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Focus

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FEATURE COMMENT: The Growing Split Over Whether The FCA's Public Disclosure Bar Is Still A Jurisdictional Limitation

In March, we published a FEATURE COMMENT entitled "New Questions Regarding The Jurisdictionality Of The FCA's Public Disclosure Bar: Potential Hurdles And Increased Costs In Defending Against Parasitic Qui Tam Actions," 55 GC ¶ 92. We explored whether, given the 2010 amendments to the civil False Claims Act under the Patient Protection and Affordable Care Act, the public disclosure bar still implicates a federal court's subject matter jurisdiction. See P.L. 111-148, title X, § 10104(j)(2), 124 Stat. 119 (2010); 31 USCA § 3729 et seq.

Surveying the few cases to have addressed the issue, we concluded that it was largely an open question. The only opinion to have substantially analyzed the question at that time concluded that the bar was still jurisdictional. See *U.S. ex rel. Beauchamp v. Academi Training Ctr.*, 2013 WL 1189707, at *9 (E.D. Va. March 21, 2013). Several other courts have continued to treat the bar as jurisdictional, although they offer no analysis of the underlying question. See *U.S. ex rel. Hoggett v. Univ. of Phoenix*, 2013 WL 875969, at *1 (E.D. Cal. March 7, 2013); *U.S. ex rel. Watson v. King-Vassel*, 2012 WL 5272486, at *3 (E.D. Wisc. Oct. 23, 2012); *U.S. ex rel. Osheroff v. Humana, Inc.*, 2012 WL 4479072, at *4 (S.D. Fla. Sept. 28, 2012).

Since then, several courts have reached the opposite conclusion. Two have made passing reference to the point in footnotes. See *U.S. v. Chattanooga-Hamilton County Hosp. Auth.*, 2013 WL 3912571, at *7 n.6 (E.D. Tenn. July 29, 2013); *U.S. ex rel. Fox Rx, Inc. v. Omnicare, Inc.*, 2013 WL 2303768, at *8 n.15 (N.D. Ga. May 17, 2013). Another has been more direct, comparing the two versions of the public disclosure bar and concluding that "[a]fter the 2010 amendment, the bar ... is not described as jurisdictional in nature; instead, the statute simply directs that the action or claim be dismissed." *U.S. ex rel. Paulos v. Stryker Corp.*, 2013 WL 2666346, at *3 (W.D. Mo. June 12, 2013).

But a recent opinion from the U.S. District Court for the Southern District of New York provides the most detailed analysis to date. See *U.S. ex rel. Ping Chen v. EMSL Analytical, Inc.*, 2013 WL 4441509 (S.D.N.Y. Aug. 16, 2013). It observes a "split as to whether the public disclosure provision remains jurisdictional in nature." Id. at *8. The case responds to some of the more academic questions that we posed in our previous article, and illustrates well the practical consequences of these questions.

Questions Answered and Unanswered—In our previous FEATURE COMMENT, we surveyed some of the finer points of statutory interpretation that are implicated by this issue. For example, we observed that one of the strongest arguments against the bar remaining jurisdictional is that Congress deliberately removed the word "jurisdiction," arguably evincing an intent to relegate the bar to a non-jurisdictional status.

This point, which had not been raised by any court prior to the publication of our article, did not escape Judge Abrams in *Ping Chen*. Failing to find a "clear statement" of jurisdictionality, as required by U.S. Supreme Court precedent, he reasoned in part that "Congress deliberately *removed* such clear language from the provision where it could have kept it in." Id. at *9. This legislative background is likely to undergird those opinions that conclude that the bar is no longer jurisdictional.

One facet of the new bar that was *not* addressed by Judge Abrams in *Ping Chen* was the Government's new veto power. Under the amended

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public disclosure bar, a court must dismiss an action "unless opposed by the government." 31 USCA § 3730(e)(4)(A) (2012). It appears that no court has yet considered the argument that the executive's power to intervene necessarily renders the new bar non-jurisdictional. This constitutional question thus remains open.

More interestingly, the *Ping Chen* opinion does not reflect any consideration of whether the Government opposed dismissal in that case. The Government declined to intervene, so the question would seem pertinent. Yet there is no evidence that the Government was given an opportunity to oppose dismissal. This begs the question of *how* the new bar will work in practice—a question we also posed in our March article. Will courts ask the U.S. attorney's office whether they oppose dismissal before rendering an opinion? Or will the Government be heard to object after the fact? Much remains to be seen.

Practical Consequences—The thesis of our previous Feature Comment was that, although the 2010 amendments might seem benign or semantic, the practical ramifications of a non-jurisdictional public disclosure bar are anything but. The effects of this new interpretation are evident in the *Ping Chen* opinion, and manifest themselves in two pertinent ways.

First, under a non-jurisdictional bar, a court will not refer to evidence outside the pleadings, "except to the extent [it has] been provided to place before the Court documents that may be considered on a motion to dismiss, in this case, *judicially-noticeable* public disclosures." See id. (emphasis added). Under that standard, a court may consider only "the *fact* that press coverage, prior lawsuits, or regulatory filings contained certain information, without regard to the truth of their contents." Id. (citing *Staehr v. Hartford Fin. Servs. Group, Inc.*, 547 F.3d 406 (2d Cir. 2008)).

This was not ultimately fatal to the defendant's challenge in *Ping Chen*, because there were "judicially-noticeable" documents that the court concluded had publicly disclosed the fraud. But there will inevitably be cases in which the defendant's argument depends upon declarations, affidavits or other evidence that is *not* judicially noticeable. Defendants in those cases, who have historically been able to introduce such evidence, are not likely to fare as well in the wake of *Ping Chen* and similar decisions.

Second, regardless of the evidence available, the court will henceforth place the burden of persuasion on the defendant and not the plaintiff. This is the consequence of converting a public disclosure bar challenge from a Rule 12(b)(1) motion into a Rule 12(b)(6) motion. This point was made expressly by the court in *Ping Chen*, 2013 WL 4441509, at *9. And while the defendants were able to carry the day in that case, this sea change in the relative burdens is sure to yield substantially more relators surviving motions to dismiss. Put simply, more defendants will be forced into discovery and to litigate cases that otherwise would have been dismissed for lack of subject matter jurisdiction.

Conclusion—Is the public disclosure bar still "jurisdictional"? It is not merely an academic question, but one with very real practical consequences. The growing split among district courts suggests that a resolution in a court of appeals is not far off. And the answer has the potential to increase significantly the time and expense of defending qui tam actions under the FCA.

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