

## The U.S. Supreme Court Narrows Relators' Ability to Pursue *Qui Tam* Claims

**Introduction:** In *Rockwell International Corp et al. v. U.S.*, No. 05-1272, 549 U.S. \_\_\_\_ (March 27, 2007), the U.S. Supreme Court ("the Court") held that a former employee of the Rocky Flats nuclear facility was not an "original source" for the purposes of the False Claims Act ("FCA"). As a result, the district court lacked jurisdiction. To qualify as an "original source" under the *qui tam* provision of the FCA, a relator must have direct knowledge of the information underlying the specific allegations in his cause of action. The Court in *Rockwell* found that the term "allegation" was not limited to the allegations in the original complaint, but included the allegations in any amendment of the original complaint. To the extent a relator does not have direct knowledge of the facts contained in the complaint, the relator does not qualify as an original source such that he does not have a valid cause of action. As a result, government contractors may find added protection from would-be plaintiffs who are not true whistleblowers with direct and independent knowledge of the allegations necessary to their claims.

**Background on the FCA:** The FCA prohibits the submission of false or fraudulent claims for payment to the U.S. government (31 U.S.C. § 3729(a)) and permits civil claims to be brought either by the Attorney General or by private individuals as *qui tam* relators on behalf of the U.S. government. *Id.* at § 3730(a), (b)(1). To bring a suit as a private individual, "the person bringing the action [need be] an original source of the information." *Id.* at § 3730(e)(4)(A). For purposes of this provision, an "original source" means:

[A]n 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.

*Id.* at § 3730(e)(4)(B).

**The *Rockwell* Case:** While employed as an engineer for Rockwell International, a contractor with the Department of Energy ("DOE") responsible for managing and operating the Rocky Flats nuclear facility, James Stone predicted that a method for disposing of toxic pond sludge by mixing it with concrete would fail due to inadequacies in piping the sludge. Despite Stone's opinion, Rockwell employed the method and began creating a mixture called "pondcrete." In 1986, after Stone had been laid off, Rockwell discovered that some of the pondcrete blocks began to leak, or become "insolid."

In 1987, Stone met with the Federal Bureau of Investigation ("FBI") and alleged that Rockwell was guilty of various environmental crimes. As part of his disclosure, Stone turned over 2,300 pages of documents, including an engineering report containing his prediction that the pondcrete methodology would fail. In 1988, DOE learned of the insolid blocks when several blocks began to leak. This led to the discovery of thousands of other insolid blocks which received media coverage. In 1989, based in part on the information provided by Stone, the FBI obtained and executed a search warrant of Rockwell's Rocky Flats facility.

In 1989, Stone also filed a *qui tam* action alleging that Rockwell had committed numerous violations of environmental laws and regulations. Stone's suit further alleged that Rockwell had knowingly presented false claims when it submitted various statements during its semi-annual evaluations attesting to its compliance with the applicable environmental laws which was a requirement for payment under Rockwell's contracts. Stone's claim alleged 26 environmental and safety issues, only one of which was related to his prediction that the piping system was inadequate for the production of pondcrete. The Government initially declined to intervene in the matter, but in 1996 decided to intervene. Several weeks later at the district court's request, the Government and Stone filed a joint amended complaint. Notably, the amended complaint did not contain any allegation relating to Stone's prediction of the inadequacy of the pondcrete production methodology's piping system. The Government and Stone further clarified their allegations in a statement of claims, which alleged that the pondcrete insolidity resulted from an incorrect cement to sludge ratio, as well as inadequate controls and inspection procedures.

**Lower Court Decisions:** Following a jury verdict that found Rockwell liable for some claims, Rockwell filed a postverdict motion seeking to dismiss Stone's cause of action. In its motion, Rockwell argued that Stone's claims were based on publicly disclosed allegations of which he was not an original source under § 3730(e)(4). Stone responded by acknowledging that his claims were based on publicly disclosed allegations, but he also asserted that he was the original source of the disputed information. The district court found in favor of Stone. On appeal the Tenth Circuit, the appeals court affirmed the lower court's decision in relevant part, but remanded the matter to determine whether Stone had disclosed his information to the Government prior to filing his *qui tam* claim as required by § 3730(e)(4). The district court subsequently found that Stone had failed to meet this burden. On appeal, the Tenth Circuit disagreed and reversed the district court's decision. Rockwell then appealed the Tenth Circuit's decision to the U.S. Supreme Court, which granted *certiorari*.

**The Supreme Court's Decision:** Writing for the majority, Justice Scalia found that Stone was not an original source under the FCA and, as a result, the district court did not have jurisdiction over Stone's cause of action. As a case of first impression, Justice Scalia explained that the Court had to first address whether the phrase "information on which the allegations are based" refer to the information on which [Stone's] *allegations* are based or the information on which the *publicly disclosed allegations* that triggered the public disclosure bar are based?" (Emphasis in original). The Court found it was the former – that the information on which the allegations were based refers to the information on which Stone's allegations were based.

The Court next confronted a second "textual ambiguity" – which of Stone's "allegations" were the relevant claims to consider? In this case, Stone had filed his original claim, Stone and the Government had later filed a joint amended complaint, and finally, Stone and the Government filed a statement of claims in a final pretrial order that superseded all prior pleadings. Scalia stated that "[t]he statute speaks not of the allegations in the 'original complaint' (or even the allegations in the 'complaint'), but of the relator's 'allegations' *simpliciter*. Absent some limitation of § 3730(e)(4)'s requirement to the relator's *initial* complaint, we will not infer one." (Emphasis in original). Consequently, the Court would only "look to the allegations as amended – here, the statement of claims in the final pretrial order." Thus, because the statement of claims dealt with a time period following Stone's employment, he did not have direct and independent knowledge of the insolid pondcrete blocks. Rather, Stone had only predicted the problem. Absent direct knowledge of the insolid pondcrete blocks, he was not an original source under the FCA.

**Practical Implications:** The Supreme Court's holding in *Rockwell* has significant practical implications:

- The Court held that the status of a relator as an original source is a jurisdictional issue, thus a party cannot concede whether another party has such status. Moreover, the Government's intervention in such a case does not provide the relator an independent basis of jurisdiction.
- The Court restricted the ability of relators to bring *qui tam* actions by narrowly interpreting the requirement that they possess "direct and independent knowledge" of their allegations. The Court's holding raises issues to be decided in subsequent cases, however, because it did not decide the issue of whether "a prediction can qualify as direct and independent knowledge."
- A broad but reasonable interpretation of the *Rockwell* decision is that each time a complaint is amended, the judge must make a jurisdictional determination with regard to the relator's status as an original source. Unfortunately, the majority opinion in *Rockwell* provides little guidance as to how the judge should approach this analysis as noted above.
- Although the ultimate impact of the decision on a relator's willingness to cooperate with the Government in prosecuting an FCA case is unclear, the Court's decision in *Rockwell* seems to drive a wedge between the interests of the Government and those of relators. Specifically, future relators may object to the Government's tactical decisions to narrow or clarify claims through amendment of the complaint over concern of losing their original source status.

**Practitioner's Tips:** The *Rockwell* decision limits the ability of relators who are not true whistleblowers from digging into the pockets of a government contractor. The decision suggests several tips that may assist government contractors in defending *qui tam* claims:

- Counsel must fully explore the factual bases for the relator's cause of action during his or her initial investigation and during discovery. Relators can only bring suit if they have "direct and independent knowledge" of the allegations they proffer in their pleadings, and not those disclosed publicly by the media or other sources.
- Counsel should carefully investigate any changes to a relator's claims or theories of the case and compare them to the facts that formed the basis of the relator's cause of action. Relators must continue to have "direct and independent knowledge" of the allegations proffered in their pleadings. If a relator's allegations deviate from those for which he has direct and independent knowledge, he should lose his original source status and the claim should be dismissed for lack of jurisdiction.

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