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Sixth Circuit Affirms that Broad Public Disclosure of Misconduct May Bar More Specific Allegations of Fraud Under False Claims Act's Public Disclosure Bar

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In *U.S. ex rel. Advocates for Basic Legal Equality, Inc. v. U.S. Bank*, 816 F.3d 428 (2016), the Sixth Circuit affirmed the dismissal of a False Claims Act ("FCA") suit against U.S. Bank based on the FCA's public disclosure bar. In reaching its decision, the Sixth Circuit held that the bar applied to a subset of broader misconduct than had previously been publicly disclosed, and that the few specific examples of alleged misconduct offered by Relator to qualify as an original source did not "materially add to" the prior public disclosures, and thus did not suffice to save the complaint from dismissal. Relator subsequently filed a petition for a writ of certiorari to the United States Supreme Court challenging the public disclosures that the Sixth Circuit held triggered the bar as insufficiently tailored to the fraud alleged in the complaint for the bar to apply. That petition remains pending.

Background

U.S. Bank participated in a mortgage insurance program, backed by the Federal Housing Administration ("FHA"), that encouraged banks to lend money to high-risk borrowers. To participate in the program, U.S. Bank had to certify that it would meet certain requirements, and each time it requested an insurance payment, U.S. Bank had to certify that it had satisfied those requirements. One such requirement mandated that 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.

Relator alleged that U.S. Bank engaged in a practice of initiating foreclosure proceedings on FHA-insured mortgages without complying with the servicing and loss mitigation regulations of the Department of Housing and Urban Development ("HUD"), although it submitted annual certifications to HUD containing a general statement that it was compliant with all HUD-FHA regulations. The relator alleged that this conduct resulted in $2.3 billion in false claims for FHA insurance benefits.

Sixth Circuit's Holding

The FCA's public disclosure bar directs courts to dismiss *qui tam* actions where "substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed" unless the *qui tam* plaintiff is an original source of the allegations. 31 U.S.C. § 3730(e)(4)(A). Only certain types of disclosures trigger this bar, namely, disclosures "in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party," "in a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation," or "from the news media." *Id.*

Here, the Sixth Circuit held that Relator's claims were barred because the conduct it alleged had already been publicly disclosed. The sources that the court cited as prior public disclosures included (i) a 2011 consent order between U.S. Bank and the OCC requiring U.S. Bank to implement a wide variety of reforms, including loss mitigation and foreclosure prevention efforts for delinquent loans; (ii) a 2011 foreclosure practices review by three federal agencies, which noted that various banks, including U.S. Bank, had failed to take a variety of loss mitigation

measures; and (iii) a 2011 news article discussing the consent order, which explained that U.S. Bank had engaged in a pattern of misconduct and negligence.

The court found that these disclosures were sufficient to trigger the public disclosure bar because they put the government on notice of the possibility of fraud. They disclosed the allegation that U.S. Bank had failed to engage in appropriate loss mitigation measures and that it committed fraud when it made false certifications about those efforts. The court also rejected the argument that, because neither the consent order nor the foreclosure practices review dealt with loss mitigation related specifically to federally insured mortgages, there was no prior public disclosure. Those prior disclosures broadly applied to any type of mortgage, thus encompassing federally insured mortgages. Otherwise, the court reasoned, "one could always—or at least nearly always—evade the public disclosure required by focusing the allegations in a second action on sub-classes of potential claims covered by the initial action." *Advocates for Basic Legal Equality, Inc.*, 816 F.3d at 432. In short, the court held that the broader disclosure encompassed Relator's narrower allegations.

Having concluded that Relator's allegations were publicly disclosed, the court then addressed Relator's claim that it was an original source of the allegations. To qualify as an original source, a relator must have information that "materially adds to" the public disclosure. 31 U.S.C. § 3730(e)(4)(B). Materiality, here, "requires the claimant to show it had information 'of such a nature that knowledge of the item would affect a person's decision-making,' is 'significant,' or is 'essential.'" *Advocates for Basic Legal Equality, Inc.*, 816 F.3d at 431. Relator argued that it met this standard for three foreclosures that purportedly demonstrated that U.S. Bank failed to engage in appropriate loss mitigation measures. The court rejected this, concluding that these incidents did not add to the thousands of prior problematic foreclosures already disclosed in the public record. Moreover, Relator failed to show that these three incidents in any way affected the government's decision-making as to U.S. Bank, as the government had already tried to remedy U.S. Bank's foreclosure practices in the 2011 consent decree.

In the process of reaching its decision, the Sixth Circuit joined at least five other circuits in concluding that the post-2010 version of the public disclosure bar "is no longer jurisdictional."

Implications of the Court's Ruling

This decision represents a principled application of the post-2010 public disclosure bar that will be useful to FCA defendants in challenging relators' efforts to bring claims based on conduct that has already been made public.

Relator filed a certiorari petition in July 2016 seeking to overturn the Sixth Circuit's decision. The petition asks the Supreme Court to address the specificity at which a court should assess whether a prior public disclosure states substantially the same fraud that is alleged in a complaint. In October 2016, the Court invited the Acting Solicitor General to file a brief in the case expressing the views of the United States. The petition remains pending.

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