

Putting Teeth into the False Claims Act's Pre-Complaint Disclosure Requirements for Relators

By DAVID Z. BODENHEIMER

The changes wrought by the 1986 amendments to the False Claims Act¹ have fueled a litigation explosion in qui tam actions as whistleblowers scramble to grab a share of escalating recoveries that exceed \$1 billion per year.² One of the most contentiously litigated and consistently confusing components of the 1986 amendments is the jurisdictional restriction on qui tam actions. In general, courts have no jurisdiction over qui tam actions “based upon the public disclosure of allegations or transactions,” such as disclosures in judicial proceedings, congressional hearings, or the news media.³

However, the False Claims Act creates an exception from this jurisdictional bar if a qui tam relator is an original source—a potentially lucrative status conferred by meeting two criteria: (1) having “direct and independent knowledge” of the basis of the alleged fraud and (2) voluntarily disclosing such information to the government before filing suit.⁴ Despite the burgeoning case law on qui tam jurisdiction in general, the second criterion for original source status (voluntary pre-complaint disclosure to the government) largely escaped judicial scrutiny until the late 1990s. Because of the growing number of recent cases dismissing qui tam actions for failure to adhere to this requirement, neither plaintiffs nor defendants can afford to overlook the jurisdictional mandate for pre-complaint disclosure. Indeed, even the government has invoked this jurisdictional requirement, cutting off relators’ right to share in proceeds recovered via False Claims Act actions.

Statutory Requirements

In a qui tam action, a relator bears the burden of proving jurisdiction.⁵ If the action rests on information that has been publicly disclosed, a relator can only remain in the case by proving her status as an original source: “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.”⁶ This provision represents a jurisdictional prerequisite and is a statutory condition precedent to a qui tam that is based on publicly disclosed information.⁷ To satisfy the jurisdictional prerequisite for voluntary disclosure to the government, there must be a “disclosure of information to the Government that is voluntarily made before suit is filed.”⁸

Proof of Disclosure

Initially, relators must establish that a disclosure of the basis of alleged fraud has been made to the government. Relators have sometimes stumbled on this jurisdictional element by failing to come forward with proof of disclosure. For example, a relator ignored court orders and schedules for submitting evidence of such disclosure, resulting in a court’s striking the relator’s belated proffer of proof of pre-complaint disclosure to the government.⁹ In another case, a relator failed to point out any evidence in the extensive record that would demonstrate that a pre-complaint disclosure had been made.¹⁰

Content of Disclosure

A relator cannot secure original-source status simply by disclosing allegations or suspicions of fraud. Instead, disclosure must include information supporting an allegation of fraud. The statute’s original-source provision distinguishes between information and allegations by referring to “the information on which the allegations are based” and requiring disclosure of “the information to the Government.”¹¹ A relator “must reveal the facts and circumstances on which the allegations or transactions of his complaint are based.”¹² Conclusive allegations and hearsay do not suffice:

While scant authority exists delineating what constitutes a disclosure statement sufficient to survive summary judgment, there is no doubt that it must be more substantive than the notion that “something fishy” is going on. It should, at a minimum, “comprise much of what [the relator] will rely upon to support the contentions in the case at bar.” It cannot gird itself with hearsay from an employee of the purported violator, and then use discovery as a fishing expedition to determine if there was, in fact, a violation.¹³

In addition, the scope and content of disclosure must be measured against what information a relator has at the time. For example, a relator could not satisfy the statutory requirements by making a partial disclosure to the government while withholding the rest of the information he has at the time of disclosure: “No one claims that a court should consider information a putative relator says he knew but never communicated to the government. The statute contemplates, indeed requires, that all relevant information be disclosed to the United States.”¹⁴

Disclosure to the Government

The statutory provision for disclosure to the government indicates disclosure “to an appropriately responsible government or official agency.”¹⁵ A relator could satisfy this requirement “by notifying the United States Attorney, the FBI, or other suitable law enforcement office of the infor-

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mation which is the basis for the action, or by informing the agency or official responsible for the particular claim in question.”¹⁶ Such notification must be made to a federal official or agency; disclosure to a state or local official is not sufficient to establish original-source status.¹⁷

Voluntary Disclosure

The original-source provision expressly requires that a relator’s disclosure be voluntary. This provision’s legislative history indicates that information disclosed in response to a subpoena would not qualify as voluntary.¹⁸ In fact, qui tam actions by federal employees have been dismissed for lack of jurisdiction because such employees act not as volunteers but as salaried employees whose job duties mandate disclosure of fraud as an element of employment.¹⁹

Proof of voluntary disclosure might also fail if a relator remains silent about alleged fraud until a federal investigation begins. In *United States ex rel. Barth v. Ridgedale Electric, Inc.*, a court upheld dismissal for lack of voluntary disclosure because the relator had said nothing about the alleged fraud for nearly two years until a federal investigator initiated contact with him and obtained information regarding the alleged fraudulent activities:

Although Barth [the relator] had been aware of Ridgedale’s possible fraud against the government for some time he remained silent until the government itself heard of the fraud and began its own investigation. In this sense, Barth did not “voluntarily” bring the information to the government and now rewarding him for merely complying with the government’s investigation is outside the intent of the Act.

Pre-Complaint Disclosure

To ensure original-source status, a relator’s disclosure must occur before filing a qui tam action.²⁰ A relator cannot satisfy the statute’s jurisdictional requirements by establishing disclosure to the government after filing a complaint.²¹ Similarly, disclosure that is simultaneous with a complaint does not qualify as timely.²² Pre-complaint disclosure is required not only by the express terms of the statute but also by the legislative purpose of encouraging relators to bring information evidencing fraud to the government’s attention at the earliest possible time:

Should jurisdiction depend upon such quirks? Do we really want a rule which says: Get your qui tam claim in quickly? The short answer is yes, because that is the rule Congress adopted. Where the statute makes jurisdiction depend on events which occur at determinable times, such as a public disclosure of information or its voluntary provision to the government before filing a lawsuit, a plaintiff is encouraged not to dawdle.²³

Although the statute does not mandate a time restriction for disclosure before filing suit, the purpose of pre-complaint disclosure implies that the government should have reasonable prior notice to consider information on which alleged fraud is based, to decide whether to intervene, and to develop allegations should the government choose to intervene.²⁴ To accomplish this legislative purpose, a court applied a judicial “rule of reason” that “two

weeks” to “thirty days” would likely be reasonable, but “a few moments, hours, or days before will not do.”²⁵

In addition to requiring disclosure before filing an action, the U.S. Courts of Appeals for the D.C. and Sixth Circuits required that relators tell the government of the basis for alleged fraud before any public disclosure.²⁶ As the Sixth Circuit explained, this requirement is consistent with the legislative purpose of encouraging relators to blow the whistle promptly and barring qui tam actions by an “individual who sits on the sidelines while others disclose the allegations that form the basis of her complaint.”²⁷

Conclusion

After years of receiving minimal judicial scrutiny, the original-source requirement for pre-complaint disclosure has emerged as a significant factor in determining jurisdiction in qui tam actions. For relators, such jurisdictional challenges can prove especially treacherous, as the lack of jurisdiction can be raised not only by the defendant but also by the government or even a court at any time. As a consequence, a relator’s strict compliance with the pre-complaint disclosure requirement promises to be the target of an ever-growing number of jurisdictional challenges in qui tam suits in which the basis of fraud allegations has been publicly disclosed. PL

Endnotes

1. False Claims Amendments Act, Pub. L. No. 99-562, 100 Stat. 3153 (1986) (generally codified at 31 U.S.C. §§ 3729–3732). Under 31 U.S.C. § 3730, a private individual may initiate a False Claims Act action in the name of and on behalf of the United States.
2. The U.S. Department of Justice’s statistics show overall recoveries from qui tam actions of \$1,198,550,834 for fiscal year 2000 and \$1,191,164,737 for fiscal year 2001.
3. 31 U.S.C. § 3730(e)(4)(A).
4. *Id.* § 3730(e)(4)(B).
5. *See, e.g., United States ex rel. Precision Co. v. Koch Indus.*, 971 F.2d 548, 551 (10th Cir. 1992).
6. 31 U.S.C. § 3730(e)(4)(B).
7. *United States ex rel. Ackley v. International Business Machines Corp.*, 76 F. Supp. 2d 654, 666 (D. Md. 1999) (a jurisdictional prerequisite); *Burroughs v. DeNardi Corp.*, 167 F.R.D. 680, 682 (S.D. Cal. 1996) (a statutory conditions precedent).
8. *Ackley*, 76 F. Supp. 2d at 666.
9. *Id.* at 672–73.
10. *United States ex rel. Coleman v. Indiana*, 2000 WL 1357791 at 16 (S.D. Ind. 2000).
11. 31 U.S.C. § 3730(e)(4)(B).
12. *Ackley*, 76 F. Supp. 2d at 666.
13. *United States ex rel. Made in the USA Foundation v. Billington*, 985 F. Supp. 604, 608 (D. Md. 1997) (footnote deleted).
14. *United States ex rel. Detrick v. Daniel F. Young, Inc.*, 909 F. Supp. 1010, 1017, n.21 (E.D. Va. 1995).
15. *Ackley*, 76 F. Supp. 2d at 666.
16. *United States v. Bank of Farmington*, 166 F.3d 853, 866 (7th Cir. 1999).
17. *See United States ex rel. Jones v. Horizon Healthcare Corp.*, 160 F.3d 326, 334 (6th Cir. 1998) (holding that relator’s disclosure to Michigan agencies did not satisfy the jurisdictional requirement for pre-complaint disclosure to the federal government).
18. *See* 132 CONG. REC. S11244 (daily ed. Aug. 11, 1986) (statement of Sen. Grassley).

19. See, e.g., *United States ex rel. Fine v. Chevron, U.S.A., Inc.*, 72 F.3d 740, 743–44 (9th Cir. 1995); *Wercinski v. International Business Machines Corp.*, 982 F. Supp. 449, 461 (S.D. Tex. 1997).

20. 31 U.S.C. § 3730(e)(4)(B). See *Made in the USA Foundation*, 985 F. Supp. at 608, n.10 (“if this letter is the disclosure statement, it is pre-dated by the institution of the suit, and cannot then serve its own purpose” of complying with the statutory requirements); *Detrick*, 909 F. Supp. at 1017 (“the assessment of relator status should take into account all of the information the putative relator has communicated to the government prior to the filing of the action”).

21. See *United States ex rel. Grant v. Rush-Presbyterian-St. Luke’s Medical Center*, 2001 WL 40807 at 5 (N.D. Ill. 2001); *Ackley*, 76 F. Supp. 2d at 669–73.

22. See *Bank of Farmington*, 166 F.3d at 866.

23. *Id.*

24. *Ackley*, 76 F. Supp. 2d at 668.

25. *Id.*

26. See *Jones*, 160 F.3d at 334; *United States ex rel. McKenzie v. Bellsouth Telecomm., Inc.*, 123 F.3d 935, 943 (6th Cir. 1997); *United States ex rel. Findley v. FPC-Boron Employees’ Club*, 105 F.3d 675, 690–91 (D.C. Cir. 1997). But see *Coleman*, 2000 WL 1357791 at 15.

27. *McKenzie*, 123 F.3d at 943.