FraudMail Alert®



Please click here to view our archives

CIVIL FALSE CLAIMS ACT: Supreme Court Signals Its Interest in the Question of Whether Administrative Reports Issued by State and Local Governments Qualify as "Public Disclosures"

Today, the Supreme Court asked the Solicitor General to submit a brief expressing the views of the United States on a key definitional issue under the public disclosure bar in *Graham County Soil & Water Conservation District v. United States ex rel. Wilson,* No. 08-304 ("*Graham County II*"). The issue raised in Petitioner/Defendant Graham County's petition for certiorari is whether an audit and investigation performed by a state or its political subdivision could be considered an "administrative report" that qualifies as a "public disclosure" within the meaning of Section 3730(e)(4)(A). This is the second time in two years that the Supreme Court has requested the government's views on this issue.

This question comes to the Court from a case arising in the Fourth Circuit, *United States ex rel. Wilson v. Graham County Soil & Water Conservation District,* 528 F.3d 292 (4th Cir. 2008), and is virtually identical to the one raised two terms ago in the relator's petition for certiorari in *United States ex rel. Bly-Magee v. Premo* (No. 06-1269) (filed Mar. 16, 2007). *See* FraudMail Alert No. 07-05-30. As it did today, the Court invited the Solicitor General to file a brief expressing the views of the United States in *Bly-Magee.* The Solicitor General recognized the importance of the question, but recommended denying certiorari in *Bly-Magee* on the basis that only one circuit, the Third, had disagreed with the Eighth, Ninth and Eleventh Circuits in holding that the public disclosure bar was limited to federal administrative reports, and that this issue was unlikely to affect the outcome of that case.

Now that the Fourth Circuit in *Graham County II* has joined the Third Circuit in *United States ex rel. Dunleavy v. County of Delaware,* 123 F.3d 734 (3d Cir. 1997) in creating a *per se* rule against public disclosures made in state reports, audits, or investigations--regardless of any other factors, including the scope, nature, subject, or circulation of the state report--the circuit split on this important issue is more pronounced than it was in *Bly-Magee.* This *per se* rule undermines the purpose of the public disclosure bar by allowing parasitic suits based on public information to go forward without assessing the relator's qualifications as an original source. *See* Br. of the Washington Legal Foundation and the Allied Educational Foundation as *Amici Curiae* in Support of Petitioners, *Graham County II* (filed Oct. 8, 2008), *available at* http://www.wlf.org/upload/101008grahamBrief.pdf. (The reader should note that the author represents WLF and AEF and submitted this *amicus* brief on their behalf).

Copyright © 2008 Fried, Frank, Harris, Shriver & Jacobson LLP. All rights reserved. Qui Tam practice group.

There is no time limit in the Court's invitation to the Solicitor General to file a brief in *Graham County II*. In view of the impending change in administrations, it is likely that the government's brief will be the new Obama administration's first opportunity to weigh in on an FCA issue before the Supreme Court.

Authors and Contributors

For more information regarding this client alert, please contact your usual Fried Frank attorney or the attorney listed below.

Washington, DC

John T. Boese
+1.202.639.7220

Fried, Frank, Harris, Shriver & Jacobson LLP

New York
One New York Plaza
New York, NY 10004-1980
Tel: +1.212.859.8000
Fax: +1.212.859.4000

Washington, DC
1001 Pennsylvania Avenue, NW
Washington, DC 20004-2505
Tel: +1.202.639.7000
Fax: +1.202.639.7003

Frankfurt
Taunusanlage 18
60325 Frankfurt am Main
Tel: +49.69.870.030.00
Fax: +49.69.870.030.555

Hong Kong
in association with
Huen Wong & Co.
9th Floor, Gloucester Tower
The Landmark
15 Queen's Road Central
Hong Kong
Tel: +852.3760.3600
Fax: +852.3760.3611

Shanghai
40th Floor, Park Place
1601 Nanjing Road West
Shanghai 200040
Tel: +86.21.6122.5500
Fax: +86.21.6122.5588

Fried, Frank, Harris, Shriver & Jacobson (London) LLP

London
99 City Road
London EC1Y 1AX
Tel: +44.20.7972.9600
Fax: +44.20.7972.9602

Fried, Frank, Harris, Shriver & Jacobson (Europe)

Paris
65-67, avenue des Champs Elysées
75008 Paris
Tel: +33.140.62.22.00
Fax : +33.140.62.22.29

A Delaware Limited Liability Partnership

FraudMail Alert® is published by the Qui Tam Practice Group of, and is a registered trademark and servicemark of Fried, Frank, Harris, Shriver & Jacobson LLP.

FraudMail Alert® is provided free of charge to subscribers. If you would like to subscribe to this E-mail service, please send an E-mail message to FraudMail@ffhsj.com and include your name, title, organization or company, mail address, telephone and fax numbers, and E-mail address.

To view copies of previous FraudMail Alerts, please visit our FraudMail Alert® archives on the Fried Frank website.

To view copies of previous Qui tam To Our Client Memoranda, please visit our archives on the Fried Frank website.