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Civil False Claims Act: Reflections on *Rockwell* and the Future of the "Original Source" Rule

Two weeks have passed since the Supreme Court's decision in *Rockwell*, and it is time to reflect on the implications of that decision and other related events. In *United States ex rel. Stone v. Rockwell*, No. 05-1272, 2007 WL 895257 (U.S. March 27, 2007), the Supreme Court interpreted the knowledge standard in the poorly drafted original source exception to the public disclosure bar, a jurisdictional provision that for more than twenty years has resulted in far too many circuit conflicts. Resolving some of these conflicts, the Court held that the relator in *Rockwell* lacked the knowledge required under the original source exception because he had no "direct and independent knowledge" of the actual allegations in the amended complaint that went to trial and judgment. See [FraudMail Alert No. 07-03-27](#). On reflection, the points raised in that original FraudMail Alert on *Rockwell* remain valid:

- Section 3730(e)(4) is jurisdictional, an issue that may be raised and must be satisfied at any stage of the litigation.
- The relevant "information" is the information on which relator's allegations are based, not the information that was publicly disclosed.
- Relator must have "direct and independent" knowledge of the allegations in each amended complaint, including those in the final pretrial order.
- Government intervention allows the government to proceed but does not cure relator's jurisdictional defect.

But what will be the long-term impact of *Rockwell*?

Rockwell and the Knowledge Requirement of the "Original Source" Exception

The Court's rulings on the jurisdictional nature of the original source inquiry in *Rockwell* were definitive and far-reaching. To appreciate how far-reaching, it is important to parse what knowledge the relator lacked. First, the Court set forth the allegation at issue: "[a]s described by Stone and the Government in the final pretrial

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order, the only pertinent problem with respect to this period of time for which Stone claimed to have direct and independent knowledge was insolid pondcrete." The Court then specifically delineated what knowledge Mr. Stone lacked:

1. "he did not know that the pondcrete was insolid;"
2. "he did not know that pondcrete storage was even subject to RCRA;"
3. "he did not know that Rockwell would fail to remedy the defect;"
4. "he did not know that the insolid pondcrete leaked while being stored onsite; and,"
5. "of course, he did not know that Rockwell made false statements to the Government regarding pondcrete storage."

2007 WL 895257, at *10.

Interestingly, factors (1), (3), and (4) go to knowledge of the facts underlying the environmental violation. Factor (2) goes to knowledge of the regulation allegedly violated. And factor (5) goes to the knowledge that the defendant made false statements to the government. All of these are different types of knowledge, which, together, could be used to allege a violation of the False Claims Act. Yet the Court did not differentiate between these different kinds of "knowledge" nor did it state whether any of these five factors were more or less important. The clear implication, however, is that, at least in the context of a False Claims Act case based on a regulatory violation (colloquially known as a "false certification" case), a relator must know:

- the key facts that underlie the regulatory violation;
- the regulation that is violated; and
- the false statements to the government regarding that regulatory violation.

The Court also did not differentiate between "direct" and "independent" knowledge, which many other courts have been careful to do. Some of these knowledge inadequacies could be seen as a lack of "direct" knowledge, while others could be seen as a lack of "independence" because Stone obviously learned of them only later as a result of the government investigation. Nonetheless, the need to satisfy both requirements—directness and independence—remains. After *Rockwell*, once allegations are "publicly disclosed" (an issue the Court did not address since public disclosure was stipulated), the level of "direct and independent knowledge" a relator must possess has now been established at a much higher threshold than many courts had previously required.

Impact on Circuit Jurisprudence Interpreting "Original Source"

Practitioners will have to evaluate the effect of the *Rockwell* decision on the "original source" jurisprudence in their respective circuits. Many prior circuit decisions (even outside the Tenth Circuit) must be reevaluated in light of *Rockwell*. For example, a holding of the Fifth Circuit in *United States ex rel. Laird v. Lockheed Martin Eng. & Science Servs. Co.*, 336 F.3d 346, 353-55 (5th Cir. 2001), while not directly at issue, simply cannot survive. In *Laird*, the Fifth Circuit held that, to qualify as an original source, the relator must have knowledge of the information on which the publicly disclosed allegations were based. The Court made it clear in *Rockwell*, however, that the allegations to be examined were the allegations in the relator's complaint and not the allegations that were publicly disclosed. It specifically noted that this conclusion was contrary to the linkage of the term "information" with the information underlying the publicly disclosed allegations or transactions by some lower courts, citing the Fifth Circuit's decision in *Laird*. *Rockwell*, 2007 WL 895257 at *8. The decisions of other circuits using the same faulty predicate are also called into serious question by this holding.

See, e.g., United States ex rel. Minn. Ass'n of Nurse Anesthetists v. Allina Health Sys. Corp., 276 F.3d 1032, 1048 (8th Cir. 2002); *United States ex rel. Grayson v. Advanced Mgmt. Tech. Inc.*, 221 F.3d 580, 583 (4th Cir. 2000); *United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 690 (D.C. Cir. 1997); *United States ex rel. McKenzie v. Bellsouth Telecomm., Inc.*, 123 F.3d 935, 943 (6th Cir. 1997).

As noted above, *Rockwell* also addressed an issue that has divided a number of circuits concerning the nature of the knowledge that is required. In *United States ex rel. Mistick v. Housing Authority of Pittsburgh*, 186 F.3d 326 (3d Cir. 1999), the Third Circuit held that the relator, a contractor who had knowledge of the true facts regarding the costs of lead paint abatement at city housing projects funded by HUD, was not an original source because he did not have knowledge of any alleged false claims to the government. The Eighth, Tenth, and D.C. Circuits, on the other hand, have defined the knowledge requirement more broadly, allowing knowledge of either the true circumstances or the false statements to the government to satisfy the exception. *See, e.g., United States ex rel. King v. Hillcrest Health Ctr., Inc.*, 246 F.3d 1271, 1280 (10th Cir. 2001); *United States ex rel. Minn. Ass'n of Nurse Anesthetists v. Allina Health Sys. Corp.*, 276 F.3d 1032, 1050 (8th Cir. 2002); *United States ex rel. Springfield Terminal Rwy. Co. v. Quinn*, 14 F.3d 645 (D.C. Cir. 1994).

The Court in *Rockwell* used the terminology of both *Springfield Terminal* and *Mistick* to demonstrate the inadequacy of Stone's knowledge, but did not choose between these tests, because his knowledge did not meet either of them. However, the statement by the Court that Stone "did not know that Rockwell made false statements to the Government regarding pondcrete storage" appears to favor the *Mistick* test over the *Springfield Terminal* test that has been adopted in many circuits.

Impact on State *Qui Tam* and Tax Whistleblower Laws

Rockwell will also influence interpretations of similar provisions in state false claims laws. Eighteen states now have false claims laws with *qui tam* provisions similar to the federal law. State false claims bills have been introduced in 22 states within the past year in response to economic incentives offered under the Deficit Reduction Act of 2005 ("DRA"). *See FraudMail Alert No. 07-03-14*. Since the HHS OIG requires state false claims laws to match the federal law in order to qualify for the DRA's incentives, *Rockwell's* interpretation of the original source provision is likely to extend to similar provisions in most, if not all, of these state false claims laws. *See FraudMail Alert No. 06-12-29*.

In addition, it will likely extend to the IRS whistleblower statute, which has a provision authorizing lower awards to whistleblowers who are not "original sources" of publicly disclosed information in tax fraud actions. *See Pub. L. No. 109-432, § 406(a)(1)(D)* (2005).

Impact on Potential Legislative Amendments

The *Rockwell* decision itself generated calls for legislative action. Those calls became louder very shortly thereafter when a federal district court further curtailed the "original source" exception on a different ground, holding—consistent with many other decisions—that the relator was not an original source because, as a government employee, his disclosure of the fraud to the government was not "voluntary." *See United States ex rel. Maxwell v. Kerr-McGee Oil & Gas Corp.*, No. 04-cv-01224-PSF-CBS (slip op.) (D. Colo. March 30, 2007). *Maxwell* was a highly controversial case in which the government did not intervene and then publicly criticized

the jury's verdict in favor of the relator. After this verdict, the district judge reviewed the public disclosure/original source issue and ruled in favor of the defendant, overturning the verdict. This belated decision preserves the integrity and impartiality of *qui tam* actions by excluding government employees—who have a pre-existing, conflicting duty to investigate the fraud for the government—from bringing them. As the district judge in *Maxwell* so well explained:

a would-be relator who was "under an employment-related obligation to do the very acts he claims were voluntary," namely, detecting fraudulent activity and disclosing it to the government, cannot satisfy the "voluntary disclosure" requirement of the FCA and establish subject matter jurisdiction.

Slip op. at 25 (quoting *United States ex rel. Fine v. Chevron, U.S.A., Inc.*, 72 F.3d 740 (9th Cir. 1995)).

Rockwell and *Maxwell* have resulted in numerous calls by whistleblower advocacy groups for Congress to overturn these decisions. One hopes that Congress will not soon take up any proposals to amend this disputed provision. The only explanation for the poorly drafted language in Section 3730(e)(4) in the 1986 amendments is that Congress acted hastily and without proper process and consideration. The frequent litigation over the 1986 version should serve as a caution against repeating that mistake.

As the first Supreme Court decision to interpret any term regarding the "public disclosure/original source" bar, *Rockwell* both resolved many issues and raised new ones. Hopefully, Congress will delay any legislative review until the impact of *Rockwell* can be calmly evaluated. *Rockwell* is, in fact, an extremely logical, cogent decision, based on the premise that the government should share recoveries under the FCA only with those who bring it direct, independent evidence of actual fraud. *Maxwell* is a decision grounded in both established case law and good public policy. At long last, practitioners and lower courts are getting some interpretation of these statutory provisions. These decisions are no excuse for Congress to step in and confuse everyone again.

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