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PRATT'S
**GOVERNMENT
CONTRACTING
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REPORT



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Victoria Prussen Spears

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False Claims Act Circuit Splits—FCA Issues That May Soon Reach the Supreme Court or Lead to Congressional Amendment—Part II

*By Robert S. Salcido**

*Under the False Claims Act there are multiple circuit court splits related to how power should be allocated between the United States and the relator and whether the relator has contributed sufficient value to merit obtaining a significant portion of the government's recovery. In the first part of this multi-part article, which appeared in the April 2018 issue of Pratt's Government Contracting Law Report, the author discussed the circuit splits addressing the proper allocation of power between the government and relators, and how they should be resolved. This second part explores circuit splits addressing whether relators should be permitted to advance actions when they fail to report non-public information to the government. The final part, which will appear in an upcoming issue of Pratt's Government Contracting Law Report, discusses the False Claims Act and Rule 9(b), and will offer conclusions.***

CIRCUIT SPLITS ADDRESSING WHETHER RELATORS SHOULD BE PERMITTED TO ADVANCE ACTIONS WHEN THEY FAIL TO REPORT NONPUBLIC INFORMATION TO THE GOVERNMENT, WHEN A RELATED ACTION IS PENDING OR WHEN THEY CANNOT IDENTIFY A SINGLE FALSE CLAIM

Courts have split regarding whether the relator should be permitted to proceed with *qui tam* actions when the underlying facts are pending in another *qui tam* action and when the underlying allegations are in the public domain. Courts have also split regarding the extent to which the relator must have the ability to state a single false claim with specificity before proceeding with an False Claims Act (“FCA”) action. Set forth below is a description of the splits and how they should be resolved.

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** Footnotes are continued from Part I of this article, which appeared in the April 2018 issue of *Pratt's Government Contracting Law Report*.

The First-to-File Bar

Section 3730(b)(5), known as the “first-to-file” rule, provides that, “[w]hen a person brings an action under the [FCA], no person other than the Government may intervene or bring a related action based on facts underlying the pending action.”²⁹ This provision has its origin in Congress’ 1986 FCA amendments. Congress did not amend the provision in its 2009 and 2010 FCA amendments.

The purpose of the first-to-file rule is to avoid needlessly duplicative *qui tam* actions based upon the same essential facts when the government has already obtained information regarding the alleged fraud based upon a previously filed *qui tam* action.³⁰ Indeed, once a *qui tam* action has been filed, the government necessarily has the information it needs to enforce the law effectively or to be held accountable in the event that it fails to discharge its obligation to enforce the law. The addition of multiple relators or claims only serves to decrease the government’s ultimate recovery (inasmuch as it needs to split a portion of the recovery with relators), and it imposes additional costs on defendants (inasmuch as they will need to defend additional cases that cover the same matter).

Although the Supreme Court, in *Kellogg Brown & Root Servs., Inc. v. United States ex rel. Carter*,³¹ addressed the split in courts regarding the meaning of the word “pending,” in the first-to-file rule, there are currently four other issues underlying the proper construction of the rule upon which circuit courts have split.

Does the prohibition of intervention in the first-to-file rule bar relators from amending the complaint to join additional relators?

Courts have split regarding what it means to “intervene” in a *qui tam* lawsuit as the word is used in the first-to-file rule. For example, if the relator creates a corporate entity to serve as relator, and the corporate entity is barred from qualifying as *qui tam* relator, can an individual relator intervene, or be substituted, as the relator without running afoul of the first-to-file rule?

²⁹ 31 U.S.C. § 3730(b)(5).

³⁰ *United States ex rel. Batiste v. SLM Corp.*, 659 F.3d 1204, 1210 (D.C. Cir. 2011) (finding that Section “3730(b) is designed to allow recovery when a *qui tam* relator puts the government on notice of potential fraud being worked against the government, but to bar copycat actions that provide no additional material information”); *United States ex rel. Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181, 1189 (9th Cir. 2001) (a narrow identical-facts bar would encourage piggyback claims, which would have no additional benefit for the government, since, once the government knows the essential facts of a fraudulent scheme, it has enough information to discover related frauds”) (citation and internal quotation omitted).

³¹ 135 S. Ct. 1970 (2015).

The U.S. Courts of Appeals for the Tenth and Fifth Circuits have split on this issue. In *United States ex rel. Precision Co. v. Koch Indus., Inc.*,³² after the relator's initial action was dismissed under the FCA's public disclosure bar because the relator was not an "original source," the relator then filed an amended complaint to name as relators individuals who could qualify as original sources. The district court dismissed the action under the first-to-file rule.

On appeal, the Tenth Circuit determined that the "focal point" for proper analysis was the statutory term "intervene" in the first-to-file rule—that is, did it apply to any type of joinder or substitution of relator, or did it apply more specifically to Fed. R. Civ. P. 24 intervention?³³ The court believed that the meaning of the term should be limited to its meaning in Fed. R. Civ. P. 24 and not extended to bar, as defendants contended, any form of substitution or joinder of any party.³⁴

Conversely, in *Fed. Recovery Servs., Inc. v. United States*,³⁵ the Fifth Circuit refused to permit the relator to amend the complaint to name a different relator when the initial relator was barred under the FCA's public disclosure bar because the initial relator could not qualify as an original source.³⁶

If the first-filed pending qui tam action is defective (e.g., it does not satisfy Fed. R. Civ. P. 9(b) or is barred under the FCA's public disclosure bar), can that action nonetheless bar later-filed nondeficient qui tam actions based upon the same "related" facts?

Courts have split regarding whether a fatally defective pending *qui tam* lawsuit can serve to bar a later-filed more substantive *qui tam* action under the first-to-file rule. For example, if a *qui tam* action is pending that does not state the alleged fraud with specificity under Fed. R. Civ. P. 9(b), can the second-filed action be a "related action" under the first-to-file rule?

³² 31 F.3d 1015 (10th Cir. 1994).

³³ *Id.* at 1017.

³⁴ *Id.* Subsequently, the Tenth Circuit ruled, in dicta, in *United States ex rel. Little v. Triumph Gear Sys.*, No. 16-4152, 2017 U.S. App. LEXIS 17997, at *7, n. 6 (10th Cir. Sept. 18, 2017), that, in light of the Supreme Court's decision in *United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 933 (2009), *Precision* may no longer be good law. The court noted in *Eisenstein* that the Supreme Court defined "intervention" broadly as the "method for a nonparty to become a party to a lawsuit." *Id.* Under this definition, a Rule 15 motion would encompass intervention and hence be barred. That is, "intervention takes place when a nonparty becomes a party—regardless of the mechanism by which it occurs." *Id.* at *6.

³⁵ 72 F.3d 447 (5th Cir. 1995).

³⁶ *Id.* at 452–53.

The U.S. Courts of Appeals for the D.C. and the First Circuits have held that the first-filed complaint need not necessarily comply with Fed. R. Civ. P. 9(b) as a prerequisite to the application of Subsection 3730(b)(5) based upon the first-to-file rule's plain language and purpose.³⁷ For example, as to the plain language, the D.C. Circuit, in *Batiste*, noted that nothing in the first-to-file rule indicated that it “incorporates the particularity requirement of Rule 9(b), which militates against reading such a requirement into the statute.”³⁸ Second, the court found that engrafting such a requirement onto the plain language of the first-to-file rule would not advance the rule's purpose to provide the government notice. Specifically, the court reasoned, “Rule 9(b) is designed to protect defendants in fraud cases from frivolous accusations and allow them to prepare an appropriate response. Section 3730(b) is designed to allow recovery when a *qui tam* relator puts the government on notice of potential fraud being worked against the government, but to bar copycat actions that provide no additional material information. As the district court found, a complaint may provide the government sufficient information to launch an investigation of the fraudulent scheme even if the complaint does not meet the particularity standards of Rule 9(b).”³⁹

Conversely, the U.S. Court of Appeals for the Sixth Circuit, in *United States ex rel. Walburn v. Lockheed Martin Corp.*, has ruled that, if the first-filed action breaches Fed. R. Civ. P. 9(b) such that it could not have provided effective notice of the fraud to the government, the first-filed action will not operate to bar a second-filed action under the first-to-file rule.⁴⁰ Additionally, the U.S.

³⁷ *United States ex rel. Heineman-Guta v. Guidant Corp.*, 718 F.3d 28, 34–35 (1st Cir. 2013) (“The question in this case is narrow. It is whether a first-filed complaint under the FCA’s first-to-file rule, § 3730(b)(5), must comply with Rule 9(b) particularity requirements in order to give sufficient notice to the government of an alleged fraudulent scheme. To that narrow question, . . . “we hold it does not” and noting that, although the FCA references the Federal Rules of Civil Procedure in various provisions, § 3730(b)(5) makes no reference to Rule 9(b) and thus “Congress’s reference to the Federal Rules of Civil Procedure in some of the FCA’s provisions, particularly the subsections under § 3730(b), and the omission of any Rule 9(b) requirement from § 3730(b)(5), tells us that Congress did not intend the first-to-file rule to incorporate Rule 9(b)’s heightened pleading standard.”); *United States ex rel. Batiste v. SLM Corp.*, 659 F.3d 1204 (D.C. Cir. 2011).

³⁸ *Id.* at 1210.

³⁹ *Id.* (citation omitted). Additionally, the court ruled that engrafting such an extratextual requirement would be nonsensical: “Imposing the heightened pleading standard, moreover, would create a strange judicial dynamic, potentially requiring one district court to determine the sufficiency of a complaint filed in another district court, and possibly creating a situation in which the two district courts disagree on a complaint’s sufficiency.” *Id.* at 1210.

⁴⁰ See *United States ex rel. Walburn v. Lockheed Martin Corp.*, 431 F.3d 966, 973 (6th Cir.

Court of Appeals for the Ninth Circuit has similarly ruled that, if the first-filed action is barred under the public disclosure bar, then it does not serve to eliminate the second-filed action under the first-to-file rule.⁴¹

If the first-filed action is no longer pending when the defendant's motion to dismiss is heard in the second-filed action, must the court in the second-filed action nonetheless dismiss the second-filed action under the first-to-file rule?

Circuits have split regarding what sanction, if any, is appropriate if the first-to-file rule is breached at the time the subsequent related action is filed but the first-filed action is no longer “pending” when the motion to dismiss is considered in the subsequent action. Does the court look to the facts at the time when the second-filed action is filed and thus dismiss the second-filed action because another action was pending at the time the second-action was filed? Or does the court look to the facts at the time it rules on the motion to dismiss and, given that there is no longer any pending related action, allow the second action to proceed or simply permit the relator to amend or supplement the complaint noting that the first-filed action is no longer pending? If this latter approach is adopted, defendants may lose important defenses. For example, if the second-filed action is dismissed and the relator must refile, the relator's subsequent action may have claims barred under the FCA's statute of limitations. Additionally, if additional public disclosures occurred, the relator's subsequent action may be barred under the FCA's public disclosure bar.

Courts have split on this issue. The U.S. Courts of Appeals for the Fourth and the D.C. Circuits have ruled that the second-filed *qui tam* must be dismissed because, under their view, the provision's plain language and purpose operate to bar the action at the time it is filed.⁴² For example, as to the plain

2005) (relator's “action cannot be ‘based on the facts underlying’ the [first-filed] action when the facts necessary to put the government on notice of the fraud alleged are conspicuously absent from the [first-filed] complaint. Because the [first-filed] action is legally infirm under Rule 9(b), it fails to preempt [the relator's] later-filed action despite the fact that the overly broad allegations of the [first-filed] complaint ‘encompass’ the specific allegations of fraud made by [the relator].”).

⁴¹ See *United States ex rel. Campbell v. Redding Med. Ctr.*, 421 F.3d 817, 825 (9th Cir. 2005) (“we hold that in a public disclosure case, the first-to-file rule of § 3730(b)(5) bars only subsequent complaints filed after a complaint that fulfills the jurisdictional prerequisites of § 3730(e)(4)”). See generally *United States ex rel. Poteet v. Medtronic, Inc.*, 552 F.3d 503, 516 (6th Cir. 2009) (“if the first complaint is either jurisdictionally precluded, see 31 U.S.C. § 3730(e), or legally incapable of serving as a complaint, see Fed. R. Civ. P. 9(b) . . . , then it does not properly qualify as a ‘pending action’ brought under the FCA”) (citations omitted) (dicta).

⁴² *United States ex rel. Carter v. Halliburton, Co.*, 866 F.3d 199 (4th Cir. 2017); *United States ex rel. Shea v. Celco P'ship*, 863 F.3d 923, 929–30 (D.C. Cir. 2017) (noting that “the ‘general

language, the Fourth Circuit, in *Carter*, noted that the relevant statutory text imposes a restriction on the “bring[ing]” of an “action.”⁴³ The court ruled that, in ordinary parlance, one “bring[s] an action” by “institut[ing] legal proceedings.”⁴⁴ The court noted that, inasmuch as “[o]ne ‘brings’ an action by commencing suit,” the appropriate reference point for a first-to-file analysis is the set of facts in existence at the time the FCA action under review is commenced.⁴⁵ The court concluded that, based upon this statutory language, the facts that may arise after the commencement of a relator’s action, such as the dismissals of earlier-filed, related actions pending at the time the relator brought her action, do not factor into this analysis.⁴⁶ Additionally, as to policy, the Fourth Circuit concluded that its ruling advances the purposes underlying the first-to-file rule. The court noted that, although its holding may reduce the number of duplicative actions that can survive the FCA’s statute of limitations, this reduction would have no material effect on the FCA’s objective of ensuring that the government is put on notice of fraud because such notice is already provided by the first-filed action.⁴⁷

Other courts have permitted the relator to supplement her existing complaint and have not required dismissal. For example, the First Circuit has ruled that a first-to-file defect at the time of filing can be cured if the earlier-filed

rule’ is that, ‘if an action is barred by the terms of a statute, it must be dismissed’ rather than left on ice” and the “first-to-file bar, in specifying that ‘no person . . . may . . . bring a related action’ while a first-filed suit is ‘pending’ . . . manifests just such a statutory command” and rejecting contention that the relator may simply amend the complaint once the other parties’ prior complaints are dismissed because an amended complaint “does not operate to end the action and begin a new one” and concluding that the relator’s action was “incurably flawed from the moment he filed it”) (citations omitted).

⁴³ See 866 F.3d at 206 (citing 31 U.S.C. § 3730(b)(5)).

⁴⁴ *Id.* (citing *Bring and Action*, BLACK’S LAW DICTIONARY 231 (10th ed. 2014)).

⁴⁵ *Id.* at 206–07 (citations omitted).

⁴⁶ *Id.* The Fourth Circuit also noted that its plain-language interpretation was supported by the Supreme Court’s decision in *State Farm Fire & Cas. Co. v. United States ex rel. Rigsby*, 137 S. Ct. 436 (2016). In *Rigsby*, the Supreme Court considered whether a violation of the FCA provision mandating that relators file their complaints under seal could be sanctioned only with dismissal. *Id.* at 439–40. The Court held that the appropriate response to a seal violation was left to the district court’s discretion in light of congressional silence on the issue of how to sanction a seal violation. *Id.* at 442–44. In reaching this ruling, however, the Court contrasted the seal requirement with the first-to-file rule, which the Court described as one of a number of FCA provisions that do require, in express terms, the dismissal of a relator’s action. *Id.* at 442–43 (citing 31 U.S.C. § 3730(b)(5)). The Fourth Circuit found that the Supreme Court’s reasoning confirms that the only appropriate response for a first-to-file rule violation is dismissal. See 866 F.3d at 209.

⁴⁷ *Id.* (citations omitted).

action is dismissed by filing an amended or supplemental complaint in the later-filed action.⁴⁸ The court ruled that dismissal and refile would be a “pointless formality.”⁴⁹

Is the first-to-file rule jurisdictional?

Courts have split regarding whether the first-to-file rule is jurisdictional. For example, the U.S. Courts of Appeals for the Fourth, Fifth, Sixth, and Ninth Circuits have stated or assumed that the first-to-file rule is jurisdictional.⁵⁰ However, the U.S. Courts of Appeals for the Second and the D.C. Circuits have reached the opposite conclusion.⁵¹

The Meaning of the Word “Public[]” in the FCA’s Public-Disclosure Bar

Section 3730(e)(4)(A) bars actions where the relator does not qualify as an original source that are based upon the public disclosure of specified information. Congress created the public-disclosure bar in 1986, including the provision that it is a “public disclosure” that triggers the bar. The purpose of the public-disclosure bar is to prohibit those actions in which the allegations or transactions underlying the lawsuit have been publicly disclosed—because no “whistleblower” who will obtain a substantial portion of the government’s recovery is needed if the information is already public—unless the relator contributes material, independent information that advances the government’s knowledge of the case and hence qualifies as an original source.⁵² Although

⁴⁸ See *United States ex rel. Gadbois v. PharMerica Corp.*, 809 F.3d 1 (1st Cir. 2015).

⁴⁹ *Id.* at 6.

⁵⁰ See, e.g., *United States ex rel. Hartpence v. Kinetic Concepts, Inc.*, 792 F.3d 1121, 1130 (9th Cir. 2015); *United States ex rel. Carter v. Halliburton Co.*, 710 F.3d 171, 181 (4th Cir. 2013), *aff’d in part on other grounds sub nom Kellogg Brown & Root*, 135 S. Ct. 1970, 1979 (2015); *United States ex rel. Branch Consultants v. Allstate Ins. Co.*, 560 F.3d 371, 376–77 (5th Cir. 2009); *Walburn v. Lockheed Martin Corp.*, 431 F.3d 966, 970 (6th Cir. 2005).

⁵¹ See *United States ex rel. Hayes v. Allstate Ins., Co.*, 853 F.3d 80, 86 (2d Cir. 2017) (“we join the D.C. Circuit in holding that the first-to-file rule of the FCA is not jurisdictional”); *United States ex rel. Heath v. AT&T, Inc.*, 791 F.3d 112, 120–21, (D.C. Cir. 2015).

⁵² *United States ex rel. Doe v. Staples, Inc.*, 773 F.3d 83, 88–89 (D.C. Cir. 2014) (noting that the relator’s action did not fulfill purposes of the public-disclosure bar because “anyone armed with the information in the [administrative reports] could troll the aisles of any office-supply store for pencils with loose ferrules or off-center leads. The would-be plaintiff could then determine whether the retailer had paid the required anti-dumping duties by reference to other public information, and if it had not, then voila, the plaintiff would be entitled to millions of dollars in *qui tam* compensation. But these sorts of lawsuits, brought by ‘opportunistic plaintiffs who have no significant information to contribute of their own,’ are precisely the kind the public disclosure bar seeks to prevent.”) (citation omitted); *United States ex rel. Poteet v. Bahler Med. Inc.*, 619 F.3d 104, 111 (1st Cir. 2010) (“*Qui tam* actions are intended to help the federal

Congress substantively amended the public-disclosure bar in 2010, it did not expressly address the circuit splits regarding the meaning of the word “public” upon which circuit courts had split prior to the 2010 amendments.

There are at least three discernible splits regarding the meaning of the word “public”—Does it apply to any disclosure to a person not involved in the fraudulent conduct? Does it instead require a disclosure beyond not just those who participated in the fraud, but the agents of those persons? Does a member of the “public” include disclosures to government employees such that, if the defendant, or someone else, discloses the allegations to the government before the *qui tam* complaint is filed, does that become a “public” disclosure under the FCA?

The Second and Third Circuits have defined the word “public” broadly to encompass any information that is disclosed to one or more persons who is a “stranger to the fraud.”⁵³ Moreover, the Second Circuit took this rule a step further in *United States ex rel. Kreindler v. United Techs.*⁵⁴ by holding that, not only is information “public” if it reaches a single individual (“a stranger to the fraud”), but it is also “public” if it is simply accessible to the public. Accordingly, in that case, the court found that, although the relator was prohibited under a

government expose fraud on the United States that has escaped the government’s detection. If the materials necessary to ground an inference of fraud are generally available to the public, however, there is nothing to prevent the government from detecting it. Concomitantly, the likelihood of parasitic *qui tam* action in such circumstances is high, providing a reason for the public disclosure bar.”); *United States ex rel. Gilligan v. Medtronic*, 403 F.3d 386, 389 (6th Cir. 2005) (“Where information has been publicly disclosed, the government has access to enough information to bring a civil action and the citizen-suit provision becomes unnecessary.”); *United States ex rel. Feingold v. Adminastar Fed., Inc.*, 324 F.3d 492, 495 (7th Cir. 2003) (“[T]he function of a public disclosure is to bring to the attention of the relevant authority that there has been a false claim against the government Where a public disclosure has occurred, that authority is already in a position to vindicate society’s interests, and a *qui tam* action would serve no purpose Where, on the other hand, a transaction or an allegation of fraud has not been publicly disclosed, society benefits by creating a monetary incentive for a knowledgeable person, called a relator, to identify the problem, present his information to the government, and, where the government declines to prosecute, proceed with a *qui tam* action under the FCA.”) (citations omitted).

⁵³ See, e.g., *United States ex rel. John Doe v. John Doe Corp.*, 960 F.2d 318 (2d Cir. 1992); *United States ex rel. Stinson v. Prudential Ins. Co.*, 944 F.2d 1149, 1155 (3d Cir. 1991); cf. *United States ex rel. Springfield Terminal Ry. v. Quinn*, 14 F.3d 645, 652–53 (D.C. Cir. 1994) (no public disclosure results from “the discovery process conducted between two private litigants” when that information is not filed with the court) (dictum) (citations omitted); *United States ex rel. Hagood v. Sonoma Cty. Water Agency*, 929 F.2d 1416, 1419 (9th Cir. 1991) (no public disclosure occurs merely as a result of internal government debate regarding the defendant’s acts); *United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493 (11th Cir. 1991) (same).

⁵⁴ 985 F.2d 1148, 1195 (2d Cir. 1993).

confidentiality agreement from disclosing information that it had obtained in discovery, the information nonetheless was “public” because it was on file with the court, and, thus, “it was available to anyone who wished to consult the court file.”⁵⁵

The Ninth Circuit, however, has construed the term “public disclosure” more narrowly. For example, the Ninth Circuit, in *United States ex rel. Schumer v. Hughes Aircraft*,⁵⁶ specifically rejected the Second and Third Circuits’ broad interpretation of the word “public.” In *Schumer*, the government had issued an audit report critical of the defendant’s accounting practices and released the audit report to the defendant’s and the prime contractor’s employees.⁵⁷ The court rejected the defendant’s contention that the disclosure of the audit report to “innocent” employees and other “strangers to the fraud” constituted a “public” disclosure and that the audit report was a “public” document because it could be obtained under the Freedom of Information Act.⁵⁸ The court reasoned that any disclosures to the company and its prime contractor were merely disclosures within a “private sphere” because those companies had no economic incentive to further publicize the results of the audit report.⁵⁹

⁵⁵ *Id.* See *United States ex rel. Branban v. Mercy Health Sys. of Sw. Ohio*, No. 98-3127, 1999 U.S. App. LEXIS 18509 at *5 (6th Cir. Aug. 5, 1999) (HCFA report was publicly disclosed because it would be “available to anyone who requested it”) (citations omitted); *United States ex rel. Woods v. Empire Blue Cross & Blue Shield*, No. 99-Civ. 4968, 2002 U.S. Dist. LEXIS 15251 at *15 (S.D.N.Y. Aug. 19, 2002); *United States ex rel. Phipps v. Comprehensive Cmty. Dev. Corp.*, 152 F. Supp. 2d 443, 453 (S.D.N.Y. 2001) (“If information is equally available to the relator as it is to strangers to the fraud transaction had they chosen to look for it, then there is public disclosure.”) (citations omitted); cf. *United States ex rel. Holmes v. Consumer Ins. Grp.*, 318 F.3d 1199, 1205 (10th Cir. 2003) (where the government interviewed current and former employees of the defendant, there was no public disclosure because all persons were “previously informed” of the fraudulent scheme prior to their respective interviews with government investigators) (en banc).

⁵⁶ 63 F.3d 1512 (9th Cir. 1995), *rev’d on other grounds*, 520 U.S. 939 (1997).

⁵⁷ 63 F.3d at 1518–19.

⁵⁸ *Id.* at 1518–20.

⁵⁹ *Id.* at 1518. The court believed that its ruling was consistent with the statutory purpose because Congress specifically intended for relators to be able to bring lawsuits when the government possessed identical information. *Id.* at 1519. The Court relied, in part, upon statements in the Senate Judiciary Committee Report. *Id.* However, the court’s reliance on the Senate Report undermines the reliability of its holding because the draft jurisdictional bar that the Senate Judiciary Committee referenced in its Report was substantially narrower than the one that Congress ultimately passed. Compare S. REP. 345 at 43 (setting forth draft § 3730(e)(4)) with 31 U.S.C. § 3730(e)(4). Indeed, to the extent that the audit report was released to the prime contractor—which was a stranger to the fraud—under the plain language of the statute—which requires only that the information be “public”—the Ninth Circuit should have found that there

Additionally, the court, criticizing the Third Circuit's holding in *Stinson*, ruled that the public disclosure bar applied to only actual disclosures, not theoretical disclosures; thus, the fact that the audit report was theoretically obtainable under the Freedom of Information Act was inconsequential under the statute.⁶⁰

Finally, in *United States v. Bank of Farmington*,⁶¹ the U.S. Court of Appeals for the Seventh Circuit has construed the word "public" broadly to reach disclosures that the defendant made to a responsible government official. Additionally, in *Glaser v. Wound Care Consultants, Inc.*, the Seventh Circuit ruled that notices from the government regarding potential overpayments similarly constitute a public disclosure.⁶²

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The final part of this article, which will appear in an upcoming issue of *Pratt's Government Contracting Law Report*, discusses the False Claims Act and Rule 9(b), and will offer conclusions.

had been a public disclosure of the audit report. The statute, unlike the court's ruling, contains no exception for "public" disclosures within "private spheres."

⁶⁰ *Id.* at 1520. See also *United States ex rel. Berg v. Honeywell Int'l, Inc.*, No. 11-35001, 2012 U.S. App. LEXIS 25897 at *4-*5 (9th Cir. Dec. 19, 2012) (finding no public disclosure when governmental report was produced to private company the government hired to audit contract); *United States ex rel. Putnam v. E. Idaho Reg'l Med. Ctr.*, 2009 U.S. Dist. LEXIS 81416 at *26-*27 (D. Idaho Sept. 8, 2009) (ruling that public disclosures made to defendants' employees and independent contractors did not trigger the public-disclosure bar because their financial interest is that the accusations not be further publicized). More recently, a district court within the Third Circuit distinguished *Stinson* and found that documents produced during discovery but not filed with the court did not constitute a public disclosure because, unlike the situation in *Stinson*, it was produced under a Confidentiality Agreement and the presumption that the *Stinson* court noted in the Federal Rules of Civil Procedure of "public access" to civil discovery had been altered such that public access was generally limited to discovery filed with the court. See *United States ex rel. Spay v. CVS Caremark Corp.*, 09-4672, 2012 U.S. Dist. LEXIS 180602, at *152-57 (E.D. Pa. Dec. 20, 2012).

⁶¹ 166 F.3d 853 (7th Cir. 1999). Other circuits have expressly ruled that disclosures to the government do not constitute public disclosures for purposes of the public-disclosure bar. See, e.g., *United States ex rel. Whipple v. Chattanooga-Hamilton Cty. Hosp. Auth.*, 782 F.3d 260, 267-70 (6th Cir. 2015); *United States ex rel. Rost v. Pfizer Inc.*, 507 F.3d 720, 730 (1st Cir. 2007), *abrogated on other grounds by Allison Engine v. United States ex rel. Sanders*, 553 U.S. 662 (2008).

⁶² 570 F.3d 907 (7th Cir. 2009).