VOLUME 22 FALL 2016

ILLINOIS BUSINESS LAW JOURNAL

DISCLOSURE DILEMMA: IS DISCLOSURE TO THE GOVERNMENT ENOUGH TO INVOKE THE FALSE CLAIMS ACT'S PUBLIC DISCLOSURE BAR?

❖ NOTE ❖

*Daniel N. Naydenov**

Abstract

The federal government has a significant financial interest in the $3 trillion dollar health care industry. Due to limited administrative resources, the government's biggest allies in the fight against health care fraud are individual whistleblowers who are able to file lawsuits under the False Claims Act's qui tam provisions and share in the recovery. The Act contains a public disclosure bar to prevent parasitic suits by opportunistic whistleblowers. This Note analyzes two contrasting decisions from the Sixth and Seventh Circuits interpreting who qualifies as the "public." In both cases, the court was asked to determine whether a health care provider's self-disclosure of misconduct to the federal government was sufficiently public to bar future suits. Ultimately, this Note argues that the Seventh Circuit's interpretation is more persuasive and closer to striking the proper balance between incentivizing whistleblowers and inhibiting opportunism.

TABLE OF CONTENTS

*J.D. Candidate, Class of 2017, Vanderbilt University Law School.

I. INTRODUCTION

The economic impact of the health care industry is immense. In 2014, the United States spent $3 trillion on health care.[1] What makes the industry even more distinctive, however, is that the states and federal government pay for a considerable portion of consumer costs.[2] Naturally, the federal government's direct financial interest in the $3 trillion industry has led to substantial legislation, regulation, and monitoring of the health care industry and the actors in it.[3] One major source of economic loss is health care fraud.[4] The Department of Justice ("DOJ") estimates that costs to the United States due to health care fraud may total $100 billion a year.[5]

Despite the DOJ's concern that "health care fraud schemes continue to grow in complexity and seriousness," the government's efforts have been fruitful.[6] For the 2014 fiscal year, the DOJ obtained a record $5.69 billion in settlements and judgments from civil cases involving fraud and false claims against the government.[7] Of that amount, $2.3 billion involved false claims against federal health care programs, including Medicare and Medicaid.[8] Since the founding of the interagency Health Care Fraud Prevention and Enforcement Action Team,[9] the government has recovered $14.5 billion in

---

[1] *See Health Expenditures*, CTRS. FOR DISEASE CONTROL (Oct. 7, 2016), http://www.cdc.gov/nchs/fastats/health-expenditures.htm.
[2] *See* Carolyn V. Metnick, *The Jurisdictional Bar Provision: Who Is an Appropriate Relator?*, 17 ANNALS HEALTH L. 101, 101 (2008) (describing the health care industry and the U.S. Department of Health and Human Services' increasing operating budget).
[3] *See* False Claims Act, 31 U.S.C. §§ 3729-3733 (2000).
[4] *See* Metnick, *supra* note 2.
[5] *Health Care Fraud Unit*, U.S. DEP'T OF JUST. (Feb. 3, 2017), http://www.justice.gov/criminal-fraud/health-care-fraud-unit.
[6] *Id.*
[7] *See Justice Department Recovers Nearly $6 Billion from False Claims Act Cases in Fiscal Year 2014*, Press Release, Office of Pub. Affairs, U.S. DEP'T OF JUST. (Nov. 20, 2014), http://www.justice.gov/opa/pr/justice-department-recovers-nearly-6-billion-false-claims-act-cases-fiscal-year-2014 ("The pharmaceutical industry accounted for a substantial part of the $2.3 billion in health care fraud recoveries for the 2014 fiscal year. Global health care giant Johnson & Johnson . . . paid $1.1 billion to resolve False Claims Act claims.").
[8] *Id.*
[9] In 2009, Attorney General Eric Holder and Health and Human Services Secretary Kathleen Sebelius announced the creation of the interagency task force. *See supra* note 7.

federal health care dollars through the False Claims Act.[10] Due to limited administrative resources, the government's biggest allies in the fight against health care fraud are individual whistleblowers who are able to file suits under the False Claims Act's *qui tam* provisions.[11]

One of the most stringent restrictions on *qui tam* whistleblowers is the public disclosure bar[12] enacted as part of the 1986 amendments.[13] Congress amended the public disclosure bar in 2010 but left open the issue of how to treat self-disclosure of misconduct to the federal government.[14] Along with Congress, the Supreme Court has not taken up this latter question. Recently, the Sixth Circuit tackled this issue and sided with the view held by a dominant majority of circuit courts.[15] Although the Seventh Circuit currently stands on an island,[16] this Note argues that its interpretation is more persuasive and closer to striking the proper balance between incentivizing whistleblowers and inhibiting opportunism.

This Note proceeds in four Parts: Part I provides a background of the False Claims Act and the recent Sixth Circuit decision; Part II analyzes the reasoning of the Sixth Circuit, compares it with the interpretation adopted by the Seventh Circuit, and observes some implications of the 2010 amendments to the public disclosure bar; Part III recommends that the Seventh Circuit's minority view should be adopted as the better approach; Part IV concludes and observes how the decisions will impact health care providers and other businesses.

---

[10] *Id.*

[11] "Recoveries in *qui tam* cases during fiscal year 2014 totaled nearly $3 billion, with whistleblowers receiving $435 million." *See supra* note 7 (observing that most false claims actions are filed by whistleblowers, with *qui tam* filings exceeding 700 for 2014).

[12] The public disclosure bar before 2010 provided:

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or 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.

31 U.S.C. § 3730(e)(4)(A) (2000).

[13] *Id.*; *see* Chris S. Stewart, *Resourceful Relators: The Rise of Qui Tam Suits Under the False Claims Act Based on Information Obtained in Civil Litigation*, 89 TEX. L. REV. 169, 175 (2011) (observing that the public disclosure bar has posed the greatest deterrent to relators in FCA suits).

[14] *See infra* note 37.

[15] *See infra* Part II.A.

[16] *See infra* Part III.

II. BACKGROUND

A. The False Claims Act

The False Claims Act ("FCA") originally dates back to 1863, enacted during the Civil War to combat fraud and extortion in war procurement contracts.[17] In its modern version, the FCA creates liability for "any person who knowingly submits a false money claim to the government; uses a false statement to induce the government to pay a false claim; conspires to defraud the government into paying a false claim, or uses a false statement to reduce an obligation to pay money to the government."[18] Violators face the possibility of criminal liability and harsh monetary penalties—with fines ranging from $5,500 to $11,000 per false claim, along with treble the amount of any damages that the government proves it actually sustained.[19]

Even in its original form, the FCA contained *qui tam* provisions, allowing private citizens, eventually dubbed "relators" or "whistleblowers," to bring suit on behalf of the federal government and share in the monetary recovery.[20] The *qui tam* provisions were designed to create an incentive for whistleblowers to assist government enforcement of the FCA.[21] Congress occasionally amends these provisions to achieve "the golden mean between adequate incentives for whistle-blowing insiders with genuinely valuable information and discouragement of opportunistic [parasitic] plaintiffs who

---

[17] *See* United States *ex rel.* Springfield Terminal Ry. Co. v. Quinn, 14 F.3d 645, 649 (D.C. Cir. 1994) (recounting the legislative history of the False Claims Act to its 1986 version).

[18] Violations of the Federal Anti-Kickback Statute, 42 U.S.C. § 1320a-7b(g) (2012), and Stark Law, 42 U.S.C. § 1395nn, often form the basis of FCA suits. United States *ex rel.* Drakeford v. Tuomey, 792 F.3d 364 (4th Cir. 2015) (upholding a judgment of more than $237 million against a health care provider for entering into improper compensation arrangements with physicians in violations of the Stark Law—resulting in submission of over 21,000 false claims to Medicare); *see* United States *ex rel.* Hutcheson v. Blackstone Med., Inc., 647 F.3d 377 (1st Cir. 2011) (reversing dismissal of a relator's FCA suit which premised a health care provider's liability on its false certification of compliance with the federal Anti-Kickback statute). *See* David Freeman Engstrom, *Private Enforcement's Pathways: Lessons from Qui Tam Litigation*, 114 COLUM. L. REV. 1913, 1943 (2014).

[19] *The False Claims Act: A Primer*, U.S. DEP'T OF JUST. (Apr. 22, 2011), http://www.justice.gov/civil/docs_forms/C-FRAUDS_FCA_Primer.pdf (explaining that civil penalty amounts are adjusted from time to time and currently stand at $5,500 to $11,000).

[20] *Id.*

[21] *Id.*; *see also* Kamal Al-Salihi, *Keeping It Simple: Finding Falsity Under the False Claims Act*, 36 WHITTIER L. REV. 431 (2015) ("The government's ever increasing reliance on private contractors, in conjunction with the general expansion of the administrative state, exposes numerous contracting relationships to potential False Claims Act (FCA) liability.").

have no significant information to contribute of their own."[22] The 1986 amendments incorporated several new rights and benefits, but also significant restrictions, for relators.[23] New benefits for relators included a higher ceiling reward of up to thirty percent of the recovery, or up to twenty percent if the government takes over the suit.[24] New restrictions require relators to provide a complaint and all material evidence to the government prior to filing suit—[25]the government then has sixty days to review and investigate the case to decide whether it would wish to intervene.[26] Furthermore, those who are not the first person to file a suit based on the facts of the underlying pending action are barred from proceeding.[27]

Congress also included a public disclosure bar as part of the 1986 amendments.[28] However, Congress placed an exception to the bar if the relator satisfies the statutory criteria as an "original source" of the information. [29] This latter exception served to remedy a frequent deterrent to relators—dismissal of suits brought on the basis of knowledge already known to the government.[30] Yet, as one court observed, the public disclosure bar's language has led to extensive litigation and confusion as to "which cases

---

[22] United States *ex rel.* Springfield Terminal Ry. Co. v. Quinn, 14 F.3d 645, 649 (D.C. Cir. 1994); *see* Engstrom, *supra* note 18, at 1951 (collecting data and rejecting the widespread notion that "qui tam litigation is in the midst of an inefficient 'explosion' of enforcement effort.").

[23] *See* J. Morgan Phelps, *The False Claims Act's Public Disclosure Bar: Defining the Line Between Parasitic and Beneficial*, 49 CATH. U. L. REV. 247, 256 (1999).

[24] *Id.* In fiscal year 2014, *qui tam* relators received $435 million in rewards for filing false claims actions. *See supra* note 7.

[25] *See* Phelps, *supra* note 23 (outlining requirements relators must meet in order to bring a suit).

[26] 31 U.S.C. § 3730(b)(4) (2000). As a practical matter, the government often receives an extension to investigate and decide whether to intervene or pursue the action through an administrative vehicle. *See* Stewart, *supra* note 13, at 171.

[27] 31 U.S.C. § 3730(b)(5) (2012).

[28] *See supra* note 13.

[29] The pre-2010 Act 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." 31 U.S.C. § 3730(e)(4) (2000).

[30] *See* Stewart, *supra* note 14, at 184 (discussing the defects of the 1943 amendments and criticizing a Seventh Circuit decision in which a *qui tam* plaintiff was denied relief after reporting a fraud to the government, as required by the 1943 amendments, because "its own disclosure put enough information in the federal government's hands to trigger the jurisdictional bar").

Congress intended to bar."[31] Partly in response to this judicial confusion, in 2010 Congress amended the public disclosure bar as part of its bill on health care reform.[32] Courts and commentators have noted that the 2010 Amendments[33] "made significant headway in further increasing the availability of qui tam relief."[34] Expanding incentives for relators to assist the government in detecting and reporting health care fraud was seemingly a natural result of the national recession "that ballooned the ranks of the uninsured" and amidst "reports of rampant health care frauds that were robbing millions of dollars from federal health programs."[35] Although the

[31] *See* United States *ex rel.* Findley v. FPC-Boron Employees' Club, 105 F.3d 675, 681 (D.C. Cir. 1997) ("Predictably, these jurisdictional provisions too have led to extensive litigation and to circuit splits concerning the meaning of the words 'based upon,' 'public disclosure,' 'allegations or transactions,' 'original source,' 'direct and independent knowledge' and 'information.' ").

[32] *See* the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

[33] The public disclosure bar currently reads:

> (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;
> (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.

31 U.S.C. § 3730 (2010).

[34] *See* United States *ex rel.* May v. Purdue Pharma L.P., 737 F.3d 908, 917 (4th Cir. 2013) *cert. denied*, 135 S. Ct. 2376 (2015) ("The 2010 amendments thus substantially narrowed the class of disclosures that can trigger the public-disclosure bar."); Beverly Cohen, *Kaboom! The Explosion of Qui Tam False Claims Under the Health Reform Law*, 116 PENN ST. L. REV. 77, 77–78 (2011) (observing that the amendments have "enormously broadened the ability of relators to commence quit tam lawsuits" by increasing the sources of public information relators may utilize and eliminating the stringent "direct knowledge" requirement to qualify as an "original source."); Stewart, *supra* note 14, at 178 ("[T]he 2010 FCA amendments made significant headway in further increasing the availability of *qui tam* relief, especially for suits based on information obtained in civil litigation.").

[35] Cohen, *supra* note 32, at 77.

2010 Amendments clarified the law on a variety of circuit splits,[36] they raised new issues of interpretation and left important questions unresolved.[37]

Despite the *qui tam* provisions, cooperation and voluntary disclosure of misconduct by health care providers is crucial in assisting the government and sparing its resources. The Office of the Inspector General of the Department of Health and Human Services has implemented a Provider Self-Disclosure Protocol—incentivizing voluntary disclosures by lowering damages multiples, favoring against permissive exclusion from federal healthcare programs, and granting a presumption against mandatory Corporate Integrity Agreements.[38] On the criminal side, "the DOJ has increasingly entered into deferred prosecution agreements and nonprosecution agreements with corporate defendants" in exchange for provider implementation of compliance and rehabilitation programs.[39] Strict self-disclosure requirements[40] and a high likelihood that some payment will have to be made to the government has driven most health care providers to opt against voluntary disclosure.[41] Even more, providers can face substantial FCA liability despite voluntary disclosure and monetary reimbursement.[42]

---

[36] *See, e.g.*, Leveski v. ITT Educ. Servs., Inc., 719 F.3d 818, 829 n.1 (7th Cir. 2013) ("The current version of 31 U.S.C. § 3730(e)(4), which went into effect on March 23, 2010, expressly incorporates the 'substantially similar' standard previously used by our circuit and most other circuits under the prior version of the statute.").

[37] Courts have gone through rigorous statutory interpretation and split on the issue of whether the new version of the FCA's public disclosure bar continues to be jurisdictional or presents grounds for dismissal for failure to state a claim. *Compare* United States *ex rel.* Osheroff v. Humana Inc., 776 F.3d 805, 810 (11th Cir. 2015) ("We conclude that the amended § 3730(e)(4) creates grounds for dismissal for failure to state a claim rather than for lack of jurisdiction."); United States *ex rel.* May v. Purdue Pharma L.P., 737 F.3d 908, 916 (4th Cir. 2013) ("In our view, these changes make it clear that the public-disclosure bar is no longer a jurisdiction-removing provision."); *with* United States *ex rel.* Beauchamp v. Academi Training Ctr., Inc., 933 F. Supp. 2d 825, 839 (E.D. Va. 2013) ("The relators argue that the FCA's public disclosure bar has been rendered non-jurisdictional by the 2010 amendment because Congress has not made clear that the public disclosure bar is jurisdictional. This argument fails.").

[38] *See* David Farber, *Agency Costs and the False Claims Act*, 83 FORDHAM L. REV. 219, 232 (2014).

[39] *Id.* at 236.

[40] *See* 31 U.S.C. § 3729(a)(2) (2012) (allowing the court to reduce damages only if a disclosure is made within 30 days of discovering the misconduct).

[41] *See* Faber, *supra* note 36, at 244 ("[T]he best advice for the least visible offenders must continue to be 'when in doubt—wait it out.' ").

[42] *See* United States v. Chattanooga-Hamilton Cty. Hosp. Auth., 782 F.3d 260, 263 (6th Cir.) *cert. denied sub nom.* Chattanooga-Hamilton Cty. Hosp. Auth. v. United States *ex rel.* Whipple, 136 S. Ct. 218 (2015).

B. The Sixth Circuit Decision

The U.S. Court of Appeals for the Sixth Circuit decided *United States v. Chattanooga-Hamilton Cty. Hosp. Auth.* ("*Whipple*") in February 2015.[43] The relator in that case, Robert Whipple, alleged that defendant Chattanooga–Hamilton Hospital Authority[44] ("Erlanger") violated the False Claims Act[45] by knowingly submitting four categories of false or fraudulent claims for reimbursement to federally funded healthcare programs.[46] During a six-month period in early 2006, Whipple worked at Erlanger as a Revenue Cycle Consultant on assignment from ACS Healthcare Solutions,[47] and ultimately as Erlanger's Interim Director of Care Management.[48] Whipple testified that during his brief tenure at Erlanger, he identified the alleged fraud by analyzing past billing data, reviewing patient records, and observing operations in each of the revenue cycle departments.[49] Furthermore, Whipple claimed direct knowledge of the fraudulent practices through his supervision of patient admissions, planning discharges, and reviewing the submission of claims for payment.[50] In October 2010, Whipple disclosed his *qui tam* claims to the United States.[51] His complaint was filed under seal in March 2011 and the government declined to intervene.[52]

---

[43] *See generally id.*
[44] D/b/a Erlanger Medical Center and Erlanger Health System. *Id.* at 262.
[45] Whipple also alleged that Erlanger violated Tennessee, North Carolina, and Georgia statutes—these claims were dismissed by the district court under each state's parallel public disclosure bar and not raised on appeal. *Id.* at 262 n.1.
[46] The healthcare programs at issue included Medicare, Medicaid, and Tricare/Champus. *Id.* at 262.
[47] ACS was retained by Erlanger consequent to an unrelated investigation in late 2005, which resulted in Erlanger agreeing to pay $40 million to the Department of Health and Human Services and abide by a Corporate Integrity Agreement ("CIA"). *Id.* at 268 n.2. CIAs, although costly to healthcare providers by imposing additional compliance reforms and continuous monitoring of compliance efforts, are a common prerequisite to settlement of FCA claims with the government and often entered into by providers due to threat of exclusion from the Medicare and Medicaid programs. *See* Sharon Finegan, *The False Claims Act and Corporate Criminal Liability: Qui Tam Actions, Corporate Integrity Agreements and the Overlap of Criminal and Civil Law*, 111 PENN ST. L. REV. 625, 651 (2007).
[48] United States v. Chattanooga-Hamilton Cty. Hosp. Auth. (*Whipple*), 782 F.3d 260, 263 (6th Cir. 2015).
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] *Id.*

Whipple did not know, however, that an anonymous tip to the government in April 2006 resulted in an extensive administrative audit and investigation into Erlanger's billing practices.[53] The United States Department of Health and Human Services ("HHS"), Office of Inspector General ("OIG"), referred the complaint for review by AdvanceMed Corporation on behalf of the government.[54] Consequently, AdvanceMed identified ninety problematic inpatient claims from the period of July 2005 through May 2006, and in November 2006 requested additional records and information from Erlanger.[55] AdvanceMed's audit identified evidence of upcoding[56] along with four sources of error and possible overpayments—these findings were ultimately communicated directly to the OIG's Office of Investigations through a fraud case referral in July 2007.[57] In February 2008, OIG opened an administrative investigation into whether the behavior identified by AdvanceMed violated criminal law.[58] Thereafter, an OIG's Office of Counsel to the Inspector General ("OCIG") special agent notified Erlanger that it was under OIG review.[59]

Erlanger retained Deloitte Financial Advisory Services, LLP, to perform a broader internal investigation and audit of one-day hospital stays from October 2005 through December 2007.[60] Deloitte's audit found that Erlanger had improperly billed for inpatient and outpatient services.[61] On May 29, 2008, Erlanger presented the results of the audit to the OIG special agent, along with explanations and estimates of the amount of overpayments.[62] In June 2008, after OIG's consultation with the United

---

[53] *Id.*
[54] AdvanceMed is the "Medicare Part A Program Safeguard Contractor for Tennessee hired to perform 'benefit integrity activities aimed to reduce fraud, waste, and abuse in the Medicare program.' " *Id.* at 266.
[55] *Id.*
[56] The term "upcoding" refers to a frequent form of Medicare fraud where a provider bills for "medical services or equipment designated under a code that is more expensive than what a patient actually needed or was provided." *See* United States *ex rel.* Bledsoe v. Cmty. Health Sys., Inc., 501 F.3d 493, 497 n.2 (6th Cir. 2007).
[57] United States v. Chattanooga-Hamilton Cty. Hosp. Auth. (*Whipple*), 782 F.3d 260, 267 (6th Cir. 2015). Additionally, AdvanceMed observed that Erlanger could be in violation of the 2005 CIA. *Id.*
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] *Id.* Erlanger had improperly billed for inpatient services "without a physician order, without a basis for a change in status, or without documentation to support the level of care and for observation services after outpatient same-day surgeries." *Id.*
[62] *Id.*

State Attorney's Office for the Eastern District of Tennessee, both the Civil and Criminal Divisions declined to prosecute Erlanger.[63] OCIG closed its portion of the investigation in February 2009.[64] OIG then referred the investigation to AdvanceMed, ultimately resulting in Erlanger's voluntary refund check of $477,140.42 to the government, after which the investigation was administratively closed.[65]

Erlanger moved to dismiss the complaint on several grounds, including for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1).[66] The U.S. District Court for the Middle District of Tennessee denied the motion without prejudice, but after limited discovery granted Erlanger's motion for partial summary judgment, treating it as a factual attack to subject matter jurisdiction, and dismissed the three categories of FCA claims at issue as jurisdictionally barred.[67]

Whipple appealed, and the Sixth Circuit reversed and remanded the case.[68] The court applied the pre-2010 public disclosure bar,[69] considering: (1) "whether there has been any public disclosure of fraud [through one of the specified channels]" and (2) "whether the allegations in the instant case are 'based upon' the previously disclosed fraud."[70] In elaborating on the second prong, the court stated that a public disclosure is sufficient to reveal fraud if it puts "the government on notice of the likelihood of related fraudulent activity."[71] The court reasoned that although the government's audit and investigation disclosed facts from which fraud could be inferred thus satisfying the second prong, whether there was a public disclosure was a

---

[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] *Id.* As previously noted, the 1986 version of the public disclosure bar is clearly jurisdictional. *See* Rockwell Int'l Corp. v. United States, 549 U.S. 457, 467–70 (2007).
[67] The district found that Whipple did not satisfy the public disclosure exception as an original source under the pre or post-2010 version of the statute, reasoning that the alleged misconduct occurred before Whipple worked at Erlanger and was discovered through secondhand sources. *See* Whipple v. Chattanooga-Hamilton Cty. Hosp. Auth., No. 3-11-0206, 2013 WL 4510801, at *8 (M.D. Tenn. Aug. 26, 2013).
[68] *Whipple*, 782 F.3d at 270.
[69] The public-disclosure bar was amended on March 23, 2010—after Whipple's alleged misconduct but before he filed his complaint. *Id.* at 264 n.3 (citing the Patient Protection and Affordable Care Act (PPACA), Publ. L. 111–148, § 10104(j)(2), 124 Stat. 119, 901–02 (2010)). Whipple did not properly raise the issue of whether the post-2010 amendments applied to his claims, thus waiving it on appeal. *Id.*
[70] *Id.* at 265–66 (citing United States *ex rel.* Poteet v. Medtronic, Inc., 552 F.3d 503, 511 (6th Cir. 2009)).
[71] *Id.* at 266 (citing *Poteet*, 552 F.3d at 512).

separate inquiry.[72] The Sixth Circuit tackled the "public disclosure" inquiry guided by the Supreme Court's cautioning "against interpreting the public disclosure bar in a way inconsistent with a plain reading of its text."[73]

Erlanger urged the Sixth Circuit to adopt the Seventh Circuit's interpretation of the term "public disclosure" in *U.S. ex rel. Mathews v. Bank of Farmington*,[74] to include "the disclosure of an alleged false claim to a competent public official who has managerial responsibility for that very claim."[75] The court explained that "based on one definition of 'public,'" the Seventh Circuit held "a disclosure to the public official responsible for the claim effectuates the purpose of disclosure to the public at large."[76] However, the court observed that all of the other circuits[77] to address the Seventh Circuit's interpretation did not adopt its reasoning, instead requiring "some affirmative act of disclosure to the public outside the government."[78] Specifically, the court characterized the First Circuits' case of *United States ex rel. Rost v. Pfizer, Inc.*,[79] as "the leading case involving disclosure of fraud to the government."[80] In *Rost*, the First Circuit rejected the Seventh Circuit's interpretation and held that "[t]he mere fact that the disclosures are contained in government files someplace, or even that the government is conducting an investigation behind the scenes, does not itself constitute public disclosure."[81]

Not surprisingly, the Sixth Circuit declined to follow *Bank of Farmington*'s interpretation.[82] Citing *Rost*, the court reasoned that if a disclosure to the government in an audit or investigation was by itself sufficient to trigger the public-disclosure bar, "the term 'public' would be superfluous."[83] In addition, equating "government" with "public" would be inconsistent with the other uses of the term "government" in the False

---

[72] *Id.*
[73] *Id.* (citing Schindler Elevator Corp. v. United States *ex rel.* Kirk, 563 U.S. 401, 409 (2011)).
[74] 166 F.3d 853 (7th Cir. 1999), *overruled on other grounds*, Glaser v. Wound Care Consultants, Inc., 570 F.3d 907 (7th Cir. 2009).
[75] *Whipple*, 782 F.3d at 267 (citing United States *ex rel.* Mathews v. Bank of Farmington, 166 F.3d 853, 861 (7th Cir. 1999)).
[76] *Id.* at 267–68.
[77] The court cited cases from the First, Fourth, Ninth, Tenth, and D.C. Circuits. *Id.* at 268.
[78] *Id.*
[79] 507 F.3d 720, 728–30 (1st Cir. 2007).
[80] *Whipple*, 782 F.3d at 268.
[81] *Id.*
[82] *Id.*
[83] *Id.*

Claims Act.[84] In a footnote, the court suggested that its holding was also consistent with Sixth Circuit precedent in the context of Freedom of Information Act documents—requiring both a request and receipt of documents from the government before holding that information has been publicly disclosed.[85] Therefore the court held that Erlanger's disclosure of information through the administrative audit and investigation was not enough to trigger the public disclosure bar.[86]

The Sixth Circuit also rejected Erlanger's alternative argument—that disclosures to either AdvanceMed or Deloitte constituted prior public disclosures outside the government to parties who were "strangers to the fraud."[87] The court observed that the employees deemed "strangers to the fraud" in *Doe* "were under no obligation to keep the information confidential when they learned of the fraud."[88] As to AdvanceMed, the court reasoned that it was at all times acting on behalf of the government and under an obligation to keep any disclosures confidential.[89] Similarly, Deloitte was under some obligation to keep the internal investigation confidential and did not release any information into the public domain.[90]

By ultimately holding that Whipple's allegations were not publicly disclosed, the court did not have to reach the issue of whether Whipple satisfied the original source exception to the public-disclosure bar.[91] The

---

[84] *Id.*

[85] *Id.* at 268 n.8; *see* United States v. A.D. Roe Co., 186 F.3d 717, 723 (6th Cir. 1999) ("It would be extreme to hold that all information for which someone might *potentially* make a FOIA request is 'publicly disclosed.'") (emphasis added).

[86] *Whipple*, 782 F.3d at 269.

[87] *Id.* (finding innocent employees were "strangers to the fraud" (citing United States *ex rel.* Doe v. John Doe Corp., 960 F.2d 318, 323 (2d Cir. 1992))). During execution of a search warrant in *Doe*, a government investigator informed the defendant's employees of fraudulent allegations against the company. *See* United States *ex rel.* Doe v. John Doe Corp., 960 F.2d 318, 323 (2d Cir. 1992).

[88] *Whipple*, 782 F.3d at 269. Other circuits have declined to adopt the *Doe* court's treatment of company employees as members of the public for purposes of the public disclosure bar—sharply criticizing its reasoning and implications. *See* United States *ex rel.* Schumer v. Hughes Aircraft Co., 63 F.3d 1512, 1518 (9th Cir. 1995) *vacated*, 520 U.S. 939 (1997) (vacated on other grounds) ("We decline to adopt the rule of *Doe* for application in this circuit. At one level, the *Doe* court's treatment of company employees as members of the public is unrealistic.").

[89] *Whipple*, 782 F.3d at 269.

[90] *Id.* at 270.

[91] "If both [public disclosure] requirements are satisfied, the relator's suit may nonetheless proceed if he qualifies as an "original source.' " *Id.* at 264.

Sixth Circuit denied a rehearing en banc,[92] and the Supreme Court subsequently denied Erlanger's petition for writ of certiorari.[93]

III. ANALYSIS

A. All Against One

The Sixth Circuit's endorsement of a narrow interpretation of "public disclosure" in *Whipple* aligns it with a dominant majority view held by five other circuit courts.[94] Currently the Seventh Circuit remains as the only circuit court to hold that "disclosure of information to a competent public official [with managerial responsibility for the very claims being made] about an alleged false claim against the government . . . [is a] public disclosure."[95] District courts within the remaining circuits—the Second, Third, Fifth, Eighth and Eleventh—are split on the Seventh Circuit's interpretation.[96] Although the Seventh Circuit has not yet wavered from *Bank of Farmington*, it may capitalize on the opportunity to do so given the weight of authority disagreeing with its interpretation.[97] Quite possibly, the Supreme Court denied review for this reason.

In *Whipple*, the Sixth Circuit's analysis seemed to stay true to the Supreme Court's guidance of interpreting the public disclosure bar consistent with its plain meaning.[98] The court also appeared to follow its Freedom of

---

[92] *See generally id.*
[93] Chattanooga-Hamilton Cty. Hosp. Auth. v. United States ex rel. Whipple, 136 S. Ct. 218 (2015).
[94] United States *ex rel.* Wilson v. Graham Cnty. Soil & Water Conservation Dist., 777 F.3d 691 (4th Cir. Feb. 3, 2015); United States *ex rel.* Oliver v. Philip Morris USA Inc., 763 F.3d 36 (D.C. Cir. 2014); United States *ex rel.* Meyer v. Horizon Health Corp., 565 F.3d 1195 (9th Cir. 2009); United States *ex rel.* Maxwell v. Kerr-McGee Oil & Gas Corp., 540 F.3d 1180 (10th Cir. 2008); *see* United States *ex rel.* Rost v. Pfizer, Inc., 507 F.3d 720 (1st Cir. 2007).
[95] *See* United States v. Bank of Farmington, 166 F.3d 853, 861 (7th Cir. 1999).
[96] *See, e.g.*, United States *ex rel.* Whitten v. Cmty. Health Sys., Inc., 575 F. Supp. 2d 1367, 1381 (S.D. Ga. 2008) (rejecting the Seventh Circuit's interpretation); United States *ex rel.* Cosens v. Yale-New Haven Hosp., 233 F. Supp. 2d 319, 327 (D. Conn. 2002) (applying the Seventh Circuit's holding).
[97] *See* Cause of Action v. Chicago Transit Auth., 815 F.3d 267, 277 (7th Cir.), *cert. denied sub nom.* United States, *ex rel.* Cause of Action v. Chicago Transit Auth., 137 S. Ct. 205, (2016) ("There is significant force in the position of the other circuits . . . . However, we need not address squarely the correctness of Bank of Farmington today . . . .").
[98] United States v. Chattanooga-Hamilton Cty. Hosp. Auth., 782 F.3d 260, 266 (6th Cir. 2015).

Information Act precedent, requiring actual rather potential public disclosures to trigger the bar.[99] Primarily relying on the First Circuit's decision in *Rost*—the court reasoned that the plain meaning of the public disclosure bar required disclosure outside the government.[100] In *Rost*, the First Circuit sided with the United States in rejecting a finding of public disclosure—reasoning that the term "public" had to be given independent meaning, but could not be defined as the "government."[101] In support, the First Circuit looked to Black's Law Dictionary, citing its definition of public as: "1. Relating or belonging to an entire community, state or nation . . . 2. Open or available for all to use, share, or enjoy."[102] The court also noted that although the FCA itself uses the term "government" in other provisions, at no point does the statute equate government with public.[103] As such, if Congress had wished to equate the two terms, "it easily could have done so."[104]

But the Seventh Circuit's decision in *Bank of Farmington*, which the district court relied upon, also claimed to give the term "public disclosure" its plain meaning.[105] The Seventh Circuit went beyond the text and explored the statute's purpose, legislative history,[106] and policy implications to establish a sliding scale for finding a public disclosure.[107] It premised the inquiry on how "open" a disclosure is, and to what public official it is made.[108] The court noted that the 1986 amendments sought "to encourage whistleblowing and disclosure of fraud," but also to resolve the tension between incentivizing disclosure and preventing parasitic lawsuits.[109] To that end, the court

---

[99] *Id.* at 266–67.
[100] *Id.* at 268–69.
[101] United States *ex rel.* Rost v. Pfizer, Inc., 507 F.3d 720, 729 (1st Cir. 2007) ("As the United States, in opposing Pfizer's reading, notes, the ordinary understanding of the term 'public' means 'something apart from the government itself.' ").
[102] *Id.*
[103] *Id.* ("'[O]riginal source' means an individual who . . . has voluntarily provided the information *to the Government*. ") (emphasis in original).
[104] *Id.*
[105] *See* United States v. Bank of Farmington, 166 F.3d 853, 860 (7th Cir. 1999) ("The interpretation of 'public disclosure' adopted there [the Third Circuit] runs contrary to the plain meaning of the words.").
[106] *Id.* (citing Cooper v. Blue Cross & Blue Shield of Fla., Inc., 19 F.3d 562, 565 (11th Cir. 1994).
[107] *Bank of Farmington*, 166 F.3d at 862 n.6 (7th Cir. 1999) ("The degree to which a disclosure is thus open to all or is likely to give notice to a responsible official is in general a factual question for the district court.").
[108] *Id.* at 860–62.
[109] *Id.* at 858.

observed "the point of public disclosure of a false claim against the government is to bring it to the attention of the authorities, not merely to educate and enlighten the public at large about the dangers of misappropriation of their tax money."[110] Accordingly, the court reasoned that a disclosure to a public official with direct responsibility for a health care claim, such as the OIG or the U.S. Attorney's office would effectuate the purpose of the FCA and achieve the intended balance.[111]

The disclosure at issue in *Whipple* was clearly made to several public officials with direct responsibility for the claim—OIG and the U.S. Attorney's Office—eventually reaching an administrative resolution without an FCA lawsuit by the government.[112] Under *Bank of Farmington*, there is little doubt that the disclosure was "public."

As stated in *Poteet*,[113] the "public" inquiry may not even be a separate analysis. Instead, Congress may have considered the statutory list of disclosures as inherently "public."[114] Disclosures through litigation, reports, hearings, and audits can be classified as presumptively public, while news media is public by definition.[115] This argument counteracts *Whipple* and *Rost*'s reasoning that the term "public" would be superfluous if equated with "government."[116] Rather, it can be argued that—by the statute's plain text—Congress was defining disclosures through government investigations as fundamentally "public" in nature. Taking that to its logical conclusion, the real dispute would center on whether there was an actual government "investigation" of the alleged misconduct. This interpretation supports *Bank of Farmington*, since the likelihood of a government investigation would certainly be premised on the information reaching a responsible public official. It also grounds the Seventh Circuit's holding in the statute's plain text.

---

[110] *Id.*

[111] *See id.*

[112] United States v. Chattanooga-Hamilton Cty. Hosp. Auth., 782 F.3d 260, 266-67 (6th Cir. 2015).

[113] United States *ex rel.* Poteet v. Medtronic, Inc., 552 F.3d 503, 511 (6th Cir. 2009) ("To determine whether § 3730(e)(4)(A)'s jurisdictional bar applies, a court must consider first whether there has been any public disclosure of fraud, and second whether the allegations in the instant case are 'based upon' the previously disclosed fraud.").

[114] Jason C. Lynch, Brian T. McLaughlin and Andy Liu, *Recent Developments Under FCA's Public Disclosure Bar: What is 'Public,' Anyway?*, BLOOMBERG BNA FEDERAL CONTRACTS REPORT Vol. 103, No. 13 (Apr. 7, 2015), *available at* https://www.crowell.com/files/Recent-Developments-Under-FCAs-Public-Disclosure-Bar-What-is-Public-Anyway.pdf.

[115] *Id.*

[116] *Whipple*, 782 F.3d at 268.

Another permutation of the issue raised by *Whipple* is whether disclosure from one government employee to another is "public." Courts have predominantly held that it is not.[117] Similarly, as the Sixth Circuit reasoned, disclosures made to a private company hired to perform services on behalf of the government are not made to an "outsider" to the investigation since the company has a strong incentive to keep the information confidential.[118] In *Whipple*, AdvanceMed was clearly acting on behalf of the government and the court was correct to hold that any disclosures were not "public."

The analysis with respect to Deloitte is a little more complicated. The Sixth Circuit seemed to embrace *Doe* – treating the Deloitte auditors as employees of Erlanger who are "members of the public" and to whom a "public disclosure" could have been made.[119] Other circuits have failed to embrace *Doe*'s holding, reasoning that it runs contrary to the purpose of the FCA.[120] Although Deloitte knew nothing about the fraudulent scheme and the auditors were not potential witnesses, it would appear they had an obligation and incentive to keep the information confidential because Erlanger was paying for their services.[121] Unfortunately, the Sixth Circuit cited no factual support—such as a confidentiality clause in Deloitte's engagement agreement—apart from the fact that Deloitte did not release any information into the "public domain."[122]

---

[117] *See* United States *ex rel.* Ramseyer v. Century Healthcare Corp., 90 F.3d 1514 (10th Cir. 1996) (holding that disclosure from one government employee to another does not constitute "public" disclosure); United States *ex rel.* Schumer v. Hughes Aircraft Co., 63 F.3d 1512 (9th Cir. 1995) *vacated*, 520 U.S. 939 (1997) (same); United States *ex rel.* Hagood v. Sonoma County Water Agency, 929 F.2d 1416 (9th Cir. 1991) (same).

[118] *See* United States v. Chattanooga-Hamilton Cty. Hosp. Auth., 782 F.3d 260, 269 (6th Cir. 2015) (observing that the government contractor in *Berg* "was not an 'outsider' to the investigation, but rather was acting on behalf of the government and had an incentive to keep confidential the information learned during its audit" (citing Berg v. Honeywell Int'l, Inc., 502 F. App'x 674, 676 (9th Cir. 2012))).

[119] *Id.*

[120] *See* United States *ex rel.* Schumer v. Hughes Aircraft Co., 63 F.3d 1512, 1518 (9th Cir. 1995); *see also* United States *ex rel.* Doe v. John Doe Corp., 960 F.2d 318, 325 (2d Cir. 1992) (Walker, J., dissenting) (reasoning that innocent employees are not "members of the public" because they have "no incentive to further reveal what they have learned"). The court in *Schumer* sharply criticized *Doe* for being "unrealistic." *See Schumer*, 63 F.3d at 158. Distinguishing innocent employees from random members of the public, the court reasoned that innocent employees have a strong economic incentive to protect their employer from allegations of fraud, as such "revelation of information to an employee does not trigger the potential corrective actions presented by other forms of disclosure." *Id.*

[121] *Whipple*, 782 F.3d at 269.

[122] *Id.*

The district court in *Whipple* was sympathetic to Erlanger's argument that "the information was publicly disclosed to more than just the government through investigations . . . conducted by the government, consultants, attorneys and contractors."[123] In its analysis, the district court noted that OIG allowed Erlanger to engage independent auditors, subsequently identifying a letter to OIG stating that "at least ten of Defendant's employees were interviewed by attorneys and auditors regarding the allegations."[124] Notably, the Sixth Circuit's opinion made no mention of the employees that were interviewed. Under Doe, it would appear that (at least some) of the employees could be "strangers to the fraud" with no incentive to keep the information confidential. Perhaps the factual record before the Sixth Circuit was insufficient to make any such determination or the employees were only generally aware of the allegations.

B. Impact of the 2010 Public Disclosure Bar

Since *Whipple* applied the unequivocally jurisdictional pre-2010 version of the public disclosure bar, the decision is not an accurate depiction of how a court would apply the prevailing interpretation[125] of the 2010 non-jurisdictional version. The consequences of a move to a non-jurisdictional bar are significant—including a stark contrast in the evidence that a court may consider when ruling on a motion, and a shift of the party who must bear the burden of persuasion.

In addressing the question of public disclosure through the standard of review for challenges to jurisdiction, courts can consider evidence outside the pleadings.[126] The district court in *Whipple* did just that, initially denying Erlanger's motion without prejudice in order to allow discovery and develop

[123] Whipple v. Chattanooga-Hamilton Cty. Hosp. Auth., No. 3-11-0206, 2013 WL 4510801, at *4 (M.D. Tenn. Aug. 26, 2013).
[124] *Id.*
[125] The two circuits that have addressed the question, the Fourth and Eleventh, have both held that the public disclosure bar now creates grounds for dismissal for failure to state a claim. *See* United States *ex rel.* Osheroff v. Humana Inc., 776 F.3d 805, 810 (11th Cir. 2015) ("We conclude that the amended § 3730(e)(4) creates grounds for dismissal for failure to state a claim rather than for lack of jurisdiction."); United States *ex rel.* May v. Purdue Pharma L.P., 737 F.3d 908, 916 (4th Cir. 2013) ("In our view, these changes make it clear that the public-disclosure bar is no longer a jurisdiction-removing provision.").
[126] *See* Hamm v. United States, 483 F.3d 135, 137 (2d Cir. 2007) ("In resolving the question of jurisdiction, the district court can refer to evidence outside the pleadings . . . .").

a more thorough factual record.[127] In contrast, a motion to dismiss for failure to state a claim under Rule 12(b)(6) requires the court to accept the relator's allegations as true and solely consider matters outside the pleadings that qualify as judicially noticeable public disclosures.[128] Defendants that rely on declarations or affidavits to prevail will only be able to utilize such evidence on motions for summary judgment, which carry a much higher burden and require significantly more time, effort, and money.[129] Unlike a defense raised under (12)(b)(6), challenges to subject matter jurisdiction cannot be waived or procedurally barred.[130]

Furthermore, relators will no longer have to carry the burden of persuasion on the issue of public disclosure.[131] This burden shift will certainly lead to more relators surviving challenges under the public disclosure bar, especially when coupled with the limited universe of relevant judicially noticeable documents. Also pertinent is the government's new ability to oppose dismissal.[132] Practitioners have only speculated on how the government may be given an opportunity to oppose dismissal, and much remains to be resolved.[133] However, it is certain that this new provision can only bode well for relators and decrease the number of cases dismissed on the basis of public disclosure.

IV. RECOMMENDATION

Common sense dictates that the Sixth Circuit did not reach the right result. For health care providers, the facts in *Whipple* made it the ideal case to go up on appeal. Upon discovering that it was under investigation for

---

[127] Whipple v. Chattanooga-Hamilton Cty. Hosp. Auth., No. 3-11-0206, 2013 WL 4510801, at *1 (M.D. Tenn. Aug. 26, 2013).
[128] *See* Staehr v. Hartford Fin. Servs. Group, Inc., 547 F.3d 406, 425 (2d Cir. 2008) (taking judicial notice of "the *fact* that press coverage, prior lawsuits, or regulatory filings contained certain information, without regard to the truth of their contents").
[129] *See* FED. R. CIV. P. 56.
[130] United States v. Cotton, 535 U.S. 625, 630 (2002) (observing that subject matter jurisdiction cannot be forfeited or waived because it involves a court's power to hear a case).
[131] *See* Ping Chen *ex rel.* United States v. EMSL Analytical, Inc., 966 F. Supp. 2d 282, 294 (S.D.N.Y. 2013) ("[T]he Court is not permitted, as it would be on a motion challenging its jurisdiction, to refer to evidence outside the pleadings, nor does the burden rest with Plaintiff . . . .").
[132] *See* 31 U.S.C. § 3730(e)(4)(A) (2012).
[133] *See* Robert T. Rhoad & Jason C. Lynch, *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 THE GOV'T CONTRACTOR 1, 1 (2013).

potential fraudulent billing practices, Erlanger promptly retained an auditor, disclosed the findings to the government, and voluntarily repaid close to $500,000.[134] Although the government was compensated for its losses, and prospective fraudulent conduct was averted, Erlanger continues to incur substantial legal fees in defending an FCA suit. Yet under *Whipple* and in almost all other circuits, such is the state of the law today.

True, the now extinct government knowledge bar was discarded for a reason—proving too restrictive and "resulting in under-enforcement of the FCA."[135] A return to that standard would be far astray from the "golden mean."[136] But that is not an accurate characterization of *Bank of Farmington*. The Seventh Circuit was careful to craft a narrow government knowledge bar based on the information reaching the proper official who could then take action to investigate the fraudulent conduct. In this scenario, there appears to be "little need for assistance by a qui tam relator unless the relator is an original source."[137] Rewarding relators under these circumstances who are not an original source does nothing to further the FCA's purpose of combatting fraud. In contrast, the Seventh Circuit's interpretation would greatly incentivize providers to voluntarily disclose misconduct and resolve fraudulent claims without the need to burden the federal judicial system.

Whipple will have significant implications for a large portion of U.S. providers, bringing some certainty to a previously unresolved question. Many health care providers operate within the Sixth Circuit's jurisdiction—Nashville, Tennessee, has been described as the "health care industry capital."[138] Now, most health care providers faced with a problematic internal audit or government investigation are in a precarious position—given the weight of authority, including *Whipple*, to hold that voluntary disclosure or a prior government investigation alone will not trigger the public disclosure

---

[134] *See* United States v. Chattanooga-Hamilton Cty. Hosp. Auth., 782 F.3d 260, 267 (6th Cir. 2015).

[135] *See* United States *ex rel.* Rost v. Pfizer, Inc., 507 F.3d 720, 729 (1st Cir. 2007) ("With the 1986 amendments, Congress deliberately removed a previous provision that barred jurisdiction whenever the government had knowledge of the allegations or transactions in the relator's complaint.").

[136] *See* United States *ex rel.* Springfield Terminal Ry. Co. v. Quinn, 14 F.3d 645, 649 (D.C. Cir. 1994).

[137] *See* Beverly Cohen, *Trouble at the Source: The Debates over the Public Disclosure Provisions of the False Claims Act's Original Source Rule*, 60 MERCER L. REV. 701, 748 (2009) (discussing the pros and cons of the Seventh Circuit's interpretation).

[138] There are nearly 400 health care companies that have operations in Nashville and work on a multistate, national or international basis, of which sixteen are publicly traded. *See Nashville: The Health Care Industry Capital*, NASHVILLE HEALTH CARE COUNCIL (Nov. 26, 2015, 6:20 PM), http://healthcarecouncil.com/nashville-health-care-industry/.

bar. Public companies in particular will face an enhanced calculus. In-house counsel, officers, and directors will have to factor in effects on stock prices, potential securities suits, and necessary filings with the U.S. Securities and Exchange Commission.[139]

On the one hand, a provider may choose to discretely self-disclose problematic conduct to the government in hopes of lower damages and earning credibility towards favorable exercise of prosecutorial discretion. This avenue also avoids public relations concerns and limits public exposure of news and documents to opportunistic relators.

On the other hand, a discrete resolution lacks the protection of the public disclosure bar and leaves the door open to *qui tam* suits. A potential solution to this latter dilemma is a provider's proactive public disclosure—through a press release or otherwise—of a pending investigation or discovery of problematic conduct. However, it is not clear what news medium, format, or level of detail is sufficient for a "public" disclosure.[140] Additionally, the law remains unclear as to whether disclosure to employees or outside auditors such as Deloitte in *Whipple*—even if made without an explicit or implicit expectation of confidentiality—are sufficient for a public disclosure.[141] Voluntary public self-disclosures also carry the risk of opening a Pandora's box of potential relators, with distinct possibilities that they possess independent information from what is publicly disclosed, or that they qualify as an original source.

Even providers in the Seventh Circuit—which has appellate jurisdiction over the federal courts in Illinois, Indiana, and Wisconsin—must remain

---

[139] *See* Jay A. Brozost & A. Jeff Ifrah, *I Tell Them, I Tell Them Not: Deciding When and How to Disclose False Claims Act Lawsuits to Shareholders*, ACC DOCKET, Vol. 26, No. 1, 52 (2008) ("You can disclose a lawsuit that may expose your company to millions of dollars in damages at the risk of going to prison, or you can hold on to the information and quite possibly face SEC-related liability. Neither option is attractive for in-house counsel."); *see also* Reuben A. Guttman et al., *The Interplay Between the False Claims Act, Securities Fraud, and ERISA*, 39 FALSE CL. ACT AND QUI TAM Q. REV. 20 (2005) ("Where a publicly traded company reports revenue that is based on dollars that were generated through unlawful conduct, as in the case of revenues based on 'false claims,' then potentially an action may exist under the federal securities laws if that conduct causes injury to shareholders who purchased stock at inflated prices.").

[140] *See* United States ex rel. White v. Gentiva Health Servs., Inc., No. 3:10-CV-394-PLR-CCS, 2014 WL 2893223, at *1 (E.D. Tenn. June 25, 2014) (dismissing some FCA allegations relating to a fraudulent billing scheme for unnecessary home health services because they were publicly disclosed in a *Wall Street Journal* article—but permitting other allegations because they were not discussed with the requisite specificity to put the government on notice of possible fraudulent activity).

[141] *See supra* Part II.

vigilant of legislative and judicial trends narrowing the scope of the public disclosure bar. Since *Bank of Farmington* remains the controlling precedent, relators in that jurisdiction will be reluctant to bring cases arising out of information that was possibly disclosed to the government via audits, investigations, or even a provider's self-disclosure. But even in the Seventh Circuit, defendants will have to bear the burden of persuasion on the issue of public disclosure.

V. CONCLUSION

In conclusion, the Seventh Circuit's interpretation of the public disclosure bar strikes the proper balance in the fight against fraud and should be given greater effect. But as a practical matter there are many additional deterrents to *qui tam* suits apart from the letter of the law. Relators and their counsel often face skilled defense attorneys and health care providers with very deep pockets. FCA cases generally run on for several years, and due to the amount of money at stake often, like *Whipple*, end up on appeal. Regardless of the outcome, their co-workers often ostracize relators and employers are extremely reluctant to hire former whistleblowers. Recognition of these practical realities may be an underlying explanation for congressional amendments and narrowing judicial interpretation of the public disclosure bar in order to adequately incentivize whistleblowing.

Ultimately, the Sixth Circuit's decision foreshadows darker days ahead for health care providers and other companies who do business with the government. Coupled with the ostensible shift toward a non-jurisdictional bar, these companies will face a much greater risk of liability. This may signal substantial investments in stringent compliance and monitoring programs to prevent potential misconduct on the front-end.