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Two Recent Decisions Hold That A Whistleblower Is Not Barred From Bringing A Qui Tam Lawsuit Based Upon Facts Already Known To The Government As A Result Of Audit Or Investigation That Is Not Known To The General Public

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One of the procedural hurdles facing a whistleblower who brings a qui tam lawsuit under the ***False Claims Act (FCA)*** is the so-called "public disclosure bar." That bar arises from a section of the FCA stating that a qui tam case may be subject to dismissal if it is "based upon the public disclosure of allegations or transactions" in certain specified ways, including in a government "report, hearing, audit, or investigation," unless the whistleblower is the "original source" of that information. 31 U.S.C. § 3730(e)(4)(A).

In 1999, the U.S. Court of Appeals for the Seventh Circuit ruled that information provided to a "competent government official" was "publicly disclosed" within the meaning of the public disclosure bar. *United States v. Bank of Farmington*, 166 F.3d 853 (7th Cir. 1999). That interpretation of "public disclosure" is problematic for a whistleblower considering a qui tam action because the whistleblower may have no way of knowing whether information was previously provided to the government if that same information was not also disclosed to the general public. For example, if the government's own internal investigation uncovered the fraud, then under Bank of Farmington, a non-public report of that investigation could trigger the public disclosure bar.

Luckily, the Seventh Circuit's interpretation of "public disclosure" has been rejected by other federal appellate court decisions, including two that have come out within the past month.

In a case that has been working its way through the court system for 14 years—including an earlier trip up to the Supreme Court on a different issue—the U.S. Court of Appeals for the Fourth Circuit considered whether reports of government audits and investigations are "public disclosures" if those reports are distributed within the government, but not to the general public. *United States ex rel. Wilson v. Graham County Soil & Water Conservation Dist.*, No. 13-2345 (4th Cir. Feb. 3, 2015). The Wilsoncase involved allegations of fraud by certain county governments on federally-funded programs intended to help counties affected by storm damage. Those programs were administered by the U.S. Department of Agriculture (USDA). The whistleblower, an employee of one of those county governments, first reported her concerns to USDA in 1995. In 1996, one of the counties at issue conducted an audit, and issued an audit report substantiating certain of the whistleblower's

allegations. Then, in 1997, a USDA investigator issued a report substantiating other parts of her allegations. Both of those reports were widely distributed within various state and federal government agencies, but were not published to the general public.

The Fourth Circuit held that these audit and investigative reports were not "public disclosures." The Court reasoned that "[b]y specifying that a 'disclosure' must be 'public,' Congress indicated that only disclosures made to the public at large or to the public domain" would trigger the FCA's public-disclosure bar. The Court specifically rejected the Seventh Circuit's earlier ruling in Bank of Farmington.

A few weeks later, the U.S. Court of Appeals for the Sixth Circuit took up the same issue, and reached the same result, in United States ex rel. *Whipple v. Chattanooga-Hamilton County Hospital Authority*, No. 13-6645 (6th Cir. Feb. 25, 2015). The whistleblower in that case alleged that the defendant, which operated a hospital, submitted false claims to federally-funded healthcare programs, including Medicare and Medicaid, by knowingly overbilling for certain types of services. He worked for defendant for six months in 2006, and alleged that he discovered the fraud by analyzing the defendant's internal records. Unbeknown to the whistleblower, the government had began an audit of defendant's billing practices in late-2006, which resulted in an administrative settlement and the refund of almost $500,000 by defendant, in late-2009. The audit was overseen by the Department of Health and Human Services Office of Inspector General (HHS OIG), but also involved a private company, AdvanceMed Corporation (AdvanceMed), working for HHS OIG as a contractor, as well as an outside consultant, Deloitte Financial Advisory Services, LLP (Deloitte) working for defendant.

Subsequently, the whistleblower disclosed his allegations to the government in 2010, and filed his qui tam case in 2011. The district court dismissed his case under the public disclosure bar, holding that the administrative audit was a "public disclosure" within the meaning of the bar.

The Sixth Circuit reversed. The Court held that disclosure of information to the government does not, by itself, constitute a "public disclosure" because the government is not the "public." Thus, investigations or audits conducted by government agencies do not constitute "public disclosures" if they are not disclosed to the general public. In so holding, the Sixth Circuit also rejected the Seventh Circuit's analysis in Bank of Farmington. The Sixth Circuit also went onto hold that the involvement by private companies—AdvanceMed and Deloitte—in the audit process did not change the result, because reports issued by those companies were only distributed within the government, and those companies worked under an obligation to keep their findings confidential.

In addition to these recent decision by the Fourth and Sixth Circuits, Bank of Farmington has been rejected in decisions by the First, Fifth, Ninth, Tenth and D.C. Circuits, all of which have held that internal government investigations or audits are not "public disclosures." See *United States ex rel. Oliver v. Philip Morris USA Inc.*, 763 F.3d 36, 42 (D.C. Cir. 2014); *United States ex rel. Meyer v. Horizon Health Corp.*, 565 F.3d 1195, 1200 & n.3 (9th Cir. 2009); *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, 728-30 (1st Cir. 2007).

The Seventh Circuit has appellate jurisdiction over the federal courts in Illinois, Indiana and Wisconsin. The Bank of Farmington decision is still controlling precedent in those courts. Accordingly, whistleblowers who are considering qui tam lawsuits arising out of information that may have previously been disclosed to government officials through audits, investigations or other means should give serious consideration to whether such cases should be brought in the Seventh Circuit, or

instead brought in one of the growing number of Circuits that have rejected Bank of Farmington.

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