Supreme Court To Decide Scope of FCA Public Disclosure Bar

Thanks in part to congressional amendments expanding the scope of liability and removing barriers to filing suit under the statute, 2010 was a banner year for the False Claims Act ("FCA"). According to data compiled by the Department of Justice, 573 FCA *qui tam* complaints were filed under seal in 2010, up from 433 in 2009 and 379 in 2008.[1] The increase in cases was accompanied by a corresponding increase in the total amount of civil settlements and judgments obtained by the government and individual plaintiffs (known as "relators"). For 2010, the government secured over $3 billion in civil settlements and judgments, a 25% increase over 2009; relators' earnings increased at a similar rate.[2] This spring, the United States Supreme Court will decide whether a key provision of the FCA statute should be construed in line with the majority of courts of appeals, and thereby provide some restraint on this expanding source of litigation. The Court is scheduled to hear oral argument in this case tomorrow, March 1.

Specifically, the Court will determine the appropriate scope of the FCA's so-called public-disclosure bar, which limits the range of materials on which a relator's claims may be based. The bar is intended to prohibit individuals with little or no personal knowledge of an alleged fraud from building a case, and seeking a significant statutory recovery, from publicly available materials and information. To that end, the statute prevents relators from basing their claims on certain enumerated public sources. The provision states:

> 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.[3]

The case before the Court—*Schindler Elevator Co. v. United States ex rel. Kirk*, No. 10-188— asks the Justices to decide whether a federal agency's response to a Freedom of Information Act ("FOIA") request is a "report . . . or investigation" within the meaning of the definition above.[4] If so, a relator will be precluded from basing claims on information obtained through a FOIA request unless he can establish that he is an "original source" of the information.[5]

When faced with this issue last year, the Second Circuit held that FOIA requests were not necessarily "report[s]" or "investigation[s]"[6] Instead, relying on the context in which the terms "report" or "investigation" are used in the statute, the scope of the neighboring terms, as well as the legislative history, the court held that whether information provided by a government agency in response to a FOIA request is deemed a "report" or "investigation" for purposes of the public-disclosure bar depends on the circumstances of the request, the nature of the agency's search for responsive materials, and the information provided in response.[7] The Second Circuit held that this determination should be made on a case-by-case basis.[8]

The Second Circuit agreed with the reasoning of a previous Ninth Circuit decision,[9] which runs contrary to the decisions of the majority of courts of appeals, including the leading decision by then-Judge Alito for the Third Circuit. In *United States ex rel. Mistick PBT v. Housing Authority of the City of Pittsburgh*,[10] then-Judge Alito looked to the plain meaning of the terms "report" and "investigation" and concluded that FOIA requests and responses are necessarily encompassed by those

terms, and therefore were disclosures prohibited by the statute, regardless of the particulars of the FOIA request or government response at issue. The First and Fifth Circuits have reached similar conclusions.[11]

If the Supreme Court rejects the Second Circuit's interpretation and adopts a broad reading of the terms "report" and "investigation" encompassing all FOIA requests and responses, as the majority of courts of appeals have, it will recognize a reasonable limit on FCA actions where the source of the relator's information is the government itself. Such a decision will likely mean that fewer *qui tam* FCA cases will succeed and a greater number of filed cases currently under investigation by the government may be dismissed on threshold motions and may not be allowed to proceed to discovery. Without the benefit of FOIA to supplement the factual bases of their claims, relators who lack extensive firsthand knowledge of fraud would have more difficulty pleading allegations that satisfy Federal Rule of Civil Procedure 9(b), which requires that allegations of fraud be plead with particularity, including the facts and circumstances of specific false claims, which many courts require for an FCA complaint to survive a motion to dismiss.[12] As a result, courts would be more likely to dismiss FCA claims before discovery.[13]

Oral argument in *Schindler Elevator Co. v. United States ex rel. Kirk* is scheduled for March 1, 2011. Justice Kagan has recused herself from hearing the case because of the Solicitor General Office's participation in the case. ◆

Endnotes

1 *See* Fraud Statistics – Overview, available at http://www.fcaalert.com/uploads/file/Stats(1).pdf (last visited Feb. 28, 2011).

2 *Id.* at 2.

3 31 U.S.C. § 3730(e)(4). This version of the provision, which was considered by the Second Circuit in *United States ex rel. Kirk v. Schindler Elevator Co.*, has recently been amended. As a result of amendments passed in connection with the 2010 Patient Protection and Affordable Care Act, the public-disclosure requirement is no longer jurisdictional. As amended, the statute states that the court "shall dismiss an action or claim under this section, unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed . . ." 31 U.S.C. § 3730(e)(4)(A). The amendments also resulted in a revision to the list of enumerated sources that qualify as applicable public disclosures. Patient Protection and Affordable Care Act, Pub. L. 111-148, § 10104(j)(2), 124 Stat. 119 (2010). The amended provision states that in order for the bar to apply, "substantially the same allegations or transactions" must be disclosed in a "*federal* criminal, civil, or administrative hearing, a congressional, Government Accountability Office, other *federal* report, hearing, audit, or investigation, or by the news media" *Id*. (emphasis added). Although in *Kirk* the Supreme Court considers the pre-amendment version of the provision, because the amended statute is virtually identical in pertinent part, the Supreme Court's decision will influence the application of the current version of the statute.

4 Every circuit to have considered the initial question of whether FOIA responses are "publicly disclosed"—setting aside whether it is an enumerated source under the statute—has held that information obtained in response to a FOIA request is public once it is received by the requester. *See United States ex rel. Kirk v. Schindler Elevator Corp.*, 601 F.3d 94, 104 (2d Cir. 2010) (collecting cases).

5 If the relator is an original source of the allegations contained in the public disclosure—as the statute defines it—then the relator is exempt from the public-disclosure prohibition. After recent amendments, the FCA defines an original source as:

> "an individual who either (i) prior to a public disclosure under [the public disclosure provision], has voluntarily disclosed to the Government the information on which allegations or transactions in a claim are based, or (ii) who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the Government before filing an action under this section."

31 U.S.C. § 3730(e)(4)(B) (2010). Having concluded in *Kirk* that there was no public disclosure that would trigger the public-disclosure bar, the Second Circuit did not reach the issue of whether the relator was an original source of the information in his allegations.

6 *See Kirk*, 601 F.3d at 107.

7 *Id*. at 107-111.

8 *Id*. at 111.

9 *See United States ex rel. Haight v. Catholic Healthcare West*, 445 F.3d 1147 (9th Cir. 2006).

10 186 F.3d 376, 382-83 (3d Cir. 1999).

11 *See United States ex rel. Ondis v. City of Woonsocket et al.*, 587 F.3d 49, 54-55 (1st Cir. 2009); *United States ex rel. Reagan v. East Texas Med. Ctr. Reg'l Healthcare Sys., 384* F.3d 168, 176 (5th Cir. 2004).

[12] *See* Fed. R. Civ. P. 9(b) ("In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake."); *see United States ex rel. Karvelas v. Melrose-Wakefield Hosp.,* 360 F.3d 220, 228 (1st Cir. 2004) (noting that every circuit court to address the issue has concluded that the heightened pleading requirements of 9(b) apply to FCA claims); *see also Hopper v. Solvay Pharms., Inc.,* 588 F.3d 1318 (11th Cir. 2009).

[13] Relators may also look to the government to share documents it obtains through Civil Investigative Demands and other investigatory methods with them, which the FCA now explicitly permits. *See* 31 U.S.C. § 3733(a) (2010) ("Any information obtained by the Attorney General or a designee of the Attorney General under this section may be shared with any qui tam relator if the Attorney General or designee determine it is necessary as part of any false claims act investigation.").

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