IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

STATE OF ILLINOIS *ex rel.*
EDELWEISS FUND LLC,

PLAINTIFF,

V.

JPMORGAN CHASE & CO., *et al.*,

DEFENDANTS.

CASE NO. 2017-L-000289
JUDGE DIANE M. SHELLEY
CALENDAR W

ORDER ON PROPOSED CERTIFIED QUESTIONS UNDER SUPREME COURT RULE 308

This matter comes on to be heard on defendants' joint motion to certify a certain question pursuant to Illinois Supreme Court Rule 308, as to certain questions of law related to the court's denial of the defendants' combined motion to dismiss under section 2-619.1 of the Code of Civil Procedure. Under rule 308, the trial court may certify a question of law for immediate appellate review if it finds there is both (1) substantial ground for difference of opinion and (2) immediate appeal would materially advance the ultimate termination of litigation. The court finds that the requirements under Rule 308 are satisfied, and defendants' joint motion to certify a proposed questions is accordingly granted, as stated below.

BACKGROUND

The court begins with a brief summary of the procedural posture of this case.

Plaintiff's Amended Complaint

On April 5, 2018, plaintiff generally alleged in its amended complaint as follows. Since at least April 1, 2009, Illinois paid defendants to reset and remarket its variable-rate demand obligations (VRDOs) at the lowest possible rate to clear the market. However, defendants allegedly reset the VRDO rates (a) mechanically and collectively, and (b) without consideration of any unique characteristics of any one individual VRDO. Plaintiff alleged that constituted a falsehood directed to Illinois because it contradicted the statement that VRDO rates would be reset "in [defendants'] judgment, [at] the lowest rate that would permit the sale" of the VRDOs. Through plaintiff's forensic analysis of all defendants' VRDO interest-rate-resetting activities between April 1, 2009, to November 14, 2013, it determined defendants were not remarketing and resetting interest rates on the VRDOs individually. It is alleged that

defendants engaged in parallel conduct of resetting interest rates on a collective, concerted basis and not obtaining the most favorable rate. Plaintiff stated that the interest rates for many of Illinois issued VRDOs were reset in lock-step to other VRDOs, even though defendants—as alleged by plaintiff—stated under their remarketing agreements that such interest rates would be changed "at the rate necessary, in its judgment, as the lowest rate that permits the sale of the VRDOs at 100% of their principal amount (par) on the interest reset date."

Defendants' Motions to Dismiss and Certify Certain Questions

On February 1, 2019, this court denied defendants' joint, combined motion to dismiss plaintiff's amended complaint under section 2-619.1, which invoked sections 2-615 and 2-619(a)(9) of the Code of Civil Procedure. In pertinent part, defendants argued that dismissal was appropriate under section 2-619 of the Code of Civil Procedure because plaintiff did not qualify as an "original source" under section 4(e)(4)(B) of the Illinois False Claims Act. See 740 ILCS 175/4(e)(4)(B).

On February 15, 2019, the defendants' filed a joint motion to certify certain questions of law for appellate review under Illinois Supreme Court Rule 308(a) (eff. July 1, 2017), which was revised pursuant to a March 21, 2019, filing with leave of court.

On February 28, 2019, the court entered an order directing both parties to immediately confer, in good faith, to draft any questions of law that would satisfy the requirements of Rule 308, and to file a joint report to the court as to such questions, if any. The court conditioned the joint report on the event that the parties could not, in good faith, jointly agree to such questions, then they could file separate proposed questions (if any) to the court for its consideration. Such reports were furnished to the court by both sides on March 22, 2019, for its consideration.

Defendants submitted the following question:

- Whether a relator's analysis of publicly-disclosed transactional data qualifies a relator as an "original source" within the meaning of the Illinois False Claims Act, 740 ILCS 175(e)(4)(B)?

Plaintiff argued that (1) no question of law exists as to which there is substantial difference of opinion and, (2) even if such question(s) exist,

answering any question would not materially advance the litigation toward termination. Assuming *arguendo* that such questions were appropriate for rule 308 certification, plaintiff proposed the following questions:

- Whether a *qui tam* relator's use of publicly available data as part of an independent and extensive forensic investigation is sufficient to trigger the public disclosure bar under the Illinois False Claims Act, 740 ILCS 175/4(e)(4), when the data does not show that the government was a victim of fraud.
- If the answer to the first question is affirmative and there was a "public disclosure," as that term is used in the Illinois False Claims Act, whether a relator's complaint is "substantially the same" or "based upon" the publicly disclosed data where it alleges facts not in the public domain, including that the government is the victim of fraud, defendants' *scienter*, the existence of defendants' conspiracy, and specific details of defendants' fraud, which relator determined, in part, based on decades of experience working with defendants and after undertaking an extensive forensic analysis of the data.
- If the answer to the first and second questions are affirmative, whether a relator has "knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions," and thereby qualifies as an "original source" under the Illinois False Claims Act, when the relator's allegations of fraud are derived from the relator's extensive experience working with defendants combined with an independent forensic analysis of publicly available raw data that does not on its face indicate that the government was the victim of fraud.

ANALYSIS

When entering a non-appealable interlocutory order, a circuit court may certify a question of law for immediate appeal by making a written finding that "there is substantial ground for difference of opinion [on the question of law] and that an immediate appeal from the order may materially advance the ultimate termination of the litigation . . . ." Ill. S. Ct. R. 308(a) (eff. July 1, 2017). The court must find there is both (1) substantial ground for difference of opinion as to a question of law and (2) that an immediate appeal may materially advance the ultimate termination of the case.

The Illinois False Claims Act is modeled after the federal False Claims Act. 740 ILCS 175/1, *et seq.*; 31 U.S.C. §§ 3729-3733 (2006); *State ex rel. Schad,*

Diamond & Shedden, P.C. v. National Business Furniture, LLC, 2016 IL App (1st) 150526, ¶ 28. It creates a civil cause of action against a person who knowingly conceals or knowingly and improperly avoids or decreases its obligation to pay or transmit money or property to the State. 740 ILCS 175/3(a)(1)(G). In evaluating the sufficiency of a complaint in this regard, the court must determine whether it can be reasonably inferred from the allegations in the complaint that the information relied upon has not been "publicly disclosed" before the relator filed the complaint and that the lawsuit is not based upon publicly-disclosed allegations. If the claim is based on such information, the lawsuit is barred as a matter of law, unless the plaintiff is an "original source" of the information upon which the lawsuit is based. *City of Chicago ex rel. Rosenberg v. Redflex Traffic Sys.*, 884 F.3d 798, 803 (7th Cir. 2018).

The defendant argues that the statutory text and case law surrounding section 4(e)(4)(B) of the Illinois False Claims Act create a substantial ground for difference of opinion as to the meaning of an individual as an "original source." This court has looked at cases from other jurisdictions applying the Federal False Claims Act, local federal cases, and an Illinois unpublished decision. See *City of Chicago ex rel. Rosenberg v. Redflex Traffic Sys.*, 884 F.3d 798 (7th Cir. 2018); *Phone Recovery Services of Illinois, LLC v. Ameritech Illinois Metro, Inc.*, 2018 IL App (1st) 170968-U; *U.S. ex rel. JDJ and Assocs. LLP v. Natixis*, No. 15-CV-5427, 2017 WL 4357797 (S.D.N.Y. Sept. 29, 2017); *In Re Natural Gas Royalties*, 562 F.3d 1032 (10th Cir. 2009).

In contrasting these cases, this court first looked at the language of the Illinois False Claims Act, which defines an "original source" as an individual who has direct and independent knowledge of the information on which the allegations are based. The critical question is the meaning of "knowledge of the information that is both direct and independent." These cases raise the issue of *how much* information one must have and the *nature* of the information. However the case law is unclear as to whether these are factors that the trial court should consider.

In *City of Chicago ex rel. Rosenberg v. Redflex Traffic Sys.*, 884 F.3d 798 the relator sued based on an alleged bribery scheme that had been publicly disclosed in the news media. The court crafted the issue in terms of whether the relator's complaint "relied" on the information, not simply whether the relator "depended" on the information. *Id.* at 804. Although the case was

decided on the basis of the relator's failure to have voluntarily provided the information—another element of the cause of action—it was conceded that the relator had direct knowledge of the information because of the nature of the information, and satisfied this prong of the test.

In *Phone Recovery Servs. of Ill., LLC v. Ameritech Ill. Metro, Inc.*, 2018 IL App (1st) 170968-U, the Illinois Appellate Court stated that because the publicly-disclosed information in news articles did not specify the mechanism through which defendants allegedly committed fraud, the knowledge of the information the relator relied upon was both direct and independent. *Id.* ¶ 95. It is unclear whether the court was creating a new standard to be applied under the plain language of the statute, directing trial courts to consider the nature of the information[1]

The Court of Appeals for the Tenth Circuit in *Natural Gas Royalties Qui Tam Litig. v. Pac. Gas & Elec. Co.*, 562 F.3d 1032 (2009) stated that "substantiality" is the best approach to assess whether a relator's direct and independent information is sufficient to qualify as an original source. Other courts have held that the relator's background information or unique expertise allowing him to understand the significance of publicly-disclosed allegations and transactions is insufficient to establish the relator as an "original source." See *A-1 Ambulance Serv. v. California*, 202 F.3d 1238 (9th Cir. 2000) and *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1160 (3d Cir. 1991).

Key to this case is the electronic, forensic analysis relied upon by the relator. It is the analytical technique of gathering and categorizing information. The relator argues that it is the original source because of the very nature or characteristics of such an analysis. In other words, the essential characteristic of a forensic analysis is its independent nature or creation of new information. The court finds that there is substantial ground for difference of opinion as to whether the trial court should consider the nature of the information relied upon in deciding the original-source question.

---

[1] The court notes that this case is an unpublished appellate court order under Rule 23, which prohibits the parties from citing or relying on it except in limited circumstances. Although this rule does not limit the trial court in citing such a case, the court is unable to rely on it as precedent, even though the order's reasoning may be instructive. See *Byrne v. Hayes Beer Distrib. Co.*, 2018 IL App (1st) 172612, ¶ 22.

Furthermore, the court finds that an immediate appeal would materially advance the ultimate termination of litigation. If the nature of the information (*i.e.*, the proposed forensic analysis by the plaintiff) cannot be a determinative of the individual original source, then the case ends.

However, this court can only certify questions of law, not how the law should be applied to the specific facts of a case. *Rozsavolgyi v. City of Aurora*, 2017 IL 121048, ¶ 23. When an answer depends upon the underlying facts of a case, the certified question is improper. In October 2017, the Illinois Supreme Court summarized the policy regarding such certified questions under Rule 308:

> "Certified questions must not seek an application of the law to the facts of a specific case. If addressing a certified question will result in an answer that is advisory or provisional, the certified question should not be reached. See [citation]; *In re Estate of Luccio*, 2012 IL App (1st) 121153, ¶ 32 ("The courts of Illinois do not issue advisory opinions to guide future litigation ***." (citing *Golden Rule Insurance Co. v. Schwartz*, 203 Ill. 2d 456, 469 (2003))). Similarly, if an answer is dependent upon the underlying facts of a case, the certified question is improper. *In re Estate of Luccio*, 2012 IL App (1st) 121153, ¶ 32 ("As too often happens, a certified question is framed as a question of law, but the ultimate disposition depends on 'the resolution of a host of factual predicates.' " (quoting *Dowd & Dowd, Ltd.*, 181 Ill. 2d at 469)). Appeals under Illinois Supreme Court Rule 308 should be reserved for exceptional circumstances, and the rule should be sparingly used. *Voss v. Lincoln Mall Management Co.*, 166 Ill. App. 3d 442, 450 (1988).

Rozsavolgyi v. City of Aurora, 2017 IL 121048, ¶ 21.

In the case at bar, the certified questions drafted by the parties would require extensive application of case-specific facts to the law. As to defendants' proposal, it begs the question (*i.e.*, assumes the answer in the question itself).

As to plaintiff's proposed questions, they contain *too many* qualifications such that they invite the appellate court to revisit the factual circumstances of this

case, as opposed to visiting a straightforward question of law. For example, each question states that plaintiff's forensic analysis was "extensive." The word "extensive" in plaintiff's questions is filled with factual predicates that the appellate court would have to unpack, determine, and apply. Such questions are inappropriate for Rule 308 purposes.

CONCLUSION

The court finds that this court's order of February 1, 2019 involves a question of law where there is a substantial ground for difference of opinion and an immediate appeal would materially advance the ultimate termination of litigation.

Accordingly, after reviewing the relevant standard under Illinois Supreme Court Rule 308, the parties' proposed questions, and the law, the court certifies a modified question for consideration, as set forth below.

Furthermore, the court finds that that the certification of the question should not stay the initiation of discovery, as directed by subsection (e) of Rule 308.

IT IS HEREBY ORDERED:

I. Defendants' motion to certify a question under Illinois Supreme Court Rule 308 is GRANTED, solely as to the following question:

> "Can the nature of a relator's analysis of publicly-disclosed allegations and transactions, when those allegations or transactions do not reflect on their face that the government was the victim of fraud, qualify that relator as having knowledge that is independent of and materially adding to those publicly disclosed allegations or transactions as an individual "original source" within the meaning of the Illinois False Claims Act, 740 ILCS 175/4(e)(4)(B)?"

II. Defendants' Joint Motion for Leave to File a Brief in Further Support of Joint Motion to Certify a Question Pursuant to Rule 308 is moot.

III. Plaintiff's Motion to Lift Discovery Stay is GRANTED.

IV. The discovery stay is lifted.

V. The parties may commence preliminary discovery, and shall meet to confer in good faith on a discovery plan, which should include but not be limited to the following:

a. the identification of subjects on which discovery may be needed, and whether discovery should be conducted in phases or be limited to or focused on particular issues;

b. the development of a discovery plan and protocol;

c. identification of issues about disclosure, discovery, or preservation of electronically-stored information, including the form or forms in which it should be produced; and

d. identification of any issues about claims of privilege or of protection.

VI. Plaintiff is allowed to file a consolidated reply or pleading to defendants' affirmative defenses on or before June 3 2019.

VII. This matter is continued for status on the Rule 308 Application and case management to June11, 2019 at 9:20 a.m. in courtroom 1912.

ENTER:

Judge Diane M. Shelley
APR 10 2019
Circuit Court – 1925

Judge Diane M. Shelley #1925
April 10, 2019