
Legal Analysis

**Restoring Reason to False Claims Act Motions Practice:
The False Claims Act Corrections Act Cuts Through
the Turbid Waters of “Public Disclosure” by Placing
Responsibility to Move Against “Parasitic” Cases in the
Hands of the Justice Department**

Restoring Reason to False Claims Act Motions Practice

The False Claims Act Corrections Act Cuts Through the Turbid Waters of “Public Disclosure” by Placing Responsibility to Move Against “Parasitic” Cases in the Hands of the Justice Department

Frederick M. Morgan, Jr.¹ and Kevin Mitchell Detroy²

This paper, submission of which is adjunct to a panel discussion of motions practice in *qui tam* cases, addresses the reasons why Congress is working to make a particular form of motion—those filed by defendants seeking dismissal for want of federal jurisdiction under the “public disclosure”/“original source” provisions of 31 U.S.C. § 3730(e)(4)—extinct.

INTRODUCTION

The purpose of the 1986 False Claims Act Amendments was to make it easier for *qui tam* relators to bring (and succeed in) False Claims Act cases—and, conversely, to make it harder for contractors who violate the Act to escape liability. Those amendments were necessary, in large part, because courts had done much to interpret the Act to thwart both relators and the United States from succeeding. Congress is now in the process of amending the Act again: History has repeated itself, and amendment is necessary because courts have made a hash of what Congress intended in 1986.

Nowhere (save perhaps the absurdist approach to Rule 9(b) of the Federal Rules of Civil Procedure as a one-size-fits-all means of disposing of any non-intervened case which happens to offend this or that member of the Third Branch) has the need for corrective legislation been more apparent than with respect to the “public disclosure”/“original source” provisions of the Act. Judges have ignored portions of these provisions and tortured others beyond reason. These cases, intermixed with a healthy dose of unclear draftsmanship in the first instance, have created a crazy-quilt of inconsistent standards among the circuits, the majority of which have turned the public-disclosure bar into a far more Draconian provision than Congress intended.

In this paper, we canvass the patchwork public-disclosure/original-source jurisprudence and demonstrate the importance of taking the ability to move for dismissal under that standard away from contractors accused of fraud or false claims and giving it to the Department of Justice, which the False Claims Corrections Act of 2008 will, when passed, accomplish.

1. Rick Morgan practices with Morgan Verkamp LLC in Cincinnati. Rick's practice has, since the mid-1990s, focused on representation of *qui tam* relators in federal and state False Claims Act cases. He worked in the Civil Division of the Department of Justice from 1985–1990. He is author (with Julie Popham) of *The Last Privateers Encounter Sloppy Seas: Inconsistent Original Source Jurisprudence Under the Federal False Claims Act*, 24 Ohio N.U. L. Rev. 163 (1998). This article is available on our website, www.morganverkamp.com.

2. Kevin Detroy, also with Morgan Verkamp LLC, graduated *summa cum laude* from Salmon P. Chase College of Law in May 2008. Kevin was Research Editor of the Northern Kentucky Law Review.

BACKGROUND . . . ALL OVER AGAIN

Said the Queen to Alice, "It's a poor sort of memory that only works backward."

Through several iterations of the False Claims Act, Congress grappled with the question of the extent to which the government's knowledge of a contractor's alleged misconduct should impact a relator's right to bring a *qui tam* case. The 1986 Amendments focused on reversal of *United States ex rel. State of Wisconsin v. Dean*, where the court refused to allow the State of Wisconsin to act as a *qui tam* relator in a Medicaid fraud action—even though the investigation had been conducted solely by the state—because it had sent information about the fraud to the government.³ That holding resulted from what came to be called the “government knowledge” bar in the 1943 amendments to the False Claims Act: the provision that the relator can proceed when the government declines intervention, unless “it shall be made to appear that such suit was based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought.” This provision, former 31 U.S.C. § 232(c), was largely responsible for the near-abandonment of the Act prior to 1986.⁴

The 1986 Amendments provide that “[n]o court shall have jurisdiction over an action under this section based upon the public disclosure [in narrowly-defined ways] of allegations or transactions . . . unless the . . . person bringing the action is an original source of the information.”⁵ An “original source” is “an individual who has direct and independent knowledge of the information on which the allegations are based[.]”⁶

Congress thus incorporated the concept that where there has been a public disclosure, a relator must be an “original source” of the information, which had been in the 1943 Senate bill but was not included in the bill which emerged from conference committee, and introduced the concept of “public disclosure.” Congress’ purpose was to guard against the government’s concern regarding “parasitic” suits initiated by “opportunists” by ensuring that once there had been a public disclosure, only someone with knowledge of the false claims obtained from a source other than the public disclosure could be a *qui tam* relator.⁷

3. 729 F.2d 1100, 1106–07 (7th Cir. 1984).

4. See generally *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 321 (2d Cir. 1992) (noting that FCA *qui tam* actions under the “government knowledge” bar went from “unrestrained profiteering to a flaccid enforcement tool.”).

Other factors included judicially legislated elevation of the burden of proof and *scienter* standards. These issues are discussed in detail in the Senate Judiciary Committee’s report accompanying the 1986 Amendments, S. Rep. No. 99-345, as reprinted in 1986 U.S.C.C.A.N. 5266.

5. 31 U.S.C. § 3730(e)(4)(A).

6. *Id.* § 3730(e)(4)(B).

7. We discuss below and in more detail that many courts construing the public disclosure bar have focused preternaturally on Congress’s purported fear of so called “parasitic” lawsuits, thus blinded to the overarching and dominant purpose of the FCA generally and the 1986 Amendments specifically—to encourage those with knowledge of fraud on the government to come forward. E.g., *United States ex rel. McKenzie v. BellSouth Telecommunications, Inc.*, 123 F.3d 935, 940 (6th Cir. 1997) (“The jurisdictional requirements are designed to restrict the number of persons who can bring *qui tam* actions and thereby avoid parasitic suits”).

Perhaps it is unsurprising, given the phenomenal aggregation of political power which the largest government contractors and their industries (defense, paramilitary, hospital, medical, and pharmaceutical come to mind) have at their disposal, that judicial interpretations of these provisions have resulted in a landscape dramatically different and far more hostile to the recovery of funds cheated from the taxpayers than what Congress intended in 1986. Moreover, there are many inter-circuit conflicts regarding several substantive points, the result being that a case which might proceed to judgment in one circuit is found “jurisdictionally” barred in another.⁸

The drafters of the 1986 Amendments began “publicly disclosing” their concern with bogus court decisions in this area almost a decade ago, when Congressman Howard Berman and Senator Charles Grassley wrote a lengthy letter to the Department of Justice flagging the problem.⁹ The letter, which was sent to then-Attorney General Janet Reno, said in part:

With dismay . . . we have watched the federal courts interpret several sections of the Amendments in ways that directly contravene Congressional intent, and, of even greater significance, discourage and foreclose potential relators from bringing meritorious cases. In particular, we are extremely concerned with the courts’ crabbed interpretations of the public disclosure bar—Sec. 3730(e)(4)(A) and (B). That provision, which was drafted to deter so-called “parasitic” cases, has been converted by several circuit courts into a powerful sword by which defendants are able to defeat worthy relators and their claims. If this trend continues, we fear that the very purpose of the Amendments—“to encourage more private enforcement suits”—ultimately will be undermined.

Thus, we believe it is imperative that the Department of Justice (“the Department”) adopt and adhere publicly to an interpretation of the public disclosure bar that comports with the plain meaning of the statute and the Congress’ obvious intent. The Department’s role in this regard is critical. First, of course, the Department is often involved as a party in cases where the public disclosure bar is raised, and it is entitled and expected to make its views known. Even in cases where the Department

8. The meaning of the word “jurisdiction” in the public disclosure provision was the subject of some judicial debate. The district court in *United States ex rel. Yannacopolous v. General Dynamics*, 315 F. Supp. 2d 939, 951 (N.D. Ill. 2004) held, “[s]ections 3730(e)(4)(A) & (B) are matters of substantive law, not a ‘jurisdictional bar’ as suggested by some courts.” (citing *United States ex rel. Feingold v. AdminaStar Fed., Inc.*, 324 F.3d 492, 494–95 (7th Cir. 2003)). And in *United States ex rel. Fallon v. Accudyne Corp.*, 97 F.3d 937, 940–941 (7th Cir. 1996), Judge Easterbrook, considering this issue, referred to the word “jurisdiction” as a “notoriously plastic term.” However, this debate was put to bed in *Rockwell Int’l Corp. v. United States ex rel. Stone*, 127 S. Ct. 1397 (2007), where the Court sternly rejected *Fallon* and underscored the point by stating that the statute is *ex visceribus verborum*, perhaps in the belief that if lawyers must look up a phrase the point will be better-retained.

9. 145 Cong. Rec. E1546 (July 14, 1999).

determines not to intervene, Congress intended for the Department to be involved in monitoring cases, in part to address questions significant to the ongoing operation of the statute. Finally, as the agency charged, in effect, with the administration of the False Claims Act, the courts are likely to accord significant deference to the Department's interpretation of the Act, and we believe the Department has an obligation to the Congress and to the courts to articulate those views.¹⁰

The Department elected not to accept Congressman Berman and Senator Grassley's invitation to join in the effort to derail the judicially legislated aberrant interpretations of the "public disclosure" provision, choosing instead to rely, when it did take positions, on the incorrect interpretations of "based upon" and the judicial third prongs discussed below.¹¹ Indeed, in briefing these issues before the Supreme Court, the Solicitor General made little effort to argue against the majority—and wrong—interpretation of "based upon" discussed below.¹²

THE CORRECTIONS ACT CHANGES COURSE

Bipartisan bills introduced in the House (H.R. 4854) and Senate (S. 2041) as the False Claims Act Corrections Act of 2008 propose a different approach to the "parasitic relator" problem. Under these bills, the United States, rather than the defendant in a False Claims Act case, would be the proper party to seek dismissal of a case on public disclosure grounds. This change makes sense for several reasons. Most importantly, the party which actually owns *qui tam* claims—the United States—will be the decision-maker regarding whether to suggest that a case is based on information in the public domain (or, under some proposals, otherwise known to the government). Second, the government can be predicted to take consistent litigation positions nationwide. Third, the government will be able to make better-reasoned intervention decisions, knowing that declined cases with strong facts and substantial damages will not be dismissed on jurisdictional grounds. Fourth, a time-consuming preliminary round of litigation will be eliminated, permitting litigants and courts to focus more quickly on the merits. Fifth, the understandable propensity of defendants to push the prudential envelope (which is, after all, the driving force behind the mishmash which the public-disclosure provision has become) will be eliminated.

10. *Id.* (internal citations omitted).

11. Most notably, in *United States ex rel. Rost v. Pfizer*, No. 06-2627 (First Cir., Brief Filed April 2007), the Justice Department not only adopted the indefensible majority view of the "based upon" language of the public disclosure provision, but pushed for adoption of the Sixth Circuit's third-prong analysis, which had never previously considered by the First Circuit. The Department's brief is available online at <http://www.taf.org/opinions/Rost/DoJCircuitCourtAmicus.pdf>.

12. Brief of Respondent *United States in Rockwell Int'l Corp. v. United States of America*, No. 05-1272 (United States Supreme Court, November 2006) at 12 n.4, 39–41, available at <http://www.taf.org/SG-Rockwell.pdf>.

SOME OF THE MISINTERPRETATIONS THE CORRECTIONS ACT WILL REMEDY

A. “Based Upon” Whole Cloth

Said the Dormouse, “You might just as well say that ‘I breathe when I sleep’ is the same thing as ‘I sleep when I breathe!’”

The most ubiquitous misinterpretation of the public-disclosure bar is also the most destructive of Congress’s desire to encourage persons knowledgeable of false claims against the taxpayers to come forward. It arises from the requirement in the 1986 Amendments that *only* cases “based upon” the public disclosure would be barred.¹³ The Fourth Circuit correctly held that in using those words, Congress intended to bar cases “actually derived from” the public disclosure.¹⁴

However, a majority of circuits have disregarded the plain meaning of the phrase “based upon,” and held that “based upon” meant “supported by.”¹⁵ Under these cases, it does not matter whether the *qui tam* plaintiff has inside, direct knowledge; if her allegations are the same as or similar to what was contained in the public disclosure, then the district court is deprived of jurisdiction. These counter-textual holdings have resulted in the dismissal of countless cases brought by *qui tam* plaintiffs who had detailed insider knowledge of False Claims Act violations.¹⁶

13. As discussed more fully *infra*, the phrase “public disclosure” has also been misinterpreted. One of the most inappropriate interpretations came from the same Seventh Circuit opinion, *United States ex rel. Mathews v. Bank of Farmington*, 166 F.3d 853 (7th Cir. 1999), which adopted the erroneous view that the public disclosure bar is concerned with disclosure to the government rather than “parasite” relators. Ironically, the *Mathews* Court offered the most commonsense construction of the “based upon” terminology. See *supra*, note 42.

14. *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1347–48 (4th Cir. 1994), *cert. denied*, 513 U.S. 928 (1995). Perhaps the most reasonable construction of “based upon” was adopted by the Seventh Circuit. *Mathews*, 166 F.3d at 863. However, the court’s determination that information contained in a loan application submitted by a defendant to a bank was “publicly disclosed” is so far from the plain language of the False Claims Act that the decision, on balance, fails to interpret the Act as written.

15. *E.g.*, *United States ex rel. Precision Co. v. Koch Indus.*, 971 F.2d 548, 552 (10th Cir. 1992), *cert. denied*, 507 U.S. 951 (1993); *accord* *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 324 (2d Cir. 1992); *United States ex rel. Kreindler & Kreindler v. United Tech. Corp.*, 985 F.2d 1148, 1158 (2d Cir. 1993); *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 652–55 (D.C. Cir. 1994); *McKenzie*, 123 F.3d at 940; *United States ex rel. Wang v. FMC Corp.*, 975 F.2d 1412, 1417 (9th Cir. 1992); *United States ex rel. Cooper v. Blue Cross and Blue Shield of Fla., Inc.*, 19 F.3d 562, 566–67 (11th Cir. 1994)); *see also* *United States ex rel. Paranich v. Sorgnard*, 396 F.3d 326, 334–35 (3d Cir. 2005); *Fed. Recovery Servs. v. United States*, 72 F.3d 447, 451 (5th Cir. 1995); *United States ex rel. Minn. Assoc. of Nurse Anesthetists v. Allina Health Sys. Corp.*, 276 F.3d 1032, 1044–47 (8th Cir. 2002).

16. Persuasive discussion of the linguistic absurdity of the majority position appears in *United States ex rel. Rost v. Pfizer, Inc.*, 446 F. Supp. 2d 6, 19–20 (D. Mass. 2006), *aff’d and remanded*, 507 F.3d 720 (1st Cir. 2007). The variety of justifications which judges have advanced for these holdings is tribute to their creativity, and perhaps that of their clerks. It is beyond our scope in these pages to go through them, except to note that, in the main, they have acknowledged that they are ignoring the plain meanings of the words Congress chose, and substituting an entirely different meaning in order to achieve a desired result.

B. “Third Prongs” Stick it to *Qui Tam* Relators

Says Alice, “At least I know who I was when I got up this morning, but I think I must have been changed several times since then.”

A second strain of holdings just as inconsistent with the purposes behind the 1986 Amendments came in the form of decisions adding all-but-random additional elements to the statutory definition of “original source.” The first such “third prong” came in *United States ex rel. Dick v. Long Island Lighting Co.*, where the court held that in order to be an original source, the *qui tam* plaintiff must have “directly or indirectly” disclosed the information to “the entity that publicly disclosed the allegations.”¹⁷ The Ninth Circuit subsequently adopted the same standard.¹⁸ Other circuits rejected these holdings, but engrafted another additional requirement—that the *qui tam* plaintiff disclosed the information on which the suit was based to the government before the public disclosure occurred.¹⁹

The continuing validity of these “third prong” original source decisions has been placed in doubt by *Rockwell*; however, the extent of *Rockwell*’s influence in this area must await future adjudication. In *Rockwell*, the Supreme Court held that the term “information” was a reference to the same thing in both § 3730(e)(4)(A) and (B)—namely, the information upon which the relator’s allegations are based.²⁰ This conclusion is clearly at odds with the holding in *Dick*, suggesting that the latter has been effectively abrogated. The fate of *Wang* and the other cases is less certain because, unlike *Dick*, none of them relied upon a now-defunct textual analysis. It is nonetheless notable that the Court’s opinion does not reference any of the third-prong cases.

Federal subject-matter jurisdiction over *qui tam* cases varies from court to court depending on which concatenation of judicial interpretations of the public-disclosure bar has been adopted. *Qui tam* relators and their counsel are left to divine how a particular court may interpret its jurisdiction on a given day. And as this article was in final preparation, the editorial pages of the *Wall Street Journal* published a screed against the Corrections Act accusing its sponsors of pandering to “trial lawyers” overreacting to “courts [which] have modestly reined [the act] in over the years.”²¹ That the impossibly-powerful community of False Claims Act targets and their apologists are willing to carry to ostensibly-responsible journalists the calumny that “trial lawyers” are pushing an overreac-

17. *United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13, 16 (2d Cir. 1990).

18. *Wang*, 975 F.2d at 1419 (9th Cir. 1992). Interestingly, the *Wang* Court was not as eager as the *Dick* Court to assert that the plain language of § 3730(e)(4)(A) and (B) is all too clear, noting that “undoubtedly the text remains ambiguous.” *Id.* at 1418. Frustrated with the language, the *Wang* Court relied instead upon its view of the purposes of the FCA and the 1986 Amendments; namely, “that *qui tam* jurisdiction was meant to extend only to those who played a part in publicly disclosing the allegations and information on which their suits were based.” *Id.*

19. *United States ex rel. Findley v. FPC-Boron Employees’ Club*, 105 F.3d 675, 690–91 (D.C. Cir. 1997), *cert. denied*, 118 S. Ct. 172 (1997); *McKenzie*, F.3d at 938.

20. *Rockwell*, 127 S. Ct. at 1408.

21. *False Claims Gold Rush*, *Wall Street Journal*, May 2, 2008, at A14.

tion to “modest” judicial “reining in” is ample evidence of the need for clear and firm congressional guidance.

C. Me, Myself and I: FOIA Foolishness

*Said the Cheshire Cat: “If you don’t know where you
are going, any road will take you there.”*

Were the foregoing not of itself sufficient to force an unwholesome level of unpredictability to those attempting to make reasoned judgments about what cases to bring and where to bring them, the situation has become even more confused in recent years due to judicial bending-over-backward to find “public disclosure” where none existed. There is particular irony in a strain of decisions holding that a *qui tam* relator who dares to investigate her case by serving a Freedom of Information Act request on a government agency actually *defeats jurisdiction* when and if the government responds. Remarkably, moreover, several circuits have held that a would-be whistleblower causes a public disclosure by requesting information pursuant to the Freedom of Information Act.

The first court to reach this bizarre conclusion was *United States ex rel. Burns v. A.D. Roe Co.*²² Relying on an obvious misreading of *United States ex rel. Schumer v. Hughes Aircraft Co.*,²³ *Burns* vaguely held that the contents of FOIA responses are publicly disclosed once received by the requesting party.²⁴

The most seemingly thoughtful FOIA-response-as-public-disclosure case is *United States ex rel. Mistick PBT v. Housing Authority of City of Pittsburgh*.²⁵ In *Mistick*, the court looked to the text of the Freedom of Information Act itself, which makes repeated reference to “the public,” as well as an opinion in which the Supreme Court held that a FOIA response by the Consumer Product Safety Commission constituted a “public disclosure.”²⁶

Other courts have disagreed. In *United States ex rel. Haight v. Catholic Healthcare West*, the court considered the effect of a FOIA request by a relator on the jurisdictional bar.²⁷ As part of her investigation of false statements related

22. 186 F.3d 717 (6th Cir. 1999).

23. 63 F.3d 1512, 1519-20 (9th Cir. 1995), *vacated on other grounds*, 520 U.S. 939 (1997).

24. *Burns*, 186 F.3d at 723-24.

25. 186 F.3d 376 (3d Cir. 1999) (Alito, J).

26. *Id.* at 383.

The 1999 letter from the House and Senate sponsors of the 1986 Amendments to Attorney General Reno, discussed earlier, came shortly after the Sixth and Third Circuits mistook FOIA requests for public disclosures and sharply criticized those holdings. 145 CONG. REC. E1546-01 (1999) (statement of Rep. Howard Berman and Sen. Charles Grassley, the principal House and Senate sponsors of the 1986 Amendments, that they do not view FOIA requests as public disclosures). The letter stated:

We want forcefully to disagree with cases holding that *qui tam* suits are barred if the relator obtains some, or even all, of the information necessary to prove fraud from publicly available documents, such as those obtained through a Freedom of Information Act (FOIA) request. . . . We believe that a relator who uses their education, training, experience, or talent to uncover a fraudulent scheme from publicly available documents, should be allowed to file a *qui tam* action. . . . This is especially true where a relator must piece together facts exposing a fraud from separate documents.

27. *United States ex rel. Haight v. Catholic Healthcare West*, 445 F.3d 1147, 1152-53 (9th Cir. 2006).

to a grant application submitted to the National Institutes of Health (“NIH”), Haight sought documents from NIH through a FOIA request.²⁸ Included in the documents received pursuant to the FOIA request was the grant application itself which, according to *Haight*, contained the false statements upon which her subsequent *qui tam* claim was based.²⁹ The United States declined to intervene, and the complaint was unsealed and served upon the defendants.³⁰ After some discovery, the defendants filed a motion to dismiss the suit for lack of jurisdiction based upon the theory that NIH’s response to Haight’s FOIA request was a public disclosure.³¹ The district court agreed, citing *Schumer* for the proposition that FOIA requests constitute public disclosure.³²

The Ninth Circuit reversed. “*Schumer* holds only that material in a government file that is potentially accessible to the public through a FOIA request is *not* publicly disclosed.”³³ The court similarly rejected the defendant’s urgings to adopt the reasoning of *Mistick*: because the terms “report” and “investigation” denote “governmental legwork” as opposed to responding to a FOIA request which entails “little more than duplication,” “Interpreting ‘report’ or ‘investigation’ as listed in the jurisdictional bar to include any document obtained in response to a FOIA request would stretch the meaning of those terms too broadly.”³⁴

Haight correctly recognized that viewing a FOIA response as a public disclosure would “deter individuals who suspect fraud from investigating it,” as “FOIA requests are one of the simplest vehicles by which interested citizens can uncover possible fraud against the government.”³⁵

Haight’s conclusion was followed in *United States v. Solinger*.³⁶ In order to reach this result, the district court had to work around the Sixth Circuit’s decision in *Burns*, which it did by interpreting the Circuit’s decision as requiring that the FOIA-produced document itself satisfy the statutory definition of “public disclosure.”

The district court in *United States v. Yannacopolous v. General Dynamics*³⁷ reached the same result, recognizing that treating FOIA responses as public disclosures would destroy the incentive for citizen-led investigations encouraged by the 1986 Amendments. The court posited that if documents produced to a single requester pursuant to a FOIA request were to trigger the jurisdictional bar, then

28. *Id.* at 1149.

29. *Id.*

30. *Id.* at 1150.

31. *Id.* at 1151.

32. *Haight*, 445 F.3d at 1153 n.2.

33. *Id.* (emphasis added).

34. *Id.* at 1153.

35. *Id.* at 1155 n.5.

36. 457 F. Supp. 2d 743, 751 (W.D. Ky. 2006).

37. 315 F. Supp. 2d 939, 951 (N.D. Ill. 2004).

every corporation would be well-advised to request as much FOIA material as possible. If the corporation was later named a defendant in a FCA action, then anything in the FOIA request would be a public disclosure merely because the defendant asked for it in a FOIA request. Certainly, the FCA was not intended to insulate corporations in this manner.³⁸

Two other courts have held that FOIA responses are not public disclosures. The Fourth Circuit reached the painfully-obvious conclusion that FOIA is not a public disclosure because Section 3730(e)(4)(A) does not list FOIA responses as a means of disclosure.³⁹ In *United States ex rel. Pentagen Technologies Int'l Ltd. v. CACI Int'l Inc.*, the court similarly held that FOIA responses do not trigger the public disclosure bar because—why is this so hard?—there is no public disclosure.⁴⁰

D. The Sharpest Cut?

The Black Knight: "It's just a flesh wound! Come back and I'll bite your kneecaps off."

Congress thought, in 1986, that it was incentivizing knowledgeable informants to retain capable counsel, and that teams thus constituted would contribute resources to the fight against rapacious government contractors.

In yet another departure from what was intended by Congress in 1986, at least two recent decisions have held that a relator litigating a declined case cannot use information obtained in assisting the government's investigation. In *United States ex rel. Fowler v. Caremark Rx, LLC*, the court held that a defendant's response to a subpoena resulting from a *qui tam* relator's allegations by providing documents to the United States Attorney constituted a "public disclosure."⁴¹ When the relator filed an amended complaint which included some of that information, the court held that it lost jurisdiction because the amended complaint was based upon the "public disclosure" of information to the government.

The *Fowler* panel concluded that the public disclosure bar is triggered when allegations are revealed to the government from one other than the relator herself. "The point of the public disclosure of a false claim against the government is to bring it to the attention of the authorities, not merely to educate and enlighten the public about the dangers of misappropriation of their tax money."⁴²

Fowler's reasoning runs counter to the legislative history of the 1986 Amendments and fails to acknowledge role of *qui tam* relators under the FCA. While the 1986 Amendments were enacted to reinvigorate the FCA by encouraging re-

38. *Id.*

39. *United States ex rel. Bondy v. Consumer Health Foundation*, 28 F. App'x. 178, 181 n.2 (4th Cir. 2001) (unpublished).

40. No. 94 CIV. 2925, at *9 (S.D.N.Y. Nov. 22, 1995).

41. 496 F.3d 730, 736 (7th Cir. 2007), *cert. denied*, 128 S. Ct. 1246 (2008).

42. *Id.* at 736 (quoting *Matthews*, 166 F.3d at 861).

lators to come forward, the jurisdictional bar specifically was inserted to prevent so-called “parasitic” plaintiffs—those who cut and paste fraud allegations drawn from public sources. This is hardly an appropriate description of one who, having personal knowledge of fraudulent behavior, works hand-in-hand with the government to unearth the depth of the wrongdoing. Such an individual who “sounds the alarm” to the government of potential fraud is the impetus for the investigation. What is clear from the history is that it was disclosure of fraud to the public—not to federal prosecutors—that Congress was concerned about.

Moreover, the *qui tam* provisions of the FCA were born out of the recognition that federal enforcement authorities lack the resources not only to discover all frauds against the government, but also to prosecute them. The United States chooses not to intervene in the majority of *qui tam* complaints. While it is doubtless true that many declinations are based on government counsel’s view of the merits, it is our experience that resource issues often loom large in terms of both the government’s ability fully to investigate claims during the seal period, and the appropriate reluctance of government counsel to commit to litigating more cases than can be handled. This was underscored during the late 1970s and early 1980s when fraud against the government exploded. That the government may be aware of a particular fraudulent scheme by one of its contractors does not necessarily mean that enforcement action will be taken, and in fact very likely will not. Congress did not craft the original-source provision to bar from the courtroom the very people it hoped would assist overburdened federal prosecutors simply because those same prosecutors may already know of the fraud but lack the resources to do anything about it.

The First Circuit recently rejected the amalgamated contractor lobby’s efforts to use a *Fowler*-like argument to fully reinvigorate the “government knowledge” bar abandoned by Congress in 1986. In *United States ex rel. Rost v. Pfizer, Inc.*,⁴³ Pfizer, joined by the National Defense Industrial Association, the Pharmaceutical Research and Manufacturers of America, and the American Hospital Association, argued that self-disclosure by a defendant to the government—without more—constituted a public disclosure under 31 U.S.C. § 3730(e)(4) (A). The court did not take Pfizer’s bait, noting prosaically that the “[g]overnment may be of the people, by the people, and for the people, but that does not mean the government and the public are the same.”⁴⁴

In *United States ex rel. Montgomery v. St. Edwards Mercy Medical Center*,⁴⁵ the court held with scant analysis that when a relator learns relevant facts from the United States during the course of its investigation of a filed *qui tam* case, the government’s communications to the relator constitute a “public disclosure” and the court lacks jurisdiction over an amendment including that information.

That a company’s providing documents to the United States Attorney while allegations in a *qui tam* case are being investigated could be a “public disclo-

43. 507 F.3d 720 (1st Cir. 2007).

44. *Id.* at 729.

45. No. 4:05-CV-899, at *16 (E.D. Ark. Sept. 28, 2007) (Mem. Op. and Order, Doc. 76)

sure” misapprehends Congress’s fundamental concern: preclusion of cases based on information in the public domain. Documents provided to the government during investigation of a sealed complaint do not qualify. Moreover, a central purpose of the 1986 Amendments was to encourage and empower relators and their representatives to provide resources to assist the government in its investigation. Consistent with this purpose, courts have recognized that during the pendency of a *qui tam* case, communications between the government and the relator are privileged.⁴⁶

Dismissing a complaint because it incorporates information learned during a relator’s efforts on the government’s behalf improperly penalizes the relator for doing what Congress intended and skews the effective operation of the Act. Holdings like these are inconsistent with the balance Congress sought to establish in 1986 and demonstrate further why the Committee has chosen to put the decision to seek dismissal related to publicly disclosed information in the hands of the United States.

CONCLUSION

Judicial interpretations of the public disclosure and original source provisions of the False Claims Act Amendments Act have strayed dramatically from what Congress intended in 1986. Congress therefore is prepared to eliminate those provisions in favor of empowering the Department of Justice to seek dismissal of cases where the government is already involved in an investigation of the potential violations of the False Claims Act alleged by the *qui tam* plaintiff. The policy considerations at issue are uniquely the province of the government and the Justice Department. Experiences since 1986 have demonstrated that when it is left to the accused contractor to assert that a *qui tam* plaintiff is not properly advancing the federal interest, parochial interests lead to skewed results. That three versions of the statute spread over 80 years have not gotten quite right the balance between information in the public domain and the appropriate service of *qui tam* plaintiffs demonstrates that what to do with cases relating to disclosed information is a work in progress. That two decades of litigation since the 1986 Amendments have resulted in a confused and unpredictable landscape demonstrates that progress will be impossible without change. It is not without trepidation that we look forward to a new era where the Department of Justice, rather than the world’s largest corporations and law firms, are responsible for initiation of motions practice designed to address parasitic *qui tam* cases. However, the “devil we know” has proven so willing to advance with glee arguments which are wildly inconsistent with Congress’s intent that change is essential. Perhaps this time the courts will not put it asunder.

46. E.g., *United States ex rel. Miller v. Harbert*, Civil Action No. 95-1231, at *3 (D.D.C. Feb. 2, 2007) (Mem. Op., Doc. 530) (common interest privilege applies to communications between FCA relator and United States because each “had a common interest in the prosecution of common defendants in an existing civil or criminal case or both.”).