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CLIENT ALERT

Government Auditor Cannot Qualify As An Original Source

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On March 30, 2007, two months after a jury returned a verdict in favor of the relator, the District Court in *United States ex rel. Maxwell v. Kerr-McGee Oil & Gas Corp.*, No. 04-cv-01224 (D. Colo.), dismissed the False Claims Act ("FCA") case for lack of subject matter jurisdiction. Agreeing with the Ninth Circuit and several district courts, Judge Figa held that while government auditors are not per se precluded from serving as *qui tam* relators, the court will not have jurisdiction over the case if the claims are based upon a public disclosure. More specifically, the court held that although the FCA's so-called "public disclosure" jurisdictional bar does not preclude suits brought by a relator who qualifies as an "original source," a would-be relator who is employed *by the government* to detect fraudulent activity and disclose it to the government, cannot satisfy the "voluntary disclosure" requirement to qualify as an original source.

As significant as these holdings are, the issues that remain to be resolved are perhaps just as significant. Unlike the case before the Supreme Court in *Rockwell Int'l Corp. v. United States*, which was decided three days earlier, the government declined to intervene in *Kerr-McGee*. It remains to be seen whether the government will now intervene in *Kerr-McGee* and, if so, whether the court can and will enter a judgment based on the jury's verdict. Assuming that it cannot and that the government does intervene and is forced to file its own complaint, the defendant will likely argue that at least some of the claims are time-barred because the government's complaint does not relate back to the relator's complaint under the Second Circuit's rationale in *United States v. Baylor Univ. Med. Ctr.*, 469 F.3d 263 (2d Cir. 2006).

Factual Background and Procedural History

Pursuant to leases that it had with the government, the defendant, Kerr-McGee, was obligated to pay royalties on oil that it explored for and produced. The relator, Bobby Maxwell, was employed as a senior auditor with the U.S. Department of the Interior's Minerals Management Service ("MMS") and, as part of his job, designed and participated in an audit of Kerr-McGee's federal royalty reporting. Convinced that the defendant had fraudulently underreported its royalty obligations, Maxwell brought suit under the FCA based on the information that had been gathered in the course of his audit. After the government declined to intervene and take over the litigation of the case, Maxwell proceeded through trial and obtained a jury verdict that subjected Kerr-McGee to up to $39 million in damages and penalties.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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