March 29, 2007

# Supreme Court Update:

## *Rockwell International Corp. v. United States*

On Monday, the Supreme Court provided a major victory for government contractors and other targets of False Claims Act *qui tam* suits brought by private whistleblowers (relators) on behalf of the federal government. The decision, *Rockwell International Corp. v. United States*, narrowed the scope of the "original source" exception to the "public disclosure bar"—which deprives courts of jurisdiction over *qui tam* suits based on publicly-disclosed information. Covington & Burling filed an amicus brief, on behalf of the National Defense Industrial Association, in support of prevailing petitioner Rockwell International Corporation.

The Court's decision will enhance defendants' protections against *qui tam* suits brought by former employees (or other relators) whose knowledge is attenuated or speculative and whose suits are based on publicly-available information. If the government declines to intervene in such a suit, the court will lose jurisdiction. Even if the government intervenes in such a suit, dismissal of the relator would spare the defendants from paying the relator's attorneys' fees. Although Rockwell must still pay the damages award, due to the government's intervention, the dismissal of the relator means that Rockwell no longer must contend with his request for attorneys' fees totaling $10 million—more than double the damages award.

*Rockwell,* a case about toxic sludge, took "nearly two decades to seep, so to speak, into [the Supreme] Court." Slip Op. at 1. Rockwell operated a nuclear-weapons plant for the government. To dispose of toxic sludge, Rockwell mixed it with cement to create solid, non-toxic "pondcrete blocks." In 1982, when he worked for Rockwell, relator James Stone incorrectly predicted that the blocks were improperly manufactured and would leak. Stone reiterated his prediction to the FBI in 1987.

The pondcrete blocks eventually did leak—but after Stone left Rockwell and for reasons unrelated to those he cited in 1982. Rockwell discovered the leaks in May 1988.. Newspapers publicized these leaks in 1988 and 1989, and the FBI raided Rockwell in 1989.

Following these events, Stone filed a *qui tam* False Claims Act suit against Rockwell. In his original compaint, he alleged that the pondcrete blocks leaked due to the defect he identified in 1982; Rockwell had known of problems with the blocks in 1986; and the company waited until 1988 to inform the government. In an amended complaint, filed after the government intervened, and at trial, the plaintiffs argued instead that the blocks leaked because Rockwell had reduced the amount of cement—a practice that began after Stone had left Rockwell.

Given that Stone's suit postdated newspaper coverage of the pondcrete leaks, his lawsuit triggered the False Claims Act's "public disclosure bar." Stone claimed, however, that his suit could proceed because he had "direct and independent knowledge" of the information underlying his original complaint. The district court accepted Stone's argument that he was an "original source," the jury found for the plaintiffs, and the Tenth Circuit affirmed.

By a vote of 6-2, the Supreme Court reversed. In an opinion by Justice Scalia, the Court held that Stone was not an "original source" because he lacked "direct and independent knowledge" of the allegations in his ***amended*** complaint—the basis for the jury's verdict. Stone did not have "direct and independent knowledge" of pondcrete problems that began after he left the company. Moreover, his complaints in 1982 constituted only a prediction that Rockwell's pondcrete blocks were defective, not "direct and independent knowledge" of the relevant defect. Whether or not a prediction could in some instances constitute "direct and independent knowledge"—an issue the Court did not address—"it assuredly does not do so when its premise of cause and effect is wrong."

Please click here for a copy of the Court's decision and Covington's amicus brief.

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