

Supreme Court To Interpret False Claims Act's "Original Source" Rule

On September 26, 2006, the United States Supreme Court granted *certiorari* in *Rockwell International Corp. v. United States ex rel. Stone*, No. 05-1272, on the question of who qualifies as an "original source" under the *qui tam* provisions of the civil False Claims Act ("FCA") (31 U.S.C. § 3730(e)(4)(B)). Over five thousand *qui tam* actions have been filed since the FCA was amended in 1986, and the case law has resulted in circuit splits on many issues of statutory interpretation. This is only the fourth post-1986 *qui tam* case reviewed by the Supreme Court, and this particular question is one of the most hotly contended issues in *qui tam* litigation. Rockwell had also requested that the Court rule on the question of whether the *qui tam* provisions are unconstitutional as a violation of Article II separation of powers principles; however, the Court declined to grant *cert.* as to that question.

McKenna Long & Aldridge partners, [Herbert Fenster](#) and [Lawrence Ebner](#), prepared an *amicus* brief on behalf of the Chamber of Commerce of the United States in support of Rockwell's *cert.* petition.

The FCA prohibits anyone from knowingly presenting or causing to be presented to the government a false or fraudulent claim for payment or approval (31 U.S.C. § 3729(a)(1)). Suits may be brought by so-called *qui tam* relators on behalf of the government, and the government may either intervene in the action or decline to take it over (Section 3730(b)(2)). If the action is successful, the relator receives a share of the government's recovery (Section 3730(d)). One significant jurisdictional limitation on the right of a *qui tam* relator to maintain the suit is the provision barring *qui tam* actions that are based on allegations that have already been publicly disclosed (Section 3730(e)(4)(A)). But even under that limitation, a *qui tam* suit can go forward if the relator is an "original source" of the information. The statute defines "original source," in part, as one who has direct and independent knowledge of the information on which the allegations are based (Section 3730(e)(4)(B)). At issue is whether the nature and the extent of the relator's knowledge of the alleged wrongdoing is sufficient to qualify him as an original source.

There is no question that the allegations of fraudulent non-compliance with environmental regulations had been publicly disclosed in the media, in government investigative reports and in the government's indictment of the company prior to Stone bringing his *qui tam* action. Stone was an engineer employed by Rockwell at the Rocky Flats nuclear weapons plant whose duties included plant-wide troubleshooting and review of designs and existing operations for safety and cost effectiveness, including Rockwell's plans for producing pondcrete (mixture of cement, sludge and liquid from evaporation ponds containing toxic industrial wastes). Stone had prepared an engineering order which was critical of a particular pipe design and which predicted that the defective design would not permit proper waste disposal. Two years after Stone's employment ended – but before Stone filed suit – newspaper reports disclosed the government's investigation of Rockwell's environmental compliance problems at the site. Stone played no role in the government's initiation of that investigation. After these public disclosures, Stone filed suit. The government declined to intervene on the issue at hand (but filed an *amicus* brief in support of Stone). When the case went to trial, the jury found that three false claims had been submitted, but all three claims had been submitted subsequent to Stone's employment. Consequently, Rockwell argued to the Tenth Circuit that Stone could not possibly have had direct and independent knowledge of those claims. The Tenth Circuit held that Stone was an original source because he knew and disclosed background information concerning pondcrete, in particular, his prediction that Rockwell's design would lead to a defective process. It held that a relator need not know of the actual act of fraud.

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Rockwell argued in its *cert.* petition that the standard employed by the Tenth Circuit ignores the “direct and independent knowledge” requirement and permits a relator to base a *qui tam* action on public information merely on the basis of having background knowledge underlying or supporting the fraud allegation. Rockwell notes that the information in Stone’s possession at the time of his employment did not include any false claims for payment or any evidence relating to false claims; Stone’s engineering order was not introduced as evidence, and Stone did not testify during the trial. Rockwell argued further that the alleged fraud was the concealment of the defective pondcrete blocks, and Stone had no knowledge of any concealment or any other essential element of the FCA claim.

Rockwell’s *cert.* petition highlighted the circuit split to be reviewed by the Supreme Court. The Third and Eleventh Circuits define “original source” as someone who knows of an actual false statement made to the government (See *United States ex rel. Mistick PBT v. Housing Authority*, 186 F.3d 376 (3d Cir. 1999) (Alito, J.); *Cooper v. Blue Cross & Blue Shield of Florida, Inc.*, 19 F.3d 562 (11th Cir. 1994)). The Tenth Circuit rejected this strict definition, holding instead that a “relator need not...have in his possession knowledge of the actual fraudulent conduct itself; knowledge ‘underlying or supporting’ the fraud allegation is sufficient.” The Ninth Circuit requires a relator to have “firsthand knowledge of the alleged fraud” (*United States ex rel. Aflatooni v. Kitsap Physicians Servs.*, 163 F.3d 516 (9th Cir. 1998)), unless the relator himself “triggered” the government investigation that uncovered the fraud (*Seal 1 v. Seal A*, 255 F.3d 1154 (9th Cir. 2001)). The rule adopted by the DC and Eighth Circuits is not as strict as the Third and Eleventh Circuit’s rule requiring actual knowledge of the false statements, but it does require knowledge of facts sufficient to show that statements made to the government were false; i.e., direct and independent knowledge of one of the essential elements of the underlying fraudulent transaction (*United States ex rel. Springfield Terminal Railway Co. v. Quinn*, 14 F.3d 645 (DC Cir. 1994); *Minn. Assoc. of Nurse Anesthetists v. Allina Health System Corp.*, 276 F.3d 1032 (8th Cir. 2002)).

Rockwell contends that Stone had no direct knowledge of any information essential to his claim. As noted in the dissent by Judge Briscoe of the Tenth Circuit, whatever knowledge Stone had was not essential to the proof of his claims. Finally, Rockwell contends that the Tenth Circuit’s holding disserves the intended function of the original source rule by permitting relators to qualify for relator status on the basis of mere speculation without actually knowing of any fraud, thereby allowing abusive relators to siphon away money that otherwise might be recovered by the government.

In reviewing the Rockwell decision, the Supreme Court has the opportunity to put to rest one of the most contested issues in False Claims Act litigation and determine once and for all who can properly utilize this potent weapon against government contract fraud.

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