by LILCO.[211]

The Second Circuit noted that to be an original source, a *qui tam* plaintiff must (1) have direct and independent knowledge of the information on which the allegations are based and (2) have voluntarily provided such information to the government prior to filing suit.[212] Moreover, the court added that:

> A close textual analysis combined with a review of the legislative history convinces us that under §3730(e)(4)(A) there is an additional requirement that a *qui tam* plaintiff must meet in order to be considered an "original source," namely, a plaintiff also must have directly or indirectly been a

202. United States *ex rel.* Dick v. Long Island Lighting Co., 912 F.2d 13, 17 (2d Cir. 1990).
203. *Id.* at 18.
204. *Id.* at 14.
205. *Id.*
206. *Id.*
207. *Dick*, 912 F.2d at 14.
208. *Id.*
209. *Id.* at 15.
210. *Id.*
211. *Id.*
212. *Dick*, 912 F.2d at 16.

> source to the entity that publicly disclosed the allegations on which as suit is based.[213]

In this case, plaintiffs were not government sources who ultimately placed the information in the public domain. The court held that if information on which a *qui tam* suit was based is in the public domain, and the *qui tam* plaintiff was not a source of that information, then the suit must be barred.[214] In holding that the plaintiffs were not the original source, the court reasoned that the county's original complaint did not rely on information disclosed by the plaintiffs.[215]

In *Chen-Cheng Wang ex rel. United States v. FMC Corp.*, a mechanical engineer brought a *qui tam* action against his former employer, FMC Corp., claiming that it defrauded the government through its performance of certain defense contracts.[216] One issue considered by the court was whether a relator was required to be the one who disclosed the information originally if the suit was brought after the allegation had already been made public.[217] Wang had been part of the team of FMC engineers who studied the problem related to the fraudulent performance of the defense contract and had personally written the report, which outlined the problem and recommended further research.[218] The court concluded that "Wang had personal knowledge of the . . . problems because he worked . . . on trying to fix them."[219] "Wang's knowledge of the . . . problems was 'direct and independent' because it was unmediated by anything but Wang's own labor."[220]

The Ninth Circuit agreed with the Second Circuit's holding in *Dick* that a *qui tam* plaintiff "must have directly or indirectly been a source to the entity that publicly disclosed the allegations on which a suit is based."[221] The Ninth Circuit added, however, that to bring a *qui tam* suit, "one must have had a hand in the public disclosure of allegations that are part of one's suit."[222] The court held that because Wang had no hand in the original public disclosure of the transmission troubles, his *qui tam* claim did not

213. *Id.*
214. *Id.* at 18.
215. *Id.*
216. Chen-Cheng Wang *ex rel.* United States v. FMC Corp., 975 F.2d 1412, 1414 (9th Cir. 1992).
217. *Id.*
218. *Id.* at 1417.
219. *Id.*
220. *Id.*
221. *Chen-Cheng Wang*, 975 F.2d at 1416 (quoting United States *ex rel.* Dick v. Long Island Lighting Co., 912 F.2d 13, 16 (2d Cir. 1990)).
222. *Id.* at 1418.

qualify for the original source exception and was therefore barred by the jurisdictional bar provision.[223] The court reasoned that although Wang knew of the transmission problems, he was silent and failed to bring them to the attention of the government or media.[224]

> He sat quietly in the shadows and breathed not a word about them until he was fired. While Wang was silent, some other conscientious or enterprising person bravely brought the transmission problems to the attention of the media and the Army. If there is to be a bounty for disclosing these troubles, it should go to the one who in fact helped to bring them to light.[225]

In *United States ex rel. Siller v. Becton Dickinson & Co.*, the Fourth Circuit took a very different view from the Ninth and Second Circuits.[226] In *Siller*, an employee of Scientific Supply, Inc ("SSI"), a former distributor of Becton Dickinson ("BD"), brought a *qui tam* action against BD, alleging that BD overcharged the government. SSI had previously sued BD, alleging wrongful termination of its distributorship agreement, claiming BD ended the agreement because it feared that SSI would disclose BD's practice of overcharging the government.[227] SSI's lawsuit was resolved when SSI and BD entering into a confidential settlement agreement.[228]

Within fifteen months of the settlement, Siller filed a *qui tam* action against BD.[229] However, the trial court found that Siller's action was precluded by the jurisdictional bar provision because it was "based upon" the prior public disclosure of allegations that BD overcharged the government which appeared in SSI's lawsuit against BD.[230] On appeal, the court then considered whether Siller had adequately made a disclosure as an original source.[231] This court challenged the Second Circuit's requirement:

> [T]he provision unambiguously does not require, as the Second Circuit has held that it does, that a relator be a source to the original disclosing entity in order to be an "original source." Rather, it requires only that the relator have direct and independent knowledge of the information

223. *Id.* at 1420.
224. *Id.* at 1419.
225. *Id.* at 1419-20.
226. United States *ex rel.* Siller v. Becton Dickinson & Co., 21 F.3d 1339, 1339 (4th Cir. 1994).
227. *Id.* at 1340-41.
228. *Id.* at 1341.
229. *Id.*
230. *Id.* at 1342.
231. *Siller*, 21 F.3d at 1351.

> underlying the allegations of a false claim and voluntarily provide the information *to the government* before filing his *qui tam* action.[232]

In *United States ex rel. Cooper v. Blue Cross and Blue Shield of Florida, Inc.*, the Eleventh Circuit Court of Appeals disagreed with the Second Circuit's holding in *Dick* that a relator must demonstrate the he was the original source to the entity that disclosed the information.[233] Rather, the Eleventh Circuit held that "[r]elators under the FCA are required to bring their allegations to the government's attention before filing suit."[234]

C. Rockwell *has Ended the Dispute Over "Information on which the Allegations are Based"*

Prior to the United States Supreme Court's March 2007 decision in *Rockwell International Corp. v. United States*, the circuits were split over the meaning of "information on which the allegations are based." One of the conditions of the original source exception requires individuals who bring *qui tam* actions to have independent and direct knowledge of the information on which the allegations are based.[235] The Third, Ninth, and Tenth Circuits took the position that the phrase referred to the allegations in the relator's *qui tam* complaint, while the Fourth, Fifth, Sixth, Eighth, and D.C. Circuits held that the phrase referred to information on which the publicly disclosed allegations are based.[236] In *Rockwell* the Supreme Court adopted the position of the Third, Ninth and Tenth Circuits, affirming that the phrase "'information on which the allegations are based' refers to knowledge of the actual facts underlying the allegations on which the whistleblower may ultimately prevail and not the information underlying the publicly disclosed allegations."[237]

In *Rockwell*, one of the issues considered by the Court was whether the

---

232. *Id.*

233. United States *ex rel.* Cooper v. Blue Cross & Blue Shield of Fla., Inc., 19 F.3d 562, 568 (11th Cir. 1994).

234. *Id.*

235. 31 U.S.C. § 3730(e)(4) (2000).

236. *See* United States *ex rel.* Laird v. Lockheed Martin Eng'g & Sci. Servs. Co., 336 F.3d 346, 353-55 (5th Cir. 2003); United States *ex rel.* Grayson v. Advanced Mgmt. Tech., Inc., 221 F.3d 580, 583 (4th Cir. 2000); United States *ex rel.* Hafter v. Spectrum Emergency Care, Inc., 190 F.3d 1156, 1162 (10th Cir. 1999); United States *ex rel.* Mistick PBT v. Housing Auth., 186 F.3d 376, 388 (3d Cir. 1999); United States *ex rel.* Findley v. FPC-Boron Employee's Club, 105 F.3d 675, 690 (D.C. Cir. 1997); United States *ex rel.* Barajas v. Northrop Corp., 5 F.3d 407, 411 (9th Cir. 1993).

237. Marcia Coyle, *Supreme Court: More Scrutiny Required in Whistleblower Claims,* NAT'L L.J., Apr. 2, 2007, at 25, *available at* http://www.law.com/jsp/article.jsp?id=1175763838772.

relator, James Stone, was an original source.[238] Rockwell International Corp. ("Rockwell") ran Rocky Flats nuclear weapons plant in Colorado under a contract with the U.S. Department of Energy ("DOE").[239] James Stone worked as an engineer at Rocky Flats and explored the possibility of disposing toxic pond sludge that accumulated in solar evaporation ponds at the facility by mixing it with cement.[240] The plan was to pour the mixture into large rectangular boxes where it could solidify into "pondcrete" blocks to be stored onsite or transported to other sites for disposal.[241] Having reviewed the pondcrete process, Stone concluded that it "would not work" and conveyed his opinion to Rockwell management in writing, predicting the pondcrete would fail.[242] Stone believed that the process "would result in an unstable mixture that would later deteriorate and cause an unwanted release of toxic wastes to the environment."[243]

Notwithstanding Stone's recommendation, Rockwell proceeded with the pondcrete project.[244] Stone was laid off in March 1986, and later that year, Rockwell discovered that a number of pondcrete blocks were insolid.[245] The DOE eventually learned of the problem in 1988.[246] In 1987, however, Stone provided the FBI with information pertaining to environmental crimes committed by Rocky Flats.[247] Based on information from Stone, the FBI obtained a search warrant and raided Rocky Flats in June 1989.[248] Newspapers published the allegations.[249] In July 1989, Stone filed a FCA *qui tam* lawsuit against Rockwell, alleging that the company violated environmental and safety issues and knowingly presented false and fraudulent claims to the government in order to induce payments.[250]

Stone's statement to the government described his review of the pondcrete system and his prediction that the piping mechanism would fail and lead to an inadequate mixture of sludge and cement.[251] The government intervened and an amended complaint was filed, alleging that

238. Rockwell Int'l Corp. v. U.S., 127 S. Ct. 1397, 1405 (2007).
239. *Id.* at 1401.
240. *Id.*
241. *Id.*
242. *Id.* at 1401-02.
243. *Rockwell Int'l Corp.*, 127 S. Ct. at 1402.
244. *Id.*
245. *Id.*
246. *Id.*
247. *Id.*
248. *Rockwell Int'l Corp.*, 127 S. Ct. at 1402.
249. *Id.* at 1403.
250. *Id.*
251. *Id.*

Rockwell stored leaky pondcrete blocks.[252] The complaint did not allege that Stone had predicted a defect in the piping system causing the insolid concrete.[253] Stone and the government clarified their position further in a statement of claims which stated that pondcrete's insolidity was due to "an incorrect cement/sludge ratio used in pondcrete operations, as well as due to inadequate process controls and inadequate inspection procedures."[254]

At trial, Stone and the government did not argue that the defect in the piping system had been predicted by Stone and caused the insolid pondcrete.[255] Rather, they argued that "the pondcrete failed because Rockwell's new foreman used an insufficient cement-to-sludge ratio in an effort to increase pondcrete production."[256]

Before determining whether Stone had "direct and independent knowledge," the Court first considered the meaning of the phrase "information on which the allegations are based." The Court concluded that the phrase refers to the information upon which the relator's allegations are based and not the publicly disclosed allegations.[257] The Court reasoned that the plain language of subparagraph (B) of the jurisdictional bar provision suggested this result.[258] Moreover, the Court concluded that "[t]o bar a relator with direct and independent knowledge of information underlying his allegations just because no one can know what information underlies the similar allegations of some other person simply makes no sense."[259]

The Court held that Stone's prediction that the pondcrete would be insolid due to a flaw in the piping system did not qualify as "direct and independent knowledge" of the defect.[260] The Court reasoned that Stone lacked knowledge because he did not know for certain that the pondcrete would fail.[261] Rather, the Court stated "[e]ven if a prediction can qualify as direct and independent knowledge in some cases . . . , it assuredly does not do so when its premise of cause and effect is wrong."[262]

V. CONCLUSION

Although the United States Supreme Court has provided some much

252. *Id.* at 1404.
253. *Rockwell Int'l Corp.*, 127 S. Ct. at 1404.
254. *Id.*
255. *Id.*
256. *Id.*
257. *Id.* at 1407.
258. *Rockwell Int'l Corp.*, 127 S. Ct. at 1407.
259. *Id.* at 1408.
260. *Id.* at 1410.
261. *Id.*
262. *Id.*

needed clarification on the issue of the "direct and independent knowledge" needed to satisfy the original source exception, much of the language in the jurisdictional bar provision remains unclear. Whether a relator will proceed beyond the jurisdictional bar depends significantly on the circuit in which he files the *qui tam* suit. In deciding whether to bar a relator, the various courts determine whether the information alleged in the suit was publicly disclosed and if so, whether the *qui tam* plaintiff was the original source of the information.

When analyzing the jurisdictional bar provision, it is generally best for a relator to file suit in a circuit with a narrow interpretation of "public disclosure" to avoid barring of the claim. The Ninth Circuit generally remains a good jurisdiction for a relator in requiring actual disclosure while the Third Circuit holds that the mere potential for public disclosure satisfies the jurisdictional bar provision. On the other hand, the Third Circuit requires that information originate in a forum specifically listed in the jurisdictional bar provision; however, its interpretation of "hearing" is so expansive that no benefit is offered to the relator. Moreover, the Third Circuit case, *Mistick*, also requires that "public disclosure" be in the form of an "allegation" or "transaction." The Third Circuit also interprets "allegations or transactions" broadly such that it essentially has no significance in the jurisdictional bar provision. Consequently, the Third Circuit remains a difficult jurisdiction for a relator to bring a *qui tam* suit under the FCA.

In *Rockwell*, the United States Supreme Court clarified the meaning of "information," as used in §3730(e)(4)(B) of the United States Code, but failed to address the other components of the original source exception which require a relator to voluntarily provide the information to the government before filing his action and have direct and independent knowledge. Despite some clarification, the circuits remain split over the meaning of original source. They also remain split over the significance of public disclosure.

With so many points of controversy, Congress must revise the jurisdictional bar provision to offer some guidance on the ambiguous terms and nebulous phrases which haunt this important statutory pitfall. Given the increase in importance of *qui tam* litigation in fighting healthcare fraud and abuse, it is crucial that FCA litigants and their counsel are well informed of the highly contested language in the jurisdictional bar provision and the arbitrary results which may be produced, depending on where suit is filed. A thorough evaluation of the law in any circuit will improve a relator's chance of success in the action.