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Copycat suit against acquiror of prior qui tam defendant barred

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When can a relator get two bites at the same FCA apple? This was the question in *United States ex rel. Schweizer v. Canon, Inc.*, No. 20-20071, 2021 WL 3560911 (5th Cir. Aug. 12, 2021), where a relator sued one company and then, a few years later, sued its acquiror for purportedly continuing the same alleged misconduct.

The district court agreed with Canon that Schweizer's claims were publicly disclosed and barred the second complaint.

Between 2004 and 2005, Schweizer (the relator) worked as a General Services Administration contracts manager for Océ North America, a company that sold printers, copiers and related services to the government.

In 2006, after leaving the company, Schweizer filed an FCA suit against Océ, alleging that Océ (1) overcharged the government for the same products it sold to non-government customers and (2) sold the government non-compliant products manufactured in China and other countries.

The government eventually intervened in the case and, over Schweizer's objections, settled with Océ in 2009 regarding alleged conduct between April 2001 and December 2008. The settlement was ultimately approved in 2013; in the interim, Canon, Inc. (Canon) acquired Océ in 2012.

In 2016, three years after Schweizer's first suit settled, Schweizer filed a second FCA suit — this time against Canon. In her second suit, Schweizer alleged that between January 2010 and January 2016 Canon continued Océ's fraud by violating the same GSA contracts at issue in the first FCA suit. The government declined intervention.

Canon ultimately moved for summary judgment, arguing, in part, that Schweizer's earlier suit against Océ constituted a public disclosure that barred the second suit against Canon.

The district court agreed with Canon that Schweizer's claims were publicly disclosed and barred the second complaint.

Schweizer appealed, arguing that the public disclosure bar did not apply because her suit against Canon involved a different entity and time period and involved additional government contracts.

The Fifth Circuit disagreed. Consistent with Fifth Circuit law that the public disclosure bar is intertwined with the merits and therefore "properly treated as a motion for summary judgment," the court applied a two-part burden shifting approach to the issue.

In other words, if the defendant can point to "documents plausibly containing allegations or transactions on which [relator's] complaint is based," the relator must produce evidence that there is a genuine issue of fact as to whether her "action was based on those public disclosures."

The court then held that Schweizer's allegations against Canon were "more than" partly based on her earlier suit against Océ, noting that "her complaint against Canon draws largely, if not exclusively, from her complaint against Océ," including reliance on the "same contracts" and "same scheme" alleged in the first litigation.

Her claims against Canon were not sufficiently "temporally distant" to immunize her from application of the public disclosure bar.

The court rejected Schweizer's argument that her suit against Canon "expose[d] a different wrongful scheme" because Canon purportedly "restarted" Océ's scheme after Canon acquired it. Despite Schweizer's reliance on the Sixth Circuit's decision in *United States ex rel. Ibanez v. Bristol-Myers Squibb Co.*, 874 F.3d 905 (6th Cir. 2017), the court held that Schweizer's case was unlike *Ibanez*.

In *Ibanez*, the first and second sets of fraud allegations were "temporally distant" from one another, separated also by the execution of a Corporate Integrity Agreement. In contrast, the court found that Schweizer's allegations against Canon began only a year

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after the government settled her first suit against Océ. Thus, her claims against Canon were not sufficiently "temporally distant" to immunize her from application of the public disclosure bar.

Notably, unlike the relators in *Ibanez*, Schweizer concededly was no "original source." She did not work at Canon during the relevant time period and, as the court found, "fail[ed] to describe with 'particularity' any post-settlement fraud," relying just on "prior contracts" and "generalized allegations."

As the *Schweizer* court's analysis suggests, courts will continue to scrutinize copycat FCA lawsuits under the public disclosure bar — and a relator cannot merely claim a "continuing fraud" and a different named defendant in the hope of avoiding the bar's fatal reach.

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