
Commentary:

The Public Disclosure Bar of the False Claims Act

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Introduction

The False Claims Act is the federal government's "primary litigative tool for combating fraud."¹ It imposes liability on those who, among other things, "knowingly" present, or cause to be presented, "a false or fraudulent claim for payment" to the United States.² The FCA empowers private persons (known as relators) to institute civil actions (known as *qui tam* actions) to enforce the act and bestows upon them substantial bounties if their cases are successful.³

In 1986 Congress substantially amended the FCA to encourage *qui tam* actions. As a result of Congress' expansion and liberalization of the FCA, the government's recoveries under the FCA have skyrocketed. As of federal fiscal year 2000, the government has recovered almost \$7 billion under the FCA since the 1986 amendments.⁴ In federal fiscal year 2000 alone, the government recovered \$1.5 billion and more than half that amount arose from health-related FCA cases.⁵

As a result, *qui tam* relators have been substantially enriched. For example, the relators in the TAP Pharmaceutical *qui tam* case reportedly received more than \$70 million, and the whistleblowers in the HCA-The Healthcare Company *qui tam* case received more than \$25 million for filing their actions.⁶

As *qui tam* recoveries escalate, debate continues to rage regarding which "whistleblowers" truly merit these massive rewards. The primary provision of the FCA that screens out unqualified whistleblowers from these riches is the public disclosure jurisdictional bar.⁷ This bar eliminates actions that are not in the public interest by divesting a court of subject matter jurisdiction when the relator's action is "based upon" specific types of public information unless the relator can prove that he or she is the "original source" of that information.⁸

Multiple circuit courts of appeal have split regarding the interpretation of several key provisions of the public disclosure bar. Recently, the U.S. Court of Appeals for the Eighth Circuit, in *United States ex rel. Minnesota Association of Nurse Anesthetists v. Allina Health System*, joined the fray by construing what it means for a *qui tam* action to be "based upon" a public disclosure

and by interpreting the scope of the original source provision.⁹

Specifically, the court held that an action can be "based upon" a public disclosure even if the relator did not rely upon the public information in filing the action. Further, the court ruled that a relator can in fact qualify as an "original source" even if the information underlying the action was in the public domain *before* the relator disclosed the information to the federal government.

For the reasons stated below, the decision substantially misconstrues the language and purposes underlying the public disclosure bar and will ultimately result in reduced governmental recoveries because the government's recovery will be diluted by the substantial bounties it must pay to "whistleblowers" who do nothing more than republish public information in the form of *qui tam* complaints.

The Eighth Circuit's Decision in *Allina*

In *Allina*, the relator, the Minnesota Association of Nurse Anesthetists, filed a *qui tam* action on Dec. 28, 1994, alleging that the defendant hospitals and anesthesiologists had knowingly made false claims on the United States by mischaracterizing services they had provided to Medicare patients.¹⁰

Specifically, MANA claimed that the defendant anesthesiologists and hospitals made the following types of misrepresentations: billing on a reasonable-charge basis when the services the anesthesiologists provided did not meet the criteria for reasonable-charge reimbursement; billing services as personally performed by the anesthesiologists when the services did not meet the criteria for personal performance; billing as if the anesthesiologists involved were directing fewer concurrent cases than they actually did direct; and certifying that it was medically necessary for both an anesthesiologist and an anesthetist to personally perform cases that in fact an anesthetist alone personally performed.¹¹

The relator asserted that the defendants violated the False Claims Act by overcharging the government for their services and that they had conspired among

each other to do so. The United States declined to intervene.¹²

Significantly, however, for purposes of the FCA's public disclosure bar, on Nov. 8, 1994, approximately seven weeks *before* filing its *qui tam* case, MANA and several individual anesthetists sued many of the same defendants alleging various federal antitrust and state law violations, again in connection with their anesthesia billing practices.¹³

The antitrust complaint alleged:

The defendant anesthesiology groups and their co-conspirators have engaged in a widespread practice of fraudulent billing of anesthesia services in violation of ... Federal statutes, including § 128(a)(1)(A). Such violations include, but are not limited to, billing for operations at which they were not present and inaccurately designating operations as one-on-one for Medicare purposes.¹⁴

These allegations in MANA's antitrust case were immediately reported in the local newspapers in St. Paul and St. Cloud, Minn., on Nov. 10 and 11.¹⁵ MANA also provided a copy of the antitrust case to the U.S. government.¹⁶ Only after this publicity did MANA file its *qui tam* action in which it republished these same allegations.¹⁷

As a result of these public disclosures, the defendants moved to dismiss the relator's action under the FCA's public disclosure bar. According to the court, "Applying the [bar] requires [the court] to answer three questions: (1) Have allegations made by the relator been 'publicly disclosed' before the *qui tam* suit was brought? (2) If so, is the *qui tam* suit 'based upon' the public disclosure? and (3) If so, was the relator an 'original source' of the information on which the allegations were based?"¹⁸

For a relator to qualify as an original source, the court ruled that the relator's knowledge of the information must be "(1) direct and (2) independent, and (3) the relator must have voluntarily provided the information to the Government before filing the suit."¹⁹

In addressing these elements, the court had to interpret two provisions of the public disclosure bar upon which several other courts had split. First, the court had to consider whether MANA's *qui tam* action was "based upon" its previously filed antitrust action even though the relator had knowledge of the underlying facts independent of the public disclosure. Second, the court had to address whether MANA failed to

qualify as an original source because the allegations were publicized (in the form of a civil proceeding and press accounts) *before* the relator made *any* disclosure of the facts to the government.

A. The Eighth Circuit's Construction of 'Based Upon'

There is a split in the circuits regarding the meaning of the term "based upon" in the public disclosure jurisdictional bar. As in *Allina*, the issue typically arises when there has been a public disclosure of allegations or transactions of fraud contained in or resulting from a hearing, audit, report, investigation or news media account, but the relator claims ignorance of the public information or claims that the information was obtained from another source. Under these circumstances, the issue is whether the relator's action can be "based upon" the public information if the relator in fact did not know of or rely on that information.

The vast majority of circuits have ruled that a relator's allegations are "based upon" public information if they are substantially similar to that information.²⁰ Conversely, a minority of circuits has ruled that the relator's action must actually be derived from the public information in order to be based upon that information.²¹

Before *Allina*, the Eighth Circuit had not expressly addressed this issue. In evaluating both the majority and the minority views, the court noted that there were two strong arguments in support of the minority view. First, the court opined that the minority view was consistent with the FCA's statutory language and that the majority view distorted "the plain meaning of the words 'based upon the public disclosure,' since if the *qui tam* allegations are not derived from the public disclosure itself, they are not based upon the *public disclosure*, but rather on the *facts* which have been publicly disclosed."²²

Second, the Eighth Circuit asserted that an important policy supported the minority interpretation. Specifically, the "second objection to the majority view is that the policy justification sometimes given by courts in the majority, if taken to its logical conclusion, would return us to the rule of [*United States ex rel. Wisconsin v. Dean*, 729 F.2d 1100 (7th Cir. 1984)], which Congress was specifically attempting to overrule by means of the 1986 Amendments Act," because Congress sought "to treat relators fairly, which would be frustrated by kicking relators out of court when their claim was not parasitical, but was merely disclosed before the relator had filed suit."²³

However, ultimately, the *Allina* court adopted the majority position and thus held that an action is based upon a public disclosure whenever the allegations in

the suit and in the publicly disclosed material are substantially the same regardless of where the relator obtained its information. In reaching this conclusion, the court believed that it had struck the appropriate balance between utility and fairness that underlies the jurisdictional bar and addressed the policy concern identified by the minority position that non-parasitic relators would be barred if the court adhered to the majority position.

Specifically, the court reasoned:

In our view, ... these policy objections [raised by the minority viewpoint] disappear if one considers the overall design of the public disclosure provision. Congress's 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 the 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.²⁴

B. The Eighth Circuit's Construction of the Original Source Provision

As when it construed the "based upon" standard, the Eighth Circuit, in interpreting the original source provision, returned to the *Dean* case. The court said, "Since we know from the history of the False Claims Act that the original source provision was added in 1986 to permit claims like the one in *Dean*, in which a claimant investigated the fraud and then revealed it to the government before filing suit, we would expect that the effect of the original source provision is to protect from the public disclosure bar those who first bring a claim to light."²⁵

With that thought in mind, the court turned to the issue of whether the relator must provide the information underlying its lawsuit to the government prior to the time in which the information is publicly disclosed to satisfy the statutory test that the relator must be "an original source of the information" and have "voluntarily

provided the information to the Government before filing an action under this section which is based on the information."²⁶

The defendants in *Allina* contended that the relator could not satisfy this standard because it disclosed the antitrust complaint to the United States only *after* it had publicly filed its antitrust action. Although recognizing that the D.C. Circuit and the Sixth Circuit had adopted this rule,²⁷ the Eighth Circuit found that "[t]his additional requirement has no textual basis in the statute." Moreover, returning to its theme regarding fairness versus utility, the court reasoned that the D.C. and Sixth Circuit rule should be rejected because it undermines the purpose of the original source provision to extend "fairness" to the relator:

[T]he courts adopting this requirement have justified it by arguing that after public disclosure, the relator has no utility to the government. *FPC-Boron Employees' Club*, 105 F.3d at 691 ("Once the information has been publicly disclosed, however, there is a little need for the incentive provided by a *qui tam* action."). However, as we have seen, through the original source provisions Congress chose to reward persons who discovered and revealed fraud, rather than confiscating their claims. At the same time, Congress limited that beneficence by denying the bounty even to those who uncovered the fraud unless they had revealed it to the government before filing suit. Sec. 3730(e)(4)(B). We would change the balance Congress struck if we were to further restrict the class of those whose discoveries had been made public but who were nevertheless permitted to proceed as relators. We decline to adopt the proposed additional requirement.²⁸

History Underlying the FCA Public Disclosure Jurisdictional Bar

An evaluation of the scope and meaning of the public disclosure jurisdictional bar must begin with its history. Initially, when Congress enacted the False Claims Act in 1863, the statute contained no jurisdictional bar.²⁹ In 1943, after a series of abuses in which private persons filed *qui tam* actions based expressly on public information, Congress revamped the statute to preclude such lawsuits.³⁰ Specifically, Congress provided that no action could be filed based on information in the government's possession.³¹ This jurisdictional bar applied even if the relator was the original source of the information in the government's "possession."³²

When the Senate and House Judiciary Committees initially considered amending the jurisdictional bar in 1986, both proposed language that would have expressly permitted persons to bring lawsuits based on public information.³³ As initially proposed, the jurisdictional bar would have permitted actions based on public information if the federal government failed to act on that information within six months of its disclosure.³⁴ The committees believed that such modification was necessary because Justice Department files were stuffed with referrals it had received from other governmental agencies, but had failed to process.³⁵

Significantly, however, the committees' proposals were not enacted. Instead, rather than permitting persons to file actions based on public information, Congress opted to prohibit such actions unless the whistleblower was the original source of the publicly disclosed information.³⁶ If the information is not in the public domain, there is no assurance that the government is aware of the information and is acting as needed to further the public interest. Hence, *qui tam* actions are permitted. But if the information is in the public domain, *qui tam* actions are barred unless the relator was the government's source of the information.

The basis for using a public disclosure as a trigger in activating the bar is that when the allegations or transactions of fraud have been publicly disclosed, the whistleblower's action does not advance the public interest, but hinders it, because the government is compelled to share a portion of its recovery with a whistleblower who merely republishes public allegations.³⁷

Once allegations are public, citizens rely on the government to proceed with the action, and if the government does not do so, they have the power to hold the government accountable through the political process. By drawing the line here, Congress ensured that *qui tam* actions would augment the government's recoveries in FCA actions and, at the same time, eliminate *qui tam* actions when such actions were not needed to protect the federal fisc.³⁸

A comparison of three of the FCA's jurisdictional bars — subsections 3730(b)(5), (e)(3) and (e)(4) — further illuminates Congress' purpose in creating the public disclosure jurisdictional bar. Under subsection 3730(e)(4), Congress forces would-be whistleblowers to report fraud before it is publicized. If a relator fails to report the information before publication, the suit would be barred unless the relator was the government's informant; that is, the original source of the information.

Under subsection 3730(e)(3), Congress, in addition to other procedures, forces relators to race the government

to the courthouse by prohibiting any *qui tam* action after the United States files a civil lawsuit or administrative civil money penalty proceeding based on the allegations or transactions underlying the government's action. If the government files first, the relator is barred even if the underlying facts were not publicly disclosed and even if the relator was an original source.

Under subsection 3730(b)(5), Congress pits relators against each other in a race to the courthouse by prohibiting all actions based on facts underlying a pending action. As in subsection 3730(e)(3), subsection 3730(b)(5) applies even if the pending action is not public (e.g., the action is under court seal) and even if the relator in the subsequent action would otherwise qualify as an original source.

The reason that subsections 3730(b)(5) and 3730(e)(3) are broader than subsection 3730(e)(4) — that is, they apply even if the underlying allegations or transactions are not public and even if the relator was the original source of the information — is that once a *qui tam* lawsuit has been filed — subsection 3730(b)(5) — or once the government is a party to a proceeding — subsection 3730(e)(3) — no *qui tam* action is necessary for the government to enforce its rights effectively.

The primary purpose underlying the creation of each of these various "races" in the FCA is to compel whistleblowers to disclose perceived wrongdoing to the government at the earliest possible moment.³⁹ Further, in construing the scope of subsection (e)(4), courts should be mindful that *qui tam* actions are designed only to provide a mechanism by which the government may obtain useful information so that it may protect its interests; they should not be viewed as a means to enrich private individuals and their counsel.⁴⁰

Thus, whenever the information underlying the complaint is publicly available and the relator did not furnish the information to the government before that disclosure, the relator should be barred from proceeding. Although, as noted in detail below, some courts have reached this conclusion,⁴¹ other courts, such as the Eighth Circuit in *Allina*, have taken an unduly expansive view of the statute, such that if whistleblowers merely disclose to the government information that is already public, they may proceed with the action.⁴² This interpretation serves to enrich relators (and their counsel) but does not appropriately enrich the government, whose recovery is reduced by the relator's share.

Why the Eighth Circuit Was Wrong in *Allina*

The court's ruling in *Allina* that the relator qualified as an original source can be questioned on the following grounds:

- The court misapplied the *Dean* case;
- The court’s balancing between “utility” and “fairness” has no basis in the statutory language or the legislative history;
- The court’s interpretation of the scope of the original source provision is inconsistent with the statutory language;
- The court did not address the applicable statements in the legislative history regarding who should qualify as an original source; and
- The court’s opinion undermines the chief purpose underlying the *qui tam* provisions.

A. The Court’s Misapplication of *Dean*

In construing the public disclosure bar, the Eighth Circuit believed it was critical that it construe the original source provision in a manner consistent with the *Dean* decision. Specifically, as noted, it said, “[Because] we know from the history of the False Claims Act that the original source provision was added in 1986 to permit claims like the one in *Dean*, in which a claimant investigated the fraud and then revealed it to the government before filing suit, we would expect that the effect of the original source provision is to protect from the public disclosure bar those who first bring a claim to light.”⁴³

However, if the court had compared the facts in *Dean* to those in *Allina*, it would have found that an application of the *Dean* rule would result in the dismissal of the relator in *Allina*. In *Dean*, the following events occurred: the relator investigated the fraud, the relator reported the fraud to the United States, and then the allegations of the fraud were publicly disclosed (in the form of criminal proceedings and news media accounts).⁴⁴ Under any interpretation of the public disclosure bar, the relator under the facts in *Dean* should be protected: the relator broke the conspiracy of silence and divulged critical information to the government so that the government could conduct its own investigation before the same material is publicly disseminated.

That, however, is not what occurred in *Allina*. There, the sequence was quite different. In *Allina*, the relator apparently investigated the alleged misconduct and publicly disclosed the misconduct (in the form of a civil complaint and newspaper accounts); only then did the relator disclose the allegations to the government. Hence, in making its disclosure to the government, the relator did not break any conspiracy of silence, but merely handed over public material to the government.

If the *Allina* court had literally adhered to the teaching of *Dean* and the language of the public disclosure bar, it would have dismissed the relator. By publicizing the allegations before making any disclosure to the federal government, the relator in *Allina* deprived the government of the very important opportunity to control and conduct its investigation in secrecy without prematurely tipping off the target of the investigation.

In *Dean*, conversely, the government was afforded this opportunity. Because the original source provision is intended to benefit relators like the relator in *Dean* who disclosed the information before it became public knowledge, and not relators like the one in *Allina* that divulge information to the government that has already been publicized, the relator in *Allina* should have been dismissed.

B. The Court’s Balancing Test Between Utility and Fairness Has No Basis in the Statute

As noted, another guiding principle in *Allina* concerned its notion that Congress sought to balance utility and fairness in constructing the public disclosure bar. In the context of discussing utility and fairness, the court, in its opinion, did not point to any specific language in the False Claims Act or the legislative history to support its construction. None exists.

Moreover, as noted above, from the structure of the statutory language it appears that Congress’ predominant concern was with utility. For example, it prohibited a relator, under subsections 3730(b)(5) and (e)(3), from bringing an action even if there had been no public disclosure and even if the relator otherwise qualified as an original source, because such actions served no utility to the government. There is no basis to believe that it made a different policy choice in the public disclosure bar.

Also, the court’s conception of “fairness” is elusive and subjective. When the relator did not break the conspiracy of silence by reporting misdeeds to the government before the information is publicized, is it “fair” that the whistleblower should obtain up to 30 percent of the government’s recovery for republishing public information? Or, under these circumstances, is it fairer that the federal government (and ultimately taxpayers like us) should receive the full 100 percent? Most courts have ruled that the *qui tam* provisions are a mechanism to supply the government with information to prosecute fraud and not merely a mechanism to enrich relators and their counsel.⁴⁵ Under this construction of the public disclosure bar, it would be fairer to have dismissed the relator from the action.⁴⁶

C. The Court's Interpretation Is Contrary to the Plain Language of the FCA

In *Allina*, the court stated that a construction of the public disclosure bar that would require a relator to disclose the allegations to the United States *before* the public disclosure “has no textual basis in the statute.”⁴⁷ However, a literal construction of the public disclosure bar requires that the relator be the government’s informant in order to qualify as an original source.

First, as to the statutory language, any fair characterization of who is an original source must include the notion that the person was the first to report the information. As the Ninth Circuit pointed out in *Wang v. FMC Corp.*,⁴⁸ the informer is the person who breaks the conspiracy of silence, not the one that mimics public information:

The paradigm *qui tam* plaintiff is the “whistleblowing” insider.... *Qui tam* suits are meant to encourage insiders privy to a fraud on the government to blow the whistle on the crime. In such a scheme, there is little point in rewarding a second toot....

If, however, someone *republishes* an allegation that already has been publicly disclosed, he cannot bring a *qui tam* suit, even if he had “direct and independent knowledge” of the fraud. *e* is no “whistleblower.” “whistleblower” sounds the alarm; he does not echo it. The Act rewards those brave enough to speak in the face of a “conspiracy of silence,” and not their mimics.... Because he had no hand in the original public disclosure of the [defendant’s] troubles, [the relator’s] claim regarding the [defendant] is blocked by the jurisdictional bar of section 3730(e)(4)(A).⁴⁹

Furthermore, a reading of the statutory language that requires the informer to have direct and independent knowledge of the publicly disclosed information and provide it to the government is the only reading, as the D.C. Circuit pointed out in *United States ex rel. Findley v. FPC-Boron Employees’ Club*, that harmonizes subparagraphs (A) and (B).⁵⁰ Subparagraph (A) mandates that the relator be “an original source of the information.” The phrase “of the information” must have meaning; otherwise Congress could easily have omitted the language without changing the meaning of the jurisdictional bar. The question is, what information? The only information referenced in the subparagraph is the allegations or transactions that are publicly disclosed. Thus, a plain reading of subparagraph (A) is that the person must be “an original source of the [allegations or transactions]” that were publicly disclosed.

Moreover, an analysis of subparagraph (B) confirms this interpretation. Each use of the word “information” in subparagraph (B) refers back to the allegations or transactions that were publicly disclosed. Therefore, that provision, when read in light of subparagraph (A), would read as follows: For purposes of this paragraph, “original source” means an individual who has direct and independent knowledge of the information (separate discrete transactions or allegations) on which the complaint’s allegations are based and has voluntarily provided the information (again, the separate discrete transactions or allegations) to the government before filing an action under this section which is based on the information (the separate discrete transactions or allegations).

This is the only reading of the provision that harmonizes subparagraphs (A) and (B) and makes use of each word of the public disclosure jurisdictional bar. Further, to read the last clause of subparagraph (B) as the court did in *Allina* would render it meaningless. That provision requires that the original source voluntarily provide the information to the government before filing an action based on that information.

When relators file actions, they are required to file statements of material evidence with the government.⁵¹ Because relators must submit the materials to the government at the time of filing, it would make no sense to require that they also submit the same information to the government before filing the action (*e.g.*, five minutes prior to filing).⁵² It does make sense, however, to require that relators provide the information to the government before publication. The government then can use the information to investigate before defendants are prematurely tipped off by the public disclosure and can promptly undertake any remedial actions needed to minimize its losses.

D. The Court’s Opinion Is Inconsistent With the Legislative History

In *Allina*, the Eighth Circuit never cited to the pertinent legislative history that contradicts its holding that the relator need not disclose its information to the government prior to the publication of the information to qualify as an original source.

Specifically, in discussing the original source provision, both the primary Senate sponsor and the primary House sponsor stated that to qualify as an original source the person must be the source of the subsequent disclosure of the information. Senator Charles Grassley (R-Iowa) said, “[A] *qui tam* action based solely on public disclosures cannot be brought by an individual ... who had not been an *original source* to

*the entity that disclosed the allegations.*⁵³

Representative Howard Berman (D-Calif.) said, “Once the public disclosure of the information occurs through one of the methods referred to above, then only a person who qualifies as an ‘original source’ may bring the action. A person is an original source if he had some of the information related to the claim *which he made available to the government or the news media in advance of the false claims being publicly disclosed.*⁵⁴ The legislative history thus is consistent with the statutory language mandating that the original source be the person who supplies the pertinent information to the government before its public disclosure.

E. The Court’s Opinion Undermines the Purpose of the Qui Tam Provisions

Finally, the court in *Allina* ignores the primary purpose of the provision. Both the legislative history and several cases make clear that the purpose of the *qui tam* provisions is to ensure that the federal government learns of misconduct at the earliest possible time.⁵⁵

Indeed, it is illogical, on the one hand, to believe that Congress required that lawsuits be placed under seal, as it did, so that the United States’ interest could be protected by not prematurely disclosing an investigation to defendants,⁵⁶ but, on the other hand, that Congress, in the original source provision, would reward relators who publicly disclosed the allegations underlying the lawsuit before informing the government of that conduct.

Once the government learns of the information, it may take remedial action and minimize its potential losses. Contrary to this purpose, the court’s ruling in *Allina* will encourage possible whistleblowers to wait in the hope that damages will mount and their bounty will increase.

Conclusion

Qui tam actions should benefit the United States. When there is no public disclosure of the underlying allegations, *qui tam* suits potentially benefit the United States because the Justice Department presumably receives non-public facts that it can then investigate and discharge the executive branch’s constitutional duty to enforce the law.

Alternatively, when the allegations have been publicly disclosed, no *qui tam* action is needed because the appropriate government officials will take action or be held politically accountable for their inaction. Con-

gress, however, even after a public disclosure, would permit a narrow category of individuals to proceed with an action if they had been informants to the United States before the disclosure because these individuals assist the government by providing it with non-public information that it can then investigate.

The Eighth Circuit’s decision in *Allina* undermines the language and purpose of the public disclosure jurisdictional bar by permitting non-whistleblowers to proceed with *qui tam* actions that do not benefit the United States. The action does not benefit the government because the relator tips the defendants off regarding the alleged misconduct before the United States has had an opportunity to investigate and because if the government now determines to proceed with the public allegations it will have to split a substantial portion of the proceeds with relators who did not provide the United States with non-public information. Therefore, other circuits considering this issue should elect to follow the D.C. Circuit’s ruling in *Findley* and the Sixth Circuit’s ruling in *McKenzie* and reject the Eighth Circuit’s ruling in *Allina*.

Notes

¹ *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 745 (9th Cir. 1993) (quoting Senate Judiciary Committee, False Claims Amendments Act of 1986, S. REP. No. 345 [1986], reprinted in 1986 U.S.C.C.A.N. 5266).

² *Id.* § 3729(a)(1). “Knowingly” is defined to mean, among other things, that the provider acted in “deliberate ignorance” or in “reckless disregard” of the truth or falsity of the information. *Id.* § 3729(b).

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

⁴ See Jack A. Meyer and Stephanie E. Anthony, *Reducing Health Care Fraud: An Assessment of the Impact of the False Claims Act* at 9, monograph published by New Directions for Policy for Taxpayers Against Fraud (September 2001).

⁵ *Id.*

⁶ See Mark Bogen, *Federal Law Rewards Whistleblowers*, ORLANDO SUN-SENTINEL, Dec. 27, 2001, at 6B.

⁷ 31 U.S.C. § 3730(e)(4).

⁸ Specifically, the jurisdictional bar provides:

(4)(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 [sic] 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.

There are three other lesser-known jurisdictional bars in Section 3730(e). Subsection (e)(1), in pertinent part, bars suits “brought by a former or present member of the armed forces ... arising out of such person’s service in the armed forces.” Subsection (e)(2) bars actions “against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the government when the action was brought.” Subsection (e)(3), in pertinent part, bars all persons from bringing an action if the government had already brought a civil suit or administrative action involving monetary penalties. Another jurisdictional bar, in Section 3730(b)(5), prohibits relators from intervening in or bringing a related action that is based on the facts underlying a pending action.

⁹ 276 F.3d 1032 (8th Cir. 2002).

¹⁰ *Id.* at 1036.

¹¹ *Id.* at 1037.

¹² *Id.* at 1040.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 1042 (citation omitted).

¹⁹ *Id.* at 1042-43.

²⁰ See, e.g., *United States ex rel. Jones v. Horizon Healthcare Corp.*, 160 F.3d 326, 335 (6th Cir. 1998) (adopting broad interpretation of “based upon” and holding that the relator’s lawsuit was based upon an earlier state court action, although the basis for her *qui tam* lawsuit was her personal knowledge, because all that is required to trigger the bar is that the allegations or trans-

actions in a complaint mirror the information in the public domain and not that the relator actually derive her information from the public information); *United States ex rel. Mistick PBT v. Housing Auth.*, 186 F.3d 376, 385-88 (3d Cir. 1999), cert. denied, 120 S. Ct. 1418 (2000); *United States v. Board of Trustees of Stanford Univ.*, 161 F.3d 533 (9th Cir. 1998), cert. denied, 119 S. Ct. 1457 (1999); *United States ex rel. McKenzie v. BellSouth Telecomm. Inc.*, 123 F.3d 935, 940 (6th Cir. 1997), cert. denied, 522 U.S. 1077 (1998); *United States ex rel. Findley v. FPC-Boron Employees’ Club*, 105 F.3d 675 (D.C. Cir.), cert. denied, 522 U.S. 865 (1997).

²¹ *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339 (4th Cir. 1994) (adopting narrow interpretation of “based upon” and holding that the relator’s action would not be based upon allegations of fraud in the public domain if the relator could prove that he learned of the allegations independent of the public disclosure); cf. *United States v. Bank of Farmington*, 166 F.3d 853, 863 (7th Cir. 1999) (noting in dicta that the “Fourth Circuit’s interpretation of ‘based upon’ is the better on the grounds of plain meaning and public policy”).

²² 276 F.3d at 1045-46.

²³ *Id.* at 1046, 1047. In *Dean*, the state of Wisconsin had investigated Medicaid fraud, and consistent with its duty under the Social Security Act to report various fraud and abuse information to the government, disclosed its findings to the Department of Health and Human Services. See 729 F.2d at 1106. Notwithstanding reporting this information, the Seventh Circuit determined that the relator’s action was barred because the suit was based on information in the government’s possession, which triggered the pre-1986 FCA jurisdictional bar.

²⁴ *Id.* at 1047.

²⁵ *Id.* at 1047-48.

²⁶ 31 U.S.C. § 3730(e)(4).

²⁷ *Id.* at 1049 (citing *Findley*, 105 F.3d at 690-91; *McKenzie*, 123 F.3d at 943).

²⁸ *Id.* at 1050-51.

²⁹ Act of March 2, 1863, ch. 67, § 4, 12 Stat. 698 (1863). For a discussion of the history underlying the public disclosure bar, see Robert Salcido, *Screening Out Unworthy Whistleblower Actions: An Historical Analysis of the Jurisdictional Bar to Qui Tam Actions Under The False Claims Act*, 24 PUB. CONT. L.J. 237 (1995).

³⁰ Act of Dec. 23, 1943, 57 Stat. 608, recodified in 31 U.S.C. § 3730.

³¹ *Id.* (no *qui tam* action can be brought “based upon evidence or information in the possession of the United States ... at the time such suit was brought”).

³² See, e.g., *United States ex rel. Wisconsin v. Dean*, 729 F.2d 1100, 1103 (7th Cir. 1984); *Pettis ex rel. United States v. Morrison-Knudsen Co.*, 577 F.2d 668, 669 (9th Cir. 1978) (“[W]e conclude that jurisdiction is lacking even when an informer prior to bringing suit supplies the government with the information which under [the *qui tam* provisions] invokes the bar”); *Safir v. Blackwell*, 579 F.2d 742 (2d Cir. 1978); *United States v. Aster*, 176 F. Supp. 208 (E.D. Pa. 1959), aff’d, 275 F.2d 281 (3d Cir. 1960).

³³ See S. REP. No. 99-345, at 43, proposed § 3730(e)(4); H.R. REP. 99-660, at 2–3 (1986), proposed § 3730(b)(5).

³⁴ *Id.*

³⁵ S. REP. No. 99-345, at 4, 8 reprinted in 1986 U.S.C.C.A.N. 5269, 5273 (the Senate report noted that “available Department of Justice records show most fraud referrals remain unprosecuted and lost public funds, therefore remain uncollected” and that a “resource mismatch” exists between the federal government and large contractors who may marshal the efforts of large legal teams).

³⁶ 31 U.S.C. § 3730(e)(4).

³⁷ See, e.g., *Findley v. FPC-Boron Employees’ Club*, 105 F.3d 675, 685 (D.C. Cir.) (“Once the information is in the public domain, there is less need for a financial incentive to spur individuals into exposing frauds. Allowing *qui tam* suits after that point may either pressure the government to prosecute cases when it has good reasons not to or reduce the government’s ultimate recovery”), cert. denied, 522 U.S. 865 (1997); *United States v. CAC Ramsay*, 744 F. Supp. 1158, 1159 (S.D. Fla. 1990) (“Congress intended to bar parasitic *qui tam* suits, that is, lawsuits based on public information” because “it will usually serve no purpose to reward a relator for bringing a *qui tam* action if the incident of fraud is already a matter of public knowledge by virtue of ‘public disclosure’”), aff’d mem., 963 F.2d 384 (11th Cir. 1992).

³⁸ See, e.g., *Findley*, 105 F.3d at 680–81 (“After ricocheting between the extreme permissiveness that preceded the 1943 amendments and the extreme restrictiveness that followed, Congress again sought to achieve the golden mean between adequate incentives for whistleblowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant information to contribute on their own.”) (internal quotations and citations omitted).

³⁹ See, e.g., H.R. REP. No. 660, at 23 (“The purpose of the *qui tam* provisions of the False Claims Act is to encourage private individuals who are aware of fraud being perpetrated against the Government to bring such information forward”); S. REP. No. 345, at 14, reprinted in 1986 U.S.C.C.A.N. at 5279 (amendments intended to reward those who “bring … wrongdoing to light”); see also *United States ex rel. Jones v. Horizon Healthcare Corp.*, 160 F.3d 326, 335 (6th Cir. 1998) (“the *qui tam* provisions were intended not only to block freeloading relators, but also to inspire whistleblowers to come forward as

soon as possible”) (citation omitted); *Findley*, 105 F.3d at 685 (“the *qui tam* provisions of the FCA were designed to inspire whistle-blowers to come forward promptly with information concerning fraud so that the government can stop it and recover ill-gotten gains”); *United States ex rel. Devlin v. California*, 84 F.3d 358, 362 (9th Cir. 1996) (“the purpose of the FCA … aims at ferreting out fraud by encouraging persons with first-hand knowledge of alleged wrongdoing to come forward”); *United States ex rel. Barth v. Ridgedale Elec. & Eng’g*, 44 F.3d 699, 704 (8th Cir. 1995) (“the clear intent of the Act … is to encourage private individuals who are aware of fraud against the government to bring such information forward at the earliest possible time and to discourage persons with relevant information from remaining silent”) (citations omitted); *United States ex rel. Wang v. FMC Corp.*, 975 F.2d 1412, 1419–20 (9th Cir. 1992); *United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13, 18 (2d Cir. 1990); cf. *United States ex rel. King v. Hillcrest Health Ctr.*, 264 F.3d 1271, 1281 (10th Cir. 2001) (holding that in cases in which there has been a public disclosure the relator must voluntarily provide the government with the essential elements or information on which the *qui tam* allegations are based before filing the *qui tam* action because this interpretation of the jurisdictional bar “encourages private individuals to come forward quickly with their information, to not dawdle when there has been a public disclosure, and to discourage persons from withholding or remaining silent about their relevant information”) (citation omitted); *United States ex rel. LaCorte v. SmithKline Beecham*, 149 F.3d 227, 234 (3d Cir. 1998) (“[I]nterpreting section 3730(b)(5) as imposing a broader bar furthers the Act’s purpose by encouraging *qui tam* plaintiffs to report fraud promptly.... In addition, ... duplicative claims do not help reduce fraud or return funds to the federal fisc, since once the government knows the essential facts of the fraudulent scheme, it has enough information to discover related frauds.”) (citation omitted).

⁴⁰ See, e.g., *United States v. Health Possibilities, P.S.C.*, 207 F.3d 335, 340 (6th Cir. 2000) (“The FCA is not designed to serve the parochial interests of relators, but to vindicate civic interests in avoiding fraud against public monies”) (citations omitted); *United States v. Northrop Corp.*, 59 F.3d 953, 968 (9th Cir. 1995) (“The private right of recovery created by the provisions of the FCA exists not to compensate the *qui tam* relator, but the United States. The relator’s right to recovery exists solely as a mechanism for deterring fraud and returning funds to the federal treasury”).

⁴¹ See, e.g., *Findley*, 105 F.3d at 685.

⁴² See, e.g., *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339 (4th Cir. 1994).

⁴³ 276 F.3d at 1047–48.

⁴⁴ Although in *Dean* neither the appellate nor the district court set forth the precise dates of the disclosures to the government and the subsequent dates of the publicly disclosed criminal proceedings and news accounts, it seems clear from the state’s statutory duty to report misconduct regarding federal grant

funds and the court's factual rendition of the disclosures that the state made disclosures to the federal government before any public disclosure of the defendant's misconduct. *See* 729 F.2d at 1106 ("Under Title XIX of the Social Security Act, 42 U.S.C. §§ 1396-1396p, states that receive grants from the federal government under the Act must report various fraud and abuse information to the Health Care Financing Administration of the Department of Health and Human Services. 42 C.F.R. § 455.17..."); *see also id.* at 1104 ("First, the Wisconsin Medicaid Fraud Control Unit provided the United States Department of Health and Human Services with many reports about the allegedly fraudulent Medicaid claims during the State's investigation and prosecution of the appellant on state criminal grounds.... Second, the state criminal proceedings were reported extensively in two Milwaukee newspapers").

⁴⁵ *See supra* note 40.

⁴⁶ The court in *Allina* had stated that the fairness point that Congress had sought to address in the original source provision was that of the government "not biting the hand that fed the government the information." 276 F.3d at 1047. However, when the relator only discloses the information *after* the public disclosure, this is simply not a concern. In *Allina*, for example, the United States could have obtained the same information by simply reading the newspaper. Under these circumstances the relator's information is not necessary and permitting the relator to proceed only diminishes the government's ultimate potential recovery in the lawsuit.

⁴⁷ 276 F.3d at 1050.

⁴⁸ 975 F.2d 1412 (9th Cir. 1992).

⁴⁹ *Id.* at 1419-20 (emphasis added). The Sixth Circuit, in *United States ex rel. McKenzie v. BellSouth Telecomm.*, 123 F.3d 935 (6th Cir. 1997), concurred with the D.C. Circuit's ruling. In *BellSouth*, the Sixth Circuit noted:

We find it difficult to understand how one can be a "true whistleblower" unless she is responsible for alerting the government to the alleged fraud before such information is in the public domain. Therefore, we adopt the approach of the District of Columbia Circuit and conclude that, to be an original source, a relator must inform the government of the alleged fraud before the information has been publicly disclosed.

The court further reasoned that its ruling was based on the policy of the statute because it rewarded persons who broke the conspiracy of silence and penalized those who merely repeated public information:

Anyone who alerts the government and is a "true whistleblower" deserves any reward that may be obtained by pursuing a *qui tam* action under the FCA. However, the individual who sits on the sidelines while others disclose the allegations that form the basis of her complaint should not be able to participate in any award. This would be contrary to the purpose of the statute.

Id. at 942-43.

⁵⁰ 105 F.3d at 690.

⁵¹ 31 U.S.C. §3730(b)(2).

⁵² *See, e.g., Findley*, 105 F.3d at 690-91. As the court pointed out:

We previously noted that the government notice part of the "original source" exception may appear extraneous in light of the statute's filing provisions, which require cases to be filed under seal for a period of at least sixty days and served only on the government. The "original source" government notification provision is not superfluous, however, for it serves an entirely different purpose from the statute's filing and government notice provisions. By protecting a party who initially exposes fraud to the government, Congress "corrected" the holding of *United States ex rel. Wisconsin v. Dean*. Once the information has been publicly disclosed, however, there is little need for the incentive provided by a *qui tam* action. Thus, the only reading of the statute that accounts for the requirement that an "original source" voluntarily provided information to the government before filing suit, and Congress' decision to use the term "original source" rather than simply incorporating subparagraph (B)'s description into subparagraph (A), is one that requires an original source to provide the information to the government prior to any public disclosure.

See also United States ex rel. Ackley v. IBM, 76 F. Supp. 2d 654, 667 (D. Md. 1999) (holding that the relator's assertion that he could satisfy the original source provision by disclosing his information to the government seconds before filing "leads to an obviously absurd result since, at the time of the filing of the complaint, a formal written disclosure statement must also be filed. It makes no sense at all to require what might be a disclosure, oral or written, to be made a few seconds before a written one is required to be filed"). Other courts have required that the relator prove that she provided her information to the United States prior to filing the action. *See United States ex rel. Cherry v. Rush-Presbyterian/St. Luke's Med. Ctr.*, No. 99 C 06313, 2001 WL 40807 at *5 (N.D. Ill. Jan. 16, 2001) (ruling that the relator could not satisfy the voluntary requirement when she did not establish that she provided the information to the government prior to filing the action); *United States ex rel. Coleman v. Indiana*, No. 96-714-C-T/G, 2000 U.S. Dist. LEXIS 13666 at *46-*47 (S.D. Ind. Sept. 19, 2000) (ruling that the relator's action should be dismissed because the relator did not prove that he disclosed his information to the government prior to the time he filed his action) (citations omitted). Further, the 10th Circuit recently ruled that even if an attorney makes a pre-suit disclosure to the United States, the disclosure will be deemed inadequate to satisfy the original source mandate that information be provided to the government prior to suit if the relator's attorney withheld the identity of the relator and the purported defendants. *See United States ex rel. King v. Hillcrest Health Ctr.*, 264 F.3d 1271, 1281 (10th Cir. 2001) ("The narrow question raised on appeal is whether a relator qualifies as a 'source' if in making his pre-filing disclosure he withholds his identity and the identities of the potential defendants. The identities of the accuser and the accused are information, i.e. essential elements of the fraud transaction, on

which the *qui tam* allegations are based. As for the information about the fraudulent schemes that was disclosed, there is little question that the government's ability to analyze and assess it was hampered, if not blocked, by this omission of identities. To withhold the identities of the relator and perpetrator deprives the government of key facts necessary in its efforts to confirm, substantiate or evaluate the fraud allegations. Without the identities, the information behind the allegations essentially remains in the relator's possession and undisclosed to the government, and what has been disclosed could be said to be little more than a hypothetical account given by an attorney").

⁵³ 132 CONG. REC. 20,536 (1986) (emphasis added). Presumably, the reason Sen. Grassley used the word "entity" rather than "government" is that at the time he made these statements a person could qualify as an original source if the person had "voluntarily informed the Government or the news media prior to an action filed by the Government." *Id.* at 20,531. The words "news media" subsequently were struck, and relators instead were required to supply their information solely to the government.

⁵⁴ 132 CONG. REC. 29,322 (1986) (emphasis supplied).

⁵⁵ See *supra* note 39 (citing cases).

⁵⁶ See 31 U.S.C. § 3730(b)(3).

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