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Reining in the Rogue Squadron: Making Sense of the “Original Source” Exception for *Qui Tam* Relators

Dayna Bowen Matthew*

“The qui tam provisions offset inadequate law enforcement resources and encouraged ‘a rogue to catch a rogue’ by inducing informers ‘to betray [their] coconspirators.’”¹

Christopher Alexion has provided me a welcome opportunity to revisit the Civil False Claims Act (FCA)² and its *qui tam* provision. I have long found the *qui tam* provision problematic. However, in *Open the Door, Not the Floodgates*, Mr. Alexion provides an insightful and well-organized overview of the public disclosure provision that calls for a fresh look at how courts should enforce this jurisdictional bar, in order to curb the abusive prosecution this statute invites.³

Alexion focuses on the struggle federal courts and Congress have had with one of the statute’s most important protections against parasitic litigation by *qui tam* relators—the jurisdictional public disclosure bar. He offers a proposal to narrowly construe the most recent revision of this restriction, hoping, I believe, to head off yet another spate of contradictory and irreconcilable constructions of the FCA statute. Further, Alexion’s proposal is directed, as the title to his Note suggests, at supporting Congress’s most recent attempt to limit the number of specious

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1. U.S. *ex rel.* Findley v. FPC-Boron Emp. Club, 105 F.3d 675, 679 (D.C. Cir. 1997) (citing CONG. GLOBE, 37TH CONG., 3D SESS. 955–56 (1863)).

2. See An Act to Prevent and Punish Frauds upon the Government of the United States, ch. 67, § 4, 12 Stat. 696 (1863) (current version at 31 U.S.C. §§ 3729–33 (2010)) (providing for civil actions for false claims).

3. See Christopher M. Alexion, Note, *Open the Door, Not the Floodgates: Controlling Qui Tam Litigation Under the False Claims Act*, 69 WASH & LEE L. REV. 365, 368 (2012) (arguing for a narrow construction of the “original source” exception to the FCA’s public disclosure bar).

lawsuits *qui tam* plaintiffs bring, while protecting the rights of worthy private litigants who prosecute fraud on behalf of the government. Mr. Alexion's efforts are matched against the government's commitment to an aggressive prosecutorial strategy built on the premise that the *qui tam* provision allows the state to "use a rogue to catch a rogue."⁴ The upshot of this policy is that the vast numbers of *qui tam* rogues now mobilized in the fight against fraud have, I fear, grown as powerful as the fictional "Rogue Squadron" from the Star Wars movies, books, and comics. However, unlike their science fiction counterparts, the evidence suggests that the targets of *qui tam* rogues are not always evil empires, the *qui tam* rogue's aim is not always sharp and true, and these rogues are not always "the best pilots and the best fighters."⁵ In contrast to the fictional Galactic Empire heroes, all too often, *qui tam* rogues are just plain rogues. The basic idea behind the public disclosure bar is to stop unworthy rogues before they do reckless and expensive harm, but to allow truly helpful ones to proceed.

The public disclosure bar operates to exclude *qui tam* relators from recovering damages under the FCA if they do not disclose fraudulent conduct that was previously hidden from public view. The "original source" exception to the public disclosure bar makes room for the *qui tam* relator who is, in fact, the informant behind the public disclosure, to recover her share of damages recovered under the FCA. Mr. Alexion has identified three different approaches courts have taken to construing the original source exception to the public disclosure bar.⁶

4. *Findley*, 105 F.3d at 679 (citing CONG. GLOBE, 37TH CONG., 3D SESS. 955-56).

5. The Rogue Squadron, also known as the "Red Squadron" and the "Rogue Group" is the band of X-wing pilots, originally headed by Wedge Antilles, that Luke Skywalker famously joined in the two successful attacks against Darth Vader's Death Stars I and II, in *A NEW HOPE* (Lucasfilm 1977) and *RETURN OF THE JEDI* (Lucasfilm 1983). See STEPHEN J. SANSWEET, *STAR WARS ENCYCLOPEDIA* 252 (1998) (providing background on Rogue Squadron).

6. The relevant language is as follows:

(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—

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

Mr. Alexion calls the First and Fourth Circuits' rule the "Permissive Approach" because plaintiffs can qualify as the original source of a public disclosure, and thus overcome the jurisdictional bar, more easily under this rule than under any other.⁷ In the First Circuit, the Permissive Approach turns on the *timing* of the relator's disclosure. That rule bars recovery only to relators who fail to disclose the facts of fraud prior to filing their *qui tam* lawsuit. From a timing perspective, plaintiffs do not have to share their knowledge of fraud with the government before the relevant facts become public from other sources. In *United States ex rel. Duxbury v. Ortho Biotech Products, L.P.*,⁸ for example, the United States Court of Appeals for the First Circuit concluded the statute "only requires that a relator provide his or her information prior to the filing of the *qui tam* suit."⁹ Thus, the fact that relator Duxbury filed his *qui tam* action "hot on the heels"¹⁰ of a master consolidated, multi-district complaint containing similar allegations, did not bar his claim. In the Fourth Circuit, the Permissive Approach turns on the *content* of the *qui tam* disclosure. The court in *United States ex rel. Siller v. Becton Dickinson & Co.* took the Permissive Approach to determine the content of the *qui tam* suit was not "derived from" a public disclosure, even though the relator's brother and their shared

(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.

(B) For purposes of this paragraph, "original source" means an individual who either (i) prior to a public disclosure under subsection (e)(4)(a), has voluntarily disclosed to the Government the information on which allegations or transactions in a claim are based, or (2) who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the Government before filing an action under this section.

31 U.S.C.A. § 3730(e) (West 2011).

7. See Alexion, *supra* note 3, text accompanying notes 96–141 (discussing the approach taken by the First and Fourth Circuits).

8. See U.S. *ex rel. Duxbury v. Ortho Biotech Prods., L.P.*, 579 F.3d 13, 21 (1st Cir. 2009) (finding that the *qui tam* relator qualified as an original source).

9. *Id.* at 28.

10. *Id.* at 17.

company had filed and settled a civil action against the same defendant, making the same allegations about overcharging the government for the same medical device products.¹¹

Interestingly, in contrast to *Duxbury* and *Siller*, the cases that Mr. Alexion uses to explain what he calls the “Restrictive Approach” do *not* involve health care defendants.¹² Plaintiffs in courts adopting this approach have a more difficult time qualifying as original sources and less often successfully overcome the public disclosure bar. Mr. Alexion calls the Second and Ninth Circuits’ rule the “Restrictive Approach” because it allows recovery only to *qui tam* plaintiffs who not only provide their information voluntarily to the government before filing, but who also are the initial source of the relevant information to the entity that publicly disclosed the fraud. Disclosing to the government alone is not enough. In *United States ex rel. Dick v. Long Island Lighting Co.*,¹³ the relator was barred because he was not the source of the earlier-filed allegations in a RICO class-action suit against the defendants.¹⁴ The court was impressed that the *qui tam* plaintiff did not provide any information to the earlier plaintiffs.¹⁵ On the other hand, the court in *United States*

11. See U.S. *ex rel.* Siller v. Becton Dickinson & Co., 21 F.3d 1339, 1355 (4th Cir. 1994) (holding that “a *qui tam* plaintiff need not be a source to the entity that publicly disclosed the allegations on which the *qui tam* action is based in order to be an original source under section 3730(e)(4)(B)”).

12. See Alexion, *supra* note 3, text accompanying notes 142–69 (discussing the approach taken by the Second and Ninth Circuits). An empirical study could be constructed to confirm my instinct that the majority of cases that employ the “Permissive Approach” to the original source exception involve health care defendants, while the majority of cases applying the “Restrictive Approach” are unrelated to the health care industry. Uncovering such a pattern would support a conclusion that even courts play an unwitting role in ensuring that one significant driver in the burgeoning of the health care fraud prosecution business is the lucrative recovery that *qui tam* plaintiffs and the government reap, not solely the determination to stamp out fraud in this particular industry.

13. See U.S. *ex rel.* Dick v. Long Island Lighting Co., 912 F.2d 13, 18 (2d Cir. 1990) (holding that “if the information on which a *qui tam* suit is based is in the public domain, and the *qui tam* plaintiff was not a source of that information, then the suit is barred”).

14. *Id.* at 16 (“Appellants assert . . . that since they were ‘original sources,’ their suit may be maintained notwithstanding the fact that it is based upon publicly disclosed allegations. Based upon our review of the evidence presented and our interpretation of the applicable statute, we do not agree.”).

15. *Id.* at 18 (noting a need to discourage “persons with relevant information from remaining silent and encourage them to report such

*ex rel. Wang v. FMC Corp.*¹⁶ was unimpressed by the fact that, there, the *qui tam* relator in 1983 had acquired direct and independent knowledge of the allegations and transactions he later sued upon in 1987. In the interim, those allegations had been publicly disclosed in the media before Wang's *qui tam* suit was filed.¹⁷

According to Mr. Alexion, the “Middle Ground” belongs to the Sixth and D.C. Circuits, which do not require the relator to be the original source of the initial leak to any disclosing entity in order to recover but do insist that the *qui tam* relator is the source of information not already “widely disseminated” before their filing.¹⁸ The Middle Ground courts focus on whether an original source adds information to inspire the government to investigate, uncover, and prosecute previously hidden fraud.

The beauty of Mr. Alexion's tripartite description is that it creates a framework to understand all attempts to reform the public disclosure bar and the related original source exception, including the most recent reform enacted under the Patient Protection and Affordable Care Act of 2010 (PPACA). Alexion helps us to see that the construction of these FCA provision turns on understanding three variables: the timing, the content, and the recipient of the *qui tam* relator's disclosures. The following table summarizes the lessons that Mr. Alexion's “Permissive-Middle-Restrictive” model teaches:

information at the earliest possible time”).

16. See *Wang v. FMC Corp.*, 975 F.2d 1412, 1420 (9th Cir. 1992) (holding that “[b]ecause he had no hand in the original public disclosure of [fraud], Wang's claim . . . is blocked by the jurisdictional bar of section 3730(e)(4)(A)”).

17. *Id.* at 1418 (“[S]omeone else publicly disclosed the [relevant] problems. Wang is now revealing what is already publicly known.”).

18. See Alexion, *supra* note 3, text accompanying notes 170–204 (discussing the approach taken by the D.C. and Sixth Circuits).

Applying Alexion’s “Permissive-Middle-Restrictive” Model to Understand the Public Disclosure Bar

	Permissive (1st, 4th Cir.)	Middle (D.C., 6th Cir.)	Restrictive (2d, 9th Cir.)	PPACA (2010)	H.B. 1788 (Not enacted)
Timing of Relator’s Disclosure	Before filing <i>qui tam</i> action	Before public disclosure OR Prior to filing <i>qui tam</i> action	Before public disclosure AND	Before a public disclosure OR Prior to filing <i>qui tam</i> action IF	
Content of Relator’s Disclosure	May not be “derived from” or “based upon” prior disclosure	Must be new discoveries not widely known. Must introduce new elements of wrongful transactions or material elements to transaction publicly disclosed	Must be the allegations and transactions in the initial leak to entity that first publicly disclosed	Information materially adds to the case based on relator’s independent knowledge	May be any essential element not made public or broadly disseminated
Recipient of Relator’s Disclosure	Government	Government	Disclosing Entity	Government	Government

Alexion rightly finds the evidence of parasitic *qui tam* actions “alarming” and concludes his Note by proposing a “narrow” reading of the revised public disclosure bar exception outlined in the PPACA.¹⁹ I believe he is right to try to get out in front of the courts on construing PPACA’s version of the original source exception. First, the most current numbers are even worse than those that Mr. Alexion found “alarming.” The number of *qui tam* filings is at an all-time high. In 2010, relators filed the largest number of new matters—574—ever initiated since the 1986 Amendment to the Civil False Claims Act was passed.²⁰

19. See Alexion, *supra* note 3, text accompanying notes 218–59 (arguing for a narrow construction of the 2010 amendments to the original source exception).

20. U.S. DEP’T OF JUSTICE, FRAUD STATISTICS: OVERVIEW 2, available at http://www.justice.gov/civil/docs_forms/C-FRAUDS_FCA_Statistics.pdf.

Moreover, if Mr. Alexion is right to use the low rate at which the government elects to intervene in *qui tam* actions as a proxy for the high number of low-quality lawsuits filed, then the fact that in 2010 the Department of Justice reported it intervened “in fewer than 25% of cases filed” *including* those it settled, raises concern about the tremendous waste of judicial resources unworthy *qui tam* lawsuits represent.²¹ And Mr. Alexion’s alarm is further justified by the overwhelming extent to which health care cases have become the singular focus of *qui tam* prosecution. I believe Mr. Alexion has identified a very practical and costly problem that requires careful judicial construction to repair.

However, I have more confidence in the recently enacted reforms to the original source exception than Mr. Alexion does. I am less concerned than Mr. Alexion that courts will find the second prong of PPACA’s language—which defines an original source as one “who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions and who has voluntarily provided the information to the government prior to filing an action under this section”²²—unclear. While defining these terms statutorily would have greatly reduced uncertainty, cases construing earlier versions of the original source exception have considered terms closely related to the “independent knowledge”²³ and “materially adds”²⁴ provisions in PPACA’s new statute. They will be helpful. Most importantly, PPACA clarifies the timing, content, and recipient requirements for *qui tam* plaintiffs. Now relators know they either must speak to the government *before* public disclosures, or

21. U.S. DEPT OF JUSTICE, FALSE CLAIMS ACT CASES: GOVERNMENT INTERVENTION IN QUI TAM (WHISTLEBLOWER) SUITS 2, *available at* http://www.justice.gov/usao/pae/Civil_Division/InternetWhistleblower%20update.pdf.

22. 31 U.S.C.A. § 3730(e)(4)(B) (West 2011).

23. The *Duxbury* court construed the following language in the 31 U.S.C. § 3730(3)(4)(B) as controlling in 2009: “A relator qualifies as an ‘original source’ if (1) she has ‘direct and independent knowledge’ of the information supporting her claims and (2) she ‘provided the information to the Government before filing an action.’” U.S. *ex rel.* *Duxbury v. Ortho Biotech Prods., L.P.*, 579 F.3d 13, 16 (1st Cir. 2009) *cert. denied*, 130 S. Ct. 3454 (2010).

24. See *In re Natural Gas Royalties Qui Tam Litig.*, 467 F. Supp. 2d 1117, 1130 (D. Wyo. 2006) (discussing whether a relator “brings something of real value to the table”).

must *materially add to* prior public disclosures if they wait to speak after those disclosures, but before filing. Referring to the chart above demonstrates that the PPACA amendment addresses and clarifies the timing, content, and recipient questions that have split courts' analyses of the original source exception since 1986. Yet, while PPACA may have shed considerable light on these three issues, many important questions remain unanswered.

Fundamentally, an open question remains as to whether the growing use of *qui tam* relators under FCA is actually decreasing the incidence of fraud or even deterring future fraud, rather than merely increasing litigation costs and the recoveries flowing from the mere allegations of fraud. The importance of this unanswered question cannot be overstated. The government's announcement that in 2010 it recovered over \$3 billion in judgments and settlements against those accused of fraud under the FCA²⁵ must not be misunderstood to represent the number of ill-gotten dollars that have been returned to public coffers. The impressive \$3 billion figure does not measure the amount or extent of fraudulent conduct that has been stopped because of FCA litigation. Primarily, this dollar figure measures the amount that defendants accused of fraud were willing to pay in order to make the prosecution against them cease. Moreover, knowing that \$2.5 billion of that total came from cases alleging health care fraud says little (and perhaps nothing) about the changes in health-delivery practice or reductions in fraudulent conduct that resulted from the multi-billion-dollar collection.

In fact, it would be worthwhile to examine closely what is driving *qui tam* plaintiffs'—and the government's—focus on fraud in the health care industry particularly. If, as others have observed about bank robbers, *qui tam* plaintiffs direct their attention to health care prosecution merely because that “is where the money is,”²⁶ I am left to wonder whether other

25. Press Release, U.S. Dep't of Justice, *Department of Justice Recovers \$3 Billion in False Claims Cases in Fiscal Year 2010* (Nov. 22, 2010), <http://www.justice.gov/opa/pr/2010/November/10-civ-1335.html> (last visited Jan. 23, 2012) (on file with the Washington and Lee Law Review).

26. See Pamela H. Bucy, *Crimes by Health Care Providers*, 1996 U. ILL. L. REV. 589, 589 (“As Willie Sutton said when asked why he robbed a bank, ‘[T]hat’s where the money is.’”).

fraudulent conduct in industries such as securities, defense, and construction is receiving too little attention and therefore imposing too great a cost on the American public and economy. Finally, it would be a worthwhile exercise to quantify a concrete assessment of the cost of relying upon *qui tam* relators to uncover fraud and compare those costs to the actual benefits derived from this prosecutorial approach.²⁷

While these questions are well outside the scope of Mr. Alexion's public disclosure analysis, the fact that they remain open may, in part, have motivated Congress to sharpen the definition of an original source as part of the health care reform act of 2010. By limiting the timing and content of disclosures that allow a *qui tam* relator to avoid the public disclosure bar, Congress may indeed have closed the "floodgates." However, by creating two separate alternative routes to qualify as an original source and by allowing relators to share information with either the government or the disclosing entity, Congress has left an "open door" to legitimate *qui tam* litigants. Courts' construction of the new original source exception will have to be aggressive—tolerating no derivative claims—and, "narrow" as Mr. Alexion suggests, in order to bring consistency to enforcing the public disclosure bar. But to rein in the proliferation of parasitic lawsuits filed by the virtual squadron of *qui tam* relators who appeared in courts across the country last year, judges will have to aggressively construe the materiality requirement Congress has added to 31 U.S.C. § 3730(e)(4)(B). Indeed, Mr. Alexion's proposal to allow only those relators who share "valuable" information that "substantially assists" the government to proceed is a conceptual step in the right direction.

27. See, e.g., Jeffery Manns, *Private Monitoring of Gatekeepers: The Case of Immigration Enforcement*, 2006 U. ILL. L. REV. 887, 889 (describing qualitatively the compliance and social costs of using *qui tam* relators under the False Claims Act).