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The Supreme Court To Decide Whether FOIA Responses Trigger The False Claims Act's Public Disclosure Bar

By Robert M. P. Hurwitz

The Supreme Court recently heard oral argument in a case testing the scope of the False Claims Act's public disclosure bar. The False Claims Act ("FCA") is the government's primary weapon against waste, fraud, and abuse in government contracting. Penalties for FCA violations are harsh: actual damages are trebled, and each false claim (such as an individual invoice) triggers a penalty of up to $11,000. Under the FCA's *qui tam* provisions, whistleblowers (formally called relators) can bring lawsuits on behalf of the government. Whistleblowers receive a significant bounty for acting as private prosecutors: they are entitled to between 15 and 30 percent of the government's proceeds from the litigation. This is a substantial sum, as the trebling and penalty provisions catapult many modest matters into multimillion dollar actions.

Congress recognized that this lucrative bounty could attract parasites. Without any controls, whistleblowers could file *qui tam* lawsuits based on nothing more than public information or media reports. To prevent such parasitic lawsuits, Congress required that whistleblowers base their complaints on personal knowledge. This policy is enacted through the FCA's public disclosure bar.

The public disclosure bar is a jurisdictional limit. It states that courts lack jurisdiction over a *qui tam* suit if the complaint is based on "allegations or transactions … in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media." 31 U.S.C. § 3730(e)(4)(A) (2009). The whistleblower may proceed, however, if it was the original source of the information. Otherwise, the whistleblower is barred from prosecuting the action.

(The public disclosure bar was amended by the Patient Protection and Affordable Care Act. The version at issue before the Supreme Court, and thus the text quoted above, is from the pre-amended statute. The effect of the amendment is discussed below.)

In the case before the Supreme Court (*Schindler Elevator Corp. v. United States ex rel. Kirk*), Daniel Kirk brought a *qui tam* lawsuit against his former employer, Schindler Elevator Corporation. He pursued various legal remedies after leaving Schindler, including filing an administrative complaint with the Department of Labor ("DOL") alleging a violation of the

Vietnam Era Veterans Readjustment Assistance Act ("VEVRAA"). VEVRAA requires certain government contractors to submit veteran employment information to the DOL in annual VETS-100 reports. Kirk's wife filed a Freedom of Information Act ("FOIA") request with the DOL to obtain Schindler's VETS-100 reports. The DOL reported that it could not find Schindler's reports for some years. For other years, the DOL located Schindler's reports, but pursuant to the Privacy Act, it could only release redacted copies. Based on the information obtained through these FOIA requests, Kirk alleged that Schindler violated the FCA by failing to file VETS-100 reports for some years, and by filing false reports in other years.

Schindler moved to dismiss the complaint under the public disclosure bar. Schindler objected, claiming that a FOIA request is not a report or investigation (the two relevant sources listed in the public disclosure bar statute). The district court resolved the dispute by focusing on an agency's actions when it responds to a FOIA request. An agency must broadly research the matter and identify which information is responsive to the request. It then analyzes the responsive information and determines whether it may be disclosed or is exempt from disclosure. Certain information may only be disclosed with redactions, as was the case here. As a final step, the agency produces the documents or informs the requester why certain information was not produced.

The district court turned to the dictionary to define "investigation" and "report." It defined investigation as a search or inquiry, and report as a formal statement of the results of an investigation. Because the DOL searched its records, determined what was available for disclosure, and produced an official document describing the results of the inquiry, the court held that the process involved both an investigation and a report.

Kirk appealed, and the Second Circuit disagreed with the district court. The Second Circuit interpreted "report" and "investigation" based on its neighboring words. The court looked at the words "hearing" and "audit" as neighboring words to "report" and "investigation." It held that these words must all refer to the synthesis of information in an investigatory context. Applying this definition, the court limited "report" to the analysis of information to serve a governmental end. Likewise, "investigation" was defined as a focused and defined inquiry toward a governmental end. It concluded that an agency's process of responding to a FOIA request is not a report or investigation because it is merely the production of documents; it does not require the agency to synthesize any information. Under the Second Circuit's ruling, a FOIA response would only trigger the public disclosure bar if the documents produced were themselves reports or investigations.

Schindler appealed to the Supreme Court. The company criticized the Second Circuit's ruling as opening the door to parasitic lawsuits: if an ordinary FOIA response does not trigger the public disclosure bar, then an outsider with no independent knowledge could bring a *qui tam* action. Kirk responded that Schindler's definition would characterize all governmental statements as a report, rendering the other statutory words superfluous.

The Supreme Court appeared skeptical of both positions. Justice Ginsburg asked Schindler if there should be a difference between documents created by the government and documents created by private parties. Similarly, Justice Kennedy questioned whether the public disclosure

bar would capture documents in a publicly accessible reading room. Schindler responded that all FOIA responses are reports, and a reading room would constitute a report if the agency used its discretion in deciding what to make available.

The justices also challenged Kirk's position. Justice Roberts asked if the process of analyzing responsive documents and creating a privilege log constituted a report. Justices Alito and Kennedy asked why compliance with FOIA would not be a governmental end. Kirk claimed that FOIA alone is unique among agency duties. A FOIA response, according to Kirk, is a ministerial act not connected to an agency's substantive mission. Remarkably, Justice Scalia, who eschews inquiries into legislative intent, asked about the FCA's purpose of limiting *qui tam* lawsuits to those with inside information. Kirk claimed that the FCA is intended to encourage those with secondhand information or who might need government evidence to support their case. Justice Scalia also noted that Schindler's definition would be easier to apply.

Regardless of how the Supreme Court resolves this case, its impact may be limited by recent amendments to the public disclosure bar. The Patient Protection and Affordable Care Act removed the jurisdictional element of the bar. Instead, the government decides whether the action should be barred. If a defendant moves to dismiss based on the public disclosure bar and the government opposes the dismissal, then the public disclosure bar is no impediment and the case continues. The government would be expected to oppose dismissal in the vast majority of cases because the *qui tam* provisions allow it to prosecute a case vicariously without expending any resources. To paraphrase Schindler's Supreme Court brief, the winners of this legislative change are "the class of professional relators, whose ranks will swell exponentially once released from the FCA's jurisdictional barrier against parasitic lawsuits."

All merit briefs, including the government's brief as amicus curiae in support of Kirk, can be found on the American Bar Association's website. A transcript of the oral argument can be found on the Supreme Court's website.

Authored by:

Robert M. P. Hurwitz
(213) 617-5476
rhurwitz@sheppardmullin.com