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## *Focus*

### ¶ 92

### FEATURE COMMENT: New Questions Regarding The Jurisdictionality Of The FCA's Public Disclosure Bar: Potential Hurdles And Increased Costs In Defending Against Parasitic Qui Tam Actions

> "Characterizing a rule as jurisdictional renders it unique in our adversarial system." ~ Justice Ginsburg for a unanimous Court, *Sebelius v. Auburn Medical Center*

Obscured by the myriad reforms and ensuing political rancor of the Patient Protection and Affordable Care Act of 2010 (PPACA) were several key changes made to the False Claims Act. See P.L. 111-148, title X, § 10104(j)(2), 124 Stat. 119 (2010); 31 USCA § 3729 et seq. (2013). The FCA contains a well-known public disclosure bar, which generally forbids qui tam suits when the fraud allegations or fraudulent transactions have been publicly disclosed. See id. § 3730(e)(4)(A). There is an equally well-known exception to the public disclosure bar, which applies when the relator is an "original source of the information." Id. Through the PPACA, the public disclosure bar was lowered and the original source exception was expanded. Compare 31 USCA § 3730(e)(4) (2009) with 31 USCA § 3730(e)(4) (2013) (narrowing the range of qualifying disclosures and adding to the circumstances in which one may qualify as an original source).

More fundamentally, the very nature of the bar may have changed such that it no longer concerns a court's subject matter jurisdiction. It used to read: "No court shall have *jurisdiction* over an action ...." 31 USCA § 3730(e)(4)(A) (2009). The PPACA changed this opening to "A court *shall dismiss* an action, unless opposed by the government ...." 31 USCA § 3730(e)(4)(A) (2013).

Seizing upon this change in language, relators have recently argued that the public disclosure bar is no longer jurisdictional. Some have relegated it to the status of an "affirmative defense." *U.S. ex rel. Lockey v. City of Dallas*, No. 3:11-cv-354, at *5 (N.D. Tex. Jan. 23, 2013). Others have reduced it to "just another statutory requirement" of the FCA. Relators' Opp'n to Mot. to Dismiss at 17, *U.S. ex rel. Beauchamp v. Academi Training Ctr.*, No. 1:11-cv-371 (E.D. Va. Dec. 21, 2012) (*Beauchamp* relators' brief). Either way, the nature of the public disclosure bar—whether still a per se bar to federal subject matter jurisdiction, or now a more discretionary grounds for dismissal—has been called into serious question.

This Feature Comment examines the recent debate over the nature of the public disclosure bar. The key question is whether the bar can still be deemed "jurisdictional," given the change in wording and the Government's new option to oppose dismissal. The article begins by discussing the practical consequences of the debate. With those stakes in mind, it analyzes the arguments on both sides. Finally, it surveys the few opinions to have grappled with the issue, while observing that the question is still largely unanswered.

**What Is at Stake?**—If the public disclosure bar is no longer a question of subject matter jurisdiction, then litigating the issue would change in two distinct but related respects. First, the process for invoking the bar would be markedly different, which would trigger serious cost shifting between parties. Second, the relative burdens borne by the parties would also shift, making it more likely that FCA suits will survive motions to dismiss under the public disclosure bar.

If the public disclosure bar were no longer a question of subject matter jurisdiction, then Rule 12(b)(1) would not be the proper vehicle to invoke the bar. If instead the bar is "just another statutory

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requirement," then Rule 12(b)(6) would presumably become the proper method. Cf. *Hager v. Fed. Nat'l Mortg. Ass'n*, No. 11-2090, 2012 WL 3229658, at *2–3 (D.D.C. Aug. 9, 2012) (concluding that D.C.'s FCA, which began "no person may bring an action," was therefore non-jurisdictional and "would warrant Rule 12(b)(6) dismissal rather than dismissal under Rule 12(b)(1)"). If the bar were henceforth an affirmative defense, then a defendant would have to plead the public disclosure in its answer. Fed. R. Civ. P. 8(c)(1).

Any experienced litigator immediately realizes the practical effects of these seemingly benign changes. First, a Rule 12(b)(1) motion may be brought at *any* time in a proceeding—even for the first time on appeal. See *Sebelius v. Auburn Reg'l Med. Ctr.*, No. 11-1231, slip op. at 6 (U.S. Jan. 22, 2013). By contrast, a Rule 12(b)(6) motion may only be brought at or before trial. Cf. *Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006).

Second, as the U.S. Supreme Court has observed, every federal court has "an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party." *Arbaugh*, 546 U.S. at 514. Not so for failure to state a claim, or for an affirmative defense.

Third, an affirmative defense may be waived, whereas "subject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived." *U.S. v. Cotton*, 535 U.S. 625 (2002).

Fourth, truly jurisdictional limitations are not subject to equitable exceptions, such as equitable tolling. *Auburn Reg'l Med. Ctr.*, slip op. at 7. In short, declaring the public disclosure bar no longer jurisdictional would drastically change the way in which it is litigated.

Moreover, these procedural changes would have real cost implications for defendants. Courts have allowed for limited, jurisdictional discovery precisely because the public disclosure bar, if triggered, would divest the court of jurisdiction and thus avoid protracted and expensive litigation. See, e.g., *U.S. ex rel. Davis v. Prince*, 753 F. Supp. 2d 569 (E.D. Va. 2011) ("After a hearing on defendants' motion to dismiss, the parties were ordered to complete jurisdictional discovery within thirty days and to submit supplemental briefing on the jurisdictional issue.").

This process has saved defendants and the judiciary much time and expense. That option might not be available, however, if the public disclosure bar were no longer jurisdictional. Indeed, some relators have already argued that such jurisdictional discovery is no longer appropriate after the PPACA. See *Beauchamp* relators' brief at 17 ("Whatever merit such a request for one-sided bifurcation may have had before March 23, 2010, it has no merit now that § 3730(e)(4) is just another statutory requirement for an FCA claim.").

Perhaps most significant would be the change in relative burdens of persuasion borne by the parties if the public disclosure bar were raised under Rule 12(b)(6) instead of Rule 12(b)(1). A plaintiff in federal court always has the burden of pleading jurisdiction. Hence, when defendants alleged a public disclosure under the old bar, the burden traditionally shifted to the relator to prove that there was no qualifying public disclosure—or that the relator was an original source thereof. See *U.S. ex rel. Vuyyuru v. Jadhav*, 555 F.3d 337 (4th Cir. 2009).

Under Rule 12(b)(6), by contrast, a plaintiff's claim must be *assumed* to be true. Some relators have already used this rule to argue that "invocation of factual disputes based on materials outside the pleadings—although potentially relevant later to a motion for summary judgment—has no proper place at this stage of the proceedings." *Beauchamp* relators' brief at 17. Relators are essentially trying to use the new bar's language to postpone the public disclosure analysis from the motion to dismiss stage until the summary judgment stage. Whatever the merits of the argument, the result would compound the cost-shifting phenomenon above and subject even more defendants to expensive periods of discovery before they can mount a public disclosure defense.

**Interpreting the New Bar**—With an appreciation of the consequences, we may now turn to the debate itself: Is the public disclosure bar still a question of subject matter jurisdiction? There are at least three major issues to confront. First, one must always begin with the wording of the statute. How should the bar's new language be interpreted? Second, one must grapple with Congress' affirmative decision to remove the word "jurisdiction." Should courts be mindful of this choice, or examine the new bar in a vacuum? Third, and perhaps most interesting, is the Government's new veto authority. Can the Government exercise discretion over a federal court's subject matter jurisdiction, or does this new veto render the bar per se non-jurisdictional?

*The Bar Itself*: The new public disclosure bar does not use the word "jurisdiction" or any derivative thereof. As such, one relator has recently argued that the bar does not meet the "bright-line test" recently


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articulated by the Supreme Court. *See Beauchamp* relators' brief at 17. In *Arbaugh*, the Supreme Court addressed whether the numerosity requirement in title VII—exempting employers of fewer than 15 people—was jurisdictional. See 42 USCA § 2000e(b) (2006). The Court noted that the case implicated "two sometimes confused or conflated concepts: federal-court 'subject matter' jurisdiction over a controversy; and the essential ingredients of a federal claim for relief." *Arbaugh*, 546 U.S. at 503. Put simply, the question was whether the numerosity requirement was a jurisdictional limit or a necessary element of a title VII complaint. Relators are now posing the same question vis-à-vis the FCA's public disclosure bar.

Because these concepts were so often confused, the Court sought to provide a "readily administrable bright-line test." *Arbaugh*, 546 U.S. at 516. That test was whether "the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional." Id. at 515. Under this standard, the Court found that title VII's numerosity requirement was more properly viewed as non-jurisdictional in character. Id. at 516. Borrowing from *Arbaugh*, relators now argue that the new public disclosure bar similarly fails the clear-statement test.

Yet that is hardly a foregone conclusion. The Supreme Court has also said that Congress need not "incant magic words in order to speak clearly." *Auburn Reg'l Med. Ctr.*, No. 11-1231, slip op. at 7. Thus the word "jurisdiction," although conspicuously absent from the new bar, is by no means a litmus test. One pertinent example is the FCA's "first-to-file" bar, which has widely been considered jurisdictional even though the word "jurisdiction" appears nowhere in it. See 31 USCA § 3730(b)(5) ("When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action."); see also *Grynberg v. Koch Gateway Pipeline Co.*, 390 F.3d 1276 (10th Cir. 2004) ("This provision is a *jurisdictional limit* on the courts' power to hear certain duplicative qui tam suits.") (emphasis added) (citing *U.S. ex rel. Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181 (9th Cir. 2001).

Instead, *Auburn Medical Center* instructs courts to "consider context, including this Court's interpretations of similar provisions in many years past." Slip op. at 7 (quoting *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010)). In this vein, it is worth noting that the amended public disclosure bar still falls under the broad heading of § 3730, "Certain Actions Barred," alongside the decidedly jurisdictional first-to-file bar.

One might also argue that there is little or no conceptual difference between denying jurisdiction over a class of claims and requiring that a court dismiss the same. Cf. Fed. R. Civ. P. 12(h)(3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court *shall dismiss* the action.") (emphasis added); see also *U.S. ex rel. Osheroff v. Humana, Inc.*, No. 10-24486-cv, 2012 WL 4479072, at *4 (S.D. Fla. Sept. 28, 2012) (comparing the pre- and post-2010 bars, and concluding that "because this jurisdictional threshold must be resolved preliminarily, the Court's analysis, as a practical matter, remains the same."); cf. Boese, *Civil False Claims and Qui Tam Actions* § 4.02 (4th ed. 2010, updated 2012) ("The directive 'shall dismiss' is similar to subject matter jurisdiction in the sense that these issues are threshold matters that should be resolved before the substantive case goes forward."). To the extent there is little or no difference, then the words "a court shall dismiss" may still connote a jurisdictional limitation.

One district court very recently invoked these arguments to hold that the new bar is still jurisdictional. See *U.S. ex rel. Beauchamp v. Academi Training Ctr. LLC*, No. 1:11-cv-371 (E.D. Va. March 21, 2013). First, the court arguably endorsed the argument in the preceding paragraph: "it is clear that the public disclosure bar remains jurisdictional *because it commands district courts to dismiss actions* subject to the public disclosure bar." Id. at 19 (emphasis added). Thus that court may have impliedly agreed that there is little or no conceptual difference between a "bar" to certain claims and mandatory dismissal thereof.

Second, the court relied on the admonition in *Sebelius* that there are no magic words necessary to make a provision jurisdictional. Id. at 19. The removal of the word "jurisdiction," therefore, was not fatal in the court's eyes. Third, the court relied on the "FCA's history" to inform its analysis. Id. at 18. This is in keeping with the *Sebelius* approach outlined above, under which context is key. Finally, the court noted that the subsection was still titled "certain actions barred." Id. at 20.

To be sure, one case lends only limited credence to the foregoing arguments. The debate will continue in earnest. Nevertheless, at least one court has adopted them for the purpose of finding that the new bar is still jurisdictional.

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*Congress' Intent in Amending the Statute*: The foregoing analysis considered the statute in a vacuum. An interpreting court, however, might consider the history of the FCA as a backdrop to the new public disclosure bar. We need not rehash the debate over using legislative history in statutory interpretation because nothing in the history of the PPACA sheds light on the meaning of the new public disclosure bar. Cf. Boese, supra, § 4.02 ("The legislative history for the [PPACA] does not explain the 'materially adds' requirement nor any of the public disclosure amendments."); Alexion, Note, "Open the Door, Not the Floodgates: Controlling *Qui Tam* Litigation Under the False Claims Act," 69 Wash. & Lee L. Rev. 365 (2012) ("Unfortunately, no legislative history for this portion of the PPACA is available, leaving courts to wonder as to Congress's intent in changing the original source definition."). Yet despite the dearth of evidence in the congressional record, the fact remains that Congress made a conscious choice to remove the word "jurisdiction."

This may be the strongest argument in support of the position that the bar is no longer jurisdictional. Why else would Congress change the language from "no court shall have jurisdiction" to "a court shall dismiss"? If the end result is the same, the argument goes, then they must have intended to change the process and relative burdens—by making the inquiry no longer jurisdictional. This would be in keeping with one generally accepted purpose of the PPACA: to reduce health care costs by rooting out more fraud. Cf. Cohen, "Kaboom! The Explosion of *Qui Tam* False Claims Under the Health Reform Law," 116 Penn. St. L. Rev. 77 (2011) ("In response to a national recession that ballooned the ranks of the uninsured and reports of rampant fraud in the federal health care programs, Congress sought to expand incentives for private citizens to detect and report health care frauds.") By shifting the costs and burdens from relators to defendants, Congress might by trying to achieve that objective.

One might argue in response that the change in language is simply to allow for the "unless opposed by the Government" caveat. But the very premise of that argument would seem to be that the Government veto could not have existed alongside a truly jurisdictional bar. And if that were correct, then the addition of the Government's veto would itself undo the argument. The Government's new veto is the subject of the next section.

*The Government's New Veto*: One of the most interesting aspects of this debate is the injection of the new governmental veto option. See 31 USCA § 3730(e)(4)(A) ("The court shall dismiss an action or claim under this section, *unless opposed by the Government*, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed.") (emphasis added). The otherwise mandatory dismissal under the public disclosure bar may thus be precluded if the Government opposes dismissal. The authors can find no "jurisdictional" statute that allows the Government to block its application unilaterally in this manner. For many, the conclusion is thus simple and intuitive: if the Government can veto its application, then the bar *cannot* still be jurisdictional.

Yet if the analysis is that cut-and-dry, it has not dawned on the courts. In *Beauchamp*, the most in-depth opinion to reach the issue, the court flatly affirmed that the bar is still jurisdictional. It did not appear troubled in the least by the Government's new veto. See *Beauchamp*, No. 1:11-cv-371, slip op. at 19 ("Here, it is clear that the public disclosure bar remains jurisdictional because it commands district courts to dismiss actions subject to the public disclosure bar, *unless the Government specifically opposes the application of the bar*.") (emphasis added).

Another recent case confirmed that the new bar is still jurisdictional, notwithstanding the new veto power. See *U.S. ex rel. Sanchez v. Abuabara*, No. 10-61673, 2012 WL 1999527, at *2 (S.D. Fla. Jun. 4, 2012) ("Congress eliminated an absolute jurisdictional bar in favor of a jurisdictional bar that can be lifted by government discretion."). Still a third court has said that where the new bar applies, "a court lacks jurisdiction to hear such a *qui tam* suit, unless the Government opposes." *U.S. ex rel. Estate of Cunningham v. Millennium Labs. of Cal.*, 841 F. Supp. 2d 523 (D. Mass. 2012).

The upshot is that several courts have unflinchingly read the bar as an issue of subject matter jurisdiction, while in the same breath recognizing the Government's new ability to veto. Unfortunately, none has provided a reasoned response to the thrust of the counter-argument: that the Government, as a party and potential litigant before the court, should not have a say in matters of jurisdiction. At the very least, however, these cases seriously undermine the argument that the Government veto makes the bar ipso facto non-jurisdictional.


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**The Few Courts to Have Addressed the Issue**—The only court to entertain this issue and arrive at a conclusion is *Beauchamp*, described above. Other courts have raised but not answered the question. *Lockey* at *5 (“The Court finds that, even assuming Relator is correct, Defendants would meet this burden of proof of the public disclosure provision. ... Thus, the Court need not decide whether the PPACA changes the public disclosure bar from a jurisdictional inquiry to an affirmative defense.”).

Other cases have made passing references to the new bar and the issue of jurisdiction. One found the new bar still a “jurisdictional limit” despite the new “shall dismiss” language. *See U.S. ex rel. Watson v. King-Vassel*, No. 11-cv-236, 2012 WL 5272486, at *3 (E.D. Wisc. Oct. 23, 2012). Another acknowledged the change in language, but still referred to the bar as a “jurisdictional threshold” because, as a practical matter, the question of public disclosure “must [still] be resolved preliminarily.” *Osheroff*, 2012 WL 4479072, at *4. See also *U.S. ex rel. Hoggett v. Univ. of Phoenix*, No. 2:10-cv-2478, slip op. at *1 (“In denying the Motion, this Court ruled on two *threshold jurisdictional* issues: (1) [the first-to-file bar]; and (2) whether a relator that alerts the government to the alleged continuation of fraud that was already known to the government [is] an ‘original source’ for the purposes of the public disclosure bar.”) (emphasis added). And as noted above, others have described the bar as still jurisdictional despite the Government’s new veto power.

In sum, only one court has issued a reasoned conclusion on the issue. Other references have been in passing. At best, they tend to refute the suggestion that the 2010 amendments *irrefutably* rendered the public disclosure bar non-jurisdictional. The argument is sure to recur in trial courts, and perhaps very soon on appeal. It will be a major issue to watch for in this year’s FCA cases.

**Conclusion**—Notwithstanding the above-cited cases, whether the public disclosure bar still speaks to a court’s subject matter jurisdiction is largely an open question. Only one district court has yet discussed the arguments in detail, or issued a reasoned opinion as to why the bar still is or is not jurisdictional. No court of appeals has been presented with the question.

Although the debate implicates theories of statutory interpretation and constitutional limits, its consequences are far from academic. A sea change in the litigation of the public disclosure bar could mean enormous costs for FCA defendants, with far-reaching ramifications for the Government contracts industry. With an increasing number of claims being litigated under the post-PPACA version of the bar, the issue is ripe for decision.

***This Feature Comment was written for The Government Contractor by* Robert T. Rhoad *(rrhoad@crowell.com) and* Jason C. Lynch *(jlynch@crowell.com), who are attorneys in the Washington, D.C. office of Crowell & Moring LLP. Mr. Rhoad is a partner and co-chairs the firm’s Procurement Fraud and False Claims Act practice, is an member of the firm’s Government Contracts and Health Care practice groups, and focuses his practice on False Claims Act matters. Mr. Lynch is an associate and is a member of the firm’s Government Contracts and White Collar practice groups as well as the firm’s Procurement Fraud and False Claims Act Team.***

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