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## CORPORATE LAW

### New Limits on False Claim Act Suits

Cases impose new obstacles on whistleblower and government plaintiffs

By Ross Pearlson

The Federal False Claims Act has proven to be a potent weapon for both whistleblowers and the government in their pursuit of claims against corporations. 31 U.S.C. § 3729-3733. Two recent decisions, however, have restricted the ability of these potential plaintiffs to assert such claims. In *Rockwell International Corp. v. U.S.*, 549 No. 05-1272 (June 25, 2007), the U.S. Supreme Court limited the instances under which a whistleblower or “relator” can be considered the “original source” of the allegations in bringing a qui tam suit on behalf of the government based on publicly disclosed information. In *U.S. v. The Baylor University Medical Center*, 469 F.3d 263 (2d Cir. 2006), the Second Circuit broke ranks from the other district courts to consider the issue and held that the government could not use the relation back doctrine under Fed. R. Civ. Pro. 15(c)(2) to allow a relator’s claim to remain under seal indefinitely while it investigated the claim, and then utilize the relators’ filing date to assert

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new claims and thereby circumvent the False Claims Act’s statute of limitations. It is critical for anyone practicing in this area to understand these two decisions and the restrictions they impose upon relators and the government in bringing suits under the False Claims Act.

The False Claims Act prohibits qui tam suits “based upon the public disclosure of allegations or transactions,” unless the person bringing the action is the “original source” of the information. § 3730(e)(4)(A). An “original source” is defined under the False Claims Act as a person 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 ... based on that information.” § 3730(e)(4)(B). In *Rockwell*, in a 6-2 majority opinion, Justice Antonin Scalia applied a very narrow definition in finding that the whistleblower in that case was not the “original source” of the information and, therefore, lacked jurisdiction to assert a claim under the False Claims Act.

The relator in *Rockwell* was an engineer who worked at Rockwell’s nuclear weapons plant. While employed by Rockwell, he had predicted that Rockwell’s method for disposing of toxic pond sludge through the use of

“pondercrete blocks” would not work. Specifically, the engineer claimed the system would not work because of defects in the piping of the sludge. Several months after the relator was fired, the “pondercrete block” sludge removal system failed, but for different reasons than he had predicted.

Two years later, the relator filed suit, and the government intervened. The government’s intervention, however, was based on different allegations than those disclosed by the relator. Under these circumstances, the Court found that the relator’s knowledge did not ultimately permit him to assert jurisdiction as the “original source” of the information. Specifically, the Court found that the relator’s information went to his prediction as to the shortcomings of the sludge removal system, not his actual knowledge of such deficiencies, and that his prediction as to the system’s failures did not come to fruition. The Court also rejected the relator’s attempts to claim “original source” status simply because he was the original source of some claims not ultimately pursued by the government.

As a practical matter, the *Rockwell* decision, and its narrowing of a relator’s jurisdictional status, does not impact the government’s ability to investigate and then file an amended complaint with respect to a qui tam suit filed under seal

or its right to recover when it intervenes to pursue such claims. However, in limiting a relator's ability to share in the proceeds of any resulting settlement or judgment, the Court has presented a possible deterrent to individuals seeking to file a qui tam suit.

Under the False Claims Act, a relator is required to file his complaint under seal. The relator is then required to serve the complaint on the government which, in turn, has 60 days to investigate the claims and determine whether to intervene while the complaint is still under seal. § 3730(b)(2). The 60-day investigative period can be extended upon ex parte application and "for good cause shown." As a matter of practice, the investigative period under which qui tam complaints are kept under seal — and out of the view of the defendant — can be extended for a number of years. During this period, the Government is permitted to conduct one-way discovery and develop its case without opposition.

Under Fed. R. Civ. Pro. 15(c)(2), a subsequently filed pleading can take advantage of the filing date of an earlier filed pleading, or "relate back" to such pleading, when "the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading." In qui tam lawsuits, the government's complaint-in-intervention is typically treated as an "amended" pleading of the whistleblower. Thus, once the relator's complaint is unsealed, courts typically allow the government's claims — even any new claims it asserted — to "relate back" to the relator's original filing date for purposes of determining the statute of limitations. Indeed, some courts have also permitted new counts added by the government in its complaint, which were not and could not have been in the relator's original complaint (the qui tam mechanism is only authorized for claims brought under the False Claims Act), to relate back under Rule 15(c)(2) to the fil-

ing date of the relator's original complaint for statute of limitations purposes.

Essentially, the manner in which these courts applied the "relation back" doctrine in the qui tam context allowed the government to keep a relator's complaint under seal indefinitely, conduct discovery, and then assert claims (including new claims) that would have otherwise been time barred under the statute of limitations of the False Claims Act.

In the *Baylor* case, the government waited eight years after the relator's complaint was filed before filing complaints-in-intervention that included claims brought under the False Claims Act and under the common law. The defendants moved to dismiss the government's claims on the grounds that they were time-barred. The district court dismissed the government's common law claims but, in accordance with the then-extant body of case law, held that all of the False Claims Act claims related back to the relator's original qui tam complaint under Rule 15(c)(2), and therefore had accrued within the statute of limitations.

On appeal, the Second Circuit broke ranks from existing precedent and dismissed all of the government's claims — including those brought under the False Claims Act — as untimely. In so holding, the Second Circuit found that the six-year statute of limitations under the False Claims Act had passed, and that the three-year tolling period extending from "the date when facts material to the right of action are known or reasonably known" by the government (§ 3731(b)) was unavailing. As a result, the court concluded that the government's claims were barred unless they could be related back to the filing of the relator's original complaint and Rule 15(c)(2).

The Second Circuit found they could not. In reaching this decision, the court found that the "secrecy" afforded the relator's complaint in a qui tam lawsuit — namely, that it is filed under seal

and hidden from public view — was incompatible with the requirement of notice to the defendant under Rule 15(c)(2). As the court explained, the secrecy afforded a complaint in the False Claims Act context "is incompatible with Rule 15(c)(2), because (as it is well-settled) the touchstone for relation back pursuant to Rule 15(c)(2) is notice, i.e., whether the original pleading gave a party adequate notice of the conduct, transaction, or occurrence that forms the basis of the claim or defense." Because a defendant in a qui tam suit is deprived of such notice, the court held that allowing the government's claims to relate back to the relator's complaint would be inappropriate. The Second Circuit affirmed in part, reversed in part and remanded with instructions to dismiss all of the government's claims.

The *Baylor* case could dramatically limit the government's ability to investigate and develop its case through discovery indefinitely during the "investigative period" that the complaint is under seal and while the defendant is left in the dark. If followed in other jurisdictions, the *Baylor* case has the potential to level the playing field in qui tam lawsuits by forcing the government to pursue its claims in a timely manner.

The *Rockwell* and *Baylor* decisions represent important developments in the area of False Claims Act jurisprudence. The *Rockwell* case placed additional restrictions on the ability of a purported whistleblower to share in the proceeds recovered in lawsuits brought under the False Claims Act. On the other hand, the *Baylor* case levels the playing field with the government to some extent in a qui tam case by limiting its ability to engage in one-way discovery while the relator's complaint is under seal. While neither case is a panacea to a corporate defendant facing liability under the False Claims Act, they do impose new obstacles on potential plaintiffs, be it a whistleblower or the government, attempting to bring such claims. ■