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Civil False Claims Act: Supreme Court in *Rockwell* Holds That "Original Source" Means *Qui Tam* Relator Must Have Actual Knowledge of FCA Claims to Satisfy Jurisdictional Requirement

In the watershed 1986 amendments to the False Claims Act (FCA), Congress added a provision, 31 U.S.C. § 3730(e)(4), which sought to avoid "parasitic suits" by prohibiting *qui tam* suits in which relators rely on public information, commonly known as the "public disclosure bar." The sole exception to the bar was a case brought by an "original source." The Supreme Court today in *Rockwell International Corp. v. United States ex rel. Stone*, No. 05-1272, slip op. (U.S. March 27, 2007) defined for the first time the "direct and independent knowledge" requirement of the original source exception to the FCA's public disclosure bar.

In Justice Scalia's remarkably simple and lucid majority opinion, the Court found that the original source requirement was a critical jurisdictional requirement when the suit has been brought by an individual and the underlying allegations have been publicly disclosed, and that this requirement applied throughout all stages of the action—initial complaint, amendments to the complaint, the pretrial order, and, in this case, the jury verdict. While it did not mention the matter of the relator's attorney's fees, its holding means that Rockwell is not liable for the substantial amount that would have been awarded to the relator in fees and costs under Section 3730(d)(1). More importantly, this decision returns *qui tam* enforcement to its roots by insisting that *qui tam* cases based on public information may be brought only by those with actual knowledge of the fraud.

The majority of the Court found that Mr. Stone, the relator in *Rockwell,* did not have the requisite knowledge to be considered an original source because the government's amended complaint and the jury's verdict rested on allegations that were materially different from the allegations in the relator's original complaint. The majority also held that the government's intervention did not cure the defect in the jurisdictional foundation of the relator's suit, but employed the common sense rule that this defect did not destroy the jurisdictional basis of the government's own suit and recovery.

continued on page 2

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Justice Stevens wrote a short dissenting opinion which was joined by Justice Ginsburg. Justice Breyer did not take part in the decision.

Factual and Procedural Background

Taking nearly half the opinion's length, Justice Scalia set forth in detail the critical elements of the factual background and procedural posture of the case. This section of the opinion should be required reading for anyone trying to understand the decision, and its salient features are only briefly summarized here. Almost twenty years ago, the relator in *Rockwell*, Mr. Stone, brought a *qui tam* suit alleging that Rockwell misrepresented its compliance with environmental, health and safety laws at Rocky Flats nuclear weapons facility. Importantly, Mr. Stone alleged a specific environmental violation: that the pondcrete piping system that Rockwell could use in the future at Rocky Flats to solidify and dispose of toxic sludge at the facility would not work. After a criminal investigation, culminating in Rockwell's guilty plea and payment of criminal fines for environmental violations, the government intervened in the *qui tam* suit, adding other grounds for the environmental violations. There was no question that these new allegations had been publicly disclosed in newspaper articles and grand jury investigations. Rockwell challenged Stone's qualification as an original source of the information underlying the fraud allegations under Section 3730(e)(4)(B), and the Tenth Circuit's determination that his knowledge of the allegations was sufficient under that standard.

The theory underlying the fraud allegations was that Rockwell's environmental violations directly and materially affected the amount of money paid to Rockwell by the government in "award fees," which were based on the government's evaluation of Rockwell's performance in several areas, including environmental, health and safety concerns. The suit claimed that the government would not have paid Rockwell these fees (or at least all of the fees) had it been aware of the environmental violations. The case does not hold that every environmental violation results in an FCA violation.

As discussed in previous FraudMail Alerts, the arguments before the Court in *Rockwell* focused on the knowledge requirement in Section 3730(e)(4)(B), and on how an original source's "knowledge of the information on which the allegations are based" is defined under that exception. *See* FraudMail Alert Nos. 06-12-05 and 06-09-26. The federal circuit courts were split on this (and almost every other issue in this area). Specifically, they disagreed over whether the exception required knowledge of actual facts about the fraud, or whether a relator merely had to have knowledge of the fraud alleged in the original complaint, whether or not those allegations ultimately prevailed. The standard applied by the Tenth Circuit—knowledge of information "underlying or supporting the fraud allegation"—was even more expansive than the tests applied in any other circuit. Rockwell appealed, arguing that the Tenth Circuit's bar was too low.

Issues Resolved by the Court in *Rockwell*

The majority opinion interprets the language of Section 3730(e)(4), which provides:

> (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or

investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

Section 3730(e)(4) is Jurisdictional. The initial holding by Justice Scalia was the critical finding that the public disclosure/original source provision found in Section 3730(e)(4) is, indeed, jurisdictional. This holding has enormous practical implications in the litigation of *qui tam* cases. Some courts have properly allowed defendants to seek early discovery on this issue because a court must first satisfy itself that jurisdiction exists before allowing the remainder of the case to proceed. The Supreme Court's holding on this issue should require each district court to allow defendants to take the discovery necessary to determine this jurisdictional issue before discovery on the merits is allowed to proceed. (Whether government intervention affects this timing is an issue for another day.)

The Court agreed with Rockwell that the original source requirement was jurisdictional and therefore could not be conceded by Rockwell, as relator had alleged. The Court found that the provision did not merely limit a grant of jurisdiction made under the provision, but went beyond that to explicitly withdraw jurisdiction "*over* [*the*] *action*" brought under Section 3730 if its requirements are not met. Slip Op. at 9 (quoting 31 U.S.C. § 3730(e)(4)(A)) (emphasis in opinion).

The Relevant "Information" is the Information on which Relator's Allegations Are Based. In what should have been an obvious conclusion (which became difficult only because so many lower courts got it wrong), the Supreme Court held that the "information" which the relator must have "direct and independent knowledge" of is the information on which the relator's allegations are based. The Court rejected the interpretation that the information was information that had been "publicly disclosed." In doing so, the Court properly based *qui tam* jurisdiction—and the significant bounties that go with such jurisdiction—on knowledge of fraudulent claims, not knowledge of what was disclosed by the media. Justice Stevens' dissent on this issue simply misconstrues the purpose and intent of *qui tam* enforcement.

The Relator Must Have Knowledge of the Allegations in Each Amended Complaint, Including Those in the Pretrial Order. The next ambiguity the Court addressed was which of relator's allegations were the relevant ones—the original complaint, the amended complaint, or the pretrial order. The Court relied on Rule 16(e), which deems claims included in a final pretrial order to amend previous pleadings and to supersede and "control the subsequent course of the action." *Id.* at 16 (quoting Fed. Rule Civ. Proc. 16(e)). The Court specifically rejected the argument advanced by Stone that he only had to have knowledge of the allegations in his original complaint. The Court also rejected the government's policy concern that this focus risked dividing the government from relators on trial strategy, stating that this concern "would not induce us to determine

jurisdiction on the basis of whether the relator is an original source of information underlying allegations that he no longer makes." *Id.* at 17.

As for this particular case, which went all the way to trial and verdict, the Court held that under Federal Rule 16(e), the final pretrial order supercedes all prior pleading and is, essentially, the final amendment to the complaint. Since the relator must satisfy the jurisdictional requirement—by having direct and independent knowledge of publicly disclosed allegations—at every stage of the case, Mr. Stone must have direct and independent knowledge of the allegations finally submitted to the jury. Stone did not have such knowledge, and thus his claim lacked jurisdiction.

"Claim Smuggling" is Prohibited. The Court also rejected Stone's argument that, because he did have direct and independent knowledge—and thus jurisdiction—over some claims, he satisfied the jurisdictional requirement for all claims. Justice Scalia, citing a long line of cases, rejected that argument but with a new term: "claim smuggling" (a term we thought was reserved by the Court for those attempting to add arguments not included in a grant of *certiorari*). Essentially, the Court held that jurisdiction under Section 3730(e)(4) had to be determined on a claim-by-claim basis.

Government Intervention Allows the Government to Proceed But Does Not Cure the Relator's Jurisdictional Defect. Since the government intervened in this case and prevailed, the relator argued that such intervention "cured" the relator's jurisdictional defects. Justice Scalia had no problem rejecting that argument, holding that the relator's proceeding and the government's proceeding were separate and distinct, even where (as here) the government intervenes in the relator's case. This "common sense" approach avoided the possibility, raised at oral argument, that if the relator did not have jurisdiction, the government's verdict could be overturned. Practitioners will need to determine what effect this holding has on other FCA issues, such as the recent Second Circuit ruling that a DOJ complaint does not relate back to an earlier *qui tam* complaint.

Conclusion

The *Rockwell* decision reflects a common sense reading of both the language and the purpose of the 1986 amendments to the False Claims Act. Congress added Section 3730(e)(4) to cut off parasitic suits, intending that the government should only pay the bounties it offers for successful claims, not inaccurate predictions or worthless allegations. The enormous costs of defending FCA claims should only be imposed if jurisdiction exists. Justice Scalia's opinion has brought the original source concept back to its roots.

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