AKIN GUMP STRAUSS HAUER & FELD LLP
Attorneys at Law

April 20, 2007

HEALTH INDUSTRY ALERT

A FALSE CLAIMS ACT WIN FOR DEFENDANTS: THE SUPREME COURT'S DECISION IN *ROCKWELL INT'L CORP. v. UNITED STATES*

The federal False Claims Act (FCA), 31 U.S.C. §§ 3729-3733, is the government's primary weapon to combat fraud. It empowers the federal government and private citizens, also called *qui tam* relators or whistleblowers, to file actions against those alleged to have "knowingly submitted false or fraudulent claims" to the government. If the relator's *qui tam* action is successful, the relator may receive up to 30 percent of the government's recovery. Since 1986, the federal government has recovered more than $18 billion under the FCA. In federal fiscal year 2006 alone, the government recovered a record $3.1 billion. Moreover, since 1986, more than 5,500 private whistleblower actions have been filed.

Recently, the Supreme Court issued a significant ruling that will limit a whistleblower's ability to institute *qui tam* actions. Specifically, the Court ruled that once the allegations underlying a *qui tam* lawsuit are in the public domain, the only whistleblowers that may file an action are those that provide firsthand evidence of the defendant's misconduct. The Court's decision will substantially reduce the potential class of *qui tam* relators that can file lawsuits, increase conflict between the government and relators in cases where the government intervenes, and cause defendants who previously lost on this issue to renew their efforts to dismiss relators from pending lawsuits.

THE FCA'S PUBLIC DISCLOSURE BAR AND ORIGINAL SOURCE REQUIREMENT

In *Rockwell Int'l v. United States*, No. 05-1272, 2007 U.S. LEXIS 3778 (U.S. Mar. 27, 2007), the Supreme Court considered the proper application of the FCA's public disclosure jurisdictional bar. The FCA's public disclosure jurisdictional bar divests courts of jurisdiction when a relator's *qui tam* action is based upon specified types of public "allegations" or "transactions" unless "the person bringing the action is an original source of the information." 31 U.S.C. § 3730(e)(4)(A). To qualify as an "original source," the relator must possess "direct and independent knowledge of the information on which the allegations are based and [have] voluntarily provided the information to the Government before filing an action." *Id.* at § 3730(e)(4)(B).

The purpose of the public disclosure jurisdictional bar is to limit *qui tam* jurisdiction "to those cases in which the relator played a role in exposing a fraud of which the public was previously unaware." *United States ex rel. Findley v. FPC-Boron Emplyees' Club*, 105 F.3d 675, 678 (D.C. Cir. 1997). If information is not in the public domain, a presumption exists that the government is unaware of the allegations and thus the relator, by filing the action, contributes valuable information to the government. Hence, these *qui tam* actions are allowed to proceed.

Conversely, if information is in the public domain, it is presumed that the government is aware of it and will either take appropriate action or, due to the public nature of the information, be held politically accountable for its failure to act. Under these circumstances, allowing a whistleblower to proceed with an action fails to advance — and, rather, actually hinders — the public interest, because the government will be compelled to share a portion of its recovery with a whistleblower who merely republishes public allegations. Thus, once there is a public disclosure, a whistleblower may only proceed if he is an "original source" who has firsthand, "direct" knowledge regarding a defendant's misconduct — and, as such, would have valuable information to supply to the government. By making this distinction, Congress ensured that *qui tam* actions would only augment the government's recoveries, permitting actions only when (1) the relator contributed to the government information that was not already in the public domain or (2) the relator contributed to the government direct, firsthand evidence of fraud that contributed to its recovery. Congress used the public disclosure bar to screen out all other *qui tam* actions, because such actions are unnecessary and would ultimately deprive the government from obtaining full recovery.

The precise issue before the Supreme Court in *Rockwell* concerned the original source requirement of the public disclosure bar. Specifically, the Court reviewed how "direct" a relator's knowledge regarding the alleged misconduct had to be to qualify him as an "original source" and share in the government's recovery.

FACTS OF *ROCKWELL*

In *Rockwell*, the relator, James Stone, was a paradigmatic *qui tam* insider. From 1980 to 1986 he was an engineer at the Rocky Flats nuclear weapons plant, which was operated by Rockwell International Corporation. As part of his job duties, Stone evaluated the defendant's manufacturing process of creating "pondcrete" (a mixture of toxic pond sludge and cement). He concluded that the proposed manufacturing process was faulty and would result in defective pondcrete that would release toxic waste into the environment. Stone communicated his finding to management in writing and later produced the document to the government. This notification to the government resulted in the execution of a search warrant. Newspaper articles reported on the search and, for purposes of the public disclosure jurisdictional bar, resulted in the "public disclosure" of the allegations against Rockwell. Ultimately, the defendant pleaded guilty to criminal charges and paid $18.5 million in fines.

In 1989, after Stone had left Rockwell, he filed his *qui tam* action. In his complaint, Stone identified a variety of environmental and safety problems he had witnessed while working at Rocky Flats. Included within these allegations was the contention that the defendant's process for manufacturing pondcrete was defective and would likely result in toxic waste. In 1996 the government intervened in Stone's lawsuit. The subsequent joint amended complaint alleged that the defendant violated the law by storing leaky pondcrete blocks but, significantly, did not allege the defect in the manufacture of the pondcrete that Stone had initially predicted would occur. Rather, the plaintiffs asserted that the pondcrete's insolidity was due to "an incorrect cement/sludge ratio used in pondcrete operations" and that the pondcrete failed because a new foreman had reduced the cement-to-sludge ratio. Of note, this occurred only *after* Stone had left

his employment at Rockwell. The jury found for plaintiffs regarding their pondcrete claim for the time period April 1, 1987, to September 30, 1988,[1] and awarded damages of $1,390,775.80, which was trebled under the FCA.

THE COURT'S HOLDING

Notwithstanding Stone's insider status and direct, internal communications regarding the defective product, the Court, by a 6-2 vote, ruled that the relator lacked "direct and independent" knowledge and hence could not qualify as an original source. Justice Scalia, writing for the Court, found that the information that Stone provided to the government was not sufficiently connected to the jury's ultimate verdict against Rockwell.

In reaching its conclusion, the Court pointed out that by the time the product actually became defective, Stone had left the company. Thus, he did not know that the product actually became defective, he did not know that the product was subject to governmental regulations, he did not know whether the defendant had failed to remedy the defect, and he did not know that the defendant had submitted false statements regarding the product. Significantly, the Court ruled that the relator "did not *know* that the [product] failed; he *predicted* it." Thus, under the Court's reasoning in *Rockwell*, even where the relator possessed direct knowledge that a particular outcome *could occur*, the relator lacks "direct" knowledge if the relator does not know that the event *actually did occur*.[2]

IMPLICATIONS FOR FCA LAW

The Supreme Court's ruling in *Rockwell* is correct as a matter of law and policy. The Court's ultimate ruling is that the government's recovery (which belongs to taxpayers) should only flow to relators that provide useful, accurate information, and should not be furnished to relators, like Stone, that provide wrong or useless information as judged by a jury's verdict. This is consistent with Congress' goal in formulating the public disclosure jurisdictional bar to screen out *qui tam* actions that do not contribute funds to the federal fisc.

The Court's ruling and its reasoning will have several significant implications for *qui tam* actions:

- ***Relators cannot "piggyback" on the government's claims to obtain an additional recovery.*** One of the more important implications of the Court's ruling is that relators will no longer be able to piggyback on the results of the government's investigation and still qualify as an original source. Under the prior rulings of some courts, a relator could participate in the government's recovery if his initial allegations caused the government to identify additional types of misconduct. Under the ruling in *Rockwell*, the relator would be disqualified from sharing in any such recovery where a public disclosure occurred before the relator's lawsuit and where he did not have knowledge of the claims ultimately pursued by the government.

- ***Increased conflict between relators and the government.*** Because the Supreme Court has required that relators show an express link between their evidence and a recovery, there will likely be additional conflicts between the government and relators regarding how to present their case. Prior to the Court's ruling, relators essentially recovered when the government did, so relators frequently acquiesced in the government's

[1] Stone was no longer employed at Rocky Flats during this time.
[2] Justices Stevens and Ginsburg dissented, stating that relators should have to show only that their information led the government to the fraud, not that the claims ultimately proved to a jury came from them; Justice Breyer did not participate in the case.

litigation strategy regarding how best to present the case. Now that relators may be barred if the evidence they supply is not actually used to support a claim, relators may be compelled to fight for the presentation of specific evidence even if the government believes that the evidence is weak and damaging to its overall case. As a result, it is more likely in the future that the government will move to sever its claims from those of the relators.

- ***Limitation on relators' ability to assert continuing violations.*** Frequently, relators leave their employment prior to filing a *qui tam* action. However, they also frequently assert that the defendants' practices continued after they left their employment and present those claims as part of their lawsuit. If the underlying allegations have been publicly disclosed, the Supreme Court's decision draws into question whether such relators' allegations of continuing fraud will survive. Under these circumstances, the relators, like Stone, will be only in a position to "predict" violations, without having "direct knowledge" that they exist.

- ***Renewed motions to dismiss.*** Defendants that previously lost on the original source issue will likely ask courts to reevaluate their decisions in light of the Supreme Court's ruling.

CONTACT INFORMATION

If you have questions about the Supreme Court's decision in *Rockwell*, pending litigation concerning public disclosure/original source issues, or any other FCA matters, please contact:

Robert Salcido	202.887.4095	rsalcido@akingump.com	Washington
Donald B. Craven	202.887.4081	dcraven@akingump.com	Washington
Scott M. Heimberg	202.887.4085	sheimberg@akingump.com	Washington
Robert H. Hotz, Jr.	212.872.1028	rhotz@akingump.com	New York
Paul W. Killian	202.887.4031	pkillian@akingump.com	Washington
Torsten M. Kracht	202.887.4252	tkracht@akingump.com	Washington
Mark J. MacDougall	202.887.4510	mmacdougall@akingump.com	Washington
Jerry E. Rothrock	202.887.4018	jrothrock@akingump.com	Washington
Barry R. Senterfitt	512.499.6216	bsenterfitt@akingump.com	Austin
Sabrina Yohai	202.887.4187	syohai@akingump.com	Washington
Richard B. Zabel	212.872.8060	rzabel@akingump.com	New York
David M. Zensky	212.872.1075	dzensky@akingump.com	New York

Austin Beijing Dallas Dubai Houston London Los Angeles Moscow
New York Philadelphia San Antonio San Francisco Silicon Valley Taipei Washington, D.C.