FOIA Response Triggers False Claims Act's Public Disclosure Bar

On May 16, 2011, the United States Supreme Court resolved a longstanding split among federal courts regarding whether False Claims Act (FCA) *qui tam* relators (who do not otherwise qualify as original sources) can base their cases on information learned through the Freedom Of Information Act (FOIA), 5 U.S.C. § 552.[1] The FCA public disclosure bar generally forecloses *qui tam* suits, i.e., FCA civil actions brought by private parties on behalf of the government, that are based on public information disclosed through one of the sources enumerated in the FCA *unless* the relator qualifies as a so-called original source.[2] In a partial blow to the increasing, often parasitic practice of using FOIA to develop FCA claims, the Court in *Schindler Elevator Corporation* v. *United States ex rel. Kirk* confirmed that the FCA's public disclosure bar applies where a relator (other than an original source) bases his or her FCA claim on information garnered from a FOIA response.[3] In a harbinger of future decisions, the Supreme Court noted (but did not resolve) differences between the federal courts on the meaning of the FCA public disclosure bar terms "based upon" and "original source."

Background

Millar Elevator Industries, Inc. and its successor Schindler Elevator Corporation (Schindler) employed Daniel Kirk for 25 years.[4] In August 2003, Mr. Kirk resigned from Schindler after being demoted.[5] Mr. Kirk, a Vietnam veteran, filed a complaint with the Department of Labor (DOL) Office of Federal Contract Compliance Programs (OFCCP) claiming that Schindler had improperly demoted and constructively terminated him in violation of the Vietnam Era Veteran's Readjustment Assistance Act of 1972 (VEVRAA). VEVRAA and accompanying regulations require federal contractors to, among other things, take

1 *Schindler Elevator Corp.* v. *U.S. ex rel. Kirk*, 563 U.S. ___, No. 10-188 (May 16, 2011).

2 31 U.S.C. § 3730(e)(4).

3 As discussed in the text *infra*, Congress, by the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, 901-02 (Mar. 23, 2010) (PPACA), amended the FCA provision (section 3720(e)(4)) under consideration by the Supreme Court, while the case was pending. *Schindler Elevator Corp.*, Slip Op. at 1 n. 1.

4 *Id.* at 2.

5 *Id.*

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affirmative actions to employ and advance in employment qualified covered veterans and submit to DOL annual reports (VETS-100 reports) providing data about qualified covered veterans in the contractor's workforce.[6]

In March 2005, after learning that OFCCP denied his claim, Mr. Kirk filed a *qui tam* suit against Schindler, which alleged, pursuant to an Amended Complaint, that Schindler failed to file certain VETS-100 Reports and included false information in other such reports.[7] Mr. Kirk complained that Schindler's claims for payment under its government contracts were false because Schindler purportedly had falsely certified its compliance with VEVRAA.[8] To support his claims, Mr. Kirk relied on information his wife had obtained from DOL in response to three FOIA requests seeking all VETS-100 reports filed by Schindler for the years 1998 through 2006.[9] DOL responded to Mrs. Kirk's FOIA requests, providing copies of the reports Schindler filed and noting years in which DOL found no submitted reports by Schindler.[10]

Schindler moved to dismiss on several grounds, including that the FCA public disclosure bar deprived the District Court of jurisdiction because DOL's written response to Mrs. Kirk's FOIA requests were government "reports." The District Court agreed with Schindler and dismissed the case. Mr. Kirk appealed and the United States Court of Appeals for the Second Circuit vacated and remanded to the District Court. The Second Circuit, relying on the canon of *noscitur a sociis*, whereby one construes a statutory word by the neighboring words with which it is associated, held that it "strains the natural meaning of the statute" to construe the words "report" and "investigation" in the FCA public disclosure bar provision so that "they include any and all materials produced in response to a FOIA request."[11] The Second Circuit stated, that when read in context, the term "report" in the FCA "connotes the compilation or analysis of information with the aim of synthesizing that information in order to serve some end of the government, as in a 'hearing' or 'audit.'"[12] Because FOIA is "simply a mechanism for granting public access to information in the possession of the agency," the Second Circuit reasoned that written responses to FOIA requests will not constitute a source triggering the public disclosure bar unless the response "itself is a 'congressional, administrative or Government Accounting Office report, hearing, audit, or investigation,' reflecting the government's efforts to compile or synthesize information to serve its own investigative or analytic needs."[13]

The FCA Public Disclosure Bar

The statutory language at issue before the Supreme Court provided:

> 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.[14]

While the case was pending, PPACA narrowed the reach of the public disclosure bar by amending section 3730(e)(4) to read, in pertinent part:

> 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-(i) in a Federal criminal, civil, or administrative hearing in which the Government or its agent is party; (ii) in a congressional, Government Accountability Office or other Federal report, hearing, audit, or investigation, or (iii) 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.[15]

6 38 U.S.C. §§ 4212(a), 4212(d).

7 *Schindler Elevator Corp.*, Slip Op. at 2-3.

8 *Id.* at 3.

9 *Id.*

10 *Id.*

11 *U.S. ex rel. Kirk* v. *Schindler Elevator Corp.*, 601 F.3d 94, 107 (2d Cir. 2010).

12 *Id.*

13 *Id.* at 111 (citation omitted).

14 31 U.S.C. § 3730(e)(4)(A) (2005).

15 PPACA, 124 Stat. 119, 901.

These revisions to the FCA are not retroactive but apply prospectively to conduct occurring on or after March 23, 2010, the effective date of the Act.

High Court Ruling

The Supreme Court, in a five-to-three decision reversing the Second Circuit, held that a written response to a FOIA request falls within the scope of "report" under the public disclosure bar.[16] The Court began its analysis by focusing on the ordinary meaning of "report" because the FCA does not define the term.[17] The Court noted that *Webster's Third New International Dictionary* defines the "report" as "something that gives information" and that *Black's Law Dictionary 1300 (6th ed.)* defines it as "[a]n official or formal statement of facts or proceedings."[18] The Court found that these "broad ordinary" meanings of the word "report" are consistent with the "broad scope of the FCA's public disclosure bar," which the Court characterized as "a wide-reaching public disclosure bar."[19] In the majority's view, because a FOIA response plainly is something that "gives information," the response falls within the scope of a "report" even if the response consists merely of assembled and duplicated records or notes regarding the absence of such records. The Court stated: "Each response was an 'official or formal statement' that '[gave] information' and 'notif[ied]' Mrs. Kirk of the agency's resolution of her FOIA request."[20]

The Supreme Court rejected the Second Circuit's analysis that the textual context of "report" within the statutory provision warranted a narrower definition.[21] The Court determined that the Second Circuit misapplied the *noscitur a sociis* canon to only the immediately surrounding words (i.e., "hearing, audit, or investigation"), to the exclusion of the rest of the statutory provision.[22] Relying on its decision in *Graham County Soil and Water Conservation District* v. *United States ex rel. Wilson*, 130 S. Ct. 1396 (2010),[23] the Court reasoned that all of the public disclosure sources "provide interpretative guidance," and when all the sources are considered, especially the reference to "news media"—which the Court concluded the Second Circuit ignored—a broader scope for the term "report" is revealed.[24]

The Supreme Court also rejected the Second Circuit's conclusion that the legislative history of the public disclosure bar counseled against all FOIA responses constituting "reports." The Second Circuit focused on the fact that the public disclosure bar was enacted in 1986 to replace a prior government disclosure bar, which had precluded any *qui tam* action that was based on information in the possession of the government even if the government learned of that information from the relator.[25] The Supreme Court minimized the legislative history noting that it "raises more questions than it answers" and concluded, based on the stated purpose of the bar, that it was logical to find that the public disclosure bar may operate the same as the government knowledge bar in a "subset of cases".[26] Characterizing Mr. Kirk's lawsuit as "a classic example of the 'opportunistic' litigation that the

16 *Schindler Elevator Corp.*, Slip Op. at 2, 9. Justice Thomas delivered the opinion of the Court in which Chief Justice Roberts and Justices Scalia, Kennedy, and Alito joined. Justice Ginsberg filed a dissenting opinion in which Justices Breyer and Sotomayor joined. Justice Kagan took no part in the consideration or the decision of the case.

17 *Id.* at 5.

18 *Id.*

19 *Id.* at 5, 6.

20 *Id.* at 9.

21 *Id.* at 6-7. The Court also disagreed with the position urged by the government as *amicus curiae*. The government had argued that the adjectives "congressional, administrative, or [GAO]" which precede "report" in the FCA's public disclosure provision suggest that the bar only applies to agency reports "analogous to those that Congress and the GAO issue or conduct." *Id.* at 7 (quotations and citations omitted). The Court disagreed concluding that the adjectives reflect nothing more than that a report must be governmental. *Id.*

22 *Id.* at 7.

23 In this decision, the Supreme Court held that the term "administrative" in the public disclosure bar was not limited to federal sources but rather was broad enough to include state and local sources. This decision has been mooted by the revised language of the public disclosure bar in PPACA.

24 *Id.* at 6-7. Justice Ginsberg rejected this analysis, finding that disclosures from the news media "share a common core of meaning with disclosures in other sources that involve 'processes of uncovering and analyzing information or…the products of those processes." *Schindler Elevator Corp.*, Slip Op. (Ginsberg, J., Dissenting) at 3-4. She stated: "By ranking DOL's ministerial response an 'administrative report,' akin to a 'Government Accounting Office report,' the Court weakens the force of the FCA as a weapon against fraud on the part of Government contractors." *Id.* at 4.

25 601 F.3d at 108 (characterizing the 1986 amendments as "a reaction against the previous version of the statute, which had barred any *qui tam* action that was based on information in the possession of the government.").

26 *Schindler Elevator Corp.*, Slip Op. at 10.

public disclosure bar is designed to discourage,"[27] the Court stated:

> Although Mr. Kirk alleges that he became suspicious from his own experiences as a veteran working at Schindler, anyone could have filed the same FOIA requests and then filed the same suit. Similarly, anyone could identify a few regulatory filing 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.[28]

The Supreme Court also rejected concerns that its ruling would lead to unfair or unintended consequences. For instance, the Court dismissed as an issue the situation whereby two relators could obtain copies of the same document but only the relator who received the document through a FOIA request would find his case barred.[29] The Court stated: "[W]e are not troubled by the different treatment. By its plain terms, the public disclosure bar applies to some methods of public disclosure and not to others."[30]

The Supreme Court also was unconcerned by charges that contractors may try to insulate themselves from liability by making FOIA requests for incriminating documents, noting such concerns were pure speculation, and that arguments may exist to shelter the relator from the disclosure to the defendant.[31] The Court noted, for example, that the relator who comes by the information from a different source *may* have an argument that his lawsuit is not based upon the initial public disclosure or the relator *may* qualify under the "original source" exception to the bar.[32] The Court recognized, however, that the scope of these potential defenses to the public disclosure bar are unsettled in the lower courts and remain unresolved by this decision.[33]

27 *Id.*
28 *Id.* at 11.
29 *Id.*
30 *Id.* at 11-12.
31 *Id.* at 12.
32 *Id.*
33 *Id.*

The Unsettled Future Of The Public Disclosure Bar

The Supreme Court's interpretations of the public disclosure bar in *Schindler Elevator Corporation* and *Graham County* reflect an intent by a majority of the Court to construe the public disclosure bar broadly, to the detriment of opportunistic plaintiffs lacking inside information. Congress, by contrast, recently narrowed the events that a court may consider as public disclosures under the FCA and provided the Department of Justice with discretion to block any dismissal.[34] The revisions, however, likely will not disturb the *Schindler Elevator Corporation* ruling or analysis (absent a change in the Court's Justices) as the "report" language remains for FCA *qui tam* cases brought after the effective date and based upon information learned through FOIA. That said, the Court's *dicta* forebodes more public disclosure bar decisions in the near future.

34 PPACA, 124 Stat. 119, 901-02.

If you have any questions about any of the topics discussed in this Advisory, please contact your Arnold & Porter attorney or any of the following attorneys:

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