Supreme Court Places a New Roadblock in the Way of *Qui Tam* Relators

The False Claims Act's "public disclosure bar" generally forecloses *qui tam* suits that are "based upon the public disclosure of allegations or transactions" in a governmental "report, hearing, audit, or investigation." On May 16, 2011, in *Schindler Elevator Corp. v. United States ex rel. Kirk*, the Supreme Court held that "a federal agency's written response to a request for records under the Freedom of Information Act . . . constitutes a 'report' within the meaning of the public disclosure bar." The Supreme Court's decision, which reversed the Second Circuit and reflects a Court that continues to be highly receptive to FCA defendants, places a significant new roadblock in the way of relators whose *qui tam* complaints are based on information they learned from materials obtained through FOIA requests. Such relators will now have their *qui tam* complaints dismissed at the pleadings stage unless they can make the difficult showing that they are the "original sources" of the information underlying their complaints. Equally important, *Schindler* suggests that the Court may be willing to endorse further restrictions on the ability of relators to pursue "opportunistic" FCA lawsuits, for example, by narrowing the circumstances in which a relator can premise a suit on "false certification theories."

Schindler involved a *qui tam* complaint brought by Daniel Kirk alleging that his longtime employer, Schindler Elevator Corporation, had failed to file with the U.S. Department of Labor so-called "VETS-100 reports," which notify the Department how many of a company's employees are "qualified covered veterans." According to Mr. Kirk, Schindler's failure violated statutory and regulatory requirements, as well as a condition of payment under the company's "hundreds" of federal contracts. Mr. Kirk alleged that Schindler had submitted "hundreds of false claims for payment under its Government contracts" because it had "falsely certified" to the Department that it had complied with its obligations to file the VETS-100 reports.

Mr. Kirk had learned of Schindler's failure to file the VETS-100 reports as a result of FOIA requests that his wife had made to the Department. In response to those FOIA requests, the Department informed Mrs. Kirk in writing that "it had found no VETS-100 reports filed by Schindler in 1998, 1999, 2000, 2002, or 2003." For the other years, the Department provided Mrs. Kirk "with copies of the reports filed by Schindler, 99 in all."

The Supreme Court agreed with Schindler that a "written agency response to a FOIA request falls within the ordinary meaning of 'report'" and, furthermore, that any copies of original "records [an] agency produces along with its written FOIA response are part of that response, 'just as if they had been reproduced as an appendix to a printed report.'" The Court rejected the argument, advanced by Mr. Kirk and the United States as *amicus curiae*, that it "should adopt a 'different, somewhat special meaning' of 'report'" that would exclude FOIA responses from the public disclosure bar's ambit. The Court similarly found "no merit to the suggestion that the public disclosure bar is intended only to exclude *qui tam* suits that 'ride the investigatory coattails of the government's own processes.'"

Though it acknowledged that its holding would make things more difficult for relators such as Mr. Kirk, the Court was not "troubled" by this consequence. Nor was the Court concerned with the possibility that, had it not been for a relator such as Mr. Kirk, the government would not have discovered Schindler's failure to file its VETS-100 report or its "false certifications." Rather, the Court described Mr. Kirk's lawsuit as a "classic

example of the 'opportunistic' litigation that the public disclosure bar is designed to discourage." As the Court pointed out, "anyone could have filed the same FOIA requests and then filed the same suit." And, in a passage that might suggest a deeper skepticism of relators' ever-expanding "false certification" theories, the Court wryly stated that, if Mr. Kirk's interpretation of the public disclosure bar were correct, "anyone could identify a few regulatory filings and certification requirements, submit FOIA requests until he discovers a federal contractor who is out of compliance, and potentially reap a windfall in a *qui tam* action under the FCA."

Although the Court's decision in *Schindler* resolves a discrete public disclosure bar issue, the decision also reveals the current Court's potential antipathy toward "opportunistic" — as opposed to merely "parasitic" — *qui tam* suits more generally. "Opportunistic" lawsuits come in all sorts of stripes. Sometimes, as with Mr. Kirk's case, they involve a *qui tam* complaint based on information that the relator has acquired through FOIA requests. Other times, however, they involve a relator that tries to shoehorn a defendant's seemingly innocuous regulatory violations into a devastating FCA suit, a scenario that, as the Chamber of Commerce's *amicus* brief in *Schindler* rightly noted, is becoming increasingly common with the relator's bar's embrace of the "false certification theories" of FCA liability. *Schindler* may serve as a signal to the relator's bar that the halcyon days of creative false certification claims may be nearing an end.

The Supreme Court has now ruled against the relator in all five of the False Claims Act cases that it has decided during Chief Justice John Roberts' tenure. *Schindler* suggests that future significant victories for the defense bar are a distinct possibility.

The full text of the Supreme Court opinion is available here.

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