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Supreme Court Provides Guidance for the Original Source Requirements under the False Claims Act

The False Claims Act ("FCA") f/k/a the "Informer's Act" was enacted as a vehicle to capture losses suffered by the government as a result of fraud. To date, some of the largest recoveries under the FCA have been for health care fraud and abuse. According to the government, Medicare fraud continues to rise. The government announced a new initiative to combat fraud known as the Strike Force. The Strike Force is designed to identify, prosecute and disrupt Medicare fraud schemes. As the government focuses more heavily on Medicare fraud, it is likely that the number of the FCA actions initiated will continue to rise.

Not only can the government bring claims under the FCA, but an individual citizen (relator) may bring claims on behalf of the government. Relators stand a chance of collecting a bounty if liability is established. In an attempt to encourage more private citizens to bring FCA suits, the statute was amended in 1986 to guarantee relators a certain minimum percentage of the proceeds recoverable (15-25% if the government does intervene and 25-30% if the government does not intervene). It is this bounty that motivates private individuals to take on large companies for FCA violations. 31 U.S.C. §3730(d)(1)-(2). Relators are commonly current or former employees of the defendant. Often, relators are disgruntled employee with a personal vendetta.

In order to avoid parasitic behavior by individuals, the statute provides a public disclosure bar prohibiting individuals from bringing suit if there has been a prior public disclosure of the information on which the allegations are based. Section 3730(e)(4)(A) provides that "[n]o court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions . . . unless the action is brought by the Attorney General or the person bringing the action is an original source of the

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information.” (emphasis added) The statute defines original source as 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. Id. §3730(e)(4)(B). Common public disclosures include newspaper articles, governmental agency alerts and previously filed lawsuits.

With the increasing number of FCA claims litigated by private citizens, two dilemmas have developed (assuming a public disclosure): (1) At what time during the course of the proceedings must the relator satisfy the original source requirement? and (2) Over which claims must the relator satisfy the original source requirement? In *Rockwall International Corp v. U.S.*, 127 S.Ct. 1397 (2007), the Supreme Court determined that, while the relator must meet the original source requirement at the time of filing the original complaint, the relator must also meet the requirement at the time that any subsequent amendment to relator’s allegations are made. The Court limiting the original source requirement to the original complaint only “. . . 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.” Id. at 1408.

The Court made it clear that the statute does not permit jurisdiction in gross merely because relator has satisfied the original source requirement as to some claims. The Court further quoted an opinion authored by Justice Samuel Alito (while sitting on Court of Appeals for Third Circuit) which explained that “[t]he plaintiff’s decision to join all of his or her claims in a single lawsuit should not rescue claims that would have been doomed by section (e)(4) if they had been asserted in a separate action. And likewise, this joinder should not result in the dismissal of claims that would have otherwise survived.” Id. at 1410 (*U.S. ex rel. Merena v. SmithKline Beecham Corp.*, 205 F.3d 97, 102 (3rd Cir. 2000)).

Rockwell International may be construed as discouraging claims; however, the government’s current focus on health-care fraud likely will balance any impediments created by Rockwell International. Considering the government’s continued emphasis on prosecuting false claims cases, the best way to avoid or minimize exposure under the FCA is to proactively implement strong compliance and risk management procedures. After all, one FCA violation could cripple or destroy a company.

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