Bond Case Briefs

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Mass. SJC Holds State False Claims Act Action Barred by Prior Public Disclosure.

The Massachusetts Supreme Judicial Court recently affirmed a trial court's judgment dismissing a relator's claims alleging that the defendants, certain financial institutions, collectively engaged in and conspired to engage in fraud, holding that the suit was subject to the public disclosure bar of the Massachusetts False Claims Act.

A copy of the opinion in *Rosenberg v. JPMorgan Chase & Co.* is available at: Link to Opinion.

The Massachusetts False Claims Act (MFCA), Mass. Gen. Laws ch. 12, 5A-50, prohibits making fraudulent claims against the Commonwealth and its municipalities. See G. L. c. 12, §§ 5A-5O. The statute also permits enforcement of that prohibition by means of qui tam actions, in which "[a]n individual, hereafter referred to as a relator, may bring a civil action . . . on behalf of the relator and the [C]ommonwealth or any political subdivision thereof." G. L. c. 12, §§ 5A, 5C (2). The Commonwealth may intervene and take over the case. G. L. c. 12, §§ 5C (3), 5D. Successful relators are awarded a percentage of the funds recovered by the Commonwealth. G. L. c. 12, § 5F.

The relator commenced this action on behalf of the Commonwealth against the defendants, certain financial institutions and their subsidiaries, alleging that the defendants collectively engaged in and conspired to engage in fraud in connection with resetting interest rates for certain municipal bonds, referred to as variable rate demand obligations (VRDOs).

The defendants argued that dismissal was required pursuant to the MFCA's public disclosure bar because the subject transactions had previously been disclosed to the public through news media and the relator was not an original source of the information concerning the fraud. The trial court agreed with the defendants and granted their motion to dismiss the complaint. The relator timely appealed.

The MFCA includes a public disclosure bar, which attempts to prevent "parasitic" suits, *United States ex rel. Ondis v. Woonsocket*, 587 F.3d 49, 53 (1st Cir. 2009), where a relator, "instead of plowing new ground, attempts to free-ride by merely repastinating previously disclosed badges of fraud," id., citing *United States ex rel. Duxbury v. Ortho Biotech Prods., L.P.*, 579 F.3d 13, 26-27 (1st Cir. 2009), cert. denied, 561 U.S. 1005 (2010).

Where, as here, the Commonwealth chooses not to intervene, a multipart inquiry governs whether the public disclosure bar applies. "The first three parts of this inquiry ask: (1) whether there has been a prior, public disclosure of fraud; (2) whether that prior disclosure of fraud emanated from a source specified in the statute's public disclosure provision; and (3) whether the relator's qui tam action is [substantially the same as] that prior disclosure of fraud." *United States ex rel. Poteet v. Bahler Med., Inc.*, 619 F.3d 104, 109 (1st Cir. 2010).

Where "all three questions are answered in the affirmative, the public disclosure bar applies unless the relator qualifies under the 'original source' exception." *Poteet*, supra at 109-110, quoting *Ondis*, supra at 53-54.

The Supreme Judicial Court determined that the defendants here must establish that "both [the] misrepresented state of facts and [the] true state of facts" were in the public domain when the relator filed his claims. *Poteet,* supra.

The Court found that the defendants' representations that they would comply with the obligations in their agreements with the VRDO issuers were set forth in several publicly available sources, including Municipal Securities Rulemaking Board (MSRB) rules that address remarketing agents' duties to VRDO issuers; Securities Industry Financial Markets Association (SIFMA) model disclosures; and the remarketing agreements, including remarketing circulars and official statements, reached between the defendants and the Commonwealth. See *Poteet*, 619 F.3d at 110, citing *United States ex rel. Maxwell v. Kerr–McGee Oil & Gas Corp.*, 540 F.3d 1180, 1185 (10th Cir. 2008).

The Supreme Judicial Court held that these sources disclosed that the defendants undertook (purportedly falsely) to comply with their obligations to obtain the lowest possible interest rates that would have permitted a sale on the market on a given rate determination date. Thus, the Court concluded that the defendants had shown a prior public disclosure of the misrepresented state of facts alleged in the complaint.

Accordingly, the Supreme Judicial Court turned to the question of whether the second element of fraud was disclosed — namely, whether there was a public disclosure of the "true state of facts so that the listener or reader may infer fraud." See *Poteet*, 619 F.3d at 110.

The Supreme Judicial Court held that it sufficed that other members of the public, albeit with sufficient expertise and after having conducted some analysis, could have identified the true state of affairs by using the data publicly available on the Electronic Municipal Market Access (EMMA) website. *United States ex rel. Findley v. FPC–Boron Employees' Club*, 105 F.3d 675, 688 (D.C. Cir.), cert. denied, 522 U.S. 865 (1997), citing *Springfield*, 14 F.3d at 655.

Having determined that there was a public disclosure of the essential elements of the fraud, the Supreme Judicial Court turned to consider the second prong of the public disclosure bar: whether the prior disclosure "emanated from a source specified in the statute's public disclosure provision." *Poteet*, 619 F.3d at 109. Specifically, the Court considered whether the forum in which the public disclosure was made fell within any of three sources enumerated in the statute, (1) "a Massachusetts criminal, civil or administrative hearing in which the [C]ommonwealth is a party"; (2) "a Massachusetts legislative, administrative, auditor's or inspector general's report, hearing, audit or investigation"; or (3) "the news media." See G. L. c. 12, § 5G (c).

According to the complaint, the first publicly disclosed element of the asserted fraud, namely, the misrepresentation that the defendants would undertake to obtain the lowest interest rates that, in their judgment, would permit the sale of the VRDOs, was disclosed in the governing remarketing agreements, including in the official statements. The Supreme Judicial Court held that these official statements comprised Massachusetts "reports," one of the statutorily enumerated sources.

Additionally, the second publicly disclosed element of the fraud — namely, the assertion that the defendants were not obtaining the lowest interest rate that would permit the sale of the VRDOs, and instead were remarketing the bonds en masse in a way that did not obtain the lowest rates — was disclosed on the EMMA website.

The Supreme Judicial Court held that the term "news media" is broad enough to encompass the many ways in which people in the modern world obtain financial news, including from publicly available websites on the Internet. See, e.g., *United States ex rel. Repko vs. Guthrie Clinic, P.C.,* U.S.

Dist. Ct., No. 3:04CV1556 (M.D. Pa. Sept. 1, 2011), aff'd, 490 Fed. Appx. 502 (3d Cir. Aug. 1, 2012).

The Court found that EMMA is the "official repository for information on all municipal bonds" and provides updates to bond market information by means of the Internet; the website is publicly available and widely disseminated. Therefore, the Court concluded that EMMA is much like traditional news sources that report market data and fall within the scope of the term "news media." See *Poteet*, 619 F.3d at 110.

The Supreme Judicial Court next considered the third prong of the public disclosure inquiry: whether the public disclosure includes "substantially the same allegations or transactions as alleged in the action or claim." *Poteet*, 619 F.3d at 109. A "complaint that targets a scheme previously revealed through public disclosures is barred even if it offers greater detail about the underlying conduct." *Winkelman*, 827 F.3d at 210, citing *Poteet*, 619 F.3d at 115.

Here, the Supreme Judicial Court held that the publicly disclosed information was sufficient to put the Commonwealth "on the trail of the alleged fraud" without the relator's assistance. See *Reed*, 923 F.3d at 744, citing *Fine,* 70 F.3d at 571.

Because the public disclosure bar was applicable in this case, the Supreme Judicial Court reasoned that the complaint must be dismissed unless the relator was an "original source." See *Poteet*, 619 F.3d at 109-110. General Laws c. 12, § 5A, defines two types of relators who may qualify as original sources:

"an individual who: (1) prior to a public disclosure under paragraph (3) of [§] 5G, has voluntarily disclosed to the [C]ommonwealth or any political subdivision thereof the information on which allegations or transactions in a claim are based; or (2) has knowledge that is independent of and materially adds to the publicly-disclosed allegations or transactions, and who has voluntarily provided the information to the [C]ommonwealth or any political subdivision thereof before filing a false claims action."

The relator contended that his knowledge was "independent of" EMMA because the complaint did not allege that he relied on that website to obtain the data underlying his analysis; it sufficed to defeat the defendants' motion, he argued, that the complaint alleged that his forensic analysis also used nonpublic, proprietary sources notwithstanding that the same data was available from EMMA.

However, the Supreme Judicial Court concluded that the relator cited no authority for the proposition that a relator may take advantage of the original source exception by using a nonpublic source to access the exact same data readily available from public sources. To the contrary, the Court noted that "when a relator's qui tam action is based solely on material elements already in the public domain, that relator is not an original source." *Kennard v. Comstock Resources, Inc.*, 363 F.3d 1039, 1045 (10th Cir. 2004), cert. denied, 545 U.S. 1139 (2005).

The Court determined that the EMMA website publicly reported the same data upon which the relator relied, and the relator's analysis depended entirely on the interest rate data, which was available on EMMA. Thus, the Court concluded that the relator's analysis could not be said to be "independent of" the publicly disclosed transaction discussed. See *Ondis*, 587 F.3d at 59.

Accordingly, the Supreme Judicial Court affirmed the trial court's judgment.

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