

## Supreme Court to Resolve the Scope of the FCA's Jurisdictional "Public Disclosure Bar"

June 23, 2009

On June 22, 2009, the United States Supreme Court issued certiorari in *Graham County Soil & Water Conservation District v. United States ex rel. Wilson*, No. 08-304, in order to resolve a circuit split on the question of "[w]hether an audit and investigation performed by a State or its political subdivision constitutes an 'administrative . . . report, . . . audit, or investigation' within the meaning of the public disclosure jurisdictional bar of the False Claims Act, 31 U.S.C. § 3730(e)(4)(A)." Petition for Writ of Certiorari at i. The Court issued certiorari shortly after the United States filed a brief as amicus curiae urging the Court to hear the case.

### *Graham County*

Karen Wilson was a former secretary at the Graham County Soil and Water Conservation District (Graham Conservation District) who raised concerns with Graham County officials and officials within the Graham Conservation District regarding alleged fraud in connection with the county's administration of the federal Emergency Watershed Protection Program (EWP Program), a federal disaster relief program. Thereafter, Graham County began its own investigation, including retaining an outside accounting firm to perform an audit with respect to the county's administration of the EWP Program. The North Carolina Department of Environment, Health, and Natural Resources (DEHNR) issued a report examining Graham Conservation District's noncompliance with a state cost-sharing program related to the EWP Program.

After the audit and DEHNR reports were issued, Wilson filed a qui tam action in federal district court alleging that the Graham Conservation District (among other defendants) violated the False Claims Act (FCA) by submitting numerous false claims for payment under the EWP Program. The United States declined to intervene, and Wilson proceeded with the litigation. The defendants moved to dismiss the case, arguing that it was barred by the FCA's jurisdictional "public disclosure bar," found in 31 U.S.C. § 3730(e)(4)(A), which provides that:

- (A) 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.
- (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has

voluntarily provided the information to the Government before filing an action under this section which is based on the information.

31 U.S.C. § 3730(e)(4). The district court held that under 31 U.S.C. § 3730(e)(4)(A), it lacked jurisdiction over Wilson's FCA claims because the audit report and the report issued by the DEHNR constituted "public disclosure" of Wilson's allegations, and Wilson was not an "original source" of such allegations.

The Court of Appeals for the Fourth Circuit reversed, holding that the FCA's jurisdictional public disclosure bar only applies to *federal* administrative audits, reports, hearings, or investigations, and not to those conducted or issued by a state or local governmental entity. *See United States ex rel. Wilson v. Graham County Soil & Water Conservation District*, 528 F.3d 292 (4th Cir. 2008). In so holding, the Fourth Circuit joined the Third Circuit in interpreting the FCA's public disclosure bar as limited to federal administrative reports. *See United States ex rel. Dunleavy v. County of Del.*, 123 F.3d 734, 745 (3d Cir. 1997). By contrast, the Eighth, Ninth, and Eleventh Circuits have expressly held that the public disclosure bar includes reports prepared by state governments and is not limited to federal administrative reports. *See United States ex rel. Bly-Magee v. Premo*, 470 F.3d 914, 917-18 (9th Cir. 2006), *cert. denied*, 128 S. Ct. 1119 (2008); *Battle v. Bd. of Regents*, 468 F.3d 755, 762 (11th Cir. 2006); *Hays v. Hoffman*, 325 F.3d 982, 988 (8th Cir.), *cert. denied*, 540 U.S. 877 (2003).

Even though the United States was not a party in this case because it had declined to intervene, the Supreme Court invited the Solicitor General to submit an amicus brief expressing the view of the United States. The Solicitor General thereafter submitted a brief urging the Court to grant certiorari and to hold that the Fourth Circuit correctly construed the "public disclosure" bar to include only federal administrative reports. Such a limitation, the brief argued, would promote the "twin goals" of rejecting suits that the government is capable of pursuing itself, while promoting suits the government is not equipped to bring on its own. *United States Br.* at 10.

### **Supreme Court Shows Increased Interest in FCA Issues**

The Supreme Court's grant of certiorari in *Graham County* is indicative of the Court's heightened interest in issues involving the FCA. The Court's willingness to hear this issue is significant because the Court declined to resolve this precise issue in 2007, when it denied a petition for certiorari in *Bly-Magee v. Premo*. In that case, the Solicitor General also submitted an amicus brief, but ultimately recommended against granting certiorari so that the lower courts could further develop this issue.

In January 2009, the Court granted certiorari in *United States ex rel. Eisenstein v. City of New York*, No. 08-660, in order to determine whether the 30-day time limit in Federal Rule of Appellate Procedure 4(a)(1)(A) for filing a notice of appeal or the 60-day time limit in Rule 4(a)(1)(B), the latter of which applies when the United States (or its officers) is a party, applies to a qui tam action under the FCA in which the United States has declined to intervene. On June 8, 2009, a unanimous Court held that the 60-day period for filing a notice of appeal only applies when the United States has formally intervened in the action. As such, the relator's appeal, which was filed 54 days after entry of judgment by the district court, was untimely.

In June 2008, in *Allison Engine Co. v. United States ex rel. Sanders*, 128 S. Ct. 2123 (2008), the Supreme Court resolved another split among the circuit courts, in narrowly construing the FCA and holding that proof that a false or fraudulent claim was paid using government funds is not sufficient to establish liability under the FCA. The Court held that the language of 31 U.S.C. § 3729(a)(2) requires the government or the relator to prove that the defendant made the false record or statement in order "to get" a false or fraudulent claim "paid or approved by the Government." In other words, the government or a

relator must show that a defendant intended for the government to pay the claim or that the government itself actually paid the claim at issue.

Congress's recent enactment of the Fraud Enforcement and Recovery Act of 2009 (FERA), which included a number of substantive amendments to the FCA, effectively overrules the Supreme Court's decision in *Allison Engine*. After these amendments, the FCA no longer includes the limitations embodied in the phrases "to get" and "paid or approved by the Government." Instead, FERA amended the FCA to allow liability to attach when requests for funds are made to a "contractor, grantee or other recipient" as long as "the money or property is to be spent or used on the Government's behalf or to advance a Government program or interest." 31 U.S.C. § 3729(b)(2)(A).

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