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The Evolving Public Disclosure Bar in the Seventh Circuit

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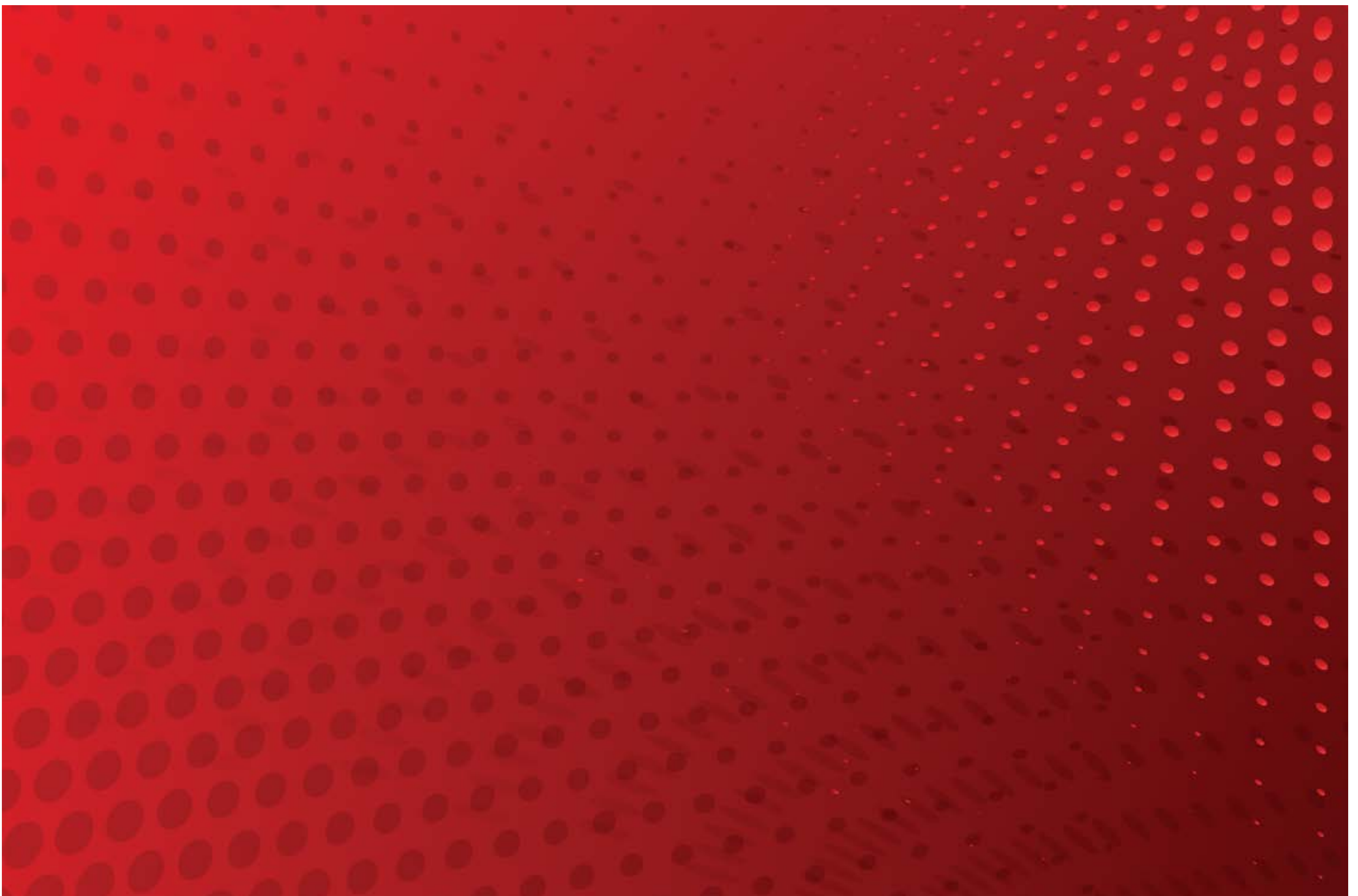

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–From a declaration of the American Bar Association.

The public disclosure bar can be a powerful weapon for defendants facing qui tam lawsuits for alleged violations of the False Claims Act (FCA)—and it is becoming more valuable in the Seventh Circuit after the court's recent decision in *Bellevue v. Universal Health Services of Hartgrove, Inc.*, 867 F.3d 712 (7th Cir. 2017) and other cases. In *Bellevue*, the Seventh Circuit applied the public disclosure bar to dismiss a relator's FCA claims when the relator alleged substantially similar conduct to that which was subject to prior government audits. In doing so, the court rejected the argument that the conduct subject to the FCA claims was *not* substantially similar to the publicly disclosed conduct because it involved a time period after the public disclosure. Instead, the court found that the conduct constituted a "continuing practice" from the publicly disclosed information. This briefing explores the evolving contours of the public disclosure bar in light of the Seventh Circuit's decision in *Bellevue* and other recent cases.

The Public Disclosure Bar

A little background on the public disclosure bar is useful. Under the FCA, the public disclosure bar prevents a relator from bringing a qui tam lawsuit if substantially same allegations or transactions were publicly disclosed in a congressional, Government Accountability Office, or other federal report, hearing, audit, or investigation.[1] The only exception to that rule is if the relator is an "original source" of the information.[2] An "original source" is someone 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 [qui tam] action."[3] From a policy perspective, the public disclosure bar prevents "parasitic lawsuits" by "opportunistic" relators (and their lawyers) who have no significant information of their own to contribute.[4]

[1] 31 U.S.C. § 3730(e)(4).
[2] *Id.*
[3] *Id.*
[4] *See Graham Cnty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 559 U.S. 280, 283 (2010).

The public disclosure bar generally follows a three-part test.[5] First, courts examine whether the relator's allegations have been "publicly disclosed," which generally means the critical elements exposing the transaction as fraudulent have been placed in the public domain.[6] Notably, there is a circuit split as to the publicly disclosed requirement—with the Seventh Circuit being at the forefront of the issue. Specifically, in *Cause of Action v. Chicago Transit Authority*, the Seventh Circuit explained the differences in circuit precedent:

> [W]e have embraced the proposition that because "the purpose of a public disclosure is to alert the responsible authority that fraud may be afoot," the Government's possession of the information exposing a fraud is alone sufficient to trigger the public-disclosure bar. Building on this rationale, we held in *Feingold* that administrative reports containing the critical elements of fraud, when generated by the responsible authority itself, "are publicly disclosed because, by their very nature, they establish the relevant agency's awareness of the information in those reports."
>
> Some of our sister circuits have criticized our reading of this term. In their view, "a public disclosure requires that there be some act of disclosure to the public outside of the government." These courts rely primarily on the text of §3730(e)(4)(A). A disclosure, they explain, requires both "an affirmative act" and a "recipient...to whom the information is revealed." That recipient, they maintain, is the public. And because "the Government is not the equivalent of the public," the phrase must be read to mean that "only disclosures made to the public at large or to the public domain ha[ve] jurisdictional significance." Otherwise, "[i]f

[5] *Bellevue*, 867 F.3d at 718.
[6] *Id.*

> providing information to the government were enough to trigger the bar, the phrase 'public disclosure' would be superfluous."
>
> Our sister circuits also emphasize the congressional intent behind replacing the broad Government-knowledge bar with the more precise public-disclosure bar. "As a result of that change, the inquiry shifted from whether the relevant information was known to the government to whether that information was publicly disclosed in one of the channels specified by the statute." Thus, to credit the Government's internal knowledge alone as sufficient to withdraw jurisdiction, as our case law permits, is to "essentially reinstate a jurisdictional bar Congress expressly eliminated." Moreover, according to these courts, requiring outward disclosure helps to strike the balance sought by Congress between encouraging private citizens with first-hand knowledge to step forward while discouraging opportunistic plaintiffs from capitalizing on public information generated by others. Finally, several courts have noted that our "interpretation is also contrary to another legislative purpose reflected in the 1986 amendments: it was the Congressional intent, through the requirement of public disclosure, to help keep the government honest in its investigations and settlements with industry. Once allegations are made public, the government can be forced to act by public pressure."[7]

Thus, under Seventh Circuit precedent, the government's knowledge of the alleged fraudulent conduct is sufficient to meet the "publicly disclosed" requirement, whereas in other circuits, the disclosure must be made to the public at large. Nevertheless, the

[7] *Cause of Action v. Chi. Transit Auth.*, 815 F.3d 267, 276-277 (7th Cir. 2016) (citations and parenthesis omitted).

Seventh Circuit left open the possibility of reconsidering its position in the future when it stated in *Cause of Action* that there "is significant force in the position of the other circuits."[8] Although the relator sought review by the U.S. Supreme Court, the Court denied *certiorari*.[9] This is an extremely important issue for health care defendants who face qui tam actions due to extensive government oversight through audits and other enforcement mechanisms that may raise potential issues but not otherwise disclose that information to the public.

Second, if the conduct has been publicly disclosed, courts look at whether the relator's claims are "substantially similar" to the publicly disclosed allegations. There is no bright line test for this element and generally each case is fact-specific. However, as the Seventh Circuit has explained, courts look to numerous factors including "whether relators present genuinely new and material information beyond what has been publicly disclosed; whether relators allege a different kind of deceit; whether relators' allegations require independent investigation and analysis to reveal any fraudulent behavior; whether relators' allegations involve an entirely different time period than the publicly disclosed allegations; and whether relators supplied vital facts not in the public domain."[10]

Third, if the conduct was publicly disclosed and the relator's claims are substantially similar to that disclosed conduct, courts look at whether the relator is an "original source."[11] Again, the statute defines "original source" as someone who has knowledge that is independent of, and materially adds to, the publicly disclosed conduct and that person has voluntarily provided the information to the government before filing suit.[12] Here, too, there is no bright line test and courts have looked at each case independently.[13] However, as the Third Circuit recently explained, to "'materially add' to

[8] *Id.* at 277 (declining to address the circuit split and revise its own precedent because multiple disclosures were at issue in the case, including one that was indisputably to the public at large).
[9] 137 S. Ct. 2015, 2016 U.S. LEXIS 5173.
[10] *Bellevue*, 867 F.3d at 719 (internal quotations omitted) (citing *Cause of Action*, 815 F.3d at 281 (collecting cases)).
[11] *Id.* at 720.
[12] *Id.*
[13] *See, e.g., United States ex rel. Moore & Co., P.A. v. Majestic Blue Fisheries, LLC*, 812 F.3d 294 (3d Cir. 2016); *United States ex rel. Bogina v. Medline Industries, Inc.*, 809 F.3d 365 (7th Cir. 2016); *U.S. ex*

the publicly disclosed conduct, a relator must contribute significant additional information to that which has been publicly disclosed so as to improve its quality."[14]

Bellevue v. Universal Health Services of Hartgrove

In *Bellevue*, the public disclosure bar again came before the Seventh Circuit. In that case, the defendant Universal Health Services of Hartgrove (Hartgrove) was a psychiatric hospital that primarily served children with mental illnesses.[15] As a Medicaid provider enrolled in the Illinois Medicaid program, Hartgrove signed a provider enrollment application and provider agreement certifying that it complied with all applicable laws and to the truthfulness and accuracy of the claims it submitted.[16] Hartgrove's license permits it to maintain 150 beds for inpatient treatment of acute mental illness, but it actually maintains 152 beds.[17] Moreover, due to a high demand for services, Hartgrove placed newly admitted patients in a large room normally used for group therapy where the patients slept on rollout beds until an actual room became available.[18] Hartgrove allegedly billed the Medicaid program for inpatient services, including for patients who occupied the temporary beds.[19] The relator, George Bellevue, was a nursing counselor at Hartgrove from October 2009 to October 2014.[20] In his qui tam complaint, Bellevue alleged that Hartgrove knowingly submitted fraudulent claims to the government by admitting patients in excess of the 150-bed capacity and certifying, either explicitly or implicitly, that it complied with all licensing requirements.[21] Bellevue disclosed this information to the government prior to filing suit, and during the pendency of the qui tam action, the government declined to intervene.

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rel. Winkelman v. CVS Caremark Corp., 827 F.3d 201 (1st Cir. 2016); *U.S. ex rel. Hastings v. Wells Fargo Bank, NA, Inc.*, 656 Fed. App'x 328 (9th Cir. 2016).

[14] *U.S. ex rel. Moore & Co., P.A. v. Majestic Blue Fisheries, LLC*, 812 F.3d 294, 306 (3d Cir. 2016).

[15] *Bellevue*, 867 F.3d at 715.

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Id.*

Hartgrove moved to dismiss the complaint based upon, among other reasons, the public disclosure bar. Hartgrove relied upon a March 23, 2009 letter from the Illinois Department of Public Health (IDPH) and a May 5, 2009 letter from the U.S. Centers for Medicare & Medicaid Services (CMS) that contained findings from two IDPH audits conducted in March 2009.[22] Those audit results showed that Hartgrove exceeded its census limit of 150 beds on at least 52 separate occasions between December 3, 2008 and February 28, 2009—or almost 60% of the time.[23] Bellevue's allegations of alleged fraudulent conduct covered the time *before* and *after* the audit reports, which the district court relied upon to hold that the public disclosure bar did not prevent the claims as to post-audit conduct.[24]

In reversing, the Seventh Circuit held that the public disclosure bar applied to both periods and rejected the argument that the post-audit report conduct was not "substantially similar" to the publicly disclosed conduct.[25] In doing so, the court pointed to the fact that Bellevue's allegations pertained to the same entity and describe the same contested conduct as described in the audit reports—in other words, a "continuing practice" like the conduct alleged in *Cause of Action*.[26] The court compared the "continuing practice" by Hartgrove to situations that, in addition to later time periods, included other factors such as involving separate departments within the same entity.[27] Applying that same reasoning, the court rejected the argument that Bellevue was an original source because he did not materially add to the publicly disclosed allegations. According to the court, "because the plaintiff's allegations were 'substantially similar to' the publicly disclosed allegations, the plaintiff did not 'materially add' to the public disclosure and could not be an original source."[28]

Although *Bellevue* does not signify a seismic shift in FCA jurisprudence, it does solidify the "continuing practice" concept first articulated by the Seventh Circuit in *Cause of Action*. Specifically, if a defendant continues to perform allegedly fraudulent conduct

[22] *Id.* at n. 1.
[23] *Id.*
[24] *Id.* at 720.
[25] *Id.*
[26] *Id.*
[27] *Id.* (citing *Leveski v. ITT Educ. Servs., Inc.*, 719 F.3d 818, 829-833 (7th Cir. 2013)).
[28] *Id.* at 721.

after substantially similar conduct is publicly disclosed, the public disclosure bar may apply. However, if there are other facts that demonstrate the post-disclosure conduct is not part of a "continuing practice," such as it involves other departments or subsidiaries, then the public disclosure bar may not apply. Notably, in seeking certiorari in *Cause of Action*, the relator argued to the U.S. Supreme Court that this "continuing practice" concept created a circuit split between the Seventh Circuit, among others, and the Ninth Circuit:

> In *Bly-Magee*, the Ninth Circuit held that even if examples of an ongoing fraud have been publicly disclosed, that does not bar a relator from bringing suit alleging false claims presented to the United States after the disclosure. The *Bly-Magee* relator alleged a continuing practice of fraud by California state agencies and officials from the early 1990s through 2000. Defendants moved to dismiss based on a California state audit report which discussed the state's practices "until June 30, 1999." The district court agreed and dismissed the suit in its entirety. The Ninth Circuit affirmed in part, and held that the audit report disclosed claims "relating to events occurring on or before June 30, 1999." However, as to alleged false claims that occurred after that date, the court held that there had been no public disclosure. It therefore "reverse[d] the dismissal of those portions of the complaint alleging the making of false claims after June 30, 1999."
>
> This case and *Bly-Magee* are factually similar. In both cases, a court held that a state audit report publicly disclosed past false claims. In the Ninth Circuit, however, the public disclosure bar has only the same time period as the conduct revealed in the disclosure itself. In the Seventh Circuit, the bar extends forward in perpetuity as long as later false

claims are part of the same “continuing practice.” The Circuit split is unmistakable.[29]

However, as indicated above, the U.S. Supreme Court denied certiorari in *Cause of Action* and, consequently, declined to address this alleged “continuing practice” circuit split.[30] Thus, we can expect that in future cases defendants will push this “continuing practice” argument to attempt to obtain dismissal of qui tam actions.

Conclusion

The Seventh Circuit has been very active in FCA case law. *Bellevue* is that court’s most recent endeavor into this realm and it re-affirmed the concept of a “continuing practice” in connection with the public disclosure bar. Although future cases will depend on the facts, this “continuing practice” argument can be yet another powerful weapon for defendants who face qui tam lawsuits involving conduct that may be subject to a prior public disclosure.

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[29] 2016 U.S. S. Ct. Briefs LEXIS 2783, at *39-40.
[30] 137 S. Ct. 2015, 2016 U.S. LEXIS 5173.