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CIVIL FALSE CLAIMS ACT: Supreme Court Hears Oral Argument in *Graham County II* on Whether Fraud Allegations in State Reports are “Publicly Disclosed” for FCA Purposes

The Supreme Court heard oral argument today in *Graham County Soil & Water Conservation District v. United States ex rel. Wilson*, No. 08-304 (“*Graham County II*”), where the Court will, for the first time, interpret the “public disclosure” provision in Section 3730(e)(4)(A) of the False Claims Act. This provision, together with the “original source” provision in Section 3730(e)(4)(B), defines the statutory bar against actions brought by *qui tam* relators based on publicly disclosed allegations. The language of the “public disclosure” provision is notorious for its poor draftsmanship, which has resulted in circuit court splits on numerous issues. The issue before the Court today is whether allegations of fraud publicly disclosed in a *state* (as opposed to a federal) administrative investigation or audit report are “publicly disclosed” for purposes of the FCA. The precise issue before the Court was defined as follows:

Whether an audit or 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).

This issue has sharply split the circuit courts and was ripe for Supreme Court review. See [FraudMail Alert No. 09-06-22](#). (The reader should note that the author submitted an amicus brief on behalf of the Washington Legal Foundation in support of Petitioners in *Graham County II*. See <http://www.wlf.org/Upload/litigation/briefs/GrahamvUSexreWilson-WLFAmicus.pdf>.)

The Justices’ questions at oral argument demonstrated their view that this is a very difficult issue in which the arguments on both sides have equally cogent counterarguments. The Justices also seemed aware that the so-called “policy” arguments raised by the Solicitor General’s Office and relator’s counsel were balanced by the “policy” arguments raised by the North Carolina Solicitor General, who argued for the defendants, with full support by 30 states *amici*. In the end, it was difficult to determine which way a majority of the Court was leaning.

Factual and Procedural Background.

The *qui tam* relator in *Graham County II*, Karen Wilson, filed an action against two North Carolina counties that received federal assistance from the U.S. Department of Agriculture under a federal emergency watershed program. As required by federal regulations, the counties had audits of their expenditures under the program performed by an independent auditor. The audit reports concluded that certain work should have been awarded through an informal bidding process, and no documentation showed whether this requirement had been met. The record reflects that the auditor's report was transmitted to local and state administrative agencies, and at today's argument, counsel for Petitioners stated that the report had also been transmitted to interested officials in the U.S. Department of Agriculture--a fact apparently not in the record below. (The report was not, however, published in the news media, which would have mooted this issue.) The relator's *qui tam* suit, following closely the conclusions in the state audit report, alleged that various payments made by the counties were improper because of the failure to employ the bidding process. Her suit was filed well after the preparation of the state report and transmission of the audit report to government agencies. The Justice Department, after investigation, declined to intervene in the case, and the relator proceeded to prosecute the FCA case alone.

The district court dismissed the relator's suit under the public disclosure bar based on the court's conclusion that a state audit or investigation was sufficient to be considered a "public disclosure" of the bidding allegations under Section 3730(e)(4)(A) and that the relator had based her allegations upon the state audit reports. The Fourth Circuit reversed, ruling that the term "administrative" in Section 3730(e)(4)(A) did not include state reports but was instead strictly limited to federal sources. This holding is directly at odds with the holdings of other circuits, and it would result in allowing a *qui tam* relator, who has no independent or direct knowledge of the alleged fraud, to file a parasitic *qui tam* case based on public information--precisely the result Congress rejected by adding Section 3730(e)(4) to the FCA in 1986.

Public Disclosure Provision

The public disclosure bar provides:

(4)(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.

The FCA's public disclosure/original source provision was enacted in order to encourage a whistleblower with independent personal knowledge of fraud to bring it to the attention of the government and ultimately share in the government's recovery, if any. The provision was included in the FCA in 1986 to avoid the results in two prior decisions: *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), which was viewed by Congress as inappropriately allowing parasitic *qui tam* suits, and *United States ex rel. State of Wisconsin v. Dean*, 729 F.2d 1100 (7th Cir. 1984), in which a case by the "original source" was dismissed under the "government knowledge" bar

passed in 1943 to overturn the *Marcus* decision. See John T. Boese, *Civil False Claims and Qui Tam Actions*, §4.02[A] (Aspen Law & Business) (3d ed. 2006 & Supp. 2010-1).

Today's Oral Argument

Many of the Justices, particularly Justices Ginsburg, Alito, and Scalia, made clear from the outset that the term “administrative” in the list of sources in the second phrase of the public disclosure provision could not be viewed in isolation from the sources listed in the preceding phrase. The more difficult question, however, is how to interpret these two phrases--whether they should be broadly interpreted to include state reports because the first phrase lacks any federal limitation, or whether the two terms (“congressional” and “Government [*i.e.*, General] Accounting Office”) that flank the term “administrative” in the second phrase should be viewed as limiting these terms to federal sources. The Justices’ questions explored various permutations of each of these interpretations, but no Justice appeared ready to base a decision on the statutory language alone.

Counsel for Respondent and the Solicitor General’s Office urged the Court to restrict the term “administrative” in the second phrase to federal sources because of a “likelihood” that Congress believed that federal authorities would focus upon strictly federal sources. Justices Alito and Scalia were quick to point out the fallacy (and the anomolous outcomes) using this approach, and questioned its underlying premise:

JUSTICE ALITO: You think the Federal Government is focusing on everything that is disclosed in every civil proceeding that occurs in the Federal court?

[. . .]

JUSTICE SCALIA: News media, they are likely to be keeping track of all local newspapers as well? . . . It said “news media” . . . It includes a local radio station, a local community newspaper, right? All of that is included . . . [a]nd yet, State proceedings, . . . are excluded, right? . . . Even state supreme court cases and so forth. It seems strange to me.

Tr. 28-29. Justice Breyer asked a number of questions about the legislative history to attempt to discover the intent of Congress. The problem with such a quest, however, is that the relevant language was different in the House and Senate bills, and no Conference Report was prepared to explain the compromise language that ultimately passed in 1986.

Even the policy arguments seemed to be almost evenly distributed between the two sides. Counsel for Petitioners/Defendants argued that a restrictive interpretation of the public disclosure bar would bring a rash of *qui tam* suits by opportunistic relators who would base their complaints entirely upon publicly disclosed state and local hearings and reports, disrupting many state and local programs. The Assistant to the Solicitor General asserted that the Federal Government is unlikely to benefit from the publication of allegations in obscure state or local reports. One point the Justices made clear was that the arguments on the interpretive question or the policy question do not conclusively support one side or the other.

A decision is expected in early spring of next year.

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