Shielding Relator's Identity in *Qui Tam* Actions

The Landscape After ACA Changes to the False Claims Act

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> "No one can know that I'm the whistleblower, or I'll get fired. I'll be blackballed in my industry—I'll never get another job!"

These words will sound familiar to any lawyer representing whistleblowers who expose fraud under the False Claims Act (FCA) or other rewards statutes. Such clients often fear blowback from employers and opprobrium from their peers. The inevitable question arises: "Can't you hide my identity?"

Congress understands the risks taken by whistleblowers, and the FCA prohibits workplace retaliation while offering the prospect of a monetary reward. But profiting from a FCA claim is far from guaranteed, and the process usually takes years. And while discrete cases of retaliation can be remedied, it's much harder to quantify—let alone dispel—the shadow that a public lawsuit may cast on a whistleblower's professional standing.

Relators' counsel have tried various tactics to shield their clients' identities from the eyes of Public Access to Court Electronic Records (PACER) and internet search engines. Efforts have included using pseudonyms such as John Doe, requesting redaction or permanent seals, and forming organizations to mask relators' identities. All have met with limited success.

In this article, we'll discuss why relators historically have found it difficult to remain anonymous under the FCA—but also how statutory tweaks in the Patient Protection and Affordable Care Act of 2010 (ACA), known colloquially as Obamacare, have made the playing field more favorable for one particular tactic: the organizational relator.

The FCA and Filing Under Seal

The False Claims Act[1] imposes civil liability on any person, including a corporation, who knowingly uses a "false record or statement to get a false or fraudulent claim paid or approved by the government" and any person who "conspires to defraud the government by getting a false or fraudulent claim allowed or paid."[2] Violators of

the FCA face treble damages and a civil penalty of up to $21,562.80 per occurrence.

The FCA's *qui tam* provision, § 3730(b), allows a private person, known as a "relator," to bring an action on behalf of the United States for a violation of the FCA. Successful relators may receive a reward of up to 30 percent of the proceeds plus reimbursement for attorney's fees, costs, and expenses.[3]

Qui tam actions are filed under seal and must remain so for at least 60 days.[4] Unlike a regular lawsuit, a *qui tam* action is not served on the defendant—at least, not immediately. Rather, the complaint and a document known as a "relator's statement" are served on the U.S. Department of Justice (DOJ), which then investigates the relator's claims.[5] While the case is under seal, the defendant usually is unaware of the action—and so the identity of the relator remains confidential, known only to the court and the DOJ.

In practice the DOJ rarely makes its intervention decision within the statutory 60 days, instead seeking consent to extend the seal, typically in increments of three or six months. It is not uncommon for cases to remain under seal for more than a year while the government conducts its investigation.

Once the DOJ completes its investigation it has three options: It can intervene as the plaintiff on one or more claims, in which case its attorneys will act as lead counsel; it can decline intervention but allow the relator to proceed; or it can move to dismiss the complaint.[6] In all three scenarios, the seal will be lifted and the relator's identity revealed.

To protect relators, the FCA contains an antiretaliation provision. Under § 3730(h) of the FCA, employers are prohibited from discriminating against employees, contractors, and agents "because of lawful acts done by the employee, contractor, agent or associated others in furtherance of an action under this section or other efforts to stop one or more violations" of the FCA.[7]

What the FCA does *not* provide to relators is an explicit option for anonymity after unsealing.

Doe Filings: A High Bar for Anonymity

One way to conceal the identity of a relator is to file the FCA complaint under a pseudonym such as John or Jane Doe. We've all seen anonymous filings in federal court—most famously with the tacit approval of the U.S. Supreme Court in the abortion cases of *Roe v. Wade*[8] and *Doe v. Bolton*.[9]

Nonetheless, there is no federal rule or statute that permits such filings. Quite the contrary: Federal Rule of Civil Procedure 10(a) requires that "[t]he title of the complaint must name all the parties." This apparent prohibition of anonymous filings stems from the strong presumption in favor of transparency in judicial proceedings. How then are anonymous filings permitted to exist? The answer is that "the decision whether to allow a plaintiff to proceed anonymously rests within the sound discretion of the [district] court."[10]

The process by which a plaintiff proceeds under a pseudonym varies by district court custom, but usually requires a "Motion for Leave to File Under a Pseudonym." The following should be attached to such a motion as exhibits: a memorandum in support, identifying the party and setting forth the justification for the motion; the proposed complaint under the desired pseudonym; a related case form, if applicable; and a proposed order. The proposed order should direct the clerk to file the proposed complaint. If the court denies the motion, the plaintiff may proceed under his or her own name or choose not to file at all.

Depending on the circumstances, a court may take many factors into consideration when determining whether to allow a plaintiff to proceed anonymously. In *Doe v. Megless*,[11] the U.S. Court of Appeals for the Third Circuit compiled a list of nine factors that it uses to guide its adjudication—the touchstone of which is a real, specific threat of harm (usually physical) to the plaintiff if he or she proceeds under his or her own name: "That a plaintiff may suffer embarrassment or economic harm is not enough."[12] By this standard, most FCA relators will have trouble justifying an anonymous filing.

The U.S. Court of Appeals for the Eleventh Circuit sets a similar standard:

> Lawsuits are public events. A plaintiff should be permitted to proceed anonymously only in those exceptional cases involving matters of a highly sensitive and personal nature, real danger of physical harm, or where the injury litigated against would be incurred as a result of the disclosure of the plaintiff's identity. The risk that a plaintiff may suffer some embarrassment is not enough.[13]

Some U.S. states have a statutory vehicle for anonymous filings, however—a fact that is particularly relevant in light of the growing number of states that have enacted their own false claims acts. Under Virginia Code § 8.01-15.1, for example, a plaintiff may proceed anonymously but bears "the burden of showing special circumstances such that the need for anonymity outweighs the public's interest in knowing the party's identity and outweighs any prejudice to any other party."[14] The statute also lists factors to be considered by the court:

> The court may consider whether the requested anonymity is intended merely to avoid the annoyance and criticism that may attend any litigation or is to preserve privacy in a sensitive and highly personal matter; whether identification poses a risk of retaliatory physical or mental harm to the requesting party or to innocent nonparties; the ages of the persons whose privacy interests are sought to be protected; whether the action is against a governmental or private party; and the risk of unfairness to other parties if anonymity is maintained.[15]

Similarly, Illinois permits anonymous filings under 735 Ill. Comp. Stat. 5/2-401(e), which provides: "Upon application and for good cause shown the parties may appear under fictitious names."

Even if a court does permit the use of a pseudonym, anonymity is not airtight. Relators still must disclose their true identity to the court and—in the case of the FCA and its equivalents—to the government. Further, the defendant may be able to deduce a whistleblower's identity by other means. For example, suppose that a relator had repeatedly expressed concerns about compliance with a particular clause in a government contract. If the government then serves the defendant with a civil investigative demand seeking proof of such compliance, or if the lawsuit unseals with specific details of such concerns, the defendant will naturally suspect the relator, especially if she recently resigned or was terminated.

Additionally, a "John Doe" relator may have trouble defeating a challenge under the FCA's bar on lawsuits not based on original information.[16] In *U.S. ex rel. Poteet v. Lenke*,[17] for instance, the named relator filed an amended FCA complaint with a caption that included John Doe relators described as "a number of unidentified people

with direct knowledge of the information contained in the allegations herein, and who have provided same to Ms. Poteet."

In response to a motion to dismiss, the *Poteet* court wrote: "While within this undifferentiated mass of 'John Does' there may well be someone who might lay claim to being an original source, anonymous broadside pleading is not acceptable for *qui tam* purposes. If it were, no sentient plaintiff could ever fail to plead an effective escape from the original source bar."

Sealing and Redacting Post-Dismissal

Another prophylactic taken by relators' counsel is a motion to seal the case permanently or, alternatively, to redact any identifying information post-dismissal. Such motions usually are made when the government declines to intervene or when a settlement has been reached with the defendant. However, just like a motion to proceed anonymously, such requests run contrary to the strong public-policy presumption in favor of transparency in judicial records—and they often fail as a result.

In *U.S. ex rel. Herrera v. Bon Secours Cottage Health Services*,[18] for example, the relator moved to seal the record permanently and for voluntary dismissal without prejudice after the government declined to intervene. Denying the motion, the court wrote:

> Here, plaintiff-relator asserts that her reputation and career would be put in jeopardy should the complaint, any order of dismissal, and any order disposing of the present motion be unsealed. While plaintiff-relator's fear of employment-related retaliation is not completely unfounded given her alleged constructive discharge by defendant in 2007, the Court does not believe that plaintiff-relator's fear of retaliation by her current employer or future employers is sufficient to overcome the strong presumption in favor of access to judicial records. Indeed, to conclude otherwise would ignore that [plaintiff-relator's] amorphous concern is no different from the concern any employee may have when she sues her employer for whatever reason. Furthermore, should plaintiff-relator be retaliated against by her current employer or future employers for filing this *qui tam* action, she is not without legal recourse. The FCA specifically provides a cause of action for employees retaliated against for filing *qui tam* actions.[19]

As with filing under a pseudonym, the bar for permanently sealing a case is high. Even when the relator is joined by the defendant in such a request, courts are hesitant to seal a record permanently.[20]

Courts also are unlikely to grant a request for redactions made with the intent to conceal the identity of the relator—or even of the defendant. Like a permanent seal, redactions run contrary to the presumption in favor of public access and transparency. The U.S. District Court for the District of Massachusetts addressed both sealing and redaction in *U.S. ex rel. Wenzel v. Pfizer Inc*. After the government declined to intervene, relator Wenzel asked the court to seal the matter permanently or, in the alternative, to redact any identifying information. The court denied the motion, observing that "redactions that would sufficiently preserve Wenzel's anonymity would effectively seal substantial portions of the complaint." The court further noted that the redactions might "enable future FCA suits against Pfizer for similar conduct that would otherwise be prevented under the FCA's public disclosure bar."[21]

Organizational Relators: Hope After the ACA

In light of the difficulty to obtain leave to file under a pseudonym or to redact and permanently seal a case, some creative relators' counsel have sought extrajudicial relief in the form of using a legal entity such as a corporation or limited liability company to stand in the place of their client. By using an organization to stand in place of the true whistleblower, counsel can at minimum keep their clients' names out of the case caption and hopefully hide the case from future employers who may perform internet searches on job applicants.

Relator's counsel found the basis for the use of organizational relators in the statutory construction of the FCA. In separate sections, the FCA creates liability for false claims submitted by "any person" and permits "a person" to file a *qui tam* action on behalf of the United States.[22] Consistent with the interpretation that corporations and other legal entities are "persons" for purposes of FCA liability, courts have ruled that various types of legal entities are also a "person" for purposes of the FCA's *qui tam* provision.[23]

However, a standard defense countermove has been to attack organizational relators as lacking appropriate jurisdictional standing under the original source exception to the FCA's public disclosure prohibition.

Prior to the enactment of the ACA in March 2010, the FCA's public disclosure bar deprived district courts of jurisdiction to hear *qui tam* claims based on informantion previously disclosed in any one of several enumerated sources unless the relator could demonstrate that they were an "original source" of that information. An "original source" was one with "direct and independent knowledge of the information on which the allegations are based."[24] An organization formed after the alleged fraud took place necessarily lacked "direct and independent knowledge," as it gained its knowledge from the true whistleblower. Thus, if defense counsel could identify to the court any public disclosure, the court would be deprived of jurisdiction without the relator having an opportuntity to to seek relief under the original source exception to the public disclosure bar.

The above scenario played out in *Fed. Recovery Servs. Inc. v. United States*.[25] The president of Priority E.M.S. ambulance company and his attorneys formed Federal Recovery Services Inc. for the purpose of pursuing a *qui tam* action against a competing ambulance company. The allegations overlapped with those previously alleged by Priority E.M.S. in a state action against the defendants. The defendants moved to dismiss, arguing that the court lacked jurisdiction due to the prior public disclosure of the same nucleus of operative facts in state court. The district court agreed, and the relator appealed. The Fifth Circuit affirmed, finding that a corporation formed after the fraud took place could not be an "original source" of the information for purposes of the public disclosure bar.

A similar fate befell the relator in *U.S. ex rel. Precision Co. v. Koch Industries Inc*. The relator, Precision, alleged that Koch Industries stole oil and natural gas from federal and Indian lands. William Koch, majority shareholder of relator Precision, previously raised substantially similar allegations in three separate lawsuits. The allegations were also discussed before a Senate committee and in several news releases. The defendant moved to dismiss for lack of jurisdiction under the public disclosure bar. Affirming the lower court's dismissal, the Tenth Circuit wrote: "Precision did not come into existence as a corporate entity until June 1988…. Therefore, Precision cannot seriously argue it qualifies as an original source of the … information upon which its FCA allegations are based."[26]

By comparison, courts have routinely found that organizations

in existence at the time that the alleged fraud took place can have "direct and independent" knowledge.[27]

In March 2010, ACA § 10104(j)(2) took effect and amended the definition of an "original source" and the public disclosure bar itself (Table 1).

By amending the "original source" rule to allow a relator who "materially adds" to publicly disclosed information to qualify as an "original source," Congress deflated the strongest defense against an organizational relator's standing.

The Third Circuit recently examined the impact of the ACA amendments in *U.S. ex rel. Moore & Co., P.A. v. Majestic Blue Fisheries LLC*. In *Moore*, a law firm learned of an alleged fraudulent scheme during a wrongful death suit. The firm then researched various public documents and filed a *qui tam* action. The Third Circuit wrote:

> Lastly, Congress expanded the definition of "original source" in § 3730(e)(4)(B). The salient question is no longer whether the relator has "direct and independent knowledge" of the information on which the allegations in the complaint are based. 31 U.S.C. § 3730(e)(4)(B) (2006). Rather, original source status now turns on whether the relator has "knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions." *Id.* § 3730(e)(4)(B) (2012). Significantly, a relator no longer must possess "direct ... knowledge" of the fraud to qualify as an original source. *See United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1160 (3d Cir.1991) (holding under the pre-ACA bar that a law-firm relator lacked direct knowledge because it had learned of the fraud "through two intermediaries," one of which was "the discovery procedure by which the memoranda [exposing the alleged fraud] were produced").[30]

Filing via a Business Entity

In light of the ACA's changes to the public disclosure bar and the definition of "original source," the use of organizational relators to file *qui tam* actions becomes a less risky proposition for a relator seeking to protect her identify.

By using an organization as a relator, the whistleblower's name is no longer in the caption of the case and her name is far less likely to turn up in an internet search or background check when the case is unsealed. The whistleblower's name is also largely shielded from PACER and docket aggregators such as Justia and Law360, which tend to reveal only party names and the captions of filings in front of their paywall. To the extent that the case is dismissed after the government declines to intervene, there is also an increased likelihood that the defendant never learns the true identity of the relator.

However, anonymity is not complete. The relator will need to disclose their true identity to the government, and it will certainly be one of the first topics brought up in discovery by defense counsel. Relator's counsel should seek to include stipulations protecting the identity of the whistleblower in a protective order. Without such stipulations, the defendant could reveal the whistleblower's identity in motions or exhibits that are publically available on PACER.

There may also be strategic reasons for disclosing the relator's identity. The government often seeks a partial lift of the seal in order to reveal details of the allegations to the defendant and to aid in its investigation. For example, if the defendant learns that the relator is an executive who sat in on important planning meetings where the fraud was orchestrated, it may be willing to settle earlier.

Types of Business Entities

The most effective type of entity varies by state. For example, in Delaware the most attractive and effective organization is likely a limited liability company (LLC). Corporations in Delaware are required to disclose the names of natural persons who serve as directors on incorporation filings and in annual franchise tax reports, both of which are public record. The filings must identify the directors and their addresses.[31] Corporations are also subject to more rigid formalities than other entities in order to protect shareholders. By comparison, an LLC has no requirement to identify the members at the time of

Table 1. Pre- and Post-ACA Definitions of Original Source

Pre-ACA/Post-Fraud Enforcement Recovery Act[28]	Post-ACA/Post-Dodd-Frank[29] (Current)
(4) (A) 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. (B) For purposes of this paragraph, "original source" means 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.	(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. (B) For purposes of this paragraph, "original source" means an individual who either (1) prior to a public disclosure under subsection (e)(4)(a), has voluntarily disclosed to the government the information on which allegations or transactions in a claim are based, or (2) has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the government before filing an action under this section.

formation or afterward. LLCs must identify a natural person as a direct contact, but it does not need to be a member of the LLC. The operating agreement is not a matter of public record and there is no requirement for an annual corporate filing required, though LLCs are subject to an annual $300 state tax.

Partnerships may also be effective organizations, as they have generally have less stringent filing and reporting standards than LLCs. However, in states where public filings require the naming of one or more partners, it may be necessary to create multiple layers of entities or to take on non-whistleblower partners to conceal the identity of the whistleblowers.

Lastly, associations once presented an advantage over LLCs and corporations as they are considered to be legally indistinct from their members in many states. This indistinction undercut the defense argument that an association could not have direct knowledge of fraud that either occurred prior to its formation or that it did not witness firsthand.[32] However, with the ACA's amendments to the FCA and the removal of the direct knowledge requirement, there is little reason to use an association. ☉

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Endnotes

[1]False Claims Act, 31 U.S.C. §§ 3729-3733.
[2]*Allison Engine Co. v. U.S. ex rel. Sanders*, 553 U.S. 662, 665 (2008).
[3]31 U.S.C. 3730(b).
[4]31 U.S.C. § 3730(b)(2).
[5]*Id.*
[6]In recent years, the government has increasingly issued a "notice of no decision" or similarly captioned filing in which it essentially punts on the issue of intervention and allows the case to be unsealed while reserving the right to intervene or decline at a later date.
[7]31 U.S.C. § 3730(h).
[8]*Roe v. Wade*, 410 U.S. 113 (1973).
[9]*Doe v. Bolton*, 410 U.S. 179 (1973).
[10]*Doe v. C.A.R.S. Prot. Plus Inc.*, 527 F.358, n.2 (3d Cir. 2008); *see e.g., Frank*, 951 F.2d at 324; *Doe v. Megless*, 654 F.3d 404, 408 (3d Cir. 2011).
[11]*Megless*, 654 F.3d at 409-411.
[12]*Megless*, 654 F.3d at 408. While embarrassment in general is insufficient, the court did recognize that anonymity is often granted in cases involving "abortion, birth control, transexuality, mental illness, welfare rights of illegitimate children, AIDS, and homosexuality." *Id.* (quoting *Doe v. Borough of Morrisville*, 130 F.R.D. 612, 614 (E.D. Pa. 1990)).
[13]*Doe v. Frank*, 951 F.2d 320, 324 (11th Cir. 1992).
[14]Va. Code § 8.01-15.1(A).
[15]*Id.*
[16]*See* 31 U.S.C. § 3730(e)(4)(A)-(B). The public disclosure bar requires courts to dismiss actions based on information that has been publicly disclosed unless the relator is the original source of the information or the government opposes the dismissal.
[17]*U.S. ex rel. Poteet v. Lenke*, 604 F. Supp. 2d 313 (D. Mass 2009).
[18]*U.S. ex rel. Herrera v. Bon Secours Cottage Health Servs.*, 665 F. Supp. 2d 786 (E.D. Mich. 2008).
[19]*Id.* at 785-786 (internal quotation and citation removed; alteration in the original).
[20]*See, e.g.*, *U.S. ex rel. Doe v. Biotronik Inc.*, No. 2:09-CV-3617-KJM-EFB, 2015 WL 6447489 (E.D.Cal. Oct. 23, 2015).
[21]*U.S. ex rel. Wenzel v. Pfizer Inc.*, 881 F. Supp. 2d 217, 222 (D. Mass. 2012).
[22]31 U.S.C. § 3729; 31 U.S.C. § 3730.
[23]*See e.g., Minnesota Ass'n of Nurse Anesthetists v. Allina Health Sys. Corp.*, 276 F.3d 1032, 1048 (8th Cir. 2002) ("There is no hint in the history of the 1986 Amendments Act that Congress intended to disqualify organizational relators." *Id.* at 1049; "Neither the 1986 Amendments Act nor a review of its background or legislative history suggests that Congress meant to exclude suits on the basis of whether the relator was a natural person, corporation, or association. We therefore reject this argument." *Id* at n.12.); *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 656-57 (D.C. Cir. 1994).
[24]31 U.S.C. § 3730(e)(4)(A).
[25]*Fed. Recovery Servs. Inc. v. United States*, 72 F.3d 447 (5th Cir. 1995).
[26]*U.S. ex rel. Precision Co. v. Koch Indus. Inc.*, 971 F.2d 548, 553-54 (10th Cir. 1992).
[27]*See, e.g., U.S. ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 656-57 (D.C. Cir. 1994) (Relator railway alleged that an arbitrator submitted false claims to the government for services unrelated to arbitration proceedings. The railway participated in the proceedings and the court found that it had "direct and independent" knowledge of the fraud that it alleged."); *United States ex rel. Durcholz v. FKW Inc.*, 997 F. Supp. 1159, 1166 (S.D. Ind. 1998), *aff'd*, 189 F.3d 542 (7th Cir. 1999) (An excavating company and its owner alleged that a competitor engaged in fraud with regard to bidding on a government contract. The court held that the individual and company both possessed direct knowledge.).
[28]The Fraud Enforcement and Recovery Act of 2009 also amended the False Claims Act, though those amendments are not relevant for the purposes of this article.
[29]Section 1079B of the Dodd-Frank Wall Street Reform and Consumer Protection Act strengthened the FCA's anti-retaliation provision codified at 31 U.S.C. § 3730(h), though the amendment is not relevant for this discussion.
[30]*U.S. ex rel. Moore & Co., P.A. v. Majestic Blue Fisheries LLC*, 812 F.3d 294, 299 (3d Cir. 2016) (alterations in original).
[31]*See* 8 Del. C. §§ 102(b), 502(a)(4), 103(c)(8).
[32]*See e.g., U.S. ex rel. Minnesota Ass'n of Nurse Anesthetists v. Allina Health Sys. Corp.*, 276 F.3d 1032 (8th Cir. 2002) (Nursing association brought a *qui tam* action based upon the knowledge of its members. Addressing the defendants' argument that the relator lacked "direct and independent" knowledge, the court observed that the "association is an unincorporated association. Unlike a corporation, a voluntary unincorporated association has no legal status separate from its members."). *Id.* at 1049-1050.