Government Contracts Advisory

MARCH 14, 2011

CONTACTS

For further information regarding the topic discussed in this update, please contact one of the professionals below, or the attorney or public policy advisor with whom you regularly work.

Elizabeth Ferrell
202.496.7544

Jason N. Workmaster
202.496.7422

Susan Corts Hill
202.496.7214

Supreme Court Hears False Claims Act Case on Public Disclosure Bar

On March 1, the U.S. Supreme Court heard oral argument in *Schindler Elevator Corp. v. United States ex rel. Kirk,* No. 10-188 (U.S. argued March 1, 2011), on the issue of whether an agency's response to a Freedom of Information Act ("FOIA") request necessarily constitutes a "public disclosure" for purposes of determining whether the public disclosure jurisdictional bar applies in a civil False Claims Act ("FCA") *qui tam* suit. This issue is significant because the current version of the FCA's public disclosure bar allows a defendant to move to dismiss a *qui tam* action if the "allegations or transactions" in the action are "substantially the same" as ones that have been "publicly disclosed" in certain enumerated ways.[1] 31 U.S.C. § 3730(e)(4)(A). Among other things, these include disclosure in a federal "report, hearing, audit, or investigation." The specific issue in *Schindler* is whether a FOIA response necessarily constitutes a "report" and/or an "investigation" within the meaning of the statute. The Circuit Courts of Appeal have been split on this issue.

At oral argument, the justices themselves seemed split on whether a response to a FOIA request is a public disclosure for purposes of the FCA. Their answer to this question, however, is potentially critical to government contractors--especially in light of recent statutory and case developments that have expanded the potential for FCA liability. *See* MLA's alerts on **FERA FCA Amendment**, **PPACA FCA Amendment**, and **SAIC**.

Background

In 2005, Daniel Kirk filed a *qui tam* suit against his former employer, Schindler Elevator Corporation ("Schindler"). In his suit, Kirk alleged that Schindler had submitted false claims within the meaning of the FCA because, at the same time Schindler was invoicing the government, Schindler was not in compliance with the requirement to submit accurate "VETS-100" reports detailing the number of Vietnam veterans it employed. Kirk alleged that compliance with this requirement was a necessary condition to Schindler's right to be paid by the government.

Kirk based his allegations in part on his personal knowledge, alleging that Schindler had never asked him about his veteran status when he was an employee. In addition to this, however, Kirk based his allegations on information he obtained through responses to FOIA requests his wife submitted to the Department of Labor ("DOL").[2] The FOIA requests, among other things, sought Schindler's "VETS-100" reports for specific years. DOL produced the VETS-100 reports for some years, but responded that it could not locate reports for the other years.

The district court dismissed the case, holding that FOIA responses necessarily are public disclosures within the meaning of the FCA. The Second Circuit reversed, holding that a document disclosed in response to a FOIA request constitutes a "public disclosure" only if the document itself is one of the sources enumerated by the FCA, such as a congressional or "other Federal" report, etc. In light of a Circuit split on this issue, the Supreme Court granted certiorari.

Oral Argument

The issue in which the Court appeared most interested at oral argument was whether a federal agency's response to a FOIA request is included in the term "report" as used in the FCA, although there also was some discussion regarding whether it is included in the term "investigation." In this regard, Schindler argued that every FOIA response is a report within the meaning of the statute, defining a report as "any officially sanctioned notification." Addressing the argument that a FOIA response is simply the result of a mechanical process and thus cannot constitute a "report," Schindler cited statistics showing that a significant percentage of FOIA requests received by the Department of Labor were denied or only partially granted. Schindler asserted that this demonstrates that an agency response to a FOIA request is not simply an automatic process of searching for documents, but requires an agency to engage in a substantial inquiry, and thus agency responses to FOIA requests are "reports" within the meaning of the FCA. Schindler urged the Court to rule that every FOIA response is itself an administrative "report," arguing that this interpretation furthered the purpose of the FCA's public disclosure bar by stopping *qui tam* lawsuits from being brought by members of the public based on information equally accessible to everyone. Schindler cautioned that a Court ruling that responses to FOIA requests are not "reports" would lead to a host of *qui tam* lawsuits being filed by relators with no meaningful information to contribute.

In response, Kirk argued that Schindler was asking the Court to construe the term "report" far too broadly, potentially undermining the FCA as a fraud-fighting tool. Kirk advocated the adoption of a ruling that responses to FOIA requests can never be deemed administrative "reports" because "reports" are narrowly defined as formal accounts of the results of an investigation given by a group or person authorized to make the investigation, and an investigation is an official probe into fraudulent conduct. When pressed by Justice Alito to admit that under Kirk's definition, a report that did not investigate fraudulent conduct would not be deemed a "report" under the FCA disclosure bar, Kirk retreated, explaining that "we're asking the Court to adopt the Second Circuit's definition, which is broader and doesn't have an explicit requirement of investigation into fraud."

When Justice Scalia pushed Kirk to articulate the definition of "report" he was advocating, Kirk then shifted attention to the Second Circuit's definition of "investigation," asserting that an "investigation" is a "focused and sustained inquiry toward a government end" and that a response to a FOIA request therefore was not an "investigation." Justice Alito seemed skeptical, stating:

> [M]ay I ask you why a FOIA response doesn't satisfy the Second Circuit's test? Now the government end in responding to a FOIA request is compliance with FOIA, and somebody has to search for these records and determine whether any exemptions apply, and that would seem to be focused and sustained. So what element is missing?

Kirk responded that there was no "government end" because a FOIA

response was simply a transmission of documents. Justices Kennedy and Alito took issue with Kirk's argument, and Kirk again retreated, admitting that satisfying FOIA was a "government end" but that it was a different kind of mission and should not count as a "public end" within the Second Circuit's definition.

The Assistant to the Solicitor General argued on behalf of the government and in support of Kirk. Agreeing with Kirk that "report" should be narrowly defined, the government argued that "reports" were limited to documents containing a substantive analysis of facts, and that Congress could have used broader terms such as "document" to identify the sources of publicly disclosed information but chose not to do so.

Throughout the argument, the justices tried to test the limits of the parties' proposed definitions of "report." In this regard, the justices seemed concerned that Schindler's proposed definition would result in the dismissal of potentially meritorious FCA actions, which would limit the FCA's use as a fraud-fighting tool. At the same time however, the justices, particularly Justice Scalia, appeared skeptical of Kirk's proposed definition, which Justice Scalia stated would be difficult to apply and would result in the Court needing to revisit this issue on practically a case-by-case basis.

Following oral argument, it remains unclear how the Court will decide the matter, but an opinion is expected before the end of the Court's term in early summer. A holding that FOIA responses necessarily constitute public disclosures would be of potentially significant assistance to contractors in defense of future FCA *qui tam* litigation. However, if the Court upholds the Second Circuit's ruling that FOIA responses are not public disclosures, there is an increased likelihood of a proliferation of *qui tam* lawsuits by persons who have no independent knowledge and are armed solely with information mined from the government's own files.

[1] Although the 1986 version of the FCA under consideration in *Schindler* differs from the current version, amended in 2010 through the Patient Protection and Affordable Care Act [see MLA's previous alerts on **FERA** and **PPACA Amendments**], these differences do not affect the issue of whether a FOIA response is necessarily a public disclosure under the FCA.

[2] The version of the FCA under consideration in *Schindler* provided that the public disclosure bar applied to cases "based upon" allegations or transactions that had been publicly disclosed. The current version provides that the bar applies to cases in which the allegations or transactions are "substantially the same" as those publicly disclosed. The impact, if any, of this change was not raised in either the briefing to the Court or at oral argument.