When Does a Publicly Disclosed Administrative Report Bar a Private Individual's False Claims Act Lawsuit?

CASE AT A GLANCE

The federal False Claims Act provides the United States with a remedy for fraud practiced on the government and permits lawsuits to be brought in the government's name by private individuals, who can receive a monetary award of 10–30 percent of the recovery paid to the government plus attorney's fees, costs, and reasonable expenses. This case asks the Court to decide when a prior public disclosure of an "administrative" report strips a court of jurisdiction to consider an individual's False Claims Act lawsuit.

Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson
Docket No. 08-304

Argument Date: November 30, 2009
From: The Fourth Circuit

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ISSUE

May whistleblower litigants recover under the federal False Claims Act for claims they pursued based on information publicly disclosed in a state or local administrative report?

FACTS

The federal False Claims Act (FCA) was "adopted in 1863 and signed into law by President Abraham Lincoln in order to combat rampant fraud in Civil War defense contracts." S. Rep. 99-345, 99th Cong., 2d Sess., (1986).

Under the act, ordinary citizen "relators" who become aware of fraud against the federal government may earn a share of the substantial money that is recoverable through *qui tam* actions, which are court actions in which a private person sues in the name of the United States. In the twelve years following the amendment of the FCA in 1986, Justice Department figures indicate approximately $14 billion of the $22 billion or so in FCA recoveries has come from cases first initiated by relators.

Recently, Congress expanded the reach of the FCA and increased the penalties for FCA violations. The Fraud Enforcement and Recovery Act of 2009 subjects all false claims to FCA penalties so long as the claims were paid with federal dollars (regardless of whether these dollars flowed directly from the federal government) and so long as they involved false statements or falsified records. The 2009 amendments to the FCA do not, however, supply an answer to the issue now before the Court, which concerns the FCA's "public disclosure" bar. This limitation provides in part: "No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions 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. …" 31 U.S.C. § 3730(e)(4)(A).

Karen T. Wilson filed her FCA lawsuit in 2001 naming 27 individual defendants (whom she identified by their given names), two boards of county commissioners, and various defendants listed as "John Does and John Doe Corporations and Governmental Entities 1-100" because "their names or the complete facts concerning their complicity" were then not known to her. The defendants also included the Graham County Soil & Water Conservation District (Graham District) and the Cherokee County Soil & Water Conservation District (Cherokee District), of North Carolina.

The lawsuit alleges fraud associated with federal Emergency Watershed Protection (EWP) funding that was intended to aid cleanup from a 1995 storm that caused extensive flooding. Graham and Cherokee counties in western Northern Carolina agreed to perform storm remediation work with EWP money under the auspices of the National Resources Conservation Service (NRCS) of the United States Department of Agriculture (USDA). Richard Greene, a former employee of NRCS and one of the defendants who petitioned the Supreme Court to review this case, served both as the federal government's representative for the work and as an inspector for the counties' EWP programs.

According to Wilson, Greene suggested that the Graham and Cherokee Districts award EWP work without bids. The districts engaged Greene's friend Billy Brown to do the work. Greene received cash payments back from Brown. Greene's project activities included inspecting and signing his approval for payment of the EWP work performed by Brown. Keith Orr, a salaried Graham District employee, also worked and received payments doing EWP work as an "independent" contractor on his own time. Graham County ultimately admitted that Orr's engagement as an independent contractor violated the EWP program's conflict of interest rules. Greene's EWP activities led to him being charged and convicted of misappropriation in federal district court.

Wilson worked as a secretary for the Graham District from 1993 to the spring of 1997. She became troubled by Orr's work for the EWP program and by the arrangements between Greene, Orr, Brown, and another federal employee, William Timpson. She learned that the four had divided the proceeds of the EWP contract and in 1995, she raised her concerns about the matter with some county and conservation district officials. Wilson spoke with two NRCS employees and also wrote to NRCS officials in 1995 about her concerns. In 1996, a federal agent interviewed her about the EWP program.

Wilson claims in her brief that retaliation and harassment by the district and her coworkers ensued. "The harassment included obscene and hostile gesturing, leaving a gun cylinder on her desk, ostracizing her, and threatening to eliminate her position, attack her violently, and kill her husband." She left her job, and her subsequent lawsuit included a retaliation claim. In 2005, the Supreme Court decided a statute of limitations question involving these same parties that led to the dismissal of her retaliation charge. *Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson,* 545 U.S. 409 (2005).

Wilson's lawsuit alleges that the various defendants submitted or caused to be submitted false claims to the government for the EWP Program benefits. She maintains that a conspiracy existed between Greene, Orr, Timpson, and Brown. Greene funneled Graham and Cherokee County EWP work to Brown and Orr, and then Greene and Timpson inspected the work and approved payments, which the four then shared among themselves. In addition to alleging improper conflicts of interest, she also claims the payments to Orr and Brown constituted false and fraudulent payments because the counties failed to seek bids before awarding the EWP work to them.

Prior to her lawsuit, Wilson's claims had received some attention at the county and state level. After learning of the EWP contract issues, Graham County officials began an investigation. They determined that Orr had charged for some work that had not been performed. Also, a March 1996 report following an audit by an accounting firm at the request of Graham County (Audit Report) noted concerns about the use of Orr as an independent contractor and the failure of the county to seek bids for the work. A May 1996 report prepared by the North Carolina Department of Environment, Health and Natural Resources (DEHNR Report) noted the same problems.

Judge Lacy H. Thornburg of the U.S. District Court for the Western District of North Carolina, Bryson City Division, ruled the Audit Report and the DEHNR Report qualified as public disclosures of the information on which Wilson based her lawsuit. The judge found that Wilson was not the original source of the information. Judge Thornburg concluded that these public disclosures left him without jurisdiction over Wilson's lawsuit due to the jurisdiction-stripping effect of the FCA's public disclosure bar. He also decided that Wilson's claims otherwise failed on their merits and granted summary judgment for the defendants—who then asked that Wilson be ordered to pay their attorney's fees. Judge Thornburgh denied this motion despite an FCA provision that authorizes attorney's fees for prevailing defendants when the government has not intervened in the case.

Wilson appealed the judge's ruling on the public disclosure bar to the U.S. Court of Appeals for the Fourth Circuit. She asserted that the "administrative" report language in the FCA public disclosure bar only applies to *federal* administrative reports and thus would not apply to the Graham County Audit Report or the state DEHNR Report. The defendants argued in opposition that no language in the FCA jurisdiction-stripping provision expressly limits the jurisdictional bar to federal rather than state or local administrative reports or audits.

Other circuit courts of appeal have addressed the same question but have not agreed on an answer. Before the Fourth Circuit's ruling on Wilson's appeal, the Third Circuit stood almost alone in its disagreement with the Ninth and Eleventh Circuits. The Third Circuit does not consider state administrative reports a "public disclosure" within the meaning of the FCA. The Ninth and Eleventh Circuits, and to a certain extent, the Eighth, do. The Eighth Circuit has held that state reports and audits can be public disclosures when they involve a "cooperative state-federal program."

The Fourth Circuit, in a unanimous opinion authored by Circuit Judge Traxler, agreed with Wilson. "In our view," Traxler wrote, "examination of the relevant language in context and consideration of the structure of the statute leads to the conclusion that only federal administrative reports, audits or investigations qualify as disclosures under the FCA." In support of its position, the Fourth Circuit quotes language from two Supreme Court decisions that invoke maxims of statutory interpretation. "It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *FDA v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 133 (2000). "In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy." *Crandon v. United States,* 494 U.S. 152, 158 (1990).

In explaining its decision, the court parsed the language of the jurisdictional bar and made this observation: "Of the three disclosure sources listed in clause two of § 3730(e)(4)(A), the first and third are clearly federal sources. … Unlike those terms, there is nothing inherently federal about the word 'administrative,' and Congress did not define the term in the FCA. The placement of the word in the statute, however, provides strong evidence of its intended meaning." *Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson,* 582 F. 3d 292, 302 (4th Cir. 2008).

The Fourth Circuit also invoked the maxim that "a word is known by the company it keeps." (*Noscitur a sociis* is the Latin rendering of this principle of statutory interpretation.) The court explained: "In our view, the placement of 'administrative' squarely in the middle of a list of obviously federal sources strongly suggests that 'administrative' should likewise be restricted to federal administrative reports, hearings, audits, or investigations."

The Fourth Circuit remanded the case to the district court for a determination as to whether portions of Wilson's complaint had been derived from a federal administrative report prepared by the USDA. The circuit court also directed the district court that (if necessary) it should reconsider its determination that Wilson's claims lacked sufficient merit to bring to trial.

The defendant petitioners now seek to convince the Supreme Court that the Fourth Circuit misread and effectively rewrote the statute. The result, they say, will be a spate of "parasitic" lawsuits based on public reports that should not supply a basis for privately initiated FCA lawsuits. They argue the Fourth Circuit's decision would allow anyone to "simply copy a state administrative report verbatim into a complaint, file a *qui tam* action and then demand a bounty even though the complaint added nothing to an ongoing investigation."

They assert the Fourth Circuit should not have concluded "that congressional intent justified overriding the literal language of the False Claims Act." They maintain the word "administrative" is neither vague nor ambiguous, and that the circuit court should have abided by the commonly understood use of the word as referring to both state and federal administrative reports. According to the petitioners, the *noscitur a sociis* interpretive doctrine "may only be used when a particular word or phrase is obscure or of doubtful meaning. The doctrine may not be used to create ambiguity."

CASE ANALYSIS

"It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule." *Marbury v. Madison,* 5 U.S. 137, 177 (1803). Petitioners, however, assert in their brief that their interpretation of the FCA jurisdictional bar must prevail in this case because the "first and overriding principle of statutory construction is that 'a legislature says in a statute what it means and means in a statute what it says.'"

"In drafting this statute," petitioners reason, "Congress chose the word 'administrative' rather than 'federal administrative' thereby indicating its intent that both state and federal audits, investigations and reports would give rise to a public disclosure under the statute."

But petitioners' brief also observes that the statutory provision at issue suffers from careless drafting. Petitioners cite to a 1999 opinion of the Third Circuit, authored by Justice (then Judge) Alito, which details features of the statute that evidence an "apparent lack of precision" that left the Third Circuit "hesitant to attach too much significance to a fine parsing of the syntax of § 3730(e)(4)(A)." A footnote in the respondent's brief refers to the same decision in the course of explaining that the present jurisdiction-stripping provision has mistakenly referred to the General Accounting Office (since renamed the Government Accountability Office) as the "Government Accounting Office."

Each side focuses on the congressional purpose in enacting the public disclosure bar and on whether the Fourth Circuit's ruling furthers that purpose. Petitioners posit that the appeals court decision will encourage the filing of actions by "strangers who have done nothing to facilitate a fraud investigation." This, in turn, will make it less likely that "true whistleblowers" will be able to pursue their own lawsuits. The petitioners also maintain that states and local governments will have less incentive to investigate mismanagement of federal programs if their reports might lead to FCA suits being brought against the very government bodies that set the investigations into motion. Petitioners also remark that the federal government requires states and local governments to prepare audits and reports pertaining to the expenditure of federal funds. These reports are made available to the public through a federal clearinghouse and on the Internet. Not to treat these as public disclosed sources would produce a "bizarre result."

Wilson disagrees. She explains that in 1946, Congress had adopted a broad bar in reaction to a court ruling that allowed a relator to bring an FCA action derived solely from information obtained from a federal criminal indictment. This 1946 amendment stripped federal courts of jurisdiction over *qui tam* lawsuits that were based on evidence or information in the possession of the federal government at the time the actions were brought. However, Wilson says, in 1986, Congress sought to relax that broad "government knowledge bar" by the adoption of today's narrower "public disclosure" bar. Wilson's brief submits that in making this change, Congress wished to encourage the filing of more FCA lawsuits by private individuals.

Respondent maintains, as does the United States in its amicus brief, that the 1986 "public disclosure" amendment seeks to bar the individual's lawsuit "only where the alleged fraud has been publicly disclosed in the course of the federal government taking actions, e.g., auditing, investigating, reporting, that indicate. … that 'the Government is already on the trail of the fraud,' … or will likely be spurred to get on it as a result of the exposure of the fraud to the general public (and the Government) by the news media." Respondent presents a legislative history that describes the amendments to the FCA and the Program Fraud Civil Penalties Act (PFCRA) as part of a "package of comprehensive anti-fraud legislation."

Wilson argues that the language of the FCA amendments is correctly understood in the context of the federal administrative investigations and proceedings authorized under the PFCRA. She contends that state and local audits, reports and investigations, "like the mere possession of fraud information by the federal government, give no indication that the federal government is pursuing the fraud." Petitioners' construction, she says, would frustrate the purposes of the 1986 amendments "by expanding, rather than reducing, the jurisdictional bar, and thereby reduce, rather than increase, the number of *qui tam* suits.

The brief of the United States asserts the federal government's interest in not employing an overly broad construction of the jurisdictional bar that will preclude individual lawsuits "in circumstance in which relators serve the valuable function of bringing to light fraud against the federal fisc." The government's brief characterizes the public disclosure bar as reflecting "Congress's decision to preclude only lawsuits likely to be duplicative of the federal government's own enforcement efforts."

The United States also submits that a literal dictionary approach to the issue would treat publicly disclosed audits by private organizations as triggering the jurisdictional bar because they would be "administrative" in the sense that they are the product of an institution's administration. Congress, the government says, did not intend to allow institutions such as hospitals and universities to shield themselves from *qui tam* suits simply by issuing their own administrative reports. The government identifies these institutions as "frequent participants in federal programs and frequent defendants in litigation under the FCA." It urges the justices to reject petitioners' arguments and ensure that neither private entities, nor state and local governments, can rely upon the disclosure of their own reports to immunize themselves from private FCA lawsuits.

SIGNIFICANCE

The amicus brief of the United States, quoting from language found in two lower court decisions, explains that private FCA lawsuits "supplement government enforcement efforts, and thereby deter fraud by harnessing the strong stimulus of personal ill will or the hope of gain." The prospect of countless litigants fueled by ill will and the hope of substantial personal gain explains the concern of the many states who have joined to support the respondents in this case. The amicus brief joined by some thirty states reports that *qui tam* plaintiffs received more than $198 million dollars in awards in 2008 alone.

At the same time, however, the federal government sees fraud as a substantial factor in our recent economic troubles. Thus, Congress passed the Fraud Enforcement and Recovery Act of 2009 with the intention of strengthening antifraud enforcement efforts. The legislative history of the 2009 law indicates that one of Congress's purposes in approving the act is to address the Supreme Court's 2008 decision in *Allison Engine v. Unites States ex rel. Sanders,* 128 S. Ct. 2123. In that case, the Supreme Court had ruled that certain language in the FCA required the government to prove that a defendant intended to defraud the federal government and not just a recipient of federal funds such as a general contractor who was responsible for paying the defendant for work on a federal project.

The passage of the 2009 act highlights the Congress's power to undo the justices' interpretation of congressional enactments. The significance of this case may yet depend upon Congress's interpretation of the public disclosure bar, once it sees how the Supreme Court translates the meaning of the 1986 version. On the one hand, the justices' decision may open or close the door to some potential *qui tam* lawsuits in a manner that will have a long-lasting effect on the litigants involved in these cases and on all those involved in activities associated with federal funding and federal programs. On the other hand, the effect of the impending decision might be short lived if Congress responds to the Court's interpretation as it did in *Allison Engine.*

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PREVIEW of United States Supreme Court Cases, pages 129–132.

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