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Client Alert

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The Supreme Court Clarifies the Original Source Rule in *Qui Tam* Cases: *Rockwell International Corp. v. United States*, 549 U.S. – (2007)

On March 27, 2007, the Supreme Court of the United States issued its first substantive opinion interpreting the public disclosure bar of 31 U.S.C. §3730(e)(4), part of the *qui tam* provisions of the federal False Claims Act. Latham & Watkins partner Maureen Mahoney argued the case before the Supreme Court, which reversed the 10th Circuit and found in favor of Rockwell International. The Court's opinion establishes several key principles that will allow courts to dismiss abusive *qui tam* litigation.

"Parties presently litigating *qui tam* cases should consider whether *Rockwell* provides an opportunity to revisit the public disclosure issue."

History of the *Stone* Case

Rockwell International operated the Rocky Flats nuclear weapons plant, and stored hazardous wastes by mixing them with cement to form "pondcrete." James Stone, the relator, worked at Rocky Flats. In 1982, while the pondcrete system was in its early planning stages, he claimed to detect a problem with the proposed piping system through which sludge was to be extracted, and predicted that it would prevent the pondcrete blocks from hardening. Years later, the pondcrete blocks actually did fail to harden – but for a different reason, unconnected to what Stone predicted.

Stone was laid off in 1986. In 1987, he went to the FBI, alleging a host of environmental violations at Rocky Flats. The FBI investigated, and in June 1989, raided Rocky Flats. The great majority of Stone's claims turned out to be false, but Rockwell did plead guilty to concealing defects in the pondcrete blocks.

Stone later brought a *qui tam* action under the federal False Claims Act, which allows a person aware of a false claim on the United States to bring suit on behalf of the United States, and to share in any recovery. The statute, however, prohibits *qui tam* cases "based upon the public disclosure of allegations" unless the "person bringing the action is an original source of the information." 31 U.S.C. § 3730(e)(4). An "original source," in turn, "means an individual who has direct and independent knowledge of the information on which the allegations are based" and who "voluntarily provided [that] information to the Government before filing." *Id.*

Early in the case, Rockwell sought dismissal under the public disclosure bar. At that time, Stone's allegations were very general, and the district court denied Rockwell's motion. The Government eventually intervened.

Stone, together with the Government, filed an amended complaint abandoning most of his claims, and focusing in on a few – including pondcrete. The jury found for Rockwell on most of the remaining claims, but found for Stone on a subset of the pondcrete claim. Rockwell again asserted the public disclosure bar, noting that because Stone left Rocky Flats before the pondcrete system failed, he could not have the requisite "direct and independent knowledge." The district court denied Rockwell's motion, and the 10th Circuit affirmed.

The Court's Opinion

Six Justices of the Supreme Court disagreed with the 10th Circuit. The Court began by affirming that the public disclosure and independent source rules are jurisdictional in nature, rejecting the 7th Circuit's contrary analysis in *Fallon v. Accudyne Corp.*, 97 F.3d 937 (7th Cir. 1996). That means that relators must bear the burden of proof in these disputes, because the burden of proof always rests upon the party asserting federal subject matter jurisdiction. *See, e.g., United States ex rel. Hafter v. Spectrum Emergency Care, Inc.*, 190 F.3d 1156, 1160 (10th Cir. 1999). It also means that the public disclosure bar and "original source" issues can be raised at any point in the litigation, and cannot be waived by the defendant.

The Court then considered what "information" the relator had to possess – direct and independent knowledge of *his own* allegations (as held by the 2nd, 3rd, 7th, 9th and 10th Circuits) or of the *publicly disclosed* allegations (as held by the 4th, 5th, 6th and D.C. Circuits). The Supreme Court sided with the majority, holding that relators must know the information on which the relator's allegations themselves are based.

The Court next considered what to do when a relator's allegations "change[] during the course of the litigation." The Court held that "the term 'allegations'" in the statute "is not limited to the allegations of the original complaint," but also reaches "the allegations ... as amended." Indeed, the Court considered not only an amended complaint, but also "a final pretrial order," in defining the "allegations" about which Stone must have "direct and independent knowledge." The Court expressly forbade a relator from "plead[ing] a trivial theory of fraud for which he had some direct and independent knowledge and later amend[ing] the complaint to include theories copied from the public domain or from materials in the Government's possession." The Court further held that the public disclosure bar must be applied on a claim-by-claim basis. "Section 3730(e)(4) does not permit jurisdiction in gross just because a relator is an original source with respect to some claim."

The combination of these holdings clearly signals to *qui tam* defendants that the public disclosure bar operates at all phases of a case – not just at the beginning, where it can either oust a relator entirely or trim away claims, but also at the end, where the defendant should confirm that the relator was an original source of whatever claims he actually prevails upon. Stone lost because the Supreme Court found he was not an original source as to the "only false claims ultimately found by the jury."

When determining that Stone was not an original source, the Court noted a host of deficiencies in his knowledge: "he did not know that the pondcrete was insolid; he did not know that pondcrete storage was even subject to RCRA; he did not know that Rockwell would fail to remedy the defect; he did not know that the insolid pondcrete leaked while being stored onsite; and, of course, he did not know that Rockwell made false statements to the Government regarding pondcrete storage." This list suggests a rather strict view of the knowledge

a relator must have – quite precise knowledge of the actual state of affairs (including, where relevant, the relevant legal regime) *plus* knowledge of false statements actually made. And while the Court declined to reach the question of whether "a prediction can qualify as direct and independent knowledge," it did hold that a prediction "assuredly does not do so when its premise of cause and effect is wrong."

Finally, the Court considered and rejected the suggestion that the Government's intervention cured the jurisdictional defect created by the public disclosure bar. Section 3730(e)(4)(A) only allows actions based on publicly disclosed allegations to proceed if the action is "brought by the Attorney General" or by an original source, and the Court distinguished between an action "brought by the Attorney General" and one brought by a relator into which the Attorney General intervenes. In order to avoid an extreme result, under which the relator's disqualification would oust the Government's own recovery, the Court held that "[t]he elimination of [the relator] leaves in place an action pursued only by the Attorney General, that can reasonably be regarded as being 'brought' by him for purposes of § 3730(e)(4)(A)."

The *Rockwell* decision resolved some of the difficult ambiguities surrounding the public disclosure bar, and should help the defense bar resist abusive *qui tam* lawsuits. Parties presently litigating *qui tam* cases should consider whether *Rockwell* provides an opportunity to revisit the public disclosure issue, particularly given the Court's determination that this is a subject matter jurisdiction issue that cannot be waived.

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