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SPECIAL ALERT

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The Epstein Becker & Green, P.C., ***Special Alert*** is published by the Health Care and Life Sciences Practice to inform health care organizations of all types of new legal developments which may affect the delivery and financing of health care services.

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Supreme Court Rules Against Relator in *Rockwell International* Qui Tam Case

On March 27th, 2007, in *Rockwell International v. United States ex. rel. Stone*, the Supreme Court provided helpful clarification to the "original source" requirement and held that 1) where there is a False Claims Act *qui tam* suit based on publicly disclosed allegations, the requirement that a relator must be the original source of the information is jurisdictional and may be raised at any time; 2) a meritorious relator must have "direct and independent knowledge of the information on which the allegations are based," as required by 31 U. S. C. §3730(e)(4)(B); and 3) the government's intervention in the case does not provide an independent basis of jurisdiction that bootstraps a relator into an original source. *Rockwell Int'l Corp. v. United States*, No. 05 – 1272, __ U.S. __ (March 27, 2007).

Under the False Claims Act ("FCA"), Section 3730(e)(4)(A) provides that no court shall have jurisdiction over an action based upon the "public disclosure" of allegations, a term defined by the statute as including criminal, civil, or administrative hearings, investigations, or media reports, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information. Section 3730(e)(4)(B) defines an "original source" as "an individual who [1] has direct and independent knowledge of the information on which the allegations are based and [2] has voluntarily provided the information to the Government before filing an action under this section which is based on the information." The primary issue in *Rockwell* was whether, under the specific facts presented, relator Stone qualified under the original-source exception to the public-disclosure bar.

The Courts of Appeals had divided over whether the phrase "information on which the allegations are based" refers to the information on which the *relator's allegations* are based or the information on which the *publicly disclosed allegations* that triggered the public-disclosure bar are based, and which of the relator's allegations were the relevant ones.

Rockwell presented a factually close case. There had been an indisputable public disclosure of environmental offenses at the Rocky Flats nuclear facility that had occurred years after the relator had had anything to do with the plant. However, the relator argued that his earlier predictions of environmental system failure were what led to the successful prosecution of the company and permitted him to carry on the civil FCA case. The Supreme Court disagreed, noting that "even if a prediction can qualify as direct and independent knowledge in some cases …, it assuredly does not do so when its premise of cause and effect is wrong."

cont.

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The Court's ruling, while very fact-specific, provides a useful clarification of the original source rule and will likely have the most impact in cases where the Government declines to intervene, but the relator decides to continue. The government declines to intervene in about 76% of the *qui tam* actions brought under the FCA.[1] This ruling could lead to the diminution of unmeritorious but expensive and time consuming litigation. Correspondingly, it is essential to raise the public disclosure/original source bar early and often when litigation is filed.

The Court's ruling also may strengthen the benefits that a company gains by participating in a voluntary disclosure program. Currently, the benefits to voluntary disclosure range from the possible reduction of civil damages, to the possibility that the government will not pursue a criminal action against the company (or a lesser criminal sentence or deferred prosecution) and/or the possible reduction or elimination of administrative remedies, such as exclusion from federal health care programs. Additionally, the government does not usually issue subpoenas when a company elects to disclose matters voluntarily. The government may let the company conduct its own investigation. Entities that view themselves as likely subjects of such claims might find potential advantage in attempting to cut off relators by participating in voluntary disclosure programs such as those administered by the Departments of Health & Human Services, Justice and Defense.

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If you would like additional information regarding this topic, please contact Stuart Gerson at 202/861-4180 or sgerson@ebglaw.com, George Breen at 202/861-1823 or gbreen@ebglaw.com, Amanda Schlager at 202/861-5336 or aschlager@ebglaw.com in the firm's Washington, DC office or the Epstein Becker & Green attorney who regularly handles your legal matters. For further information about Epstein Becker & Green's Health Care & Life Sciences Practice, or to see back issues of Special Alerts, please visit our website at www.ebglaw.com.

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[1] Information on False Claims Act Litigation: Briefing for Congressional Requestors, December 15, 2005 *available at* http://www.gao.gov/new.items/d06320r.pdf.

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