WILL THE PUBLIC DISCLOSURE BAR BE THE NEXT PROVISION OF THE FALSE CLAIMS ACT TO BE REVIEWED BY THE U.S. SUPREME COURT?

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On October 3, the U.S. Supreme Court invited the U.S. Solicitor General to express the Government's views about the application of the False Claims Act (FCA) to the public disclosure bar. The request was made in the case *United States ex rel. Advocates for Basic Legal Equality v. U.S. Bank, N.A.*,[1] a *qui tam* action that the U.S. Court of Appeals for the Sixth Circuit held was properly dismissed because of the public disclosure bar.[2]

In *Advocates for Basic Legal Equality*, the Sixth Circuit held that prior public disclosures are "substantially the same" for purposes of the public disclosure bar if they "encompass" the allegations in the subject *qui tam* action even though the prior disclosures do not reveal the specific fraud alleged. Based upon that analysis, the court dismissed the case against U.S. Bank on the grounds that two prior public disclosures revealed the alleged fraud.

The Public Disclosure Bar

The public disclosure bar limits the right of a relator to bring a *qui tam* action when it is based on substantially the same information that was previously disclosed in public documents unless the relator is the original source of the information.[3] When Congress enacted the FCA in 1863, the public disclosure bar did not exist. Consequently, a relator could base a *qui tam* complaint on any source of information,[4] even "a federal criminal indictment."[5]

To curb such opportunistic conduct, Congress amended the FCA "to preclude *qui tam* actions 'based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought.' "[6] This amendment became known as the "Government knowledge bar."[7] Under this provision, once the government "learned of a false claim, only [it] could assert its rights under the FCA against the false claimant."[8] Not surprisingly, "the volume and efficacy of *qui tam* litigation dwindled" as relators found less incentives to commence an action on behalf of the government.[9]

Seeking to find the balance "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,"[10] Congress amended the FCA in 1986 "to make [it] a more useful tool against fraud in modern times."[11] The 1986 amendments, among other things, replaced the Government Knowledge bar with the public disclosure bar.[12]

Under the 1986 version of the public disclosure bar, the court lacked jurisdiction over the action when it was based upon the public disclosure of the allegations or transactions, unless the relator was the original source of the information.[13]

In 2010, Congress enacted the Patient Protection and Affordable Care Act, which, among other things, amended the public disclosure bar.[14] The 2010 version of Section 3730(e)(4)(A) eliminated the "jurisdictional" language and added language permitting the government to waive the public disclosure bar at its discretion.[15] It also added language providing that the

bar is triggered by prior disclosure of allegations or transactions "substantially the same" as those in the *qui tam* action.[16] The new language codified the construction most Circuit courts had given to the pre-2010 language, which barred actions "based upon" public disclosures.[17]

To determine whether the allegations in the complaint were publicly disclosed, the courts generally apply a three-part test. First, the courts inquire whether there has been any public disclosure of the alleged fraud. Second, if the allegations or transactions identified were public, then the courts determine whether they appear in any of the enumerated sources identified in Section 3730(e)(4)(A). If either requirement is not satisfied, the bar does not apply, and the relator can proceed with the action. If both requirements are met, then the courts examine whether the allegations or transactions "on which the relators' suit rests are substantially the same as the publicly disclosed allegations or transactions."[18] The relator's lack of knowledge of the prior public disclosures does not alter the court's analysis.[19] At bottom, the courts look to whether the government received notice of the alleged fraud prior to the filing of the *qui tam* action.[20]

The Proceedings in *Advocates for Basic Equality*

Advocates for Basic Legal Equality involved a mortgage insurance program, backed by the Federal Housing Administration, that encouraged banks to lend money to high-risk borrowers. The insurance provided under the program covered the losses incurred by a lending institution that were caused by a borrower who defaulted on a loan. To participate in the program, a lender, such as U.S. Bank (which participated in the program), had to certify that it would meet, and did meet, certain requirements each time it requested an insurance payment.[21] The key requirement to be certified, for purposes of the action, was that the lender—in this case U.S. Bank—would engage in "loss mitigation" measures, such as attempting to arrange a face-to-face meeting with the defaulting borrower, before foreclosing.[22]

The relator, Advocates for Basic Legal Equality (ABLE), an Ohio non-profit organization that advances the interests of low-income individuals, claimed that U.S. Bank did not satisfy the loss mitigation requirement. It alleged that U.S. Bank promised to engage in loss mitigation, failed to do so, and then lied about the failure.[23] ABLE cited three foreclosures where this happened, claiming that those instances demonstrated a widespread pattern showing that U.S. Bank wrongfully foreclosed on 22,000 homes and wrongfully collected $2.3 billion in federal insurance benefits.[24] ABLE filed the action on behalf of itself and the U.S. government claiming that U.S. Bank violated the FCA. The Department of Justice declined to intervene.[25]

The district court found that two of ABLE's allegations stated a claim under the FCA.[26] Nevertheless, it dismissed the action because ABLE based its case on information that had been publicly disclosed, precluding it from bringing the lawsuit as a *qui tam* plaintiff.[27] In that regard, the court found that ABLE's allegations had been publicly disclosed in: (*i*) a 2011 consent order between U.S. Bank and the federal government, which required U.S. Bank to implement a wide variety of reforms, including measures to ensure that it " 'achieves and maintains effective mortgage servicing, foreclosure, and loss mitigation activities. . . .' ";[28] and (*ii*) a 2011 foreclosure practices review from three federal agencies, which noted that various banks, including U.S. Bank, had failed to take a variety of loss mitigation measures.[29]

The Sixth Circuit affirmed the dismissal, holding that a general disclosure suffices to bar a *qui tam* action involving more specific and detailed claims of wrongdoing: "The broader, publicly disclosed category (a variety of mortgages) encompasses ABLE's narrower category (federally insured mortgages)."[30] The Court reasoned that if the rule were "[o]therwise,

one could always—or at least nearly always—evade the public disclosure requirement by focusing the allegations in a second action on sub-classes of potential claims covered by the initial action."[31]

ABLE filed a writ of certiorari with the Supreme Court.

Split in the Circuits?

According to ABLE, there is a split between the Sixth Circuit, on the one hand, and the Seventh and Ninth Circuits, on the other hand, about how to define "substantially the same." ABLE contends that the Seventh and Ninth Circuits have considered and rejected the Sixth Circuit's "broad-brush approach," holding that "a complaint that is similar [to a public disclosure] only at a high level of generality does not trigger[ ] the public disclosure bar."[32] "In those circuits, public disclosure of some wrongdoing does not bar an FCA action unless it 'alerted the government to the specific areas of fraud alleged' in the action."[33] "Only disclosures alleging 'that a particular [defendant] had committed a particular fraud in a particular way' suffice."[34]

In response, U.S. Bank contends, among other things, that there is no split between the circuits. U.S. Bank notes that the panels in the Seventh and Ninth Circuits merely held that "where a relator alleges a different type of fraud from what has been publicly disclosed, courts should not construe the disclosures and allegations so broadly as to obviate the distinction between the kind of fraud alleged and the kind of fraud disclosed."[35] According to U.S. Bank, nothing in the Sixth Circuit's opinion conflicts with the Seventh and Ninth Circuits: "The Sixth, Seventh, and Ninth Circuits all apply the same overarching rule: public disclosures bar a given complaint when they reveal allegations or transactions that are substantially the same as those presented in the complaint and so suffice to put the government on notice of its allegations."[36]

Better Markets, Inc., which filed an amicus brief, contends that the Eighth Circuit's approach offers another view in the split among the circuits. The Eighth Circuit requires the prior public disclosure to "expose[ ]" "the essential elements" of "the transaction as fraudulent" in order for the bar to apply.[37] According to Better Markets, the Eighth Circuit found persuasive a similar articulation by the D.C. Circuit.[38] Better Markets requested that the Court adopt a rule based on this approach:

> Previous public disclosures bar a *qui tam* action only where they contain information that, taken as true, describes fraud with sufficient particularity to state a claim to relief under the False Claims Act. In other words, if the disclosures, standing as the sole allegations in a hypothetical complaint against the same defendant, are insufficiently particularized to survive a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure (and the heightened pleading standard for fraud under Rule 9(b)), then they do not bar a *qui tam* suit that features additional allegations.[39]

Potential Outcome

The approaches articulated by the courts show that there is a split of opinion among the circuits. The Seventh and Ninth Circuits advance a framework that strikes a balance between the "encompassing" "high level of generality" espoused by the Sixth Circuit and the granular level advanced by the Eighth, D.C. and First Circuits. This balanced approach "effectuates the purpose of the public disclosure bar"[40] by requiring some form of nexus in degree and kind between the prior public disclosure and the *qui tam* action.[41] As the Ninth Circuit explained, this balanced approach "brings us closer to '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.' "[42]

The Sixth Circuit's approach is far too broad. By analyzing the issue in terms of whether the prior disclosure "encompasses" the alleged fraud, the court

creates a rule that potentially has no limit. Any general allegation of fraud necessarily "encompasses" specific frauds that the government does not know about. The Sixth Circuit's approach therefore would swallow virtually every fraud filed under the FCA.[43]

Finally, the rule proposed by Better Markets takes the Eighth, First and D.C. Circuits' rulings too far. Such a rule would allow virtually every *qui tam* action to escape the application of the public disclosure bar. Indeed, relators would be able to base their *qui tam* actions on public disclosures, without adding anything material (*i.e.*, original source information) to the claim, because the prior public disclosures would not state a claim under Fed. R. Civ. P. 12(b)(6) and meet the heightened pleading requirements of Fed. R. Civ. P. 9(b). That result tips the balance too far in favor of parasitic actions the Supreme Court has long criticized.[44]

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The Supreme Court has not set a deadline for the Solicitor General to file his brief. If the Court takes the case, it will likely result in a decision that clarifies the requirement that the prior public disclosure be "substantially same" as the allegations in the *qui tam* complaint in order for the bar to apply.

ENDNOTES:

[1]*United States ex rel. Advocates for Basic Legal Equality v. U.S. Bank, N.A.*, 816 F.3d 428 (6th Cir. 2016), petition for cert. filed, U.S. July 26, 2016 (No. 16-130).

[2]*United States ex rel. Advocates for Basic Legal Equality v. U.S. Bank, N.A.*, 816 F.3d 428 (6th Cir. 2016).

[3]31 U.S.C. § 3730(e)(4)(A).

[4]*Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 293-94 (2010) (noting that Congress "did not limit the sources from which a relator could acquire the information to bring a qui tam action.").

[5]*Id.* at 294 (citing *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 545-48 (1943)).

[6]*Id.* (quoting Act of Dec. 23, 1943, 57 Stat. 609 (codified at 31 U.S.C. § 232(c) (1946 ed.)).

[7]*Id.*

[8]*Id.* (quoting *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 949 (1997)) (internal quotation marks omitted).

[9]*Id.* at 294.

[10]*Id.* (quoting *United States ex rel. Springfield Terminal R. Co. v. Quinn*, 14 F.3d 645, 649 (D.C. Cir. 1994)) (internal quotation marks omitted).

[11]*Id.* (quoting *Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 133 (2003) (quoting S. Rep. No. 99-345, p. 2 (1986)) (internal quotation marks omitted).

[12]*Graham Cnty.*, 559 U.S. at 294-95.

[13]*Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 467 (2007) (quoting 31 U.S.C. § 3730(e)(4)(A)).

[14]*See* Pub. L. No. 111-148, § 10104(j)(2), 124 Stat. 119, 901 (2010).

[15]31 U.S.C. § 3730(e)(4)(A) ("The court shall dismiss an action or claim under this section, unless opposed by the Government. . . .").

[16]*Id.* The 2010 amendments also "altered the list of enumerated sources for disclosure" (*United States ex rel. Winkelman v. CVS Caremark Corp.*, 827 F.3d 201, 206 n.2 (1st Cir. 2016)) by providing that only federal hearings, reports, audits and investigations trigger the bar. Compare 31 U.S.C. § 3730(e)(4)(A)(i)-(ii) (2010) with § 3730(e)(4)(A) (2009). Further, the public disclosure bar does not apply to an action brought by an "original source" of information. 31 U.S.C. § 3730(e)(4)(A). Prior to 2010, an original source was defined as "an individual who has direct and independent knowledge of the information on which the allegations are based." Rockwell Int'l, 549 U.S. at 467 (quoting former 31 U.S.C. § 3730(e)(4)(B)). After the 2010 amendments, an original source must either (i) have supplied the information on which the allegations are based to the government before the public disclosure; or (ii) have "knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions." 31 U.S.C. § 3730(e)(4)(B).

[17]*See, e.g., Leveski v. ITT Educ. Servs. Inc.*, 719 F.3d 818, 828 & n.1 (7th Cir. 2013) ("The current version of 31 U.S.C. § 3730(e)(4), which went into effect on March 23, 2010, expressly incorporates the 'sub-

stantially similar' standard previously used by our circuit and most other circuits under the prior version of the statute.").

[18]*Winkleman*, 827 F.3d at 208 (citation omitted); see also *Mateski*, 816 F.3d at 570.

[19]*Winkleman*, 827 F.3d at 209 ("A relator's ability to recognize the legal consequences of a publicly disclosed fraudulent transaction does not alter the fact that the material elements of the violation already have been publicly disclosed.") (citations and internal quotation marks omitted).

[20]*See, e.g., United States ex rel. Bogina v. Medline Indus., Inc.*, 809 F.3d 365, 370 (7th Cir. 2016); *Winkelman*, 827 F.3d at 208; *United States ex rel. Doe v. Staples, Inc.*, 773 F.3d 83, 87 (D.C. Cir. 2014); *United States ex rel. Fine v. Sandia Corp.*, 70 F.3d 568, 572 (10th Cir. 1995).

[21]816 F.3d at 429.

[22]*Id.*

[23]*Id.*

[24]*Id.*

[25]*Id.*

[26]*United States v. U.S. Bank, N.A.*, No. 3:13 CV 704, 2015 WL 2238660, at *4-7 (N.D. Ohio May 12, 2015).

[27]*Id.* at **8-11.

[28]*Id.* at *9

[29]*Id.* (quoting *Consent Order*, *In re U.S. Bank, Nat'l Ass'n* (AA-EC-11-18), at 4-6) (internal quotation marks omitted).

[30]816 F.3d at 432.

[31]*Id.*

[32]Advocates for Basic Equality Petition for a Writ of Certiorari, at 1 (available at http://www.scotusblog.com/wp-content/uploads/2016/08/16-130-petition.pdf) (quoting *United States ex rel. Mateski v. Raytheon Co.*, 816 F.3d 565, 575 (9th Cir. 2016), and citing *United States ex rel. Goldberg v. Rush Univ. Med. Ctr.*, 680 F.3d 933, 936 (7th Cir. 2012)) (internal quotation marks omitted).

[33]*Id.* (orig'l emphasis) (quoting *Mateski*, 816 F.3d at 579).

[34]*Id.* (quoting *Goldberg*, 680 F.3d at 935).

[35]U.S. Bank Brief in Opposition to Petition for a Writ of Certiorari, at 15 (orig'l emphasis) (available at http://www.scotusblog.com/wp-content/uploads/2016/08/16-130-BIO.pdf) (citations omitted).

[36]*Id.* at 23-24 & n.8 (noting that the First, D.C. and 10th Circuits are each in accord).

[37]Brief of Amicus Curiae Better Markets, Inc., in Support of Petitioner, at 16 (available at http://www.scotusblog.com/wp-content/uploads/2016/08/16-130-cert-amicus-better-markets.pdf) (quoting *United States ex rel. Rabushka v. Crane Co.*, 40 F.3d 1509, 1512 (8th Cir. 1994)).

[38]*Id.* (citing *United States ex rel. Springfield Terminal Ry. v. Quinn*, 14 F.3d 645, 654 (D.C. Cir. 1994)). In Springfield Terminal, the court held that "[t]he language employed in § 3730(e)(4)(A) suggests that Congress sought to prohibit qui tam actions only when. . . the critical elements of the fraudulent transaction themselves were in the public domain." See also *Winkelman*, 827 F.3d at 208 (holding that a "public disclosure occurs when the essential elements exposing the particular transaction as fraudulent find their way into the public domain.") (citation and internal quotation marks omitted).

[39] *Id.* at 3.

[40]*Mateski*, 816 F.3d at 577.

[41]*Id.* at 578.

[42]*Id.* at 577 (citations omitted).

[43]*Id.* ("Allowing a public document describing 'problems'—or even some generalized fraud in a massive project or across a swath of an industry—to bar all FCA suits identifying specific instances of fraud in that project or industry would deprive the Government of information that could lead to recovery of misspent Government funds and prevention of further fraud.").

[44]E.g., Graham Cnty., 559 U.S. at 294-95.