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False Claims Act

View From Crowell & Moring: The False Claims Act—Varied Approaches in Applying the Public Disclosure Bar



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Recent cases have highlighted differing approaches as to how to apply the False Claims Act's public disclosure bar in light of its amendment in 2010, and leave open several questions as to whether the amended bar will be applied in a given case and how that affects defense strategy.

The FCA's "public disclosure bar" precludes whistleblowers from bringing allegations that have already

been made public unless they are an "original source."¹ The bar was substantially amended in March 2010, narrowing the circumstances in which it applies, while also appearing to grant the government the power to "veto" the bar's application in a case altogether. But where a complaint filed today alleges conduct that took place in 2009 or earlier, should the old version of the bar apply? Because the amendments were not expressly made retroactive by Congress, it would appear that a court would need to analyze whether applying the amended bar to conduct predating its enactment would have an impermissible retrospective effect. But few courts have addressed the issue head-on, resulting in a growing dis-

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¹ See 31 U.S.C. § 3730(e)(4)(A), amended on March 23, 2010 as part of the Patient Protection and Affordable Care Act, Pub. L. 111-148, title X, § 10104(j), 124 Stat. 119:

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—

(i) in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party;

(ii) in a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation; or

(iii) 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.

parity in the bar's application that has important consequences for the defendant in a given case.²

Indeed, courts have recently given us at least three means of determining whether to apply the amended public disclosure bar. Some have focused on when the relator filed the action and applied the version that was in effect at that time.³ Another court held that the date of the allegedly fraudulent conduct is determinative, citing Supreme Court precedent for the proposition that "the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place."⁴ And in a third approach, a district court in March held that the dates of the public disclosure, not of the alleged fraudulent conduct, provide the benchmark.⁵ Perhaps adding more confusion to the mix, some cases may involve conduct—whether the allegedly fraudulent scheme or even of the public disclosures themselves—that overlap the amendment's enactment, leaving open how to proceed if dismissal may be

² A statute has impermissible "retroactive effect" if, when applied to the case at hand, it would "attach[] new legal consequences to events completed before its enactment." *Landgraf v. USI Film Products*, 511 U.S. 244, 269-70 (1994). Yet "[a] statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment." *Id.* at 269 (citation omitted). Rather, the test is a judgment for the court "concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event[.]" a test that may "leave room for disagreement in hard cases." *Id.* at 270. Accepting that the presumption against retroactive legislation embodies elementary fairness considerations that "dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly," *id.* at 265, it is not altogether clear whether the public disclosure bar amendments implicate such considerations or could have affected the defendant's underlying conduct or even that of the relator, but rather a third-party event/actor, that of the disclosure (at least in most cases). On the other hand, in *Graham County Soil & Water Conservation District v. United States ex rel. Wilson*, 559 U.S. 280, 283 n.1 (2010), the Supreme Court *in dicta* noted that the amended version of the public disclosure bar could not apply to pending cases because it "eliminates [defendants'] claimed defense to a *qui tam* suit." And in *Hughes Aircraft Co. v. United States ex rel. Schumer*, the Supreme Court held that the 1986 amendment of the FCA, which eliminated the government knowledge bar while enacting a more limited public disclosure bar, was retroactive because it addressed "the substantive rights of the parties . . ." a holding which gives force to the argument that the more recent amendments would have impermissible retrospective effect. 520 U.S. 939, 951 (1997). The question of retroactivity breeds others that are left for another day.

³ See *United States ex rel. Booker v. Pfizer, Inc.*, No. 10-11166, 2014 WL 1271766, at *5 n.3 (D. Mass. Mar. 26, 2014) ("Relator's current action was not filed until July 13, 2010, and Relators' eligibility for the original source exception must be evaluated under the governing law as of that date."); see also *United States ex rel. Davis v. Dist. of Columbia*, 773 F. Supp. 2d 21, 28 (D.D.C. 2011), *vacated on other grounds*, 679 F.3d 832 (D.C. Cir. 2012) ("the Court will apply the version of 31 U.S.C. § 3730(e)(4) that was in effect at the time plaintiff's complaint was filed").

⁴ *United States ex rel. May v. Purdue Pharmaceuticals*, 737 F.3d 908, 914-15 (4th Cir. 2013) (citing *Landgraf*, 511 U.S. at 265).

⁵ *United States ex rel. Saunders v. Unisys Corporation*, No. 1:12-cv-00379, 2014 WL 1165869 (E.D. Va. Mar. 21, 2014).

warranted under one version of the bar but not the other.⁶

Pros and Cons Under the Competing Bars. As a preliminary matter, why should one care which version applies? The short answer, as suggested above, is that there are several disadvantages for most defendants under the amended bar. Most evident is that the pre-2010 bar includes as qualifying public disclosures state cases, reports, hearings, audits, and investigations, as well as federal cases where the United States is not a party. The amended bar did away with all of these. Moreover, under the amended bar, the government has been given an apparent "veto" power by which a valid public disclosure challenge will cause dismissal of a relator "unless opposed by the Government." On the other hand, there may be some advantages for defendants under the amended bar, some of which depend on the nature of the disclosures and others on the forum involved.

Competing Considerations & The Fourth Circuit Anomaly. The amended public disclosure bar brought substantive changes that may affect whether a case will be dismissed or proceed. The changes also have procedural consequences. For example, the government's ability to oppose dismissal on public disclosure grounds has led some courts to conclude that the bar is no longer jurisdictional.⁷ Under the pre-amendment bar, a defendant typically moves to dismiss for lack of jurisdiction under Rule 12(b)(1), whereby the plaintiff bears the burden of demonstrating jurisdiction. As a jurisdictional bar, such a motion can be brought at any time, though many courts have resolved these motions before the case proceeds to merits discovery. Under the amended bar, however, a defendant may only be able to lodge a Rule 12(b)(6) challenge (for failure to state a claim). In contrast to a jurisdictional challenge, the well-pleaded facts in the relator's complaint will be taken as true on such a challenge, effectively flipping the burden of proof to the defendant.⁸ Thus, mere plausibility may be enough for a relator to survive a 12(b)(6) public disclosure challenge. Whether courts will entertain requests for discovery related to the public disclosure inquiry is another open question under the amended bar, including when that discovery will occur. Rule 12(b)(6) challenges that rely on materials outside the pleadings are converted to summary judgment motions, and courts may elect to defer ruling on them until merits discovery is complete and all summary judgment motions are filed. This has enormous implications for defendants as they plan litigation and/or settlement strategies.

Yet the new bar may have defense advantages. In one sense, it may have become more difficult for a relator to qualify as an "original source"—those relators who are

⁶ Indeed, while some courts have entertained public disclosure challenges involving overlapping conduct, none to date have grappled with contrary results in applying one or the other version of the bar or how to proceed in such a circumstance. See, e.g., *United States ex rel. Osheroff v. Humana, Inc.*, No. 10-24486-cv, 2012 WL 4479072, *19-41 (S.D. Fla. Sept. 28, 2012) (analyzing pre- and post-amended conduct alleged to be fraudulent under each version of the public disclosure bar and concluding dismissal was warranted under both versions).

⁷ *May*, 737 F.3d at 916-17.

⁸ See *Booker*, 2014 WL 1271766, at *5.

immune from the public disclosure bar's effect. Unless the relator's disclosure to the government predates the public disclosure, he must show that his knowledge is both "independent" and "materially adds" to the public disclosure.⁹ While the old bar merely assessed the source of the relator's knowledge, the new bar actually measures that knowledge against the public disclosure. If the relator cannot add anything material, his case will be dismissed. So in the right circumstances, a defendant might actually prefer the new bar.

Moreover, precedent in one circuit presents an interesting twist. Contrary to all others, the Fourth Circuit interpreted the prior bar's prohibition against actions "based upon" public disclosures as precluding only allegations "actually derived from" the public disclosure.¹⁰ Every other circuit had more broadly interpreted

⁹ 31 U.S.C. § 3730(e)(4)(B) (2012).

¹⁰ *May*, 737 F.3d at 917-18 (citing *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1348) (4th Cir. 1994).

"based upon" to mean "substantially the same as," and in the amendments, Congress expressly adopted the latter interpretation, nullifying the Fourth Circuit's stricter interpretation as to cases under the amended bar but perhaps not under the prior bar. Thus, a defendant seeking to avail itself of the broader array of qualifying disclosures under the prior bar while avoiding potential pitfalls under the amended version should consider the question carefully.

Conclusion. The differing approaches in the courts as to which version of the public disclosure bar applies in a given case may open the door to strategic arguments by FCA lawyers. If the complaint against you was filed in 2012, is substantially the same as public disclosures from 2011, and alleges conduct from 2009, you could conceivably argue for either version of the bar, but there are many competing factors at play. Either way, the court's determination could make the difference as to whether, or when, the case is dismissed.