

Supreme Court Limits Qui Tam Suits

Summary of Decision

The March 27, 2007 ruling by the United States Supreme Court in *Rockwell International Corp. v. United States ex rel. Stone*, No. 05-1272, imposes strict limitations on who qualifies to bring a *qui tam* action under the civil False Claims Act (FCA) (31 U.S.C. § 3730(e)(4)(B)). The Court, in a 6-2 decision by Justice Scalia, reversed the Tenth Circuit and held that: (a) in order to be an "original source," the *qui tam* relator must have direct and independent knowledge of the information underlying his allegations, as opposed to merely the information underlying the public disclosure, and (b) even though a relator may qualify as an original source of the initial complaint, if the complaint is amended, whether by the relator or the Department of Justice, the relator must satisfy the original source rule with regard to the amended allegations.

On the first point, Stone did not qualify as an original source because the relevant events occurred long after his employment with Rockwell ended. While he may have predicted Rockwell's compliance problems, he was not there to witness them first-hand. In this regard, the Court dealt a severe blow to *qui tam* relators whose allegations concern conduct which post-dates their employment with the defendant. On the second point, Stone argued that his original source status with respect to one issue made him an original source of all of the allegations contained in the Government's amended complaint. The Court held that the FCA "does not permit such claim smuggling." Its holding is precisely in line with the position that McKenna Long & Aldridge asserted in its *amicus* brief on behalf of the Chamber of Commerce of the United States, which asked the Court to "put an end to use of amended complaints as a means of circumventing the original source requirement." MLA's *amicus* brief was prepared by Mark Troy, Lawrence Ebner and Herbert Fenster.

Background

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 *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)).

In *Rockwell*, the parties agreed that Stone's 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 review of engineering designs for producing pondcrete, a mixture of cement, sludge and liquid

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Mark R. Troy
213.243.6170

James J. Gallagher
213.243.6165

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 produce an unstable mixture that would result in insolid (leaky) pondcrete. One year after he left Rockwell, Stone disclosed his allegations to the FBI, and the Government pursued a criminal investigation of non-compliance with environmental laws and regulations which was disclosed in the news media. Two years later, Stone filed suit, alleging that the pipe design for producing pondcrete was inherently flawed.

The Department of Justice intervened and, together with Stone, filed an amended complaint which dropped Stone's allegation about the pipe design but alleged that, subsequent to Stone's employment, Rockwell deliberately used an incorrect cement/sludge ratio in order to speed up its pondcrete production. 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. Rockwell then argued to the Tenth Circuit that Stone could not possibly have had direct and independent knowledge of those allegations. 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 pipe design would lead to a defective process for producing pondcrete. It held that a relator need not know of the actual act of fraud.

Crucial Aspects of the Decision

The Supreme Court interpreted the FCA to require a relator to have a much greater degree of knowledge than merely background information. Under the FCA, the relator must have direct and independent knowledge of "information on which the allegations are based." (Section 3730(e)(4)(B)). First, the Court held that this phrase requires the relator to have direct and independent knowledge of the allegations *in the complaint*. A relator who merely has background information or knowledge of the information underlying the public disclosure which falls short of direct and independent knowledge of the actual allegations does not qualify as an original source. Stone's background information, which amounted to a mere prediction that the pipe design would produce insolid pondcrete, did not constitute direct and independent knowledge of the allegation in the amended complaint that, subsequent to Stone's employment, Rockwell knowingly used incorrect mixture ratios to produce insolid pondcrete and made false statements to the Government regarding storage of the pondcrete. The Court noted that even if a prediction could qualify as direct and independent knowledge in some cases (a point not addressed in the decision), it certainly would not qualify where the prediction itself was wrong – the insolid pondcrete was never found to have been caused by the pipe design.

Even though Stone was not an original source of the insolid pondcrete allegation, he was an original source of an allegation that Rockwell conducted improper "spray irrigation" of waste water – an allegation unrelated to pondcrete but which resulted in a verdict in favor of Rockwell. Stone argued that because he was an original source with respect to that allegation which was contained in his initial complaint, there was proper jurisdiction over all of his claims, including those in the Government's amended complaint. The Court held that the term "allegations" in section 3730(e)(4)(B) is not limited to the allegations in the original complaint but "includes (at a minimum) the allegations in the original complaint *as amended*." (Emphasis in opinion.) The Court noted that if the original source inquiry applied only to the initial complaint, "[s]uch a limitation would leave the relator free to plead a trivial theory of fraud for which he had some direct and independent knowledge and later amend the complaint to include theories copied from the public domain or from materials in the Government's possession."

The last phrase in the sentence above has particular significance. During the period in which the initial *qui tam* complaint is under seal, the Government has at its disposal a variety of investigative tools, including Civil Investigative Demands, Inspector General and Grand Jury subpoenas, as well as informal requests for information from the defendant. The Government routinely shares the fruits of this discovery with the relator, and relators routinely amend their complaints to add new allegations that they learned from the Government. Several lower courts have held that this sort of disclosure is a "public disclosure." (See, e.g., *Seal 1 v. Seal A*, 255 F.3d 1154, 1162 (9th Cir. 2001)). In *Seal*, the court held that a relator can be deemed an original source of new allegations derived in that manner so long as his initial complaint "triggered" the Government's discovery of the new allegations. The Supreme Court's assertion about copying information from "materials in the Government's possession" appears to prohibit a relator from using information derived from the Government's investigation as a basis for amending his complaint or piggybacking onto new allegations raised in an amended complaint filed by the Government.

Finally, the Court held that the Government's intervention did not provide an independent basis of jurisdiction for Stone's action. In other words, the Government, by intervening, did not somehow cure the jurisdictional defect in Stone's action. Although Stone's action lacked jurisdiction, the Court held that the Government's intervention in Stone's action did not bar jurisdiction over the Government's claims because such intervention renders the action "brought by the Attorney General" once the relator is jurisdictionally barred. Indeed, the Court noted that Rockwell did not raise that defense to the Government's action.

Impact and Recommendations

Because the verdicts obtained against Rockwell by the Government were not affected by the Supreme Court's decision, what did Rockwell gain by successfully challenging jurisdiction over the relator's claim? Although the issue was not raised in the appeal, presumably, the disqualification of the relator means that he will not be able to recover any attorneys' fees against Rockwell – an amount which surely is substantial given that the action was commenced in 1989. In addition, even though the Government controls the litigation upon intervention, relators sometimes pursue claims not adopted by the Government, disrupt the proceedings and hold up settlements with their own self-interested agenda. In that regard, the dismissal of the relator from the litigation permits the defendant to litigate against and negotiate with a single plaintiff. Finally, Stone's disqualification also precludes him from receiving any share of the Government's recovery, resulting in a greater recovery for the taxpayers. While that may not have an immediate and direct financial impact on Rockwell, the decision certainly sends a strong message to potential *qui tam* relators that their actions must be based upon allegations of which they have first-hand knowledge and which they disclosed to the Government.

The dissent by Justice Stevens found nothing wrong with enabling a relator to discover new allegations from the Government and include them in an amended complaint: "If the process of discovery leads to amended theories of recovery, amendments to the original complaint would not affect jurisdiction that was proper at the time of the original filing." That statement reveals a fundamental misunderstanding of the FCA which empowers whistleblowers who already are aware of the allegations, not those who seek a license to fish for unknown wrongs.

Justice Stevens had one correct observation – "The majority's approach requires courts to reevaluate jurisdiction over a *qui tam* action brought by an original source every time the complaint is amended." Defendants in *qui tam* actions should conduct vigorous discovery as to the basis and origin of any amended allegation and move to dismiss any allegation which the relator derived from the Government. Such discovery should be directed at both the relator and the Government. They will assert, as they have with regard to relators' disclosure statements, that discussions between the relator and the Government are either privileged or confidential work product. Narrowly tailored inquiries as to the source of the amended allegations should overcome such objections. Under the Supreme Court's holding, relators will no longer be permitted to amend their complaints to include information which the Government provided to them. In that sense, the Court has upheld the underlying purpose of the False Claims Act by empowering individuals who provide information to the Government rather than those who, as Justice Scalia aptly put it, "smuggle" it from the Government.

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