Supreme Court Rules Whistleblowers Can Not Rely on FOIA in False Claims Act Cases

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On May 16th, the Supreme Court, in a 5-3 decision, held that a whistleblower's complaint under the False Claims Act (FCA) cannot be based upon information obtained from a request under the Freedom of Information Act (FOIA).

The False Claims Act prohibits the submission of false or fraudulent claims for payment to the United States. The statute allows lawsuits to be brought not only by the government, but also by private party *qui tam* whistleblowers who sue in the name of the government and are eligible to receive a percent of the money recovered in a successful suit. The False Claims Act has recovered billions of dollars into the federal fisc. In fiscal 2010 alone, the government recovered $3 billion in civil settlements and judgments. Whistleblowers, during this same time period, received $385 million.

Permitting private parties to sue on behalf of the government has historically been susceptible to abuse by "parasitic" whistleblowers who bring FCA claims based on information that is already within the public domain or that the relator did not otherwise discover for him or herself. In 1986, Congress amended the FCA to walk a fine line between encouraging whistle-blowing and discouraging opportunistic behavior. One of those limitations was the "public disclosure bar" which bars claims that are based upon public information. The statute defines public information as "the public disclosure of allegations or transactions . . . in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation," but it was not clear whether "report" included information that a whistleblower obtained from a FOIA request. The Supreme Court has now held that it does.

The case before the Court involved a United States Army veteran who alleged that his former employer, Schindler Elevator Corporation, had filed, with the US Department of Labor ("DOL"), false reports about its employment of veterans. As part of the plaintiff's evidence, he relied on information that his wife had obtained from DOL through requests under the Freedom of Information Act. The Court held that information obtained in response to a FOIA request satisfies the dictionary definition of "report" as "something that gives information" or a "notification," and therefore could not be the source for the whistleblower's complaint. The Court also banned a whistleblower from relying on attachments or exhibits sent in response to a FOIA request.

Since FOIA requests are a widely-used vehicle for obtaining information from the government, companies had been concerned that any potential whistleblower could go on "fishing expeditions," identifying required regulatory filings, submitting FOIA requests until finding a company that was out of compliance, and then filing an FCA action against the company. This concern seemed to resonate with the Court. Although the plaintiff in this case alleged that he was suspicious of Schindler Elevator because of how his former employer had treated him, the Court noted that "anyone could have filed the same FOIA requests and then filed the same suit." This case was, according to the Court, "a classic example of the 'opportunistic' litigation that the public disclosure bar is designed to discourage."

While closing this door to whistleblowers, the Court did leave open several other avenues and questions to be fought another day. Among those are whether the allegations in the complaint were "based upon" the FOIA response, thereby leaving open the possibility that a whistleblower might be able to bring a suit if his information is not from the FOIA request even if such a request has been made. In addition, an exception to the public disclosure bar - that the whistleblower is an "original source" of the information in a complaint - might permit a whistleblower to proceed with a lawsuit. It is also unclear how long the Court's decision will last. The three Justices dissenting from the opinion called for a congressional fix to the ruling, and Congress has generally been willing to amend the False Claims Act to counteract Court decisions limiting the reach of the statute. But for now at least, companies facing whistleblower lawsuits have another arrow in their quiver and can look to this ruling for an additional defense against whistleblower claims.

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