RECENT CASES

FALSE CLAIMS ACT — JURISDICTION — FIRST CIRCUIT ADOPTS PLAIN MEANING OF REQUIREMENT THAT PLAINTIFFS GIVE GOVERNMENT THEIR INFORMATION BEFORE FILING SUIT. — *United States ex rel. Duxbury v. Ortho Biotech Products, L.P.*, 579 F.3d 13 (1st Cir. 2009).

The False Claims Act[1] (FCA) combats fraud on the federal government.[2] Because the government often lacks the resources or access to information necessary to prosecute increasingly "sophisticated and widespread fraud,"[3] the FCA authorizes qui tam actions — private enforcement suits on behalf of the federal government — to supplement governmental enforcement.[4] In order to encourage such suits, the FCA awards plaintiffs, known as "relators," a portion of the damages.[5] To avoid subsidizing parasitic plaintiffs whose suits rest solely on information already in the public domain, the FCA generally bars suits based on publicly disclosed allegations.[6] This "public disclosure bar" is subject to an "original source exception": a relator can bring suit despite the public disclosure if he "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 . . . based on the information."[7] The circuit courts have offered several different interpretations of this exception's information provision requirement.[8]

Recently, in *United States ex rel. Duxbury v. Ortho Biotech Products, L.P.*,[9] the First Circuit added its voice to the circuit split by holding that the original source exception means precisely what it says.[10] This approach is truer to the exception's text than are other circuits' interpretations, but it nonetheless fails to read the FCA as a consistent whole and to balance optimally the FCA's competing purposes. A better interpretation would require the relator, before filing suit, to give

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[1] 31 U.S.C. §§ 3729–3733 (2006), *amended by* Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1617.

[2] *See* S. REP. NO. 99-345, at 1 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5266.

[3] *Id.* at 2, *reprinted in* 1986 U.S.C.C.A.N. at 5267.

[4] *See* 31 U.S.C. § 3730(b); S. REP. NO. 99-345, at 1–8, *reprinted in* 1986 U.S.C.C.A.N. at 5266–73.

[5] *See* 31 U.S.C. § 3730(d).

[6] *See id.* § 3730(e)(4)(A); *see also* Rockwell Int'l Corp. v. United States, 127 S. Ct. 1397, 1405–07 (2007) (holding that the public disclosure bar is jurisdictional).

[7] 31 U.S.C. § 3730(e)(4)(B).

[8] *See* United States *ex rel.* Duxbury v. Ortho Biotech Prods., L.P., 579 F.3d 13, 22 (1st Cir. 2009) (presenting the circuit split).

[9] 579 F.3d 13.

[10] *Id.* at 28.

the government information that the government did not already possess.

From 1992 to 1998, Ortho Biotech Products (OBP) employed Mark Duxbury as a sales representative.[11] Duxbury's work involved marketing the anemia drug Procrit.[12] In 2003, Duxbury filed a qui tam action against OBP in the United States District Court for the District of Massachusetts.[13] Duxbury alleged that OBP inflated the Average Wholesale Price that Medicare uses to calculate reimbursements by giving medical providers free Procrit samples and other kickbacks that it did not report to Medicare.[14] Duxbury's allegations had been publicly disclosed in a previous lawsuit a year earlier.[15]

As required by the FCA,[16] Duxbury submitted his complaint to the United States under seal to allow the government to decide whether to intervene.[17] The government declined to do so,[18] thereby allowing Duxbury to pursue the action.[19] Duxbury then filed an amended complaint that added as a relator Dean McClellan,[20] also a former OBP sales representative,[21] while maintaining the original complaint's principal allegations.[22]

OBP moved to dismiss for lack of subject matter jurisdiction,[23] or in the alternative, for failure to plead fraud with particularity.[24] With regard to Duxbury's allegations of kickbacks after the period of his employment with OBP, the district court found that Duxbury lacked direct and independent knowledge and thus was not an original source.[25] With regard to Duxbury's allegations of kickbacks during his employment, the court found that he had direct and independent knowledge and satisfied the "unambiguous" requirement that he "provide his information to the government prior to filling his action," as

[11] *Id.* at 15–16.

[12] *Id.* at 16.

[13] *Id.* at 17.

[14] *Id.* Duxbury also alleged that OBP had engaged in off-label marketing that led to the filing of Medicare reimbursement claims for dosages of Procrit that the FDA had not approved. *Id.*

[15] *Id.* (citing Master Consolidated Class Action Complaint, *In re* Pharm. Indus. Average Wholesale Price Litig., MDL No. 1456, No. 01-CV-12257-PBS (D. Mass. Sept. 6, 2002)).

[16] *See* 31 U.S.C. § 3730(b)(2) (2006).

[17] *Duxbury*, 579 F.3d at 18.

[18] *Id.* at 19.

[19] *See* 31 U.S.C. § 3730(c)(3).

[20] *See Duxbury*, 579 F.3d at 19; First Amended Complaint and Demand for Jury Trial, United States *ex rel.* Duxbury v. Ortho Biotech Prods., L.P., 551 F. Supp. 2d 100 (D. Mass. 2006) (No. 03-CV-12189-RWZ) [hereinafter First Amended Complaint].

[21] *Duxbury*, 579 F.3d at 16.

[22] *See* First Amended Complaint, *supra* note 20, at 1–3.

[23] *Duxbury*, 579 F.3d at 19; *see* FED. R. CIV. P. 12(b)(1).

[24] *Duxbury*, 579 F.3d at 19; *see* FED. R. CIV. P. 9(b).

[25] *Duxbury*, 551 F. Supp. 2d at 109.

he had given the government the information before filing suit.[26] The district court nevertheless dismissed these claims for failure to plead fraud with particularity.[27] The court dismissed McClellan's claims because he had not provided his information to the government before the claims were filed, so he could not be deemed an original source.[28]

The First Circuit affirmed in part and reversed in part.[29] Writing for a unanimous panel, Judge Torruella[30] began by canvassing the circuit courts' various interpretations of the original source exception's information provision requirement.[31] Under the Second and Ninth Circuits' readings, the court noted, a relator can sue only if he was "a source to the entity that [initially] publicly disclosed [his] allegations."[32] Under the Sixth and D.C. Circuits' less restrictive interpretation, which OBP advanced,[33] a relator need not meet this requirement, but must nonetheless give the government the information underlying his allegations before those allegations are publicly disclosed.[34] Finally, the court observed that the Fourth Circuit interpreted the exception most permissively, allowing a relator who meets neither of the above requirements to sue so long as he gives the government his information before filing suit.[35]

The *Duxbury* court aligned itself with the Fourth Circuit, holding that the original source exception clearly requires only that the relator give the government supporting information prior to filing suit.[36] "[T]he plain terms of [the exception] begin and end the matter."[37] OBP had argued that this approach would produce the eccentric result of rewarding parasitic plaintiffs who try to avoid the risks involved in

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[26] *Id.*

[27] *Id.* at 114–16.

[28] *Id.* at 109–10. Because McClellan's allegations were coextensive with Duxbury's, the court reasoned that McClellan would have needed to give the government his information before Duxbury filed his original complaint. *Id.* The court also indicated that the FCA's "first-to-file" rule independently barred McClellan's claims. *Id.* at 110; *see* 31 U.S.C. § 3730(b)(5) ("When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action."). The first-to-file rule also barred suit on the allegations involving off-label marketing, as a separate qui tam complaint had made these allegations earlier. *Duxbury*, 551 F. Supp. 2d at 110–14.

[29] *Duxbury*, 579 F.3d at 34.

[30] Judge Torruella was joined by Judges Siler and Howard.

[31] *Duxbury*, 579 F.3d at 22.

[32] *Id.* (quoting United States *ex rel.* Dick v. Long Island Lighting Co., 912 F.2d 13, 16 (2d Cir. 1990)) (citing Wang v. FMC Corp., 975 F.2d 1412, 1419 (9th Cir. 1992)).

[33] *See id.*

[34] *See id.* (citing United States *ex rel.* McKenzie v. BellSouth Telecomms., Inc., 123 F.3d 935, 942–43 (6th Cir. 1997); United States *ex rel.* Findley v. FPC-Boron Employees' Club, 105 F.3d 675, 690 (D.C. Cir. 1997)).

[35] *See id.* (citing United States *ex rel.* Siller v. Becton Dickinson & Co., 21 F.3d 1339, 1351 (4th Cir. 1994)).

[36] *Id.*

[37] *Id.* (citing Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997)).

exposing fraud — risks that "'true whistleblower[s]' [who] alert[] the government of fraud not [yet] publicly disclosed" must bear.[38] Because Congress intended to benefit only "true whistleblowers," OBP contended, relators should need to give the government their information before their allegations are publicly disclosed.[39]

The court found OBP's reasoning unconvincing. It observed that "the 'first-to-file' rule *already* provides potential relators significant incentive not to sit on the sidelines," as they would not want to risk losing the ability to sue if another relator filed first.[40] The court also drew on *Rockwell International Corp. v. United States*,[41] in which the Supreme Court established that the original source exception only requires relators to have direct and independent knowledge of *some* information supporting their allegations — not necessarily the same information supporting the initial public disclosure of those allegations.[42] The First Circuit inferred from this holding that relators might be able to bring valuable information to light even after their allegations are publicly disclosed.[43] Thus, excluding these relators might "bar productive suits" that a plain meaning interpretation of the original source exception would allow.[44]

The court then appealed to the FCA's legislative history to buttress its conclusion.[45] The contemporary version of the FCA, principally enacted by a set of 1986 amendments,[46] was a response to *United States ex rel. Wisconsin v. Dean*.[47] The court in *Dean* prohibited the State of Wisconsin from bringing a qui tam action where the federal government already had the "essential information"[48] underlying Wisconsin's allegations at the time of suit, even though the government had first received the information from Wisconsin.[49] Congress responded first by replacing the "essential information" test with less restrictive language barring suit only when the allegations have already been *publicly* disclosed.[50] Second, Congress introduced the current

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[38] *Id.* at 24.
[39] *Id.* at 23–24.
[40] *Id.* at 24; *see* 31 U.S.C. § 3730(b)(5) (2006).
[41] 127 S. Ct. 1397 (2007).
[42] *Id.* at 1407–08; *see Duxbury*, 579 F.3d at 24–25.
[43] *Duxbury*, 579 F.3d at 25 ("[T]he information upon which the public disclosure is based may be unavailable . . . or be of little value . . . , while a relator may have different [supporting] information . . . of great significance.").
[44] *Id.*
[45] *Id.* at 25–28.
[46] False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153.
[47] 729 F.2d 1100 (7th Cir. 1984); *see Duxbury*, 579 F.3d at 25–27.
[48] *Dean*, 729 F.2d at 1103 (quoting United States *ex rel.* Weinberger v. Florida, 615 F.2d 1370, 1371 (5th Cir. 1980)) (internal quotation mark omitted).
[49] *Id.*
[50] *Duxbury*, 579 F.3d at 26.

original source exception.[51] The *Duxbury* court stressed that the first change sought to "encourage more private enforcement suits";[52] this purpose supported the court's decision to reject as "overbroad" OBP's suggested requirement that relators give the government their information before their allegations' public disclosure,[53] which the court had already noted would exclude productive suits.[54] Applying this analysis to the facts at bar, the First Circuit affirmed the district court's finding that McClellan was not an original source.[55] The circuit court agreed that Duxbury was an original source for those allegations dating from his period of employment,[56] but reversed the dismissal of these allegations for failure to plead fraud with particularity.[57]

Duxbury's core holding — that the original source exception requires relators to give the government the information underlying their allegations only prior to filing suit — imperfectly improves upon other circuits' competing interpretations. *Duxbury*'s strength lies in its fidelity to the exception's text; its weakness lies in failing to read the FCA as a whole and to balance optimally the FCA's competing purposes. To avoid these problems, the court could have read the original source exception to require relators to give the government, prior to filing suit, information that the government does not already possess.

By adopting the exception's plain meaning, *Duxbury* improved on other circuits' interpretations that stray from the exception's text. The Second and Ninth Circuits' demand that relators contribute to their allegations' initial public disclosure[58] exceeds the exception's clearly stated requirements. In insisting that relators give the government their information before their allegations' public disclosure, the Sixth and D.C. Circuits[59] similarly ignore the statutory text, which clearly sets the information provision deadline as "before filing an action."[60]

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[51] *Id.*

[52] *Id.* at 27 (quoting United States *ex rel.* Rost v. Pfizer, Inc., 507 F.3d 720, 730 (1st Cir. 2007)) (internal quotation mark omitted).

[53] *Id.*

[54] *Id.* at 25.

[55] *Id.* at 28–29. The court thus did not need to consider the district court's finding that the first-to-file rule barred McClellan's suit. *Id.* at 29. The court affirmed the district court's determination that the first-to-file rule barred suit on the allegations that OBP engaged in off-label marketing that induced the filing of false Medicare reimbursement claims. *Id.* at 32–34.

[56] *Id.* at 32.

[57] *Id.*

[58] *See* Wang v. FMC Corp., 975 F.2d 1412, 1419 (9th Cir. 1992); United States *ex rel.* Dick v. Long Island Lighting Co., 912 F.2d 13, 16 (2d Cir. 1990).

[59] *See* United States *ex rel.* Bledsoe v. Cmty. Health Sys., Inc., 342 F.3d 634, 646 (6th Cir. 2003) (citing United States *ex rel.* McKenzie v. BellSouth Telecomms., Inc., 123 F.3d 935, 943 (6th Cir. 1997)); United States *ex rel.* Findley v. FPC-Boron Employees' Club, 105 F.3d 675, 690 (D.C. Cir. 1997).

[60] 31 U.S.C. § 3730(e)(4)(B) (2006).

Reading the original source exception in its statutory context, however, reveals that *Duxbury*'s adherence to the text is imperfect. The exception imposes jurisdictional requirements that a claimant must meet before filing suit.[61] The FCA also requires a claimant, after filing suit but before proceeding with the action, to submit his complaint and supporting information to the government under seal and wait at least sixty days for the government to decide whether to intervene.[62] Given this waiting period requirement, the *Duxbury* court's interpretation of the information provision requirement renders it nearly toothless. The information provision requirement would require only that, a minute before the relator files suit, he do what he would need to do anyway after filing suit — give the government information supporting his allegations.[63] Because the information provision requirement would not, under this interpretation, impose a meaningful additional limit on a relator's ability to sue, the *Duxbury* approach does a poor job of reading the FCA as a consistent whole.[64]

Duxbury also suboptimally balanced the FCA's two main purposes. Admittedly, *Duxbury*'s permissive interpretation of the information provision requirement readily achieves the FCA's first purpose: to "encourage more private enforcement suits."[65] The court correctly noted that relators who do not contribute to, or supply their information to the government prior to, their allegations' initial public disclosure might nonetheless bring productive and desirable suits if they can contribute otherwise unavailable information.[66] By allowing suit in such cases, *Duxbury*'s approach furthers the FCA's first purpose.

Duxbury failed, though, to uphold the FCA's second purpose: "prevent[ing] 'parasitic' qui tam actions."[67] Under *Duxbury*'s approach, a relator with direct and independent knowledge of information supporting his allegations can bring suit even though his information has already been publicly disclosed. In other words, a relator can sue even if

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[61] *See id.* § 3730(e)(4); Rockwell Int'l Corp. v. United States, 127 S. Ct. 1397, 1405–07 (2007).

[62] *See* 31 U.S.C. § 3730(b)(2).

[63] *See Findley*, 105 F.3d at 683 n.2.

[64] *Cf.* Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997) ("Our inquiry must cease if the statutory language is unambiguous and 'the statutory scheme is coherent and consistent.'" (quoting United States v. Ron Pair Enters., Inc., 489 U.S. 235, 240 (1989))).

[65] *Duxbury*, 579 F.3d at 26 (quoting *Findley*, 105 F.3d at 680) (internal quotation marks omitted).

[66] *See id.* at 25.

[67] United States *ex rel.* McKenzie v. BellSouth Telecomms., Inc., 123 F.3d 935, 943 (6th Cir. 1997) (quoting United States *ex rel.* Siller v. Becton Dickinson & Co., 21 F.3d 1339, 1347 (4th Cir. 1994)); *see also* 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, 707 (2009) (noting the FCA's "dual goals of encouraging private fraud detection and discouraging parasitic suits where the relators made no useful contribution to the action").

he "provide[s]"[68] information that the government already has as a result of the information's public disclosure. Such a relator makes no contribution to the action worth incentivizing with the FCA's financial reward.[69] The sometimes huge size of these awards[70] suggests both that potential parasitic relators have a great incentive to bring suit and that the government would thereby suffer significantly by needing to share with these relators damages awards that it could otherwise collect in full.

The First Circuit might have avoided these problems by interpreting the original source exception's information provision requirement to mandate that relators give the government, before filing suit, information that it does not already possess.[71] This approach would be less restrictive than the Sixth and D.C. Circuits' reading, but more demanding than the interpretation endorsed by the Fourth Circuit and the *Duxbury* court. Although *Duxbury*'s approach rested on perhaps the most natural reading of "provide,"[72] the tension with the rest of the

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[68] 31 U.S.C. § 3730(e)(4)(B) (2006).

[69] *See id.* § 3730(d).

[70] *See* Christopher W. Myers, *The False Claims Act Clarification Act: An End to the FCA's Bar on Parasitic Qui Tam Actions?*, PROCUREMENT LAW., Spring 2009, at 7, 7 ("[R]elators [in 2008] received . . . individual recoveries of [amounts including] $56.25 million [and] $46.7 million . . . .").

[71] Because the public disclosure bar and the original source exception are jurisdictional, the suggested approach would deny federal jurisdiction when the government already has the information that the relators supply. A motion to dismiss based on this jurisdictional bar could arise in several ways. First, it could arise immediately after the relator files suit and the government is presented with the complaint and supporting information. *See* 31 U.S.C. § 3730(b)(2). If the government determines that it already possesses the information on which the complaint is based, the government could intervene and move to dismiss. *See id.* Given the structure of the FCA, a motion to dismiss by the government as plaintiff makes sense. Because a relator receives a portion of the damages in any suit he initiates, even if the government intervenes, *see id.* § 3730(d), the government has a clear interest in dismissing the relator's suit and bringing an action by itself. Second, even if the government originally declined to intervene, the FCA allows it to intervene later if it can show "good cause." *See id.* § 3730(c)(3). A determination that a suit actually lacks subject matter jurisdiction would probably be considered good cause.

Finally, there might be circumstances in which a defendant would be able to move to dismiss a relator's suit because it is based on information the government already has. In some cases, the fact that the government possesses certain information is publicly known, such as when the information on which the complaint is based is itself publicly available through a newspaper report. In other cases, however, only the government knows which information it possesses. In such situations, defendants would not be in a position to move to dismiss a suit on the basis that the government already possesses the information. If the latter cases are much more common than the former, the suggested approach would make it harder for defendants to dismiss suits based on the public disclosure bar and the original source exception. The purposes of these provisions, however, are to promote qui tam actions and to protect *the government* against parasitic suits. These provisions are not intended to protect defendants, who are already protected against duplicative suits. *See id.* § 3730(b)(5). Therefore, it makes sense that it be easier for the government to move to dismiss claims under these provisions than it is for defendants.

[72] A commonly accepted definition is: "To supply (something) for use." Oxford English Dictionary Online (Drft. Rev. Sept. 2009), http://oed.com (enter "provide"; then click "Find Word").

FCA that this reading creates seems to disqualify it, or at least to suggest that the meaning of "provide" within the original source exception is ambiguous. The suggested approach would read "provide" as meaning "to make available" — also an accepted definition.[73] Arguably, one cannot "make available" to an entity what that entity already has. Therefore, a relator could satisfy the original source exception only if the information he gives the government prior to filing suit is information the government does not already have. This reading is more consistent with the statute as a whole[74] and better explains Congress's decision to use the term "original source."[75]

The suggested approach would also balance the FCA's two purposes more effectively: it would protect the government from subsidizing parasitic plaintiffs, while also encouraging private enforcement actions when the relator has additional information beyond what is publicly available.[76] Whereas *Duxbury* failed to guard adequately against parasitic suits in its zealous effort to promote qui tam actions, the suggested approach would further both purposes to the extent they are compatible.[77] By adopting this understanding, the *Duxbury* court could have been faithful both to the FCA's purposes and to its text.

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[73] *Id.*

[74] Under the "make available" reading, the information provision requirement would ensure that the relator's suit is not based solely on information the government already has, while the waiting period requirement would serve the different purpose of "provid[ing] the United States with enough information . . . to be able to [decide] whether [to intervene]." Carolyn V. Metnick, *The Jurisdictional Bar Provision: Who Is an Appropriate Relator?*, 17 ANNALS HEALTH L. 101, 107 (2008) (quoting Joel M. Androphy & Mark A. Correro, *Federal Qui Tam: (False Claims) Litigation: The Government's Watchdog*, HOUS. LAW., Jan.–Feb. 2005, at 18, 19).

[75] If the relator were to give the government information it already has, the relator could not be said to be the "original" source of the information. Although the *Duxbury* court reasoned that the natural reading of "original source" is irrelevant because Congress explicitly defined the term, *see Duxbury*, 579 F.3d at 22–23 (citing 31 U.S.C. § 3730(e)(4)(B)), Congress's decision to use "original source" is undeniably one data point that sheds light on its otherwise ambiguous use of "provide." *Cf.* United States *ex rel.* Findley v. FPC-Boron Employees' Club, 105 F.3d 675, 691 (D.C. Cir. 1997) (attributing significance to Congress's use of the term "original source").

[76] Given the inefficacy of relying on governmental notice of fraud allegations to spur enforcement, *see Duxbury*, 579 F.3d at 27, it might be thought that the suggested approach would result not only in fewer private enforcement suits than under the *Duxbury* approach, but also in FCA underenforcement overall. That this outcome would result is open to question. First, because the allegations have been publicly disclosed, "[p]ublic pressure . . . will lead to the prosecution of important cases." *Findley*, 105 F.3d at 684 n.4. Second, when the government already has information supporting a publicly disclosed allegation, it faces lower investigative costs in pursuing that allegation and so would be more likely to bring the suit itself, all other things being equal. Admittedly, to the extent that the government fails to act on information in its possession despite these factors, underenforcement could result. This result would need to be balanced against the increased prevention of parasitic lawsuits that obtains under the suggested approach.

[77] *See* United States *ex rel.* Siller v. Becton Dickinson & Co., 21 F.3d 1339, 1347 (4th Cir. 1994) (observing that Congress intended the original source exception to balance the FCA's two purposes). *But see id.* at 1354–55 (arguing that courts should not attempt to strike this balance because they cannot know "precisely how Congress . . . believed it achieved that balance," *id.* at 1355).