No. 09-2167

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES EX REL. KELLY BALTAZAR,

Plaintiff-Appellant,

v.

LILLIAN S. WARDEN, et al.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

BRIEF OF THE UNITED STATES AS AMICUS CURIAE IN PARTIAL SUPPORT OF PLAINTIFF-APPELLANT

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STATEMENT OF INTEREST

This action was brought under the qui tam provisions of the False Claims Act, 31 U.S.C. § 3729, *et seq.*, and Illinois state law by a private "relator" on behalf of the United States and the State of Illinois. Relator alleged that her former employer and its proprietor had submitted claims for payment to Medicare and private insurers for chiropractic services, and that these claims were falsified in a number of respects. The district court granted summary judgment to defendants based upon the False Claims Act's public disclosure bar, 31 U.S.C. § 3730(e)(4), which divests courts of jurisdiction in suits that are "based upon the public disclosure of allegations or transactions . . . unless the action is brought by the Attorney General or the person bringing the action is an original source of the information." The district court held that reports that addressed general billing practices in the 50,000-member chiropractic industry, and did not identify any alleged perpetrators of fraud by name, were sufficient to preclude relator's suit under the public disclosure bar.

Pursuant to 28 U.S.C. § 517 and Federal Rule of Appellate Procedure 29(a), the United States submits this brief as amicus curiae in support of relator's argument that this suit is not "based upon the public disclosure of allegations or transactions" for purposes of the False Claims Act's public disclosure bar. The False Claims Act is the United States' primary means of recovery for fraud against the federal government, and its qui tam mechanism is intended to alert the government to fraudulent conduct of which it would otherwise be unaware. That purpose is ill-served by a reading of the public disclosure bar that applies to qui tam suits whenever reports of questionable industry billing practices find their way into the public domain. The United States accordingly submits this brief to urge that the district court's decision in this regard be reversed.

STATEMENT OF THE ISSUES

The False Claims Act's public disclosure bar, 31 U.S.C. § 3730(e)(4), provides that no court shall have jurisdiction over certain qui tam suits that are "based upon the public disclosure of allegations or transactions." The issues addressed by the United States in this appeal are:

1. Whether public reports that address general billing practices in the 50,000-member chiropractic industry, without identifying any alleged perpetrators of fraud by name, qualify as a disclosure of "allegations or transactions" under the False Claims Act; and

2. Whether relator's allegations, which identify specific fraudulent acts undertaken by a specific actor, are properly understood to be "based upon" such disclosures.

STATEMENT OF THE FACTS

I. Statutory Background

The False Claims Act, 31 U.S.C. § 3729 *et seq.*, was enacted in 1863 in response to "the fraudulent use of government funds during the Civil

War." *United States* v. *Neifert-White Co.*, 390 U.S. 228, 232 (1968). The Act prohibits persons from "knowingly present[ing], or caus[ing] to be presented . . . a false or fraudulent claim for payment or approval" to the federal government, 31 U.S.C. § 3729(a)(1), as well as from engaging in related deceptive practices, 31 U.S.C. §§ 3729(a)(2)-(7).[1] A person who violates the False Claims Act is typically "liable to the United States Government for a civil penalty . . . plus 3 times the amount of damages which the Government sustains." 31 U.S.C. § 3729(a).

Actions under the False Claims Act may be brought by the Attorney General, or by a private person (a "relator") in the name of the United States (a "qui tam suit"). 31 U.S.C. §§ 3730(a), (b)(1). If a relator initiates a qui tam suit, the action is brought "for the [relator] and for the United States Government . . . . in the name of the Government." 31 U.S.C.

[1] Subsequent to the filing of this lawsuit, Congress twice amended the False Claims Act. Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, sec. 4, 123 Stat. 1617, 1621-25; Patient Protection and Affordable Care Act, Pub. L. No. 111-148, sec. 10104(j)(2), 124 Stat. 119, 901-02. With exceptions not directly relevant to this appeal, these amendments "make[] no mention of retroactivity, which would be necessary for [their] application to pending cases." *Graham County Soil & Water Conservation Dist.* v. *United States ex rel. Wilson*, 130 S. Ct. 1396, 1400 n.1 (2010). This brief's references are accordingly to the pre-amendment version of the False Claims Act except where otherwise noted.

§ 3730(b)(1). In such a circumstance, "a qui tam relator is, in effect, suing as a partial assignee of the United States." *Vt. Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 773 n.4 (2000) (emphasis omitted).

When a private relator initiates a False Claims Act suit, the complaint is initially filed under seal and served only on the United States, accompanied by a "written disclosure of substantially all material evidence and information the [relator] possesses." 31 U.S.C. § 3730(b)(2). Prior to the expiration of the sealing period, the United States must elect whether to intervene and prosecute the action or to decline and allow the relator to proceed with the suit. 31 U.S.C. § 3730(b)(4). If a qui tam suit results in an award of civil penalties or damages, any money recovered is divided between the United States and the relator based primarily on whether the government intervened in the case. 31 U.S.C. § 3730(d).

The False Claims Act sets forth certain limits on federal courts' jurisdiction to hear suits that would otherwise be cognizable under the statute. 31 U.S.C. § 3730(e). As relevant here, the Act's public disclosure bar provides that "[n]o 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 [General Accounting Office (GAO)] 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). The 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)(B).

II. Facts and Prior Proceedings

1. In July 2007, Dr. Kelly Baltazar brought suit under the False Claims Act and Illinois law against her former employer Advanced Healthcare Associates and its proprietor Dr. Lillian Warden, alleging that defendants had submitted false claims to Medicare and private insurers for chiropractic services. Baltazar maintains that defendants submitted claims for services that were not provided or not medically necessary; inaccurately reported treatment dates and referrals; and routinely waived patient deductibles. Doc. 17 ¶¶32, 73-74. She further alleges that

defendants altered billing slips to excessively charge the government and private carriers for services, and destroyed the originals of the slips after they were submitted for payment. *Id.* ¶¶34-42, 45.

Among other details, the complaint references five specific diagnostic codes that defendants used to submit excessive or unjustified charges to Medicare and private insurers, and includes billing slips to illustrate such falsifications. Doc. 17 ¶¶47-70; Docs. 17-1, 17-2. The complaint alleges that employees responsible for defendants' billing "confirmed to Dr. Baltazar that it was defendants' daily and consistent practice[] to alter treaters' records by adding or upcoding procedures and treatments and re-examinations that were not performed," and that defendants had instructed them to destroy altered billing slips after the claims were submitted. Doc. 17 ¶45. Baltazar contends that when one employee stated that "patients were being charged for services they did not receive," defendant Warden admitted to editing the billing slips to reflect all services that "should have been provided" on the visit. *Id.* ¶72.

The United States declined to intervene in the suit, and the case was unsealed and ordered served on defendants in February 2008. Docs. 6-8.

2. In April 2009, the district court granted summary judgment to defendants on the False Claims Act allegations and declined to exercise jurisdiction over the remaining state law claims pursuant to 28 U.S.C. § 1367(c)(3). The court reasoned that Baltazar's suit fell within the False Claims Act's public disclosure bar, 31 U.S.C. § 3730(e)(4), because it was "based upon the public disclosure of allegations or transactions" set forth in various accounts of healthcare fraud and chiropractor billing practices. In particular, the court relied upon: (1) a 1987 GAO report on healthcare fraud; (2) a 2000 GAO report on methods for assessing improper Medicare payments; (3) a 2005 report by the Department of Health and Human Services' Office of the Inspector General regarding erroneous chiropractor Medicare billings; and (4) industry publications and Internet articles addressing chiropractic billing practices, the False Claims Act, and the Inspector General's 2005 report. Appellant's Appendix ("App.") 3-6.

The district court explained that the public disclosure bar applies "'when the critical elements exposing the transaction as fraudulent are placed in the public domain.'" App. 7 (quoting *United States ex rel. Feingold* v. *AdminaStar Federal, Inc.*, 324 F.3d 492, 495 (7th Cir. 2003)). "This standard," the court held, "does not require that the specific defendants be named or identified in the public disclosures." *Id.* Rather, the court held it "sufficient that the public disclosures contain information regarding industry-wide abuses that mimic closely the plaintiff's alleged fraud." *Id.* (citing *United States ex rel. Gear* v. *Emergency Med. Assocs.*, 436 F.3d 726, 728-29 (7th Cir. 2006)).

The court concluded that the cited government and media reports met this standard because they "describe[d] the same fraudulent billing practices and procedures that Plaintiff alleges"--specifically, "upcoding, billing Medicare for services not rendered, billing Medicare for covered services when non-covered services were provided, waiving co-payments and billing Medicare for and performing unnecessary chiropractic procedures." App. 7. The court focused in particular on the 2005 Inspector General report, reasoning that because there was "no dispute that the OIG report brought to the government's attention the fraudulent billing practices apparent in the chiropractic industry," and because "these practices mirror those alleged in Plaintiff's complaint," the report was "more than sufficient to show a public disclosure." *Id.*

The court further held that Baltazar's allegations shared sufficient overlap with these reports to render her complaint "based upon" the public disclosures. App. 8-9. Although the court acknowledged that some of Baltazar's allegations provided information that was independent of the disclosures, the court reasoned that the complaint remained based upon the disclosures because it failed to "establish[] a meritorious fraud claim, much less that the defendants actually submitted the altered billing statements to Medicare." App. 8.

The district court went on to hold that Baltazar did not qualify as an original source of the information, and that the public disclosure bar accordingly divested the court of jurisdiction to hear the False Claims Act portion of the suit. App. 9-10. The court dismissed those claims, relinquished jurisdiction over the remaining state law claims, and denied as moot defendants' motion to dismiss for failure to plead fraud with sufficient particularity under Fed. R. Civ. P. 9(b). App. 10; Doc. 38. Baltazar timely appealed.

SUMMARY OF THE ARGUMENT

The public disclosure bar embodies Congress's attempt to achieve "the golden mean between adequate incentives for whistle-blowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant information to contribute of their own."

United States ex rel. Springfield Terminal Ry. Co. v. *Quinn*, 14 F.3d 645, 649 (D.C. Cir. 1994). Courts have accordingly analyzed the provision to reconcile the "twin goals of rejecting suits which the government is capable of pursuing itself, while promoting those which the government is not equipped to bring on its own." *Id.* at 651.

The district court's judgment threatens to upset this careful balance by deterring qui tam suits even in cases where the government has no viable alternative means to obtain the information provided by relators. Reports of fraud in an industry do not implicate the public disclosure bar where the industry is large, the practices disclosed are diverse or generic, and the disclosures do not render the defendant and his fraudulent acts directly identifiable. The United States cannot be expected to possess sufficient information to discover a defendant's fraud in such circumstances. Certainly, a relator's suit cannot be said to be "based upon" such disclosures where, as here, the relator's allegations–unlike the public disclosures at issue–identify particular actors and fraudulent methods that would otherwise remain unknown. The qui tam provisions of the False Claims Act exist precisely in order to encourage such suits, which reveal fraud that the government would not otherwise discover. The district court erred in concluding otherwise.

ARGUMENT

I. A Public Report That Reveals Neither The Identity Nor The Methods Of Those Engaged In Fraud Does Not Disclose "Allegations Or Transactions" Under The Public Disclosure Bar.

The district court relied on various government and media reports to conclude that Baltazar's allegations were precluded by the public disclosure bar. None of the reports identified any particular actors who had committed fraud against the United States, or the specific methods by which such fraud had been achieved. The district court nevertheless held Baltazar's suit to be barred by these disclosures, reasoning that for such purposes it was "sufficient that the public disclosures contain information regarding industry-wide abuses that mimic closely the plaintiff's alleged fraud." App. 7 (citing *United States ex rel. Gear* v. *Emergency Med. Assocs.*, 436 F.3d 726, 728-29 (7th Cir. 2006)).

That analysis is incorrect. As this Court has made clear, and as the district court acknowledged, the public disclosure bar applies only "'when the critical elements exposing the transaction as fraudulent are placed in the public domain.'" App. 7 (quoting *United States ex rel. Feingold* v.

AdminaStar Federal, Inc., 324 F.3d 492, 495 (7th Cir. 2003)). *See also Springfield Terminal*, 14 F.3d at 657 (a public disclosure "bars suit only when specific allegations of fraud or the vital ingredients to a fraudulent transaction exist in the public eye"). Accounts of generalized billing practices in an industry do not suffice for this purpose. The identity of a fraud's perpetrator and the method used to achieve the fraud are among the most fundamental elements of an allegation under the False Claims Act. That is particularly true in the Medicare context, where the potential means of attempting fraud against the government are varied and the individuals who might do so are many in number. *See, e.g.*, Doc. 25-4 at 1-3 (2000 GAO report noting "the increasingly sophisticated and dynamic nature of health care fraud and abuse" and the limitations of various methods for identifying such practices).

The district court reasoned that the Inspector General's report had "brought to the government's attention the fraudulent practices apparent in the chiropractic industry," and that the presence of similar practices in relator's complaint was "more than sufficient to show a public disclosure." App. 7. The district court offered no explanation, however, of how the United States could be expected to trace fraud to particular defendants based on the disclosures at issue. The disclosure on which the district court relied most heavily, the Inspector General's 2005 report, reveals the daunting task that a case-by-case analysis of chiropractic Medicare claims would entail: in total, the industry employed roughly 50,000 practitioners and provided 21 million services in 2004. Doc. 25-5 at 10, 13. The report, by contrast, limited its analysis to a random sample of 400 claims--less than .003% of those filed in the study year--and drew no conclusion about any specific practitioners or Medicare's overall payment error rate to chiropractors. Doc. 25-5 at 8, 15, 26-27, 30. The federal government cannot bear the exclusive burden of unearthing any subsequent fraud by each of the 50,000 members of the chiropractic industry. Yet this is precisely the effect of the district court's decision.

The disclosures likewise fail to identify fraudulent acts with specificity. In the district court's view, it was enough that the disclosures mentioned the categories of "upcoding, billing Medicare for services not rendered, billing Medicare for covered services when non-covered services were provided, waiving co-payments and billing Medicare for and performing unnecessary chiropractic procedures." App. 7. But these generic methods of healthcare fraud are common to practically every field of medicine, and it is not surprising that Baltazar's complaint alleges some variation of these practices. Descriptions of fraudulent conduct at this level of generality do not provide the "critical elements" of a False Claims Act suit. Were government reports and media accounts of such acts sufficient to invoke the public disclosure bar, the bar would apply in practically every healthcare fraud case.

In accord with this understanding, the courts of appeals have held that regardless of whether a disclosure concerns the practices of an individual or an industry, a disclosure of "allegations or transactions" must put the government on notice of both the mechanics of an alleged fraud and the perpetrators of the fraud. In *United States ex rel. Gear* v. *Emergency Medical Associates*, 436 F.3d 726 (7th Cir. 2006), this Court considered allegations that a teaching hospital had "billed Medicare for services performed by residents in [its] residency program as if those services had been performed by attending physicians." 436 F.3d at 727. A prior GAO report had exposed this tactic at another teaching hospital, prompting the Inspector General to conduct "a nationwide initiative . . . to investigate how the nation's 125 medical schools, including [defendant], billed Medicare for services provided by residents." *Id.* at 728. In these circumstances, the Court concluded that "[d]efendants were implicated" by the industry disclosures at issue: the precise mechanism of fraud had been disclosed, and the defendants were "directly identifiable from the public disclosures." *Id.* at 729. Because these disclosures placed the government "in a position to vindicate society's interests, and a qui tam action would serve no purpose," the public disclosure bar precluded relator's suit. *Id.* (quoting *Feingold*, 324 F.3d at 495).

The Eleventh Circuit has likewise recognized that while "[t]he government often knows on a general level that fraud is taking place and that it, and the taxpayers, are losing money," the dominant issue for public disclosure purposes is whether the government will have "difficulty identifying all of the individual actors engaged in fraudulent activity." *Cooper* v. *Blue Cross & Blue Shield*, 19 F.3d 562, 566 (11th Cir. 1994) (per curiam). To avoid "hamper[ing] the discovery of specific instances of fraud and the recovery of losses" by the government, and potentially insulating an entire industry from qui tam suits based solely on generic reports of industry corruption, the Eleventh Circuit has held that GAO findings and Inspector General reports of widespread fraud among Medicare health plan administrators are insufficient to trigger the public disclosure bar absent identification of a specific defendant. *Id.* at 566 & n.7. *See also United States ex rel. Foundation Aiding the Elderly* v. *Horizon West*, 265 F.3d 1011, 1016 n.5 (9th Cir. 2001).

Other courts of appeals have applied a similar analysis. The D.C. Circuit has held that the public disclosure bar does not apply where the government must "comb[] through the myriad of transactions performed by the various [industry defendants] in search of fraud," but only where the disclosure sets forth "easily identifiable defendants" engaged in clear methods of fraudulent activity. *United States ex rel. Findley* v. *FPC-Boron Employees' Club*, 105 F.3d 675, 687 (D.C. Cir. 1997). The court in *Findley* accordingly held that the public disclosure bar prohibits suit where public reports "specifically identify the nature of the fraud . . . as well as the [actors] engaged in the allegedly fraudulent activity," as opposed to general, industry-wide allegations of the sort at issue in *Cooper*. *Id.*

The Ninth and Tenth Circuits have adopted like reasoning. *See United States* v. *Alcan Elec. & Eng'g, Inc.*, 197 F.3d 1014, 1019 (9th Cir. 1999) (bar applies where "disclosures contained enough information to enable the government to pursue an investigation against" a particular defendant, by naming "a narrow class of suspected wrongdoers" that it was "highly likely that the government could easily identify"); *United States ex rel. Fine* v. *Sandia Corp.*, 70 F.3d 569, 572 (10th Cir. 1995) ("When attempting to identify individual actors, little similarity exists between combing through the private insurance industry in search of fraud [as in *Cooper*] and examining the operating procedures of nine, easily identifiable, DOE controlled, and government-owned laboratories."). As these decisions highlight, a public disclosure must contain "identified techniques" and implicate responsible individuals: "general allegation[s] of Medicare fraud" and similar widespread practices, which "do[] not help the government know where to focus in an investigation of the countless individual Medicare claims submitted to the government by vast numbers of health care providers and individuals," do not suffice. *In re Natural Gas Royalties*, 562 F.3d 1032, 1042-43 (10th Cir. 2009).

The public reports at issue in this case concern tens of thousands of potential defendants, tens of millions of Medicare claims, and a variety of generic techniques for perpetrating fraud. Intimations of improper conduct in an industry of that size do not implicate every market participant as a potential defendant, as they might in a substantially smaller industry. Nor can the United States reasonably be expected to inquire into the conduct of every chiropractor in order to ferret out fraud, as the Inspector General was prepared to do for the 125-member industry in *Gear*.

In a market of sufficiently manageable size to allow for such deliberate investigation, allegations against an industry may adequately apprise the government to "vindicate society's interests, and a qui tam action would serve no purpose." *Gear*, 436 F.3d at 729 (quoting *Feingold*, 324 F.3d at 495). But in larger markets that are not amenable to participant-by-participant scrutiny, such disclosures cannot narrow the government's investigative field so as to "set the government squarely upon the trail of the alleged fraud." *In re Natural Gas Royalties*, 562 F.3d at 1041. Suggestions of broad-based misconduct cannot identify a particular allegation or transaction in a market with 50,000 participants and 20 million transactions annually; in such a setting, relators play an essential role in identifying fraud for the government. The district court's suggestion that the disclosures in this suit could adequately identify any fraud to the United States, without a relator's participation, blinks reality. The court's decision in this respect should be reversed.

II. Baltazar's Suit, Which Rests Upon Allegations Of Particular Fraudulent Acts By Particular Defendants, Is Not "Based Upon" Disclosures Of Generic Billing Practices In The Chiropractic Industry.

Even if the reports identified by the district court could be construed as "public disclosure[s] of allegations or transactions," Baltazar's complaint is not "based upon" such disclosures. A relator's suit is based upon an allegation or transaction if it is "substantially similar" to the allegation or transaction. *Glaser* v. *Wound Care Consultants, Inc.*, 570 F.3d 907, 920 (7th Cir. 2009). *See also* Pub. L. No. 111-148, sec. 10104(j)(2), 124 Stat. 901-02 (amending Section 3730(e)(4)(A) to apply "if substantially the same allegations or transactions as alleged . . . were publicly disclosed").

Baltazar's suit is not based upon any of the disclosures identified by the district court. Those disclosures do not speak to the particular defendants in this case, let alone the particular methods of fraud that Baltazar's complaint has alleged; they address general billing practices untethered to any specific services or providers. Baltazar's complaint would not have been barred if the disclosures at issue had named a particular set of chiropractors that did not include the defendants in this case. The result should not differ where the disclosures fail to attribute conduct not only to the defendants, but to any named entity at all.

Baltazar has identified not only particular participants in an alleged fraud against the United States, but also how that fraud was committed. Her complaint sets forth specific billing codes allegedly used by defendants to overcharge Medicare and private carriers. It lays out the particular procedures used by defendants to alter chiropractors' treatment records before they were submitted for payment to the Medicare program. And it explains how defendants sought to protect themselves from discovery by systematically destroying original treatment records that could contradict the billing records that they manufactured and retained. While some of these methods fall within the generalized descriptions of fraud contained in the Inspector General's report and other media sources cited by the district court, none of those disclosures approach the degree of detail set forth in Baltazar's qui tam complaint.

The district court regarded these allegations as inadequate because, in the court's view, they failed to "establish[] a meritorious fraud claim, much less that the defendants actually submitted the altered billing statements to Medicare." App. 8. *See also* App. 9 (stating that the complaint "established only that Plaintiff found some inconsistencies in her billing statements, and that she fixed them"). But that deficiency, if accurate, would offer grounds for the district court to dismiss the qui tam complaint under Fed. R. Civ. P. 9(b) or 12(b)(6). It would not justify dismissal for lack of jurisdiction pursuant to the public disclosure bar.

The relevant inquiry is whether Baltazar's allegations are substantially similar to identified public disclosures. They are not. This is not a case where relator's complaint simply parrots a stale set of accusations against the same defendant. The facts set forth in Baltazar's qui tam complaint constitute an allegation or transaction in their own right and are not "based upon" the generalities in the public disclosures cited by the district court, regardless of whether those disclosures rise to the level of identifying an allegation or transaction themselves. There is accordingly no cause for invoking the public disclosure bar in this case, and the district court erred in concluding otherwise.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be vacated and the case remanded for further proceedings.

Respectfully submitted,

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JUNE 2010

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I hereby certify that this brief complies with the type-volume limitation in Rules 29(d) and 32(a)(7)(B). The foregoing brief contains 4327 words from its Statement of Jurisdiction to its Conclusion, and is presented in proportionally spaced 14-point Century typeface.

s/ Eric Fleisig-Greene
Eric Fleisig-Greene

CERTIFICATE OF SERVICE

I hereby certify that on June 22, 2010, I filed and served the foregoing brief by furnishing a digital copy using the Court's CM/ECF system and by causing fifteen copies to be sent to the Court by Federal Express overnight, with two copies to be sent by Federal Express to:

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