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The Supreme Court Raids the Public Disclosure Bar: Cleaning Up After *Rockwell International v. United States*

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On March 27, 2007, the United States Supreme Court issued its first substantive decision on the most important, and most litigated, affirmative defense to qui tam actions under the False Claims Act (FCA)[1]—the public disclosure bar. The Court clarified a few important issues concerning the "original source" exception to this defense, but left to be resolved other critical issues that remain subject to multiple, confusing interpretations among the circuit courts. *Rockwell International Corp. v. United States*[2] represents an encouraging start to remediating the brownfields of qui tam litigation. But there is still much work for the Supreme Court to do before qui tam litigation is restored to a condition where the interests of the government, relators, and defendants can be clearly discerned out of the legal morass created by the peculiar language of the FCA.

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FCA Qui Tam Lawsuits, the Public Disclosure Bar, and the Original Source Exception

Under the FCA's qui tam provisions, a whistle-blower, or "relator," may file a lawsuit for violations of the act and will be entitled to a share of any recovery, whether by settlement or adjudication.[3] Although these provisions give relators incentives to ferret out fraud against the government that might otherwise go undetected or unprosecuted, they also create a risk of "parasitic" lawsuits in which relators sue based on information already in the public domain, thereby getting shares of recoveries that the government could have obtained without the relators' assistance and kept entirely for the U.S. Treasury. To minimize this risk, Congress added the public disclosure bar to the FCA in the 1986 amendments of the act.[4]

The language of the public disclosure bar has proved difficult for both litigants and the judiciary to apply in the course of litigation. The operative text of the bar provides that:

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Issue Highlights

Rockwell

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> 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….[5]

This complex description of what qualifies as a "public disclosure" is then followed by a comparably complex exception: "unless the action is brought by the Attorney General or the person bringing the action is an original source of the information."[6] 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 under this section which is based on the information."[7]

The twists and turns of the language in the public disclosure bar and its accompanying exception for original sources have led to multiple, inconsistent interpretations by the circuit courts and district courts. The statutory language and circuit splits vastly increase the cost and time to resolve claims brought by relators under the FCA. Thus, Supreme Court intervention has the potential to greatly benefit all parties involved in qui tam litigation. Its decision to grant certiorari in *Rockwell* to resolve one of the legal issues in interpreting the public disclosure bar was applauded by all three sides involved in qui tam litigation—the Justice Department, relators' counsel, and the defense bar. But the Supreme Court's grant of certiorari also caused some anxiety because of the peculiar factual, procedural, and substantive posture of the *Rockwell* case.

Leaky Pondcrete at Rocky Flats

From 1975 until 1989, Rockwell was the management and operations (M&O) contractor at the United States Department of Energy's government-owned, contractor-operated nuclear weapons plant at Rocky Flats, Colorado. Starting in 1980, James Stone worked as a principal engineer for Rockwell at Rocky Flats. In the early 1980s, Rockwell proposed to dispose of toxic sludge from solar evaporation ponds by mixing it with cement and storing it as dried "pondcrete" blocks. In 1982, after reviewing Rockwell's proposal, Stone predicted in a written report to management that the proposed storage method would not work because he believed the planned piping system for extracting the sludge from the ponds would fail to adequately mix the sludge with concrete. Despite Stone's disagreement, Rockwell implemented the system it had proposed.[8]

Stone was laid off by Rockwell in March 1986. In June 1987, he reported to the FBI allegations of environmental law violations at the plant and gave the bureau thousands of pages of documents, including a 1982 report predicting that Rockwell's pondcrete system would fail. In May 1988, the DOE discovered that thousands of the pondcrete blocks at Rocky Flats had leaks. (Stone alleged that Rockwell knew of the leaks about 19 months earlier.) The DOE concluded that the leaks were caused by a new Rockwell foreman's reduction of the concrete-to-sludge ratio used for its pondcrete. In June 1989, based in part on Stone's disclosures, the FBI and EPA raided the plant. The allegations made in support of the search warrant for that raid, including the allegation that the pondcrete leaked due to an inadequate mixture ratio, were publicly disclosed in the press. Subsequently, Rockwell pled guilty to 10 violations of environmental laws, and agreed to pay fines of more than $18 million.[9]

Changing Allegations at the District Court

In July 1989—one month after the FBI raid and related press reports—Stone filed under seal a qui tam complaint against Rockwell in the District Court for the District of Colorado. In his original complaint, Stone alleged 26 FCA violations, including one based on Rockwell's problem with leaking pondcrete. At this point, Stone still attributed the pondcrete violation to alleged deficiencies in Rockwell's piping system.[10]

The government initially declined to intervene in the action, and the seal was lifted. In 1992, Rockwell moved to dismiss the case for lack of subject matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure based on the FCA's public disclosure bar. Rockwell asserted that Stone's complaint was based on allegations that had been publicly disclosed through both the FBI's search warrant application and affidavit and the subsequent reports in the news media and that Stone was not an original source. The district court agreed that the complaint was based on publicly disclosed information, but concluded that Stone qualified as an original source. As a result, it denied Rockwell's motion.[11]

In 1995, the government brought a motion to intervene. The district court granted the motion,[12] and the government intervened in 1996. Stone and the government subsequently filed a joint amended complaint as coplaintiffs. Although the amended complaint continued to allege an FCA violation based on the pondcrete failures, it alleged that these failures were due to an "incorrect cement/sludge ratio" due to an error by Rockwell's foreman, rather than the piping system deficiencies Stone predicted in 1982 and alleged in his original complaint. The government and Stone repeated the "incorrect cement/sludge ratio" allegation in the statement of claims that became part of the district court's final pretrial order that superseded their prior pleadings.[13]

The case went to jury trial in 1999.[14] The jury found for the plaintiffs on the pondcrete claim, finding that Rockwell had violated the FCA during each of three consecutive six-month periods beginning April 1987, i.e., more than one year after Stone left Rocky Flats. The jury awarded plaintiffs

$1.4 million in damages, which the court under section 3729(a) trebled to $4.2 million. (The court also awarded a $15,000 civil penalty under section 3729(a).) Of that amount, Stone's statutory share under section 3730(d) would have been as much as $1.05 million.[15]

After the jury rendered its verdict, Rockwell moved the court to dismiss Stone based on the public disclosure bar and to enter judgment solely in favor of the United States. The court denied Rockwell's motion.[16] Stone moved the trial court for $10 million in attorney fees under section 3730(d). The court reserved its ruling on Stone's motion pending Rockwell's appeal.

Rockwell's Appeals to the Tenth Circuit

Rockwell appealed the judgment to the Tenth Circuit. In 2001, a panel affirmed the judgment, and also found in a 2-1 decision that Stone was an original source.[17] The panel, however, partially remanded to the district court to make additional factual findings regarding whether Stone had voluntarily provided all of his pertinent information to the government prior to commencing suit, a requirement for original source status under section 3730(e)(4)(B).[18] On remand, the district court determined that Stone had provided a key document to the government (his 1982 report) but held that it was insufficient to satisfy the FCA disclosure requirement. On further appeal, a Tenth Circuit panel, in another 2-1 decision, rejected the district court's finding, held that Stone's disclosure was sufficient, and affirmed the district court's original judgment.[19]

The Supreme Court Grants Certiorari

In April 2006, Rockwell filed a petition for a writ of certiorari with the U.S. Supreme Court requesting review on two issues: first, whether the Tenth Circuit erred by misinterpreting the statutory definition of "original source," and, second, whether the FCA's qui tam provisions are unconstitutional. In September 2006, the Court granted the petition on the first question but not the second.[20]

The Supreme Court Decision

On March 27, 2007, the Court issued a 6-2 decision granting Rockwell's appeal. Justice Scalia wrote the majority opinion. Justice Breyer did not participate in the decision, and Justice Stevens wrote a dissenting opinion, which Justice Ginsburg joined.

As a preliminary matter, the Court held that the public disclosure bar is jurisdictional and so cannot be waived. Stone had asserted that Rockwell had conceded that he was an original source. The Court reasoned that, although the use of the term "jurisdiction" in section 3730(e)(4)(B) was not necessarily conclusive, the language of the public disclosure bar provides a clear and explicit withdrawal of jurisdiction.[21]

Next, the Court addressed whether the term "allegations" in the FCA's definition of "original source"—requiring that the relator "has direct and independent knowledge of the information on which the allegations are based"—relate to allegations in the qui tam complaint[22] or to allegations in the public disclosure.[23] Despite the split in circuit court authority, the parties all agreed that a relator must have knowledge of information on which his or her complaint is based. Still, the Court stated that, since the defense is jurisdictional, it had to reach its own determination of the issue. Ultimately, it agreed with the parties (and the Third, Ninth, and Tenth Circuits) that it is the allegations in the complaint, rather than those in the public disclosure, that are relevant to the defense.[24]

The Court reasoned first that the context in which the term "allegations" is used in section 3730(e)(4)(B)[25] indicates that it means allegations in the complaint because "[s]urely the information one would expect a relator" to provide to the government would be information underlying the claims in the relator's complaint. The opinion also found that Congress's use of different terms in section 3730(e)(4)(A)'s public disclosure bar provision, which refers to "allegations or transactions," and section 3730(e)(4)(B)'s original source definition provision, which refers only to "allegations," further indicates that the latter refers to something different than the former. Finally, the Court reasoned that, as a matter of common sense, "[i]t is difficult to understand why Congress would care whether a relator knows about the information underlying a publicly disclosed allegation . . . when the relator has direct and independent knowledge of different information supporting the same allegation. . . ."[26]

The Court then turned to the question of whether jurisdiction is established based solely on a relator's original complaint or if the existence of jurisdiction can change depending on the relator's knowledge regarding allegations in the complaint as it is amended through the court's final pretrial order and even as modified at trial. Stone argued that a district court need only look at a relator's original complaint to determine jurisdiction. The Court rejected this argument, noting both that the language of the statute says "allegations" without qualification or limitation and that Stone's interpretation "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. . . ."[27]

The Court then applied its legal conclusions to Stone and determined that his knowledge was insufficient for him to qualify as an original source. Stone did not have direct and independent knowledge of his allegation that Rockwell's pondcrete was deficient due to an insufficient cement/sludge ratio because he was laid off before any of the facts underlying that claim occurred. The Court noted that predicting something is not the same thing as knowing it. The Court stated that, while the issue of whether a prediction can ever qualify as knowledge for original source purposes is still an open question, a prediction "assuredly does not do so when its premise of cause and effect is wrong." The Court also rejected Stone's argument that the district court had jurisdiction over all of his claims because he qualified as original source for one publicly disclosed

claim that went to trial (concerning spray-irrigation). The Court noted that jurisdiction over one claim does not create jurisdiction for any other claim, i.e., the public disclosure bar does not allow "claim smuggling."[28]

Since the Court found that Stone was not an original source, it did not need to reach the only issue on which the Tenth Circuit had reversed the district court: whether Stone's disclosure of the 1982 report was sufficient to meet the second prong of section 3730(e)(4)(B), requiring that he voluntarily provided to the government before filing his qui tam action the information on which the allegations in his complaint were based.[29]

Finally, the Court responded to Stone's and the government's contention that, even if Stone were not an original source, the government's intervention provided an independent basis for the district court's subject matter jurisdiction. The Court rejected this argument, holding that, where the district court lacks jurisdiction over a qui tam lawsuit under the public disclosure bar, government intervention does not create jurisdiction unless and until the relator is ousted from the lawsuit.[30]

The Court would have had to vacate the entire judgment and force the government to retry its case.

The Court based this portion of the opinion on its interpretation of the language in section 3730(e)(4)(A) that provides for jurisdiction over actions based on publicly disclosed allegations if they are "brought by the Attorney General." The Court recognized that the FCA draws a "crystal clear" distinction between actions brought by the United States (under section 3730(a)) and those brought by relators (under section 3730(b)) and that, as a result, "[a]n action brought by a private person does not become one brought by the Government just because the Government intervenes and elects to 'proceed with the action.' " Nevertheless, the Court held that actions "brought by the Attorney General" include qui tam lawsuits so long as the government intervenes and the relator is dismissed. The Court does not disguise its result-driven analysis, stating that a finding that the government's judgment against Rockwell must be set aside would be a "bizarre result." The Court employed "common sense" to hold that, when the government joins an action brought by a relator and the relator is dismissed based on the public disclosure bar, the action is transformed into one brought by the attorney general.[31]

Oddly, in an opinion filled with careful analysis of the FCA's statutory language (e.g., analyzing the meaning of "jurisdiction" and "allegations"), the majority did not discuss here the meaning of the term "brought." Such an analysis would likely have compelled a different conclusion than the Court reached. The Court has previously held that a lawsuit is "brought" at the time it is commenced.[32] And lower courts that have considered this question are in agreement that to "bring" an action refers to its initiation, rather than its maintenance.[33] On other issues, the Court made its own determinations rather than accepting the parties' positions, citing the jurisdictional nature of the public disclosure bar.[34] On this issue, however, the Court's holding appears to have been influenced by the fact that Rockwell had only sought review of the judgment for Stone.[35] This left the Court in a position where, unless it ruled the way it did, it would have had to vacate the entire judgment and force the government to retry its case, even though Rockwell had not asked the Court to do so. The Court also may have been influenced by the fact that the government had filed a joint amended complaint with Stone, which was not technically required by the FCA.

Justice Stevens's dissent disagrees with the majority on several critical issues and, as a result, with its ultimate conclusion that Stone was not an original source. The dissent asserts that the plain language in sections 3730(e)(4)(A) and (B) makes clear that a relator is an original source if the relator has direct and independent knowledge of the information underlying the publicly disclosed allegations, rather than those in the complaint or on which the relator ultimately prevails. As such, the dissent asserts that, "[i]f the process of discovery leads to amended theories of recovery, amendments to the original complaint would not affect jurisdiction that was proper at the time of the original filing." Justice Stevens would have found that Stone was an original source of the allegations publicly disclosed in 1989 and would have vacated the judgment for Stone and remanded to the district court to determine whether he was an original source of the allegations disclosed in the press in 1988.[36]

Rockwell Won the Battle, but Who Won the War?

So, what did the Court's decision mean for the litigants? For Rockwell, it won the battle but lost the war. Since the trial court lacked jurisdiction over Stone's qui tam complaint, Rockwell will not be responsible for Stone's attorney fees, which he had claimed were $10 million. But, because the Supreme Court found that the trial court retained jurisdiction over the government's claims, the judgment against Rockwell still stands, and Rockwell will still have to pay the government $4.2 million in damages and penalties.

For the government, even though it opposed the appeal and lost, the Court's decision was a complete win (at least for the case at hand). The judgment and award it won at trial stands, and now it does not have to pay Stone his statutory share, which could have exceeded $1 million.

Finally, for Stone and his counsel, this was an unmitigated disaster, with no recovery for either of them. Stone will not receive any portion of the damages and penalties award, and, in a tragic twist, could not even experience vindication from seeing the judgment against Rockwell affirmed. Stone suffered from dementia and Alzheimer's disease in his

final years and died on April 11—just two weeks after the Supreme Court released its decision. According to his son, "By the time he died, he didn't even remember who Rockwell was."[37] Stone's many lawyers (including major New York law firm Paul Weiss), all of which likely took the case on a contingency fee basis, now will not receive reimbursement for any of their fees or costs for their work.

The Impact of the Supreme Court's Decision on Qui Tam Litigation

At first glance, it appears that Rockwell might have a relatively minor impact on ongoing and future qui tam litigation, because the factual and legal postures of the case were atypical and unlikely to be repeated. At Rocky Flats, the government abandoned the theories that were the basis for its original search warrant, and used the information gathered during the search to develop new theories of criminal liability. It resolved the criminal case at about the time it declined intervention, and stayed out of the case for a number of years while relator's counsel battled defendants and developed new theories for FCA liability. This contributed to the radical rewrite of the original qui tam complaint when the government intervened. This procedural history is even more unlikely to be repeated now that the *Rockwell* opinion has taught relators to preserve allegations that are based on direct and independent knowledge they developed before the lawsuit began.

It is also unusual that there was no dispute that relator's allegations were publicly disclosed. Normally, the threshold issue of whether a public disclosure took place under the statute is hotly disputed. Disputes are hard to avoid because the language of this part of the act is at the same time too simple and too complicated: too simple because it fails to define "public disclosure" and too complicated because it calls out unrelated forums in which public disclosure must take place. Furthermore, there is little logic in the choice of forums listed in the statute, and no clear legislative history to help clarify interpretation. As a result, circuit courts have produced conflicting opinions on what type and level of public disclosure satisfy the statute. By picking a case with no dispute over the preliminary issue of whether a public disclosure occurred, the Supreme Court had no opportunity to clear up any of this confusion. The *Rockwell* opinion actually ended up adding to the confusion. It held emphatically that the "allegations or transactions" that define a public disclosure are not the same as the "allegations" in the complaint for which the relator must be the original source, but it provided no clue about how those two concepts actually differ. Thus, litigants in qui tam suits face now more uncertainty about the meaning of "public disclosure" after *Rockwell*.

Nevertheless, the *Rockwell* opinion is likely to have a significant impact on more typical qui tam cases. The impact of the opinion can be traced through the usual stages of qui tam litigation: drafting of the complaint, review by the Justice Department to determine whether to intervene, settlement negotiations if the Justice Department elects to intervene, and motion practice if the Justice Department declines to intervene.

Rockwell should improve the quality of qui tam complaints, because it reinforces the importance of a well-drafted complaint in determining whether a court will have jurisdiction over a relator's lawsuit. The opinion instructs relators' counsel to anticipate the original source issue on an allegation-by-allegation basis. Relators' counsel will likely try to craft complaint allegations based on their clients' direct and independent knowledge, regardless of whether they are aware of any prior public disclosure, because defendants often uncover public disclosures that relators were unaware of at the time they filed their complaints. *Rockwell* will also discourage scattershot and speculative complaints, because of the difficulty of proving that a relator is an original source issues as a case progresses. Narrowly focused, well-supported allegations not only reduce the chance of dismissal for lack of jurisdiction, but also increase the chance that the government will be persuaded to intervene to hasten settlement in relator's favor.

Once the complaint is filed, the relationships of both relator and defendant with the Justice Department while the case is under seal will be relatively unaffected by *Rockwell*. The opinion has little impact on the considerations behind the decision to intervene. *Rockwell* does give the Justice Department new leverage to keep the benefits of FCA litigation in the government's coffers, against the demands of relators for a larger share of qui tam litigation proceeds. The government now can choose either to proceed with the original allegations proposed by a relator or to develop a broader case on grounds with which the relator was not familiar. The government would then be able to keep 100 percent of any recovery related to the new allegations. Although *Rockwell* has this potential to drive a wedge between the Justice Department and the relator, it seems unlikely that the Justice Department will systematically try to narrow relators' recoveries, or that relators will try to interfere with expanded investigations into charges related to their complaints' allegations. Both sides will still largely benefit from each other's work after *Rockwell*. The government will still get substantial recoveries without being required to invest in developing cases on its own, and relators will still get quick resolutions of their claims and quick payouts if the government intervenes.

Defendants will see little benefit from *Rockwell* while the government decides whether to intervene in a qui tam lawsuit. A defendant gains little benefit at this phase of the litigation from getting rid of the relator if the government still wants to go forward with the case. In fact, showing that the relator may be disqualified could actually encourage the government to stay in, because it could then benefit more from not having to share the results with the relator. If the Justice Department does decide to intervene, there will be little change from the situation before the *Rockwell* opinion was issued, because the pressures on defendants to settle quickly to minimize potential damage will still remain the same.

But if the Justice Department declines intervention, the

Rockwell opinion will have a significant impact on litigation going forward. *Rockwell* strongly encourages defendants to quickly move to disqualify the relator after the government declines to intervene. The opinion decided clearly that the public disclosure bar is a jurisdictional threshold. This provides strong support to defendants' arguments that the public disclosure issue should be resolved before wasting resources on addressing substantive liability. The opinion helps to institutionalize the procedure of early pretrial motions to determine the qualification of relators.

Because *Rockwell* requires a relator to prove that he or she is the original source of every allegation in the complaint, relators will put greater effort into obtaining rulings that no public disclosure occurred in the first place. The issue of the quantity of public disclosure necessary to trigger the original source requirement is fraught with conflicts among the various circuits. As a result, this is an area that may be pushed up more quickly to the Supreme Court for resolution.

Defendants can also use the *Rockwell* opinion to block substantive discovery until the original source issue is resolved. Because the Supreme Court has now firmly declared the public disclosure bar and original source exception to be purely jurisdictional issues, defendants can resist any attempted discovery by relators until all of these jurisdictional issues have been resolved. While fending off substantive discovery, defendants can insist on full disclosure of documents and testimony that purports to establish relator's status as an original source. Savvy defendants will now demand early discovery and depositions from relators on the limited issue of the relator's direct and independent knowledge of the allegations in the qui tam complaint. Until that discovery is complete, and the district court has ruled on its jurisdiction over each of the relator's allegations, the relator will find it difficult to conduct any substantive discovery related to the allegations in the complaint.

Rockwell will not be the Supreme Court's last word on qui tam litigation . . . [it] appears to be acquiring a taste for FCA issues.

Rockwell may also effectively block relators from substantively amending their qui tam complaints. Defendants will be able to argue that a relator is not an original source of late-added claims that emerge during litigation. Any new allegations can be argued to have been publicly disclosed in the litigation, and challenged on the grounds that they are based on information that was not directly and independently known by relators when they filed their original lawsuits.

Finally, any uncertainty by a relator over his or her qualification as an original source may encourage a relator to settle a qui tam lawsuit to avoid having an expensive trial reversed on appeal with no recovery of attorney fees. Even if the relator succeeds in obtaining a district court opinion that the relator is a qualified original source, if the issues are novel or uncertain, the relator, and especially relator's counsel, may not be comfortable going all the way through trial only to face the prospect of reversal on appeal. *Rockwell* presented the worst case scenario for relators' counsel: 18 years of hard fought litigation brought to an end with no recovery to the relator and no attorney fees for his counsel. That result provides a strong cautionary lesson for relators that will add to pressure to settle claims.

The Future of Qui Tam at the Supreme Court

Rockwell will not be the Supreme Court's last word on qui tam litigation, and may actually mark the beginning of a new period of Supreme Court activism in interpreting the FCA. The Supreme Court appears to be acquiring a taste for FCA issues. It has granted certiorari on qui tam issues at a slowly accelerating pace. For the first 10 years after the 1986 amendments to the FCA, the Supreme Court assiduously avoided interpreting its confusing provisions despite the emergence of circuit splits with significant practical implications. When it finally granted certiorari on the public disclosure bar in 1996, it ended up punting the issue and deciding the case on retroactivity grounds.[38] It decided another qui tam case three years later, and resolved the threshold issue of whether relators had required standing, but decided the substantive issue on Eleventh Amendment grounds.[39] Another three years later, it clarified the applicability of its Eleventh Amendment analysis, but still avoided interpreting the language of the 1986 amendments.[40] But it only took two more years after that to finally decide a case interpreting an aspect of the language of the 1986 amendments.[41] The grant of certiorari in *Rockwell* only one year later indicates that the Supreme Court may have overcome its reluctance to wade into the FCA swamp.

Although *Rockwell* provided the first decision on the public disclosure jurisdictional bar, it also left critical issues of statutory interpretation for later cases. Issues avoided include:

- sufficiency of public disclosure to trigger the jurisdictional bar;
- quantum of direct and independent knowledge necessary to be an original source; and
- whether a relator must have been the catalyst for a public disclosure in order to qualify as an original source.

Other significant issues of interpretation of the FCA could benefit from Supreme Court resolution of circuit splits, including presentment and materiality. And, as the Chamber of Commerce of the United States pointed out in its amicus brief supporting the petition for certiorari, the Supreme Court has yet to decide whether the qui tam provisions are constitutional under appointments and "take care" clauses.

Reading the tea leaves, it is possible that the *Rockwell* decision has solidified a five-justice block favoring a strict textual interpretation of the FCA consistent with the

statute's overall goal of benefiting the government over the interests of either relator or defendant. *Rockwell* shows that a solid three-justice block that has stood together since the *Schumer* case in 1997—Scalia, Thomas, and Kennedy—has been joined by Chief Justice Roberts and Justice Alito to support a literal interpretation of the statute consistent with its historical antecedents. The new justices may both be more open to trying to resolve the numerous disagreements among the circuits on how to interpret the statute, because both had practical exposure to the complexities of qui tam litigation since the 1986 amendments. Both also have connections with the Federalist Society, which has focused on qui tam issues, including the constitutionality of the qui tam provisions.

Conclusion

In the *Rockwell* decision, the Supreme Court demonstrated a willingness to get back to the language of the FCA to try to introduce clarity into a confusing appellate environment. In doing so, the Court cleaned up a few areas in a way that will streamline future qui tam litigation. It is now clear, for example, that when there is public disclosure, relators will be responsible for showing direct and independent knowledge of the allegations in the most current version of their complaint. At the same time, the Court stirred up new messes that will slow down many typical qui tam cases. The new uncertainty about what "allegations or transactions" will trigger the public disclosure bar only increases the confusion for qui tam litigants. But the Court's willingness to enter into the morass to try to clear a path is encouraging. If the Supreme Court follows through by continuing to grant certiorari in just a few more qui tam cases, it will go a long way towards remediating the current FCA litigation environment. PL

Endnotes

1. 31 U.S.C. §§ 3729-3733. All statutory references herein refer to the FCA.
2. 549 U.S. ___, 127 S. Ct. 1397, 167 L. Ed. 2d 190 (2007) (Scalia, J.).
3. Section 3730(b), (d).
4. Section 3730(e)(4)(A).
5. *Id.*
6. *Id.*
7. Section 3730(e)(4)(B).
8. *Rockwell*, 127 S. Ct. at 1401-02, 167 L. Ed. 2d at 199.
9. *Id.*, 127 S. Ct. at 1402-03, 167 L. Ed. 2d at 199-200.
10. *Id.*, 127 S. Ct. at 1403, 167 L. Ed. 2d at 200-01.
11. *Id.*, 127 S. Ct. at 1403-04, 167 L. Ed. 2d at 201.
12. United States ex rel. Stone v. Rockwell International Corp., 950 F. Supp. 1046 (D. Colo. 1996).
13. *Rockwell*, 127 S. Ct. at 1404, 167 L. Ed. 2d at 201-02.
14. By this time, the Rockwell business unit for which Stone had worked was a subsidiary of the Boeing Company. Boeing acquired Rockwell's aerospace and defense units in 1996 and renamed them Boeing North American, Inc. For simplicity's sake, the authors refer to the defendant in *Rockwell*, 549 U.S. ___, 127 S. Ct. 1397, 167 L. Ed. 2d 190, as "Rockwell" throughout.
15. *Rockwell*, 127 S. Ct. at 1404, 167 L. Ed. 2d at 202.
16. *Id.*, 127 S. Ct. at 1404-05, 167 L. Ed. 2d at 202.
17. United States ex rel. Stone v. Rockwell International Corp., 265 F.3d 1157 (10th Cir. 2001).
18. United States ex rel. Stone v. Rockwell International Corp., 282 F.3d 787, 815 (10th Cir. 2002).
19. United States ex rel. Stone v. Rockwell International Corp., 92 Fed. Appx. 708, 2004 U.S. App. LEXIS 4363 (10th Cir. 2004); *see also Rockwell*, 127 S. Ct. at 1405, 167 L. Ed. 2d at 202.
20. Rockwell International Corp. v. United States, 127 S. Ct. 35, 165 L. Ed. 2d 1013 (2006).
21. *Rockwell*, 127 S. Ct. at 1405-06, 167 L. Ed. 2d at 203-04 (disapproving *dicta* in United States ex rel. Accudyne Corp., 97 F.3d 937, 940-41 (7th Cir. 1996)).
22. As held by United States ex rel. Mistick v. Housing Auth. of the City of Pitts., 186 F.3d 376, 388-89 (3d Cir. 1999); United States ex rel. Barajas v. Northrop Corp., 5 F.3d 407 (9th Cir. 1993); United States ex rel. Hafter v. Spectrum Emergency Care, Inc., 190 F.3d 1156, 1162 (10th Cir. 1999).
23. As held by United States ex rel. Grayson v. Advanced Mgmt. Tech. Inc., 221 F.3d 580, 583 (4th Cir. 2000); United States ex rel. Laird v. Lockheed Martin Eng'g & Sci. Serv. Co., 336 F.3d 346, 353-54 (5th Cir. 2003); United States ex rel. McKenzie v. Bellsouth Tele., Inc., 123 F.3d 935, 943 (6th Cir. 1997); United States ex rel. Minnesota Assoc. of Nurse Anesthetists v. Allina Health Sys. Corp., 276 F.3d 1032, 1048 (8th Cir. 2002); United States ex rel. Findley v. FPC-Boron Employees' Club, 105 F.3d 675, 690 (D.C. Cir. 1997).
24. *Rockwell*, 127 S. Ct. at 1407-08, 167 L. Ed. 2d at 204-06.
25. Defining an 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 under this section which is based on the information."
26. *Id.*
27. *Id.*, 127 S. Ct. at 1408-09, 167 L. Ed. 2d at 206-07.
28. *Id.*, 127 S. Ct. at 1409-10, 167 L. Ed. 2d at 207-08.
29. *Rockwell*, 127 S. Ct. at 1410, 167 L. Ed. 2d at 208.
30. *Id.*, 127 S. Ct. at 1410-12, 167 L. Ed. 2d at 208-10.
31. *Id.*
32. Hoffman v. Blaski, 363 U.S. 335, 344 (1960) (interpreting language in 28 U.S.C. § 1404(a) permitting the transfer of "any civil action to any other district or division where it might have been brought" to refer to anything other than the time the lawsuit was filed would "do violence to the plain words" of the statute); Goldenberg v. Murphy, 108 U.S. 162, 163 (1883).
33. Harris v. Garner, 216 F.3d 970, 973-74 (11th Cir. 2000): American Casualty Co. v. FSLIC, 683 F. Supp. 1183, 1185 (S.D. Ohio 1988) (citing *Black's Law Dictionary* (5th Ed.) 174 (1977)); FDIC v. Zaborac, 773 F. Supp. 137, 140 (C.D. Ill. 1991); Calia v. Werholtz, 408 F. Supp. 2d 1148, 1152 n.29 (D. Kan. 2005); Otto v. Hirl, 89 F. Supp. 72, 74 (S.D. Iowa 1950).
34. *Id.*, 127 S. Ct. at 1405-08, 167 L. Ed. 2d at 202, 204-06 (on issues re Rockwell's alleged concession that Stone was an original source and whether Stone needed knowledge of allegations in his complaint of in the public disclosure).
35. *Id.*, 127 S. Ct. at 1411, 167 L. Ed. 2d at 209.
36. *Id.*, 127 S. Ct. at 1412-13, 167 L. Ed. 2d at 210-11 (Stevens, J., dissenting opin.).
37. *See* Mr. Stone's obituary at http://www.denverpost.com/obituaries/ci_5654331.
38. Hughes Aircraft Co. v. United States ex rel. Schumer, 520 U.S. 939 (1997) (Thomas, J.).
39. Vermont Agency of Natural Resources v. United States ex rel. Stevens, 529 U.S. 765 (2000) (Scalia, J.).
40. Cook County v. United States ex rel. Chandler, 538 U.S. 119 (2003) (Souter, J.).
41. Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson, 545 U.S. 409 (2005) (Thomas, J.) (addressing applicability of the statute of limitations provisions).