

Seventh Circuit Expands the “Based Upon” Exception to Jurisdiction in False Claims Act Lawsuits

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In a decision that will be of interest to companies faced with defending qui tam lawsuits bought under the False Claims Act (FCA), the Seventh Circuit Court of Appeals in *Glaser v. Wound Care Consultants, Inc., et al.*, No. 07-4036, 2009 WL 1885500 (7th Cir. July 2, 2009), rejected its long-standing minority position that an FCA lawsuit is “based upon” a public disclosure when the relator’s allegations are essentially dependent upon publicly disclosed information and are actually derived from that information. Instead, courts in the Seventh Circuit will now determine whether a relator’s allegations are based upon a public disclosure solely by considering whether the relator’s allegations are “substantially similar” to those already in the public domain. This new, more lenient standard will make it easier to obtain dismissals of qui tam lawsuits on jurisdictional grounds and potentially help companies

avoid the extensive costs associated with defending this type of litigation.

The Jurisdictional Threshold For Filing Suit Under the False Claims Act

Section 3730(e)(4) of the FCA requires dismissal of qui tam lawsuits for lack of jurisdiction if a lawsuit is “based upon” a “public disclosure” of allegedly fraudulent conduct “unless . . . the person bringing the action is an original source of the information.” 31 U.S.C. § 3730(e)(4)(A). In order to determine whether it has jurisdiction, a court must conduct a three-step inquiry. The court must initially determine whether the relator’s allegations have been “publicly disclosed” in litigation, at a hearing, during an investigation, or in another public forum. If they have, the court must then determine whether the relator’s allegations are “based upon” those publicly disclosed allegations. If they are, the court

must finally determine whether the relator is an “original source” of the allegations.

In 1999, the Seventh Circuit issued a significant decision bearing on the first two steps of this jurisdictional inquiry. In *United States v. Bank of Farmington*, 166 F.3d 853 (7th Cir. 1999), the court held that information a bank disclosed to a public official charged with investigating the allegations upon which the relator’s lawsuit was based constituted a “public disclosure” under Section 3730(e)(4)(A). See 166 F.3d at 861-62. The court explained that “[d]isclosure of information to a competent public official about an alleged false claim against the government [is a] public disclosure within the meaning of § 3730(e)(4)(A) when the disclosure is made to one who has managerial responsibility for the very claims being made.” *Id.* at 861.

In contrast to this broad interpretation of the first “public disclosure” step of the jurisdictional inquiry, the Seventh Circuit took a narrow approach to the second, “based upon” step of the inquiry. *Id.* at 863-64. The court held that a relator’s allegations are based upon a public disclosure when they “depend[] essentially upon publicly disclosed information and [are] actually derived from such information.” *Id.* at 864. Thus, if the allegations were very similar to facts that have been publicly disclosed, but were not actually derived from the public disclosure, the “based upon” step of the jurisdictional inquiry was not satisfied. The court reasoned that its interpretation of “based upon” comported with the plain language of Section 3730(e)(4) (A), as “‘based upon’ does not mean ‘similar (even identical) to’ but ‘derived from.’” *Id.* at 863 (internal citation omitted). The court therefore affirmed the dismissal of the relator’s lawsuit because the relator’s claims were actually and substantially derived from the public disclosure (and the relator was not an original source of the allegations). *Id.* at 863, 866.

Although this reading of the “based upon” clause was rejected by most other circuits, the Seventh Circuit reaffirmed this interpretation in *United States ex. rel. Fowler v. Caremark RX, L.L.C.*, 496 F.3d 730 (7th Cir.

2007). In support of its position, the Seventh Circuit explained that “[b]oth the majority and minority standard have rallied powerful arguments to their respective sides, but the minority standard holds the trump card, the plain language interpretation. We may be in the minority, but we will not jettison a standard when that standard includes an appropriate plain language interpretation of the statute.” *Id.* at 738.

Glaser’s Allegations Against Wound Care

In April 2005, Glaser filed her FCA lawsuit, after being contacted by an attorney, alleging that Wound Care might have improperly billed Medicaid for her treatments. *Glaser*, 2008 WL 1885500, at *2-3. However, similar allegations involving Wound Care’s billing practices had already been publicly disclosed several months earlier when the Centers for Medicare & Medicaid Services (CMS) formally notified Wound Care that it was actively investigating these practices. *Id.* at *2. Relying on the *Farmington* standard, the district court dismissed the case for lack of jurisdiction. *Id.* at *3. On appeal, Glaser alleged that the district court erred because her allegations were not essentially dependent upon information that was publicly disclosed when the CMS notified Wound Care of its investigation nor was her lawsuit derived from such information. *Id.* at *5.

The Seventh Circuit Adopts The Majority Interpretation Of “Based Upon”

Tasked with interpreting the phrase “based upon” for a third time, the Seventh Circuit shifted course and said that its interpretation of “based upon” in *Bank of Farmington* and *Caremark* was problematic. *Id.* at *5-6. While the Seventh Circuit noted that its interpretation of “based upon” follows the principle that statutory terms should be given their plain and ordinary meaning, the court also acknowledged that its interpretation does not comply with another, more fundamental principle of statutory construction – that a statute should be construed to give effect to all of its parts so that no part will be rendered inoperative or superfluous. *Id.* at *8.

Applying this principal, the Seventh Circuit explained that its long-standing interpretation of the phrase “based upon” did not give full effect to Section 3730(e)(4)’s original source exception, and thus rendered the exception superfluous. *Id.* at 11. The original source exception permits a court to have jurisdiction over an FCA lawsuit *even if* the allegations are based upon publicly disclosed information as long as the relator is “an original source of the information.” 31 U.S.C. § 3730(e)(4)(B). An original source is defined as someone with “direct and independent

knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action. . .which is based on [that] information.” *Id.* The Seventh Circuit explained that if it continued to hold that “based upon” means “actually derived from,” then “once a court concludes that a lawsuit is actually derived from publicly disclosed information, asking the original-source question never affects the jurisdictional result.” *Glaser*, 2008 WL 1885500 at *7. Similarly, the court noted that if a relator’s allegations are not “actually derived” from publicly disclosed information, a court will retain jurisdiction regardless of whether the relator was the original source of the allegations. *Id.*

Accordingly, the Seventh Circuit decided to “adopt the majority position and conclude that a relator’s FCA complaint is ‘based upon’ publicly disclosed allegations or transactions when the allegations in the relator’s complaint are substantially similar to publicly disclosed allegations.” *Id.* at *11. The court concluded that adopting

the majority interpretation of “based upon” would provide meaning to the original source exception, and thus give equal weight to each subsection of Section 3730(e)(4). *Id.* at *10-11. The court also concluded that it would balance the FCA’s competing goals of encouraging whistleblowers to promptly report fraudulent conduct against prohibiting frivolous lawsuits filed by opportunistic plaintiffs. *Id.*

Applying this standard, the Seventh Circuit affirmed the district court’s dismissal of Glaser’s FCA lawsuit for lack of jurisdiction. *Id.* at *13. The court found that Glaser’s allegations of Wound Care’s fraudulent billing practices were “virtually identical” to the allegations set forth in the CMS letter to Wound Care, which provided “enough for (the court) to conclude that Glaser’s allegations are substantially similar to the allegations that were at the heart of the CMS investigation.” *Id.* at *11. Glaser also failed to establish that she was an original source of the allegations in her lawsuit because she only learned about Wound Care’s allegedly fraudulent conduct from her

attorney, and then asserted the attorney-client privilege to avoid disclosing any information about their conversations. *Id.* at *12-13.

Going Forward

The *Glaser* decision is significant because the Seventh Circuit has now joined eight other circuits in adopting a broad interpretation of the phrase “based upon” a public disclosure. Going forward, the Seventh’s Circuit more lenient standard should expand the possibilities for defendant companies to dismiss qui tam lawsuits for lack of subject matter jurisdiction. At the same time, it is important to note that the Seventh Circuit’s broad interpretation of the “public disclosure” requirement, upon which most (but not all) circuits agree, remains intact. This interpretation has significant implications for companies that uncover potential wrongdoing, as a company’s prompt disclosure of that wrongdoing to an agency with jurisdiction over that matter may provide a basis for dismissal of any subsequent qui tam lawsuit relating to that matter.

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