

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA	:	CIVIL ACTION
ex rel., KEVIN BRENNAN	:	
	:	
Plaintiffs	:	
	:	
v.	:	
	:	
THE DEVEREUX FOUNDATION and	:	
DEVEREUX PROPERTIES, INC.	:	NO. 01-4540
	:	
Defendants	:	
	:	

Newcomer, S.J. February , 2003

O P I N I O N

Presently before the Court is Defendants' Motion to Reconsider this Court's Order of January 14, 2003, partially denying Defendant's Motion to Dismiss, Plaintiff's response and Defendants' supplemental reply. For the reasons set forth below, Defendants' Motion is denied.

BACKGROUND

This action is brought under the qui tam provisions of the False Claim Act, 31 U.S.C. §§ 3729 et seq. Plaintiff, Kevin Brennan ("Brennan"), brings suit on his own accord as, after review, the government opted against intervention. Brennan, a former employee of the Defendant, the Devereux Foundation ("Foundation"), alleges that the Foundation submitted fraudulent claims for payment and cost reports to various Medicaid and

Medicare payors for treatment and rehabilitation services provided by the Foundation. Brennan first notified the Foundation of these billing irregularities in June of 1999. Shortly thereafter, the Foundation disclosed the irregularities to the payors as well as the relevant governmental entities and continued to do so throughout 2000 and 2001. In April of 2000 Brennan notified the United States Department of Health and Human Services (HHS) of these alleged billing irregularities.

On July 25, 2002, the Defendants moved this Court to dismiss Plaintiff's Counts One through Six for improper jurisdiction based on the Plaintiff's alleged failure to meet the jurisdictional bar of 31 U.S.C. § 3730 (e)(4)(A). This Court denied the Defendant's Motion finding that the standards set forth in § 3730(e)(4)(A) are not applicable because the information at issue was never publicly disclosed, a condition necessary in order to give rise to the requirements of the Section. The Defendant brings a Motion to Reconsider arguing that public disclosure has taken place and that this Court's January 14, 2003, Opinion finding otherwise is in error.

DISCUSSION

I. Public Disclosure Standard

When considering whether a fact has been "publicly disclosed," according to 31 U.S.C. § 3730(e)(4)(A), "we must take

two distinct inquiries. The first is to ask whether the source is one recognized by the [False Claims Act]. The second posits whether the extent of disclosure is sufficient to support the conclusion that the information contained therein is now public within the meaning of the Act." United States of America, ex. rel. Anthony Dunleavy v. County of Delaware, et al., 123 F.3d 734, 744 (3d. Cir. 1997).

A. Recognized Source

The Defendants rely on two contradictory arguments to support the notion that their disclosures originate from a recognized source under § 3730(e)(4)(A). These two arguments are: (1) the transactions in question were voluntarily disclosed to a competent public official with managerial responsibility which constitutes a recognized source under § 3730(e)(4)(A); (2) the transactions in question were disclosed during an administrative investigation and/or audit, one of the recognized sources as provided by § 3730(e)(4)(A).

1. Voluntary Disclosure

In their Motion to Dismiss, the Defendants argued that their voluntary disclosure to various governmental payors and governmental agencies constituted sufficient public disclosure as per United States of America and Eunice Mathews v. Bank of Farmington, 166 F.3d 853 (7th Cir. 1999), and its progeny. In Farmington, the Seventh Circuit held that voluntary "disclosure

of information to a competent public official...who has managerial responsibility for the claims being made" constituted "public disclosure". This holding is actually comprised of two separate sub-findings. First, the Seventh Circuit held that disclosure to a government official satisfied § 3730(e)(4)(A)'s requirement that the disclosure be public (as discussed below). Id. at 861. Next, the Farmington Court held that the source requirement was satisfied by finding that the disclosure in question "was pursuant to an administrative investigation". Id. at 862.

In their Motion to Dismiss, the Defendants relied wholly on the Farmington Court's finding with regard to whether the disclosures were public and never addressed the source issue. The Defendants' argument seemed to rely solely on the basis that, just as in Farmington, the disclosures at hand were made voluntarily to a responsible government representative and were, therefore, publicly disclosed. Such an argument fails for the reasons outlined above as well as in this Court's previous Opinion. In addition, as discussed above, the Third Circuit requires that a public disclosure be public and from a source approved by § 3730(e)(4)(A). The Defendants' failure to address the source requirement led this Court to believe that the Defendants were arguing directly in contradiction to well established Third Circuit law, without fulfilling their duty to

notify the Court of that law's existence. To that end, this Court stands behind its previous Opinion.

B. Administrative investigation and/or audit

It now seems as though the Defendants have raised a new argument in order to satisfy the source requirement of § 3730(e)(4)(A). In their Motion for Reconsideration, the Defendants attempt to satisfy the source requirement by arguing that the disclosures took place during an administrative investigation and/or audit. The Court believes this to be a new argument as it clearly contradicts the argument presented in the original Motion to Dismiss. Nevertheless, the Court will address it here.

What the Defendants' Motion for Reconsideration now describes as an administrative audit or ongoing investigation was repeatedly described in their Motion to Dismiss as disclosures "prompted not by any outside inquiry but solely by [the Defendants'] own good faith...." Defendants' Motion to Dismiss at 12-13. The difference, presumably, stems from the Defendants' attempt to argue that their disclosures to various Medicaid payors and government agencies constituted an administrative audit or investigation, thereby satisfying the disclosure requirements under § 3730(e)(4)(A). Upon review of the documents originally submitted with their Motion to Dismiss, it appears to this Court that the Defendants had it right initially, when they

classified their disclosure as voluntary. There is no evidence to suggest a federal government audit or investigation was present prior to the filing date of this action.¹ Therefore, the Defendants fail to meet the source requirement and, consequently, the jurisdictional bar of § 3730(e)(4)(A) was never triggered.

B. Public Disclosure

Even if this Court were to find that the disclosure source is properly classified as an administrative audit or investigation, the Defendants fail to meet the second requirement, that is, that the disclosure be public. The Defendants correctly point out that the Seventh Circuit's approach in Farmington has never been decided by the Third Circuit, however, incorrectly argue that the Third Circuit's broad interpretation of § 3730(e)(4)(A) weighs in favor of adopting the Farmington standard. This Court is unable to agree for a number of reasons.

First, it is unlikely that the Third Circuit will adopt the Farmington approach. Contrary to the Defendants' assertions, the Third Circuit has narrowly interpreted the provisions of § 3730(e)(4)(A), especially when considering whether a disclosure

¹ The only investigation referenced by Defendants' Motion to Dismiss and accompanying exhibits was an investigation by Community Behavioral Health ("CBH"). CBH's investigation does not qualify as a valid source under § 3730(e)(4)(A) as it is not an investigation undertaken by a federal administrative entity.

was public. Moreover, a review of the pertinent case law reveals that the Third Circuit has consistently held that disclosures are not public unless they are directly in the public's view or within the public's access. United States of America ex rel. Mistick PBT v. Housing Authority of Pittsburgh, et al., 186 F.3d 376, 383 (3d. Cir. 1999)(holding that information disclosed in a Freedom of Information Act request is public because, as the Supreme Court found, it is open to public access); United States of America, ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. The Prudential Ins. Co., 944 F.2d 1149, 1158 (3d. Cir. 1991) (holding that material produced in discovery which is "potentially accessible to the public" is publicly disclosed); United States of America, ex rel. Dunleavy v. County of Delaware, et al., 123 F.3d 734, 746 (3d. Cir. 1997)(holding that public disclosure did not take place in the context of intergovernmental reports when the reports may simply be "filed away" and forgotten without being seen by the public). The Defendants' argument that the Third Circuit has broadly interpreted the meaning of public disclosure and would ultimately adopt the Farmington standard is wrong. The Third Circuit has been careful to only declare a disclosure to be public if it is actually available to the public or has been seen by the public. The Court's unwillingness to find public disclosure in Dunleavy is a perfect illustration. Adopting the Farmington standard breaks from this

pattern and presents a holding directly contradictory to the essence of Third Circuit's approach in its prior opinions.

In addition, the Seventh Circuit's holding in Farmington directly contradicts the clear intent of § 3730(e)(4)(A). Congress crafted § 3730 (e)(4)(A) in order to prevent a member of the public from being able to pursue a claim based on information obtained via a government inquiry or media account as opposed to personal knowledge. United States ex rel. Cantekin v. University of Pittsburgh, 192 F.3d. 402, 408 (3d Cir. 1999). As the Third Circuit has pointed out repeatedly, Congress altered the FCA in 1986 by adding § 3730(e)(4)(A), among other provisions, in order to allow private parties to proceed with qui tam claims in cases where the government already had knowledge of a possible claim. Prior to 1986, parties were not permitted to proceed with qui tam claims when the government already had knowledge of them. The 1986 amendments were enacted because Congress felt that the pre-1986 law restricted viable claims from being brought for a number of reasons: (1) the government lacks the resources necessary to prosecute all claims brought to its attention; (2) government officials might not understand the information they are given in connection with the possible claim; (3) the government official notified may have a personal interest in not bringing the suit. Id. One of Congress' concerns in allowing qui tam claims based on information that the government

already possessed was that suits would be brought after the government exposed the questionable activity and that a qui tam plaintiff would beat the government to the punch, thereby sharing in the proceeds of the suit without having ever played a role in exposing the wrongdoing. Id. Consequently, § 3730(e)(4)(A) was created to prevent such a scenario by presenting qui tam plaintiffs with some difficult requirements once it is determined that the information in question was publicly disclosed. It is important to note that § 3730(e)(4)(A) was only intended to come into play and raise the bar, so to speak, for potential qui tam plaintiffs after a showing that public disclosure has taken place. If public disclosure is established and the qui tam plaintiff is unable to meet the requirements, the court is unable to entertain the suit for lack of jurisdiction.

Given this legislative intent, the problem with the Seventh Circuit's Opinion in Farmington is two fold. First, the disclosure which took place in Farmington, as well as the disclosures in the case at hand, were not made public. These disclosures were made to the government privately as opposed to being made to the public or even available to the public. Such a scenario was not what Congress intended to guard against when drafting § 3730(e)(4)(A). Common sense confirms this assessment for once public disclosure is determined to have been made, the remaining requirements for a potential qui tam plaintiff are

designed to weed out those plaintiffs who gained the information giving rise to the suit by a means other than personal knowledge. If public disclosure never took place these tests become irrelevant and burdensome to the qui tam plaintiff. The disclosures at issue here, as well as those in Farmington, were never made public or made accessible to the public. Therefore, application of § 3730(e)(4)(A) is unnecessary and unduly burdensome to the qui tam plaintiff. As will be explored shortly, such an erroneous application could also present significant problems.

Second, the Seventh Circuit appears to have confused the requirement that a relator disclose information about a possible suit to the government before proceeding (31 U.S.C. § 3730(b)) with the jurisdictional bar as presented by § 3730(e)(4)(A). "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.... Since a public official in his official capacity is authorized to act for and to represent the community, and since disclosure to the public official responsible for the claim effectuates the purpose of disclosure to the public at large, disclosure to a public official constitutes public disclosure within the meaning of § 3730(a)(4) (sic)" Id. at 861. Here, the

Seventh Circuit has transferred a requirement that the government be notified into a basis that public disclosure has taken place. Clearly, this is not the type of disclosure Congress had in mind when drafting § 3730(e)(4)(A).

Third, from a public policy perspective, Congress' motivation for enacting § 3730(e)(4)(A) weighs against the Farmington holding. As explained earlier, Congress was concerned that viable suits were not being heard because the government was unable or unwilling to pursue them. A finding that disclosure to a responsible government actor triggers the requirements of § 3730(e)(4)(A) has the ability to negate Congress' desire to enable any whistle blower to bring these suits by making it considerably more difficult for relators to pursue a claim when only the government knows of the information giving rise to the claim. Thus, the Seventh Circuit's holding has the potential to take us back to the same situation Congress sought to correct with the 1986 amendments. In addition, application of the Farmington standard presents other possible negative consequences. In the case at hand, the Plaintiff disclosed the alleged fraud to the federal government in 2000, nearly a year prior to filing his suit. Assuming the Plaintiff's disclosure met the source requirement, such a disclosure would hamper his ability to be compensated for his efforts by triggering the other requirements of § 3730(e)(4)(A). Ultimately, such a policy would

discourage relators from coming forward with important information before filing suit on their own. This was not Congress' intent in crafting § 3730(e)(4)(A).

Finally, even if the Third Circuit were to adopt the Seventh Circuit's approach in Farmington, it is questionable whether the Defendants would prevail. The Farmington approach requires the disclosure be made to a "competent public official...who has managerial responsibility for the very claims being made." Id. at 861. Here, the Defendants made the disclosure not to a public official, but rather, to private Medicaid payors who were hired by governmental agencies. The Court is aware that the Defendants allege notifying the Department of Health and Human Services, however, there is no evidence to support the notion that those notified had managerial responsibility for the claim.

AN APPROPRIATE ORDER SHALL FOLLOW.

Clarence C. Newcomer, S.J.

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DEVEREUX PROPERTIES, INC.	:	NO. 01-4540
	:	
Defendants	:	
	:	

O R D E R

AND NOW, this day of February, 2003, for the reasons set forth in the accompanying Opinion, it is hereby ORDERED that Defendant's Motion for Reconsideration (Document 21) is DENIED.

AND IT IS SO ORDERED.

Clarence C. Newcomer, S.J.