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## False Claims Act

### **Seventh Circuit: Public Information Dooms FCA Suit Against Transit Authority**

BY DANIEL SEIDEN

**T**he False Claims Act's public-disclosure bar blocked claims that the Chicago Transit Authority inaccurately reported transit data to receive overpayments under a grant program, the U.S. Court of Appeals for the Seventh Circuit affirmed (*Cause of Action v. Chi. Transit Auth.*, 2016 BL 59005, 7th Cir., No. 15-1143, 2/29/16).

An audit report that reached the public domain before the appellant pursued its claims showed that the Transit Authority knew it was presenting the government with false information, the three-judge panel concluded.

The court also said a letter issued by the Federal Transit Administration (FTA) to the Transit Authority triggered the bar because the government's possession of information constitutes public disclosure.

However, the court noted tension with sister circuits on this issue, and conceded that if it only had the letter to assess, it would consider the view that information must reach the nongovernmental public to trigger the bar.

Jeffrey J. Bushofsky, a partner at Ropes & Gray LLP, told Bloomberg BNA that he wasn't surprised the panel didn't revisit the circuit's position that public disclosure can simply mean disclosure to the government. "It was pretty obvious that the information was available publicly with the audit," he said.

More notable is that the panel "indulged in a discussion of the circuit split, and if they had the issue squarely in front of them, they probably would have gone into an analysis that at least strongly questioned the viability of the Seventh Circuit's historical position on this."

He said it seemed that once the appellate court gets the right case, where the issue of what is a public disclosure is correctly framed, the Seventh Circuit might join the other circuits.

Also, he said there was enough in the facts set forth in the audit to plead fraud and get past a motion to dismiss. "The court is essentially saying there's enough in the audit to raise a reasonable inference of fraud, but unfortunately for the plaintiff, the government was aware of all the facts," Bushofsky said. Disappointment with how the government handled the purported fraud was irrelevant to the analysis, he added.

**Background.** The Transit Authority receives federal grants from the FTA's Urbanized Area Formula Program, which requires recipients to submit financial, operating and asset condition information about transit systems.

Cause of Action, a nonprofit watchdog organization, alleged that the Transit Authority received overpayments under the program by making inaccurate reports to the FTA.

A district court found that the claims were barred under the public-disclosure rule because Cause of Action based them upon (1) the FTA's post-investigation letter instructing the Transit Authority to revise its data for 2011 and future years, and (2) an audit report showing inaccurate classifications by the Transit Authority.

**Public Domain.** The Seventh Circuit said Cause of Action conceded that the audit report reached the public domain after being posted on the Illinois Auditor General website, and said the FTA letter was publicly disclosed because the government's possession of information exposing a fraud is sufficient to trigger the public-disclosure bar.

The court said its public domain stance differs from other circuits, which say information must flow outside of the government to trigger the bar, as held in *United States ex rel. Wilson v. Graham Cnty. Soil & Water Conservation Dist.*, 2015 BL 26339, 4th Cir., No. 13-2345, 2/3/15, (103 FCR 133, 2/10/15).

The court said "the position of the other circuits would warrant in-depth reconsideration of our precedent" if it only had the FTA letter upon which to rely.

**Critical Fraud Elements.** The audit report contained critical elements exposing the alleged fraud, Judge Kenneth F. Ripple said, because it provided a sufficient basis to infer that the Transit Authority knew it was presenting a false set of facts to the government.

Specifically, the court said the audit report disclosed (1) that the Transit Authority reported Vehicle Revenue Miles (VRM) that was considerably higher than that of its peer group; and (2) that the Illinois Auditor General suspected the Transit Authority of inaccurate data classification to increase grant allocations.

The court also concluded that Cause of Action's claims were substantially the same as the information disclosed in the audit report.

Cause of Action didn't show that this case was similar to *United States ex rel. Heath v. Wisconsin Bell Inc.*, 760 F.3d 688 (7th Cir. 2014), which said the public disclosure didn't apply because the relator made an independent investigation to reveal fraud.

The court said Cause of Action didn't conduct an independent investigation here.

Judges Joel M. Flaum and Diane S. Sykes joined in the decision

Daniel Z. Epstein and David Fischer represented appellant Cause of Action. Rachel L. Kaplan represented appellee Chicago Transit Authority.

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*The court's decision is available at: [http://www.bloomberglaw.com/public/document/CAUSE\\_OF\\_ACTION\\_Plaintiff\\_Appellant\\_v\\_CHICAGO\\_TRANSIT\\_AUTHORITY\\_a](http://www.bloomberglaw.com/public/document/CAUSE_OF_ACTION_Plaintiff_Appellant_v_CHICAGO_TRANSIT_AUTHORITY_a)*