Should You Make A Voluntary Disclosure to the OIG?
Check Your Circuit Court Map First

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Since the HHS Office of Inspector General ("OIG") first promulgated a voluntary disclosure protocol in October 1998, there has been a continuous debate on the merits of making voluntary disclosures. On the one hand, the Government has promoted use of the protocol as a way to avoid criminal prosecution and treble damages. ¹ Both OIG and Justice Department officials have stated publicly that providers who self-disclose overpayments usually are not criminally prosecuted and the Government is reluctant to intervene in whistleblower suits filed after the disclosure.²

On the other hand, the private bar has focused on a number of shortcomings in the OIG’s voluntary disclosure protocol, including the requirement of a waiver of the attorney-client privilege when deemed necessary by the OIG; the absence of any release from civil or criminal prosecution by the Justice Department; and the potential for a voluntary disclosure to be used as evidence against a client in other suits. Because of these competing risks and benefits, it is often difficult for a health care provider to decide whether to make a voluntary disclosure in cases where there is no evidence of deliberate wrongdoing.

There is another consideration, however, that can tip the balance on the disclosure decision in either direction. It is the effect that the disclosure will have on subsequent whistleblower suits. This effect will depend on two factors: first, whether the disclosure is a “public disclosure” within the meaning of the False Claims Act (“FCA” or “Act”); and second, the location of the provider making the disclosure. Based on existing case law, providers located in some areas have a much greater incentive to make a voluntary disclosure than do providers in others.

The FCA and its Whistlebearer Provisions

After a decade of intense enforcement, it is common knowledge that the FCA prohibits a provider from knowingly presenting a false claim for reimbursement to the Medicare or Medicaid programs, and that the “whistlebearer” provisions of the FCA permit private parties to bring suits on behalf of the Government for violations of the Act. These whistleblowers, also known as “relators” under the FCA, are entitled to receive a bounty, or “qui tam,” of up to thirty percent of any recovery, which frequently ranges into the

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¹ Treble damages can be reduced to double damages under the False Claims Act if there is a voluntary disclosure that meets specified conditions. 31 U.S.C. § 3729(a).
millions of dollars given the FCA’s treble damage and penalty provisions.  

A relator must, however, overcome several procedural hurdles before collecting his bounty. Among these hurdles are the “public disclosure” rule and the “original source” requirement. The public disclosure rule states that a court shall not have jurisdiction over a whistleblower action brought under the FCA if it is “based upon a public disclosure.” The FCA defines a public disclosure to include disclosures of allegations or transactions in (1) a criminal, civil, or administrative hearing; (2) a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation; or (3) the news media. The public disclosure bar does not apply, however, where the person bringing the action is an “original source” of the information. The FCA defines an original source as an individual with direct and independent knowledge of the information on which the allegations are based.

The federal courts have distilled this fairly complicated statutory language into a series of three dependent questions:

(A) Have the allegations or transactions been publicly disclosed?

(B) If they have, is the whistleblower action “based upon” the publicly disclosed allegations or transactions?

(C) If it is, is the relator an “original source”?

A. Have the Allegations or Transactions been Publicly Disclosed?

A threshold question in any FCA whistleblower suit is whether there has been a public disclosure prior to the filing of the suit. If a public disclosure has occurred, the suit will be dismissed if it is based upon the public disclosure unless the plaintiff is an original source. If no public disclosure has occurred, then the court need not analyze these issues.

Thus, for a provider considering a voluntary disclosure to the OIG, the question of whether it will qualify as a public disclosure can be critically important. If so, the provider will have the comfort of knowing that, although the disclosure to the OIG may become financially painful, at least the risk of liability from a whistleblower suit will be greatly diminished.

To date, there are no cases specifically addressing whether a voluntary disclosure to the OIG constitutes a public disclosure for purposes of the FCA. In United States ex rel. Mathews v. Bank of Farmington, however, the Seventh Circuit Court of Appeals held that the disclosure of information about an alleged false claim is a “public disclosure” when it is made to a government official who has managerial responsibility for the underlying claims. In Mathews, the disclosure was made in response to questioning by a government agent. Thus, the case is distinguishable from the scenario where a provider initiates the disclosure voluntarily to the OIG.

Nevertheless, in United States ex rel. Grant v. Rush-Presbyterian /St. Lukes Medical Center, a district court applied the Mathews rationale to a health care fraud case involving a voluntary disclosure to a U.S. Attorney. In Grant the plaintiff had been a nurse at Rush-Presbyterian Hospital. She filed a whistleblower suit under the FCA alleging that Rush-Presbyterian
knowingly defrauded the Medicare and Medicaid programs by submitting bills for outpatient physician services that were actually provided by nurses, and by billing for more expensive services than were in fact provided. She filed her suit four months after Rush-Presbyterian had voluntarily disclosed the same billing irregularities to an official with the U. S. Attorney’s Office. That initial disclosure led to a second meeting between representatives of Rush-Presbyterian and officials from the U.S. Attorney’s Office, the FBI, and the Health Care Financing Administration (“HCFA”).

Thereafter, Rush-Presbyterian held a meeting with a group of its nurses, including the plaintiff, where it discussed the improper billing practices, its voluntary disclosure to the Government, and the resulting investigation. Because of Rush-Presbyterian’s meeting with Government officials, the court dismissed the plaintiff’s suit on the basis of the public disclosure bar. The court determined that Rush had publicly disclosed the alleged fraud when it met with officials from the United States Attorney’s Office, the FBI, and HCFA to discuss the improper billing practices.

The decisions in Mathews and Grant should go a long way to support a finding that a voluntary disclosure pursuant to the OIG’s disclosure protocol constitutes a public disclosure for purposes of the FCA. Nevertheless, a disclosing party seeking to cut off subsequent whistleblower suits may improve its changes of success by eliciting a response from the OIG that can be fairly characterized as a government investigation or audit (two forms of public disclosure identified in the statute). The courts in Grant and Mathews were able to find that the voluntary disclosures constituted public disclosures because they led to subsequent questioning by Government officials before a whistleblower suit was filed. Another court faced with a voluntary disclosure, such as a letter to the OIG, without a subsequent inquiry by a Government official prior to the filing of a whistleblower suit, could conclude that the voluntary disclosure was not a public disclosure under the FCA because it had not resulted in a Government investigation or audit.

B. Is the Whistleblower Action “Based Upon” the Public Disclosure?

If there has been a public disclosure, the whistleblower’s action will be dismissed if it is “based upon” that disclosure, unless the whistleblower is an original source. A whistleblower action will be deemed “based upon” a public disclosure if the prior public disclosure sets out either the allegations advanced in the \textit{qui tam} action or all of the essential elements of the whistleblower’s claims. Significantly, a whistleblower action may be barred even if it is only partially based upon a public disclosure. All of the Circuits that have addressed the issue have held that suits based even in part on publicly disclosed information are subject to the public disclosure bar.

A majority of the Circuits that have considered the “based upon” language have interpreted the phrase “based upon” to mean “supported by.” In these Circuits, an action can be “based upon” a public disclosure, even if the whistleblower is completely unaware of the public disclosure. This is not the case, however, in the Fourth

12 HCFA has since changed its name to Centers for Medicare and Medicaid Services (“CMS”).
13 The Court also ruled that the plaintiff’s suit was “based upon public disclosure and the plaintiff did not qualify as an original source.”
17 Mistick, 185 F.3d 376, at 386..
Circuit,\textsuperscript{18} where the “based upon” language of the FCA has been interpreted to bar a \textit{qui tam} suit only where the allegations upon which the suit is based are actually derived from the disclosure.\textsuperscript{19}

Thus, a court will determine whether a whistleblower suit is “based upon” a prior public disclosure by comparing the whistleblower’s claim to the allegations or transactions disclosed and assessing their similarity. If any part of the whistleblower’s claim is substantially similar to or derived from the prior public disclosure, the case will be dismissed absent a finding that the plaintiff is an original source. In most cases, then, a voluntary disclosure pursuant to the OIG protocol is likely to bar a subsequent whistleblower suit that is substantially similar to or derived at least in part from the voluntary disclosure, unless the whistleblower qualifies as an “original source.”

C. Is the Relator an Original Source?

The FCA defines an “original source” as “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.”\textsuperscript{20} This is a three-pronged analysis. The whistleblower must show: (1) that his knowledge is “direct and independent” of the information that has been publicly disclosed; (2) that he voluntarily provided the information to the Government; and (3) the information was provided “before filing an action.”\textsuperscript{21} The courts have interpreted the word “direct” to mean firsthand knowledge, gained by the relator’s own efforts and not acquired from the efforts of others,\textsuperscript{22} while “independent knowledge” has been defined as not being dependent on public disclosure.\textsuperscript{23}

More interesting, however, are some judicially imposed requirements for qualification as an original source that are not clearly set forth in the statute. The Second\textsuperscript{24} and Ninth\textsuperscript{25} Circuits have construed the original source requirements of the FCA as requiring that “a plaintiff also must have directly or indirectly been a source to the entity that publicly disclosed the allegations on which the suit is based.”\textsuperscript{26} In other words, to bring a whistleblower suit where a public disclosure has already occurred, the plaintiff “must have had a hand in the public disclosure of allegations that are a part of one’s suit.”\textsuperscript{27} This position is designed to narrow the scope of the original source exception to protect only “true” whistleblowers. In \textit{Wang v. FMC Corp.}, the court reasoned:

If . . . someone republishes an allegation that already has been publicly disclosed, he cannot bring a qui tam suit even if he has ‘direct and independent knowledge’ of the fraud. He is no whistleblower. A ‘whistleblower’ sounds the alarm; he does not echo it. The Act rewards those brave enough to speak in the face of a ‘conspiracy of silence’ and not their mimics.\textsuperscript{28}

A slightly different but no less judicially imposed requirement is reflected in the decisions of the D.C. Circuit and the Sixth

\textsuperscript{18}Maryland, Virginia, North Carolina, South Carolina, and West Virginia.


\textsuperscript{22}United States \textit{ex rel.} Fine v. Advanced Sciences, Inc., 99 F.3d 1000, 1007 (10\textsuperscript{th} Cir. 1996).


\textsuperscript{24}The Second Circuit includes the States of Connecticut, New York, and Vermont.

\textsuperscript{25}The Ninth Circuit includes the States of Alaska, California, Guam, Hawaii, Idaho, Montana, Nevada, Northern Mariana Islands, Oregon, and Washington.

\textsuperscript{26}United States \textit{ex rel.} Dick v. Long Island Lighting Co., 912 F.2d 13, 16 (2\textsuperscript{nd} Cir. 1990).

\textsuperscript{27}Wang, 975 F.2d 1412, 1418 (9\textsuperscript{th} Cir. 1992).

\textsuperscript{28}Id. at 1419, citing S. Rep. No. 345, 99\textsuperscript{th} Cong., 2\textsuperscript{nd} Sess. at 6, (reprinted in 1986 USCCAN 5271).
Circuit. 29 These Circuits do not require that the plaintiff be the source of the original public disclosure; instead, they require the plaintiff to inform the Government of the allegations before the public disclosure occurs in order to qualify as an original source. 30 For example, a newspaper story about an alleged government contracting fraud would not preclude a subsequent suit by a whistleblower who had disclosed the fraud to the Government prior to the publication of the newspaper article. While these Circuits also seek to protect only true whistleblowers, they believe it is unnecessary to require that the whistleblower be responsible for the public disclosure, so long as the whistleblower provides the information to the Government prior to any disclosure. 31  

A third approach is taken by the Third, 32 Fourth, 33 Tenth, 34 and Eleventh 35 Circuits, which read the FCA more literally and require only that the plaintiff have direct knowledge of the fraud independent of any public disclosure. These Circuits have ruled that a whistleblower plaintiff need not have been a source of the public disclosure or have provided his information to the Government before the public disclosure. 36  

Conclusion  

Given the splits in the interpretation of the FCA by the Circuit Courts, a provider considering whether to make a voluntary disclosure to the OIG will want to consider the case law in the Circuit where it is located. A provider located in the Second or Ninth Circuits can make a voluntary disclosure with confidence that it will bar most subsequent whistleblower suits (except those brought by persons directly involved in making the disclosure). Similarly, a provider located in the D.C. Circuit or the Sixth Circuit can be reasonably confident that its voluntary disclosure will also cut off subsequent whistleblower suits related to the same matter. On the other hand, a provider located in the Third, Fourth, Tenth, or Eleventh Circuits has far less confidence that any voluntary disclosure to the OIG will protect it from subsequent whistleblower suits under the FCA. For those disclosing providers fortunate enough to be located in a favorable Circuit, they will also want to take steps to assure that their voluntary disclosure will be treated as a public disclosure for purposes of the FCA. These steps need to document that the disclosure has triggered a government audit or investigation. By doing so, a disclosing provider can obtain the maximum benefit from the disclosure. The public disclosure bar of the FCA would serve as a significant incentive for voluntary disclosure of improper billing practices if it could be counted on to cut off subsequent whistleblower suits. Unfortunately, however, the wide disparity in Circuit Court interpretations of the bar require a provider to consider geography when deciding whether to make a disclosure. Knowing the distinctions between the circuits is one more complicating twist in the voluntary disclosure decision tree that should not be overlooked.  

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