CLIENT ALERT

Supreme Court Deals Set-Back To Whistleblowers

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On March 27, the Supreme Court in *Rockwell International Corp. v. United States ex rel. Stone*, No. 05-1272, ruled that under the False Claims Act the District Court lacked jurisdiction to enter judgment in favor of the *qui tam* whistleblower because he was not an "original source" of the information upon which the prevailing claims were based. As there was no dispute that the allegations at issue had been publicly disclosed, thereby triggering the False Claims Act's so-called "public disclosure bar" (31 U.S.C. § 3730(e)(4)), the principal issues in *Rockwell* were (1) whether the whistleblower, James Stone, qualified as an "original source of the information"; and (2) if he did not, could the court's jurisdiction to award him a share of the judgment be saved by the Government's intervention in the case. The Supreme Court ruled against Stone on both points. Therefore, even though Stone brought this case on his own and kept it going in the face of the Government's initial decision not to intervene, neither he nor his attorney will receive anything for their efforts. This is so even though the Government was on Stone's side before the Supreme Court and *wants to share* a portion of its recovery with him. This was a bad day for whistleblowers.

To qualify as an original source, a whistleblower must, at a minimum[1], (1) have direct and independent knowledge of the information on which the allegations are based; and (2) have voluntarily provided such information to the government prior to filing suit[2]. The circuit courts have been divided as to the proper interpretation of this definition.

In reaching its decision, the Court clarified the construction of the False Claim Act in significant ways that are not favorable to whistleblowers. *First*, it found that the "information" about which an individual must have the direct and independent knowledge for original source status is the information on which the whistleblower's lawsuit's allegations are based and not the information on which the publicly disclosed allegations are based. If it were the latter, Stone arguably would have prevailed because the FBI's publicly disclosed investigation was based on information provided and known by Stone.

Second, the Court concluded that the issue of jurisdiction must be revisited on an allegation-by-allegation basis each time that a whistleblower complaint is amended either formally or through a pretrial agreement concerning which claims will be tried. If the Government's amendment of a whistleblower complaint narrows it in a way that eliminates the claims about which the whistleblower has knowledge, this will deprive the trial court of jurisdiction to award a judgment in favor of the whistleblower.

Third, the False Claims Act's exception to the public disclosure bar for actions "brought by the Attorney General" does not mean that a whistleblower who is not an original source is saved from dismissal by the Government's intervention in the whistleblower's suit. In other words, a suit brought by a whistleblower does not become one brought by the Attorney General when the Government intervenes. The court must still determine if the whistleblower can stand on his own two feet as an original source without help from the Government. This will give companies that are the target of whistleblower suits the ability to eliminate the whistleblower from the suit even after the Government intervenes. Settlement of these suits can be reached much more easily without the aggravating presence of the whistleblower and his lawyer.

This last point – that the government's decision to intervene in a *qui tam* case that is otherwise jurisdictionally defective does not save the whistleblower's claims – may turn out to be as significant as the Court's clarification of the meaning of the term

"original source." There are many consequences that can flow from a relator's insufficient complaint. These include first-filing relators being supplanted by second-filing relators and the dismissal of otherwise legitimate claims as time-barred. *See* "The Insufficient Complaint – Consequences," ABA 21st National Institute on White Collar Crime 2007. For example, in *United States v. Baylor Univ. Med. Ctr.*, 469 F.3d 263 (2d Cir. 2006), where the relator had filed his complaint in the wrong venue, the Second Circuit held that a government's subsequent complaint-in-intervention cannot relate back, under Fed. R. Civ. P. 15, to the whistleblower's original *qui tam* complaint because "the seal provision of the FCA deprives the defendant of notice, which is the touchstone of Rule 15(c)(2)."[3] In that case, however, it is unclear whether the Second Circuit would have held differently had the government merely joined in the relator's original complaint rather than filing an amended complaint of its own. In light of the *Rockwell* decision, though, it seems unlikely that the *Baylor Univ.* court would allow the government's claims to relate back to a jurisdictionally defective whistleblower's complaint.

Factual Background and Procedural History

The whistleblower, James Stone, worked as an engineer for Rockwell between November 1980 and October 1986 at the Rocky Flats nuclear plant, which Rockwell operated under a contract with the U.S. Department of Energy. Before Stone left Rockwell, he predicted that its plan for disposing of toxic sludge by converting it into solid "pondcrete" blocks would fail because Rockwell's sludge removal piping system would not create a mixture of sludge and concrete sufficient to prevent later disintegration and contamination. Rockwell's pondcrete blocks did, in fact, disintegrate because of an inadequate mixture of sludge and concrete. Stone notified the FBI of his allegations of Rockwell's environmental crimes a year after he left Rockwell. The ensuing FBI investigation resulted in Rockwell pleading guilty to 10 environmental crime violations including the knowing storage of unstable pondcrete blocks. Newspapers published stories about the allegations of Rockwell's environmental crimes.

Stone filed a *qui tam* complaint against Rockwell in 1989 alleging that it violated the False Claims Act by seeking and obtaining environmental performance award fees to which it wasn't entitled. The Government initially declined to join the suit, but subsequently changed its mind and intervened in 1996, filing a joint amended complaint. The case went to trial in 1999 and a jury found in favor of Stone and the Government awarding single damages of $1,390,775.80. The court trebled this amount. The jury based its award on violations that occurred after Stone no longer worked for Rockwell. The claims that the jury considered in reaching its verdict were based on allegations that Rockwell's pondcrete waste disposal plan failed because it knowingly used an insufficient sludge to waste ratio. The Government did not present any evidence regarding Stone's allegations that the pondcrete blocks disintegrated because of piping problems.

Rockwell moved to dismiss Stone's whistleblower suit because it was based on publicly disclosed allegations and Stone was not an original source. Stone conceded that his suit was based on public disclosures but he maintained that he was an original source. The District Court agreed with Stone and the Supreme Court has now reversed that decision, concluding that Stone could not have *known* that the pondcrete blocks failed after he left Rockwell. He *predicted* that they would fail but he didn't *know* that his predictions had come true. After he left, he also did not *know* that Rockwell made false statements to the government regarding its pondcrete storage. Therefore, the Court held that Stone did not meet the "direct and independent knowledge" requirement for original source status and the judgment in his favor must be overturned.

[1]Some courts have imposed additional obligations. The Second Circuit, for example, requires that an original source have "directly or indirectly been a source to the entity that publicly disclosed the allegations on which the suit is based." *United States ex rel. Dhawan v. New York Med. Coll.,* 252 F.3d 188, 120 (2d Cir. 2001).

[2]Section 3730(e)(4) provides that:

> **(A)** No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an *original source of the information*.
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> **(B)** For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of *the information on which the allegations are based* and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

31 U.S.C. § 3730(e)(4) (emphasis added).

[3]*See also United States ex rel. Health Outcomes Technologies v. Hallmark Health Sys., Inc.*, 409 F. Supp. 2d 43 (D. Mass. 2006) (holding that the government's claims in intervention did not relate back to the relator's original complaint where the relator's claims were originally made in the wrong venue).

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