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Supreme Court Declines to Resolve False Claims Act Public Disclosure Bar Circuit Split

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On October 3, 2016, the Supreme Court denied certiorari in *Cause of Action v. Chicago Transit Authority*, allowing the circuit split regarding what it means for information to be in the "public domain" under the False Claims Act ("FCA") to persist. 137 S. Ct. 205 (2016). On appeal, the Seventh Circuit had affirmed the district court's dismissal of relator's claims because the defendant's alleged misconduct fell with the FCA's public disclosure bar. In its decision, the panel admitted that "some of our sister circuits have criticized our reading of [public domain]." *Cause of Action v. Chicago Transit Authority*, 815 F.3d 267, 275 (7th Cir. 2016). Nevertheless, the panel declined to engage in an "in-depth reconsideration of our precedent." *Id.* at 277.

Background

Defendant Chicago Transit Authority ("CTA") operates public transportation in the City of Chicago. The Federal Transit Administration ("FTA") operates the Urban Area Formula Program ("UAFP"), which provides funding for urban transit programs. Under the UAFP, the CTA submits certain data about their transit system, including Vehicle Revenue Miles ("VRM"). VRM includes only those miles when the vehicle is in service and expected to carry passengers. VRM expressly excludes "deadhead miles" or miles accrued when the vehicle is not in service. In 2005, Thomas Rubin audited the CTA on behalf of the Illinois Auditor General. Rubin's 2007 final report (the "Rubin Audit Report") revealed that the CTA was overstating its VRM, resulting in larger grants from UAFP. Two years later, in 2009, Rubin sent the final report to the Department of Transportation Office of Inspector General and relator Cause of Action. In March 2012, Cause of Action requested that the Department of Transportation investigate the CTA's reporting practices. As a result, the FTA investigated the CTA's VRM reporting. In April 2012, the FTA concluded its review with a letter describing its investigation, the CTA's cooperation, and directing the CTA to amend its VRM reporting for 2011 (the "FTA Letter").

The District Court for the Northern District of Illinois dismissed relator's claims, holding that the allegations were publicly disclosed in both the FTA Letter and the Rubin Audit Report. Because the relevant facts were publicly disclosed, relators were precluded from bringing the suit under the FCA's public disclosure bar, 31 § 3730(e)(4).

The Seventh Circuit Affirms

The Seventh Circuit affirmed the district court's dismissal, finding that relator's "allegations of wrongdoing had been publicly disclosed at the time the action was filed." *Id.* at 269. To determine whether a suit is barred under § 3730(e), the court undertook a three-step analysis: (1) were the critical elements of the allegations in the public domain; (2) was the publicly disclosed information substantially similar to the allegations in the complaint; and (3) is the relator an original source of the information.

The court's analysis focused on the content of two disclosures, the FTA letter and the Rubin Audit Report. First, analyzing the FTA Letter, the Court relied on its holdings in *United States v. Bank of Farmington*, 166 F.3d 853 (7th Cir. 1999) and *Glaser v. Wound Care Consultants*, 570 F.3d 907 (7th Cir. 2009). Under *Bank of Farmington* and *Glaser*, allegations trigger the public disclosure bar when the authorities with responsibility for the claims have been notified and the agency is actively investigating the allegations. The Court found that the FTA

letter was "precisely the type of active investigation that the Seventh Circuit identified in *Glaser*" and dismissed the distinction that in this case the government had not fully recovered the misappropriated funds. *Cause of Action*, 815 F.3d at 275.

After reaching this conclusion, the court acknowledged the circuit split on this point. Other circuits require disclosure to the public, not just the government, relying on both the plain text of § 3730(e) and the broad congressional intent behind the 1986 amendment to the public disclosure bar. *See e.g. United States ex rel. Wilson v. Graham Cty. Soil & Water Conservation Dist.*, 777 F.3d 691, 696 (4th Cir. 2015); *United States ex rel. Oliver v. Philip Morris USA Inc.*, 763 F.3d 36, 42 (D.C. Cir. 2014); *United States ex rel. Maxwell v. Kerr–McGee Oil & Gas Corp.*, 540 F.3d 1180, 1186 (10th Cir. 2008); *United States ex rel. Rost v. Pfizer, Inc.*, 507 F.3d 720, 728 (1st Cir. 2007). The court declined, however, to re-evaluate the Seventh Circuit precedent because the FTA Letter was not the only document before the court, and relator had already conceded that the Rubin Audit Report was in the public domain when the complaint was filed.

The remainder of the opinion was devoted to the other steps in the public disclosure bar analysis, focusing on the Rubin Audit Report. Here, the Court found that the report disclosed the critical elements of a fraud, including that the CTA acted knowingly. In the Seventh Circuit, fraud need not be expressly alleged, provided all the elements, including scienter, can be inferred. On the scienter point, the court was careful to note that the facts only warrant a knowingly inference when there is no other logical explanation. Here, the court focused on the lack of judgment required in VRM reporting, particularly because the definition of VRM was clear and expressly excluded deadhead miles.

Moving to the third prong of the analysis, the court found that relators failed to meet their burden of "pleading genuinely new and material information beyond what has been publicly disclosed." *Id.* at 281 (internal quotation marks omitted). Finally, the Court found that relator did not qualify as an original source of the information, because its knowledge was derived exclusively from the Rubin Audit Report. As such, the complaint simply repackaged those findings and did not materially add to the public disclosure.

Implications of the Court's Decision

The Supreme Court's denial of certiorari in this case is important, as it leaves open the question of who must receive the relevant information for it to qualify as a "public" disclosure. The Seventh Circuit's decision suggests, however, that in another case, where this issue would be dispositive, out of "respect for the position of the other circuits" the Court may be willing to engage in an "in-depth reconsideration of our precedent." *Id.* at 277. In the meantime, Defendants who believe an FCA action is barred by public disclosure should continue to be mindful of the significant split between the Seventh Circuit and the First, Fourth, Tenth, and D.C. circuits. We will continue to monitor the development of this area of FCA law.

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