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U.S. Supreme Court Declines Once Again to Interpret FCA Public Disclosure Bar

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Earlier this year, in *United States ex rel. Gilligan v. Medtronic, Inc.*, 126 S. Ct. 1054 (Jan. 9, 2006), the United States Supreme Court denied a petition for a writ of certiorari asking it to resolve a split among the circuits concerning a provision in the public disclosure bar of the False Claims Act.[1] The circuits have divided over the meaning of the term ''based upon'' in the public disclosure bar. *Gilligan* was at least the seventh time the Supreme Court has decided against hearing this issue.[2]

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Public Disclosure Bar and Original Source Exception

The *qui tam* provisions of the False Claims Act permit private parties, known as ''relators,'' to file suit alleging fraud against the federal government. If the government elects to intervene in a *qui tam* lawsuit and take over the litigation, the relator can receive up to 25 percent of any eventual recovery by the government. If the government decides not to intervene, the relator can continue to litigate the action and can keep up to 30 percent of any eventual recovery.[3]

The False Claims Act, however, contains a number of jurisdictional limitations on *qui tam* actions. One such limitation, the public disclosure bar, precludes jurisdiction over a *qui tam* action ''based upon'' a prior public disclosure unless the relator is an ''original source.'' The public disclosure bar provides:

> No court shall have jurisdiction over an action . . . *based upon* the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.[4]

[1] 31 U.S.C. § 3730(e)(4).

[2] *See, e.g.*, Petition for Writ of Certiorari, *United States ex rel. King v. Hillcrest Health Ctr., Inc.*, No. 01-956, at 6-11 (U.S. Dec. 28, 2001), *cert. denied*, 535 U.S. 905 (2002); Petition for Writ of Certiorari, *United States ex rel. Mistick PBT v. Housing Auth. of City of Pittsburgh*, No. 99-969, at 16-23 (U.S. Dec. 8, 1999), *cert. denied*, 529 U.S. 1019 (2000); Petition for Writ of Certiorari, *United States ex rel. Biddle v. Bd of Trs. for Stanford Univ.*, No. 98-1268, at 9-17 (U.S. Jan. 28, 1999), *cert. denied*, 526 U.S. 1066 (1999); Petition for Writ of Certiorari, *United States ex rel. McKenzie v. BellSouth Telecomms., Inc.*, No. 97-850, at 11-16 (U.S. Nov. 21, 1997), *cert. denied*, 522 U.S. 1077 (1998); Petition for Writ of Certiorari, *United States ex rel. Findley v. FPC-Boron Employees' Club*, No. 97-157, at 6-10 (U.S. June 16, 1997, *cert. denied*, 522 U.S. 865 (1997); Petition for Writ of Certiorari, *United States ex rel. Siller v. Becton Dickinson & Co.*, No. 94-106, at 12-15 (U.S. July 15, 1994), *cert. denied*, 513 U.S. 928 (1994).

[3] *See* 31 U.S.C. § 3730(b).

[4] *Id.* § 3730(e)(4)(A) (emphasis added).

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To satisfy the original source exception to the public disclosure bar, a relator must meet two requirements. The relator must: (1) have ''direct and independent knowledge'' of the allegations in the *qui tam* complaint; and (2) have provided information in the relator's possession to the government before filing the *qui tam* action.[5]

The Meaning of "Based Upon"

In *Gilligan*, the relators alleged that a medical device manufacturer was liable under the False Claims Act for supposedly marketing non-FDA-approved devices. On appeal, the U.S. Court of Appeals for the Sixth Circuit held that prior products liability litigation triggered the public disclosure bar, and that the district court therefore lacked jurisdiction.[6] It found that the allegations in the relators' *qui tam* complaint were ''based upon'' allegations made in the prior litigation. Citing circuit precedent, the Sixth Circuit explained that a *qui tam* complaint is ''based upon'' a prior public disclosure when it is '' 'supported by [the public disclosure] and includes any action based even partly upon public disclosures.' ''[7]

Relators sought review in the Supreme Court, pointing to a circuit split over the interpretation of the ''based upon'' language. Nine circuits have held, as the Sixth Circuit did in *Gilligan*, that a *qui tam* claim is ''based upon'' a prior public disclosure if it is substantially similar to the previously disclosed allegation or transaction.[8] By contrast, the Fourth and Seventh Circuits have held that a *qui tam* complaint must be ''derived from'' a prior public disclosure in order to trigger the jurisdictional bar—that is, the relator must have obtained the information upon which his complaint is based from the prior public disclosure.[9]

Courts following the majority rule have stated that it is more consistent with the purposes of the FCA and the public disclosure bar: to encourage private citizens to ''blow the whistle'' on fraud while deterring parasitic lawsuits where information regarding the fraud has already been publicly disclosed. The D.C. Circuit, for instance, concluded that ''the *qui tam* provisions of the FCA were designed to inspire whistleblowers to come forward promptly with information concerning fraud so that the government can stop it and recover ill-gotten gains. Once the information is in the public domain, there is less need for a financial incentive to spur individuals into exposing frauds.''[10]

In addition, courts applying the majority rule have stated that the interpretation of ''based upon'' adopted by the Fourth and Seventh Circuits would render the original source exception a nullity. According to the minority rule, as noted above, a *qui tam* lawsuit is barred by the public disclosure bar only when the allegations made in that suit are directly ''derived from'' a prior public disclosure—meaning that the relator obtained the information on which his suit is based directly from the earlier disclosure.[11] In such a case, the relator could never be an original source with the ''direct and independent knowledge'' the statute requires, because, by hypothesis, his lawsuit used information derived from some previously publicly disclosed source. In a decision predating *Gilligan*, the Sixth Circuit expressed doubt about the minority rule, questioning ''why a Congress that was intent on eliminating parasitic *qui tam* actions would have provided an exception that allows a relator who qualifies as an original source to maintain an action actually derived from public disclosures.''[12] The court noted that it ''would have to contort normal usage to find that anyone who actually derived his action from public disclosures had 'independent' knowledge of this information'' sufficient to satisfy the original source exception.[13]

A practical issue raised by the minority rule is the need for discovery and fact-finding concerning when, where, and how relators came by the information from which they derived their *qui tam* complaint. The practical issues were illustrated by the Seventh Circuit's recent opinion in *United States ex rel. Gear v. Emergency Medical Associates of Illinois, Inc.*, where the court needed to unravel a dispute concerning how the relator derived the allegations in the Complaint.[14]

In *Gear*, a medical resident alleged that two physician groups that supply emergency department physicians to hospitals had fraudulently billed Medicare for services that were actually performed by residents. The allegations resembled those made in the physicians at teaching hospitals (''PATH'') audits of the HHS Office of Inspector General. The district court dismissed the action under the public disclosure bar, and the Seventh Circuit affirmed. The Court observed that, by the time the relator filed suit, the General Accounting Office had issued a report on physicians' billing for residents' ser-

[5] *Id.* § 3730(e)(4)(B).

[6] *United States ex rel. Gilligan v. Medtronic, Inc.*, 403 F.3d 386 (6th Cir. 2005).

[7] *Id.* at 391 (quoting *United States ex rel. Jones v. Horizon Healthcare Corp.*, 160 F.3d 326, 332 (6th Cir. 1998)).

[8] *See, e.g.*, *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 324 (2d Cir. 1992); *United States ex rel. Mistick PBT v. Housing Auth. of City of Pittsburgh*, 186 F.3d 376, 394-402 (3d Cir. 1999); *Fed. Recovery Servs., Inc. v. United States*, 72 F.3d 447 (5th Cir. 1995); *United States ex rel. Jones v. Horizon Healthcare Corp.*, 160 F.3d 326, 332 (6th Cir. 1998); *Minn. Ass'n of Nurse Anesthetists v. Allina Health Sys. Corp.*, 276 F.3d 1032, 1044-47 (8th Cir. 2002); *United States ex rel. Biddle v. Bd. of Trs. of Stanford Univ.*, 161 F.3d 533, 538 (9th Cir. 1998); *United States ex rel. Fine v. Advanced Sciences, Inc.*, 99 F.3d 1000, 1006 (10th Cir. 1996); *Cooper v. Blue Cross & Blue Shield of Fla., Inc.*, 19 F.3d 562, 567 (11th Cir. 1994); *United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 688 (D.C. Cir. 1997).

[9] *See United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1347-49 (4th Cir. 1994); *United States v. Bank of Farmington*, 166 F.3d 853, 863 (7th Cir. 1999).

[10] *Findley*, 105 F.3d at 685. *See also, e.g.*, *United States ex rel. McKenzie v. BellSouth Telecomms., Inc.*, 123 F.3d 935, 943 (6th Cir. 1997) (noting that majority reading of the public disclosure bar and its original source exception serves the purposes of the FCA ''by barring those who come forward only after public disclosure of possible False Claims Act violations from acting as qui tam plaintiffs [and thereby] discourag[ing] persons with relevant information from remaining silent'' while ''prevent[ing] 'parasitic' qui tam actions in which relators, rather than bringing to light independently discovered information of fraud, simply feed off of previous disclosures of government fraud'') (citation omitted).

[11] *See Bank of Farmington*, 166 F.3d at 863; *Siller*, 21 F.3d at 1348.

[12] *Jones*, 160 F.3d at 332 n.4. *See also, e.g.*, *Allina Health Sys.*, 276 F.3d at 1045.

[13] *Jones*, 160 F.3d at 332 n.4.

[14] Nos. 05-2235, 05-3202, __ F.3d __, 2006 WL 229999 (7th Cir. Feb. 1, 2006).

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vices, the HHS-OIG had launched its nationwide PATH initiative, many PATH cases had settled, multiple news articles on the PATH audits had been published, and the American Medical Association had filed suit seeking relief from the government audits.

On the other hand, the relator filed an affidavit stating that he based his *qui tam* complaint on ''personal observations and experience.'' The Seventh Circuit found that the affidavit was ''insufficient to counter the weighty public record, which it is difficult to believe [the relator] did not notice . . . .''[15] Such a factual inquiry into how the relator derived his or her information, which in *Gear* seems to have included a credibility determination, is not necessary under the majority rule which asks only whether the *qui tam* allegations are substantially similar to the prior public disclosure.

[15] *Id*.

Conclusion

As noted, *Gilligan* represents at least the seventh time that the Supreme Court has decided that the circuit split over the interpretation of ''based upon'' is not certworthy. As a result, defendants in *qui tam* actions brought within the Fourth and Seventh Circuits who have moved unsuccessfully to dismiss under the public disclosure bar should consider the possibility of seeking interlocutory review of the denial with an eye towards seeking a rehearing by the *en banc* court. It is possible that the Fourth and Seventh Circuits could be persuaded to reconsider their positions.