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Understanding the “Original Source Exception” to the False Claims Act’s “Public Disclosure Bar” in Light of the Supreme Court’s Ruling in Rockwell v. United States

Joel D. Hesch*†

I. INTRODUCTION

The False Claims Act (FCA) is one of the fastest growing areas of federal litigation due to its unique qui tam enforcement mechanism. The FCA is the federal government’s primary anti-fraud tool for recovering ill-gotten gains from companies submitting false claims for payments to more than twenty government agencies or programs, such as Medicare and the military. As much as two hundred billion dollars of taxpayer funds are likely lost each year to these false claims.

Because the government is unable to recover much of these funds without the help of whistleblowers, Congress, by means of the FCA, provides for a “relator” to bring a qui tam action against a person or company on behalf of the government and receive a share of the recovery, plus attorney fees, from the defendant. Since the FCA was

† A special note of thanks is given to Mr. Hesch’s research assistant and Liberty University law student, Ms. Charis Mitchell, who provided valuable assistance in the researching and writing of this article.

3. See S. REP. NO. 99-345, at 3 (1986), as reprinted in 1986 U.S.C.C.A.N. 5266, 5268 (“The Department of Justice has estimated fraud as draining 1 to 10 percent of the entire Federal budget.”). Based upon current spending of $2.5 trillion, the annual amount of fraud ranges from $25 to $250 billion.
4. The FCA permits a private person, known as a “relator,” to file and participate in qui tam lawsuits on behalf of the government and share in a percentage of the recovery as a reward, plus
modernized in 1986 to allow more relators to participate,\textsuperscript{5} the United States Department of Justice has recovered over twenty billion dollars under the FCA from companies that cheated on government contracts or programs and paid more than two billion dollars in rewards to citizens who filed such \textit{qui tam} suits.\textsuperscript{6} Many companies dislike the FCA which potentially pays its employees millions of dollars to report fraud.\textsuperscript{7}

The most contested aspect of a \textit{qui tam} suit is whether the relator is entitled to file and participate in the \textit{qui tam} action. Defendants' principal attack arises under the FCA's "public disclosure bar,"\textsuperscript{8} which is triggered when fraud allegations are in the public domain before a relator files suit.\textsuperscript{9} If the bar applies, the relator must prove that he meets the "original source exception"\textsuperscript{10} or his claims will be dismissed.

\textbf{5.} For over a century, Congress and the courts have wrestled with the issue of how wide the doorway should be for relators who wish to receive rewards for reporting fraud. The FCA was enacted in 1863 by President Lincoln to combat rampant fraud occurring in the midst of the Civil War. See Joel D. Hesch, \textit{Restating the "Original Source Exception" to the False Claims Act's "Public Disclosure Bar,"} \textit{1 LIBERTY U.L. REV.} 111, 116-17 (2006). In 1943, the FCA was amended in order to prevent claims where any of the information about the fraud was already in the public knowledge. \textit{Id.} Unfortunately, this effectively closed the door on most relators. In 1986, Congress again amended the FCA, easing the restrictions on relators when some information about the fraud is already in the public knowledge. \textit{Id.} Unfortunately, this effectively closed the door on most relators. In 1986, Congress again amended the FCA, easing the restrictions on relators when some information about the fraud is already in the public domain, opening the door and inviting relators to come forward. \textit{Id.}


\textbf{7.} Technically, the FCA does not require that the government establish fraud; it is a violation of the FCA when the defendant acted with either "actual knowledge," "deliberate ignorance," or "reckless disregard of the truth or falsity of the information." 31 U.S.C. § 3729(b). Section 3729(b) further provides that in establishing a claim, "no proof of specific intent to defraud is required." \textit{Id.} This Article uses the term "fraud" in place of "a violation of the FCA" for readability.


\textbf{9.} It is the defendant, in most instances, who moves to dismiss the relator. \textit{See infra} note 13. The relator is often an employee or former employee, someone who asked the company to stop committing fraud but was rebuffed or fired for failing to go along with the company's scheme. \textit{Id.} In \textit{Rockwell}, the government did not contest that the relator, Mr. Stone, a former employee of Rockwell, was entitled to his share of the reward. \textit{See} Rockwell Int'l Corp. v. United States, 127 S. Ct. 1397, 140, 1409-12 (2007).

\textbf{10.} 31 U.S.C. § 3730(e)(4)(B). Under the False Claims Act, if the relator's allegations had been publicly disclosed prior to filing his \textit{qui tam} complaint, his claim must be dismissed unless he meets the original source exception of the statute. \textit{Id.} The FCA defines "original source" as a person with direct and independent knowledge of the information on which the allegations are based. \textit{Id.}
Despite the fundamental importance of the FCA, the Supreme Court has rarely accepted FCA cases for review. However, the Court granted certiorari in Rockwell v. United States to resolve a circuit split and determine whether the Tenth Circuit misapplied the statutory definition of an "original source" in interpreting the original source exception. In Rockwell, the Court addressed for the first time the requirements of the original source exception in light of the FCA's public disclosure bar.

Rockwell, the company being sued under the FCA, argued that the relator, Mr. Stone, was ineligible for a reward. Stone's law firm initiated the FCA case, spent nearly ten million dollars in attorney fees, and acted as co-counsel in the six-week jury trial that resulted in a verdict against Rockwell. In the Supreme Court's decision, the majority sided with Rockwell, stating that Mr. Stone did not meet the original source exception based on the actual wording of the statute. Thus, the government could not pay him a reward under the FCA, and Rockwell would not pay the attorney fees to which Mr. Stone, if deemed a proper relator, was otherwise entitled.

Because this is the only Supreme Court decision addressing the FCA's original source exception, the impact and scope of this decision upon future qui tam cases is critically important. This article begins by discussing the Rockwell decision and the issues it resolved, including the likely implications and anticipated effects upon future FCA cases.

11. For a comprehensive discussion regarding the circuits' multiple tests, see Hesch, supra note 5, at 122-25.

12. The question presented to the Rockwell court was: "Whether the Tenth Circuit erred by affirming the entry of judgment in favor of a qui tam relator under the False Claims Act, based on a misinterpretation of the statutory definition of an 'original source' set forth in 31 U.S.C. § 3730(e)(4)?" Rockwell Int'l Corp. v. United States, No. 05-1272, 2006 WL 886721 (U.S. April 4, 2006).

13. See supra note 9. Because the author was also one of the government trial attorneys handling the case and thus has substantial first-hand knowledge of the facts of the case, additional facts are included in this article that are not included in the Supreme Court's opinion in order to give a fuller picture of the case to aid the reader. See infra notes 28, 29, 30, 41, 44, 49, 50, and 52. Specifically, the author began working on the case in 1990, when he joined the Department of Justice, through 2006, when he left government service. During that time, he participated in all aspects of the case, including investigating the allegations, recommending that the government intervene in the case, conducting numerous depositions, and preparing pleadings and motions. In addition, because the author worked on FCA qui tam cases at the Department of Justice for over 15 years, he has substantial knowledge of the workings of the FCA and DOJ practices and procedures. Accordingly, he provides information based upon his knowledge of FCA practices and procedures to give a fuller picture of how FCA cases are handled to aid the reader. See infra notes 91, 107, 137, 142, and 143.


15. Id.

cases. Next, it addresses the key issues concerning the original source exception not addressed by the Supreme Court. Finally, considering the Court’s absence of guidance on key aspects of the original source exception and the resultant continued disagreement among the federal circuits, this article proposes a framework for courts to adopt when evaluating the original source exception. This framework should produce uniform results while remaining true to the text and purposes of the qui tam provisions. The article packages these standards into a workable framework for original source disputes, creating a gateway tool for courts to follow to ensure consistency, efficiency, and accuracy in rulings.

II. THE ROCKWELL DECISION

In Rockwell, Mr. Stone, the relator, conceded that the facts underlying the allegations in his qui tam case had been publicly disclosed. He thus relied solely upon the legal argument that he met the original source exception to the public disclosure bar. Writing for the majority, Justice Scalia devoted nearly half of the opinion to articulating the details of Mr. Stone's case, demonstrating that the analysis in this case, and any other original source case, is fact driven. After outlining the complex factual scenario, the Court addressed several jurisdictional issues and the application of the original source exception to the case.

Because the facts are necessary to understand the Court's decision and how the original source exception was applied to the case, this article discusses the detailed facts before fully analyzing the decision and the resulting implications for future cases.

A. The Facts Underlying Rockwell

Rockwell International Corporation (Rockwell) was under contract with the Department of Energy (DOE) to manage and operate the government’s nuclear weapons plant in Colorado. A substantial por-

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17. See infra Parts II and III.
18. See infra Part IV.
19. The author's prior article articulated a standard for the original source exception prior to the Rockwell decision. See Hesch, supra note 5, at 152-54. This article refines the proposed standard and framework for courts to use when facing original source issues.
20. See infra Part IV.C.
22. Due to the highly unusual facts in this case, the Court did not have a clear opportunity to establish the much-needed standard to resolve the circuit split over key aspects of the original source exception. See id. at 1410-12.
23. Id. at 1401.
tion of Rockwell's compensation under that contract came from "award fees," contingent upon Rockwell's satisfactory performance in areas concerning environmental, safety, and health issues.\(^{24}\) The allegations in the FCA case centered upon whether Rockwell submitted false claims for payment by lying about its environmental performance during removal of toxic waste from the plant.\(^{25}\) Mr. Stone filed a *qui tam* complaint alleging Rockwell violated the FCA.\(^{26}\)

Mr. Stone worked at the Rockwell plant as an engineer from November 1980 through March 1986.\(^{27}\) During the early 1980s, hazardous wastes accumulated in a fabricated storage pond inside the plant.\(^{28}\) Over time, the pond began to leak, and the EPA asked the DOE to close the pond and safely remove and dispose of the waste materials. Thus, the DOE turned to Rockwell, the manager and operator of the plant, for a solution. Rockwell creatively proposed mixing the sludge at the bottom of the pond with cement, forming what it termed "pondcrete" blocks.\(^{29}\) In theory, the toxic waste would be permanently encased in cement and buried in the Nevada desert.\(^{30}\) Rockwell convinced the DOE that this plan was safe and effective.

Mr. Stone, however, disagreed with Rockwell. In a 1982 engineering report, Mr. Stone reviewed the proposed pondcrete system and concluded the proposal would not work due to a flaw in the piping system.\(^{31}\) Mr. Stone was concerned the piping might remove the sludge improperly, creating blocks with an improper sludge/concrete ratio.\(^{32}\) Despite Mr. Stone's predictions that the proposed piping system would fail, Rockwell proceeded with the project.\(^{33}\) In 1986, prior to the actual making of pondcrete, Mr. Stone left his position at Rockwell and had no further interaction with the pondcrete project.\(^{34}\)

\(^{24}\) U.S. *ex. rel.* Stone v. Rockwell Int'l Corp., 265 F.3d 1157, 1162 (10th Cir. 2001).
\(^{25}\) *Id.* at 1163-64.
\(^{26}\) *Id.*
\(^{27}\) *Id.*
\(^{28}\) Rockwell, 127 S. Ct. at 1401.
\(^{29}\) See supra note 13.
\(^{30}\) See supra note 13.
\(^{31}\) Rockwell, 127 S. Ct. at 1401. The blocks were 3 foot square. The cement mixture was poured into a plastic lined cardboard box as a temporary frame to hold the pondcrete until it hardened. See supra note 13.
\(^{32}\) See supra note 13.
\(^{33}\) *Id.*
\(^{34}\) *Id.*
The project initially succeeded and Rockwell created solid pondcrete blocks. Accordingly, the Court concluded Mr. Stone's prediction that the piping system was inadequate was wrong. However, problems with the pondcrete process soon occurred. Rockwell ran behind on its sludge-removing project, thereby risking a reduced award fee for completing the task on schedule. At some point in 1987, in an apparent effort to increase production speed, Rockwell appointed a new foreman who reduced the amount of cement used to produce the pondcrete blocks. The result was disastrous. Many blocks failed to adequately harden, and thus failed to properly encase the toxic waste.

In 1987, Rockwell became aware that some pondcrete blocks were leaking but did not report the problem to the DOE. In May 1988, the DOE first learned about the pondcrete problems when a Rockwell employee reported a toxic sludge spill after a pondcrete container fell and poured liquid waste onto the pavement.

In June 1987, more than a year after he left Rockwell, Mr. Stone went to the Federal Bureau of Investigation (FBI) alleging Rockwell had committed numerous environmental crimes. However, only a minute portion of his allegations related to the pondcrete and most of the other allegations proved to be incorrect. Of the 2,300 pages of documents Mr. Stone provided to the FBI, only a few pages of one small engineering report concerned pondcrete. Furthermore, Mr. Stone did not specifically discuss pondcrete with the FBI agents.

On June 6, 1989, FBI and agents from the Environmental Protection Agency (EPA) executed a search warrant pursuing allegations that Rockwell received government money for its excellent management of the plant despite numerous environmental problems, including its pondcrete block leaks "due to an inadequate waste-concrete

35. Id.
36. Rockwell, 127 S. Ct. at 1404.
37. The Court extensively discussed Rockwell's reduction in the amount of cement after it had successfully made blocks. Id. at 1401-06, 1409. According to the Court, due to the intentional reduction of cement quantity, the pondcrete blocks failed to solidify because of an improper cement/sludge ratio. Id.
38. Id. at 1404 (the jury found that Rockwell submitted false statements for the periods covering the pondcrete allegations, from April 1, 1987 to September 30, 1988).
39. Id.
40. Id. at 1402. Although Rockwell became aware in October 1986, DOE was not told until May 1988. Id.
41. See id.; supra note 13.
42. Rockwell, 127 S. Ct. at 1402.
44. Rockwell, 127 S. Ct. at 1402. See supra note 13.
45. Rockwell, 127 S. Ct. at 1402.
mixture.”46 Only after news of the search warrant filled the media did Mr. Stone file his *qui tam* suit under the FCA.47 As part of filing the *qui tam*, Mr. Stone provided the government with a confidential disclosure statement containing all of the material evidence he possessed supporting the allegations. The statement indicated Mr. Stone predicted the piping mechanism would cause the pondcrete system to fail.48

The government reviewed the allegations and initially declined to intervene in Mr. Stone’s *qui tam*.49 After learning new information, the government joined the suit in November 1996, filing a joint amended complaint in Mr. Stone’s suit stating the insolidity of pondcrete was due to an incorrect cement/sludge ratio.50 The thrust of the FCA allegation was that Rockwell knew in 1987 the pondcrete blocks were insolid, but failed to report it to the DOE until mid-1988.51 Meanwhile, Rockwell claimed to have excellent environmental performance, resulting in award fee bonuses of over one million dollars.52

A flaw in the piping system was not alleged in the amended complaint, and counsel for the government and for Mr. Stone accentuated the incorrect ratio to the jury during arguments before the district court.53 The final pretrial order also stated the insolidity was caused by an incorrect cement/sludge ratio.54

46. *Id.*
47. *Id.* at 1403.
48. *Id.*
49. The government initially informed the district court that it lacked information necessary to make an informed decision as to whether Rockwell concealed knowledge that pondcrete blocks had failed to harden and were leaking. *See supra* note 13. In response, the court unsealed the case and ordered Mr. Stone and his attorneys to proceed with the case in the absence of the government. *Id.* Meanwhile, Rockwell had filed a lawsuit in the Court of Federal Claims alleging that the DOE Headquarters improperly reduced award fees based upon political pressure during time periods outside of when Rockwell allegedly concealed its knowledge. *Id.* When the attorney for DOJ in the Claims Court case suddenly died, the Civil Fraud Division attorneys were asked to assist in defending the case. *Id.* Mr. Hesch took depositions of several Rockwell employees, who admitted that they had prior knowledge of leaking pondcrete and had told Rockwell management prior to May 1988. *Id.* Based upon this and other new information, DOJ sought and was allowed by the court to intervene in Mr. Stone’s case. *See id.; Rockwell, 127 S. Ct. at* 1399.
50. *Rockwell, 127 S. Ct. at* 1404. The joint complaint contained claims beyond those regarding pondcrete, but the pondcrete claims were the key claims concerning Mr. Stone’s position as a relator. *See supra* note 13.
52. At trial, DOJ presented evidence that $1,390,775.80 of the total award fees paid to Rockwell during that time period were attributable to the category “environmental, safety, and health.” *See supra* note 13. The jury ultimately awarded the government that exact amount, which was tripled by the court, as required under the FCA. *Rockwell, 127 S. Ct. at* 1404.
54. *Id.*
The jury found Rockwell submitted false claims relating to the pondcrete allegations from April 1, 1987 to September 30, 1988 in violation of the FCA.\textsuperscript{55}

After losing the FCA case, Rockwell filed a post verdict motion stating Mr. Stone was not an original source and asking the district court to dismiss Mr. Stone’s claims.\textsuperscript{56} Mr. Stone alleged leaking pondcrete would be the result of a faulty piping system, but the jury found the pondcrete leaked because of the incorrect cement/sludge ratio.\textsuperscript{57}

The parties stipulated that the facts underlying the fraudulent claims concerning pondcrete had been publicly disclosed prior to Mr. Stone filing his \textit{qui tam} case.\textsuperscript{58} Thus, Mr. Stone conceded he needed to meet the requirements of the FCA’s original source exception to be eligible for a share under the FCA.\textsuperscript{59} The issue of whether Mr. Stone was an original source went through several appeals prior to the Supreme Court granting \textit{certiorari} to determine whether Mr. Stone was an original source.\textsuperscript{60}

B. \textbf{The Holding of Rockwell}

After outlining the facts, the Court held the district court lacked subject matter jurisdiction regarding Mr. Stone.\textsuperscript{61} However, Rockwell’s liability was not at issue; thus, regardless of the Court’s decision with respect to Mr. Stone, Rockwell still had to pay the gov-

\begin{thebibliography}{9}
\bibitem{55} Id.
\bibitem{56} Id.
\bibitem{57} \textit{Rockwell}, 127 S. Ct. at 1401-06, 1409. Rockwell admitted reducing the amount of cement in the pondcrete blocks. \textit{Id.} at 1404.
\bibitem{58} \textit{Id.} at 1405.
\bibitem{59} \textit{Id.}
\bibitem{60} \textit{Id.} at 1403-1405 (explaining the procedural history of the case). Prior to trial and again after trial, the district court held that Mr. Stone was an original source under the FCA, entitling him to a share of the FCA verdict against Rockwell. \textit{Id.} at 1404-05. After the trial, Rockwell appealed this decision to the Tenth Circuit. \textit{Id.} at 1405. The appellate court affirmed the district court’s determination as to his direct and independent knowledge of the false claims, but remanded the case to determine whether Mr. Stone had properly disclosed information to the government prior to filing his \textit{qui tam} action. \textit{Id.} See also \textit{31 U.S.C. §3730(e)(4)(B)} (2000) (In addition to possessing direct and independent knowledge to be an original source, the relator must have also “voluntarily provided the information to the Government before filing an action under this section which is based on the information.”). On remand, the district court found that the 1982 engineering order provided to the FBI was insufficient to satisfy proper disclosure under the FCA, so Mr. Stone did not qualify for a percentage of the award. \textit{Rockwell}, 127 S. Ct. at 1405. The district court found that Mr. Stone had not orally discussed pondcrete with the FBI, and thus, the only evidence of informing the government was a single document in which Mr. Stone predicted the piping system would not work. \textit{Id.} Mr. Stone appealed the district court’s decision to the Tenth Circuit. \textit{Id.} The appellate court reversed the district court’s conclusion, holding that Mr. Stone had satisfied his burden of persuasion by providing the engineering order. \textit{Id.} The Court then granted \textit{certiorari}. \textit{Id.}
\bibitem{61} \textit{Id.} at 1412.
\end{thebibliography}
ernment the $4.1 million verdict.\textsuperscript{62} In short, the Court held Mr. Stone was ineligible for a reward under the \emph{qui tam} provisions of the FCA.\textsuperscript{63}

In reaching this decision, the Court analyzed some, but not all, of the FCA's public disclosure bar requirements and the original source exception. In doing so, the Court provided several guiding principles. A few of these principles resolved minor splits between the lower courts. However, the most divisive original source exception issues were neither decided nor addressed by the Supreme Court.

\section*{III. The Issues \textit{Rockwell} Resolved}

\textit{Rockwell} resolved several issues relating to the FCA's original source exception and public disclosure bar, pertinent for future \emph{qui tam} cases. This section identifies and discusses those issues.

The public disclosure bar and original source exception stem from the following language of the FCA:

\begin{quote}
\begin{enumerate}
\item[(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.
\item[(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.\textsuperscript{64}
\end{enumerate}
\end{quote}

Under this statutory scheme, if there is no qualifying public disclosure under subpart (4)(A) of the FCA, the public disclosure bar does not apply.\textsuperscript{65} In other words, the original source exception is not implicated unless a public disclosure, identified in the statute, occurred before a relator filed a \emph{qui tam} suit. Hence, a relator need not satisfy the original source rule absent a qualifying public disclosure occurring before a \emph{qui tam} suit is filed.\textsuperscript{66}

\textsuperscript{62.} Id. at 1404 ("The jury awarded damages of $1,390,775.80, which the District Court trebled pursuant to 31 U.S.C. § 3729(a)."). The only issue remaining on appeal was the original source issue. Id. at 1405.

\textsuperscript{63.} Id. at 1410.


\textsuperscript{65.} Under the FCA, a qualifying public disclosure means a "public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government [General] Accounting Office report, hearing, audit, or investigation, or from the news media . . . ." 31 U.S.C. § 3730(e)(4)(A). This article does not analyze that standard.

\textsuperscript{66.} E.g., United States \textit{ex rel.} Aflatooni v. Kitsap Physicians Servs., 163 F.3d 516, 524 (9th Cir. 1998) (citing United States \textit{ex rel.} Wang v. FMC Corp., 975 F.2d 1412, 1416 (9th Cir. 1992)).
In Rockwell, the parties stipulated that multiple media reports regarding the fraud allegations were released prior to Mr. Stone filing the *qui tam* complaint. The parties not only agreed those media reports qualified as public disclosures under the FCA, but also that Mr. Stone based his *qui tam* complaint on them. Thus, the Court did not have occasion to determine the full parameters of the public disclosure bar; its inquiry was limited to whether Mr. Stone qualified as an original source.

Because the entire issue on appeal depended on whether the courts had subject matter jurisdiction, the Supreme Court addressed several different aspects of jurisdiction relating to the original source exception. First, the Court ruled the original source provision is a "jurisdiction-removing provision" for the relator. In other words, neither the courts nor the parties can waive the original source requirement if a qualifying public disclosure exists.

The Court next addressed whether the intervention by the government, the real party in interest, provided an independent basis for the relator's jurisdiction. Mr. Stone argued that a different section of the FCA granted jurisdiction over the government's and the relator's complaints upon intervention by the government. As discussed below, the Court disagreed.

Similarly, the Court noted that eliminating the relator from the case because he did not satisfy the jurisdictional requirements did not remove jurisdiction over the government's FCA claims. Rather, the government could continue with its claims despite the relator's departure. Thus, the jury verdict in favor of the government (and against Rockwell) was not disturbed.

Next, because of the jurisdiction-removing nature of the clause, the Court determined jurisdiction is not tested solely at the filing of the *qui tam* complaint. Rather, jurisdiction over the relator must be maintained throughout the duration of the case. Thus, if the complaint is amended to drop the relator's only valid original source claim and a different claim is substituted for which he is not an original source, the

67. See Rockwell, 127 S. Ct. at 1404-05.
68. Id.
69. Id. at 1406.
70. Id. at 1410.
71. Id.
72. Rockwell, 127 S. Ct. at 1411.
73. Id.
74. Id. at 1408.
second claim is not somehow grandfathered or "smuggled" into the case.\textsuperscript{75}

In addition, the Court held the jurisdictional inquiry must be performed on a claim-by-claim basis.\textsuperscript{76} In other words, if a \textit{qui tam} complaint contains two completely different types of fraud allegations, assuming the public disclosure bar applies, the relator must establish original source status for each claim.\textsuperscript{77}

With these threshold issues decided, the Court addressed whether the relator met the statutory definition of an original source. The Court first examined the meaning of the phrase "information on which the allegations are based," as contained in the original source statute.\textsuperscript{78} Before deciding whether a relator had sufficient knowledge, the Court must first determine what the relator must possess knowledge of in order to satisfy the standard.

The limited inquiry in \textit{Rockwell} was whether the FCA required the relator to possess direct and independent knowledge of the information contained in his \textit{qui tam} complaint or the information "on which the publicly disclosed allegations" are based.\textsuperscript{79} With little difficulty, the Court found the statute required direct and independent knowledge of information underlying allegations in the \textit{qui tam} complaint, not the information the public disclosure possessed.\textsuperscript{80}

The Court was finally positioned to tackle the heart of the original source issue: Did the relator possess direct and independent knowledge of the information underlying his \textit{qui tam} complaint? Although the Court reached a decision, it failed to establish a standard for future cases beyond the narrow scope of the unique facts of this case. The Court did not define "direct and independent knowledge," despite the circuit split and varying meanings. Rather, the Court determined that regardless of the meaning, a relator who merely predicted a possible outcome did not satisfy the original source exception, especially when his prediction was wrong and the nature of the false statements proven at trial was not based upon such prediction.\textsuperscript{81}

\textsuperscript{75} See \textit{id.} at 1410 (describing this as a process of "claim smuggling").
\textsuperscript{76} \textit{Id.}
\textsuperscript{77} See \textit{infra} Part III.B.
\textsuperscript{78} \textit{Rockwell}, 127 S. Ct. at 1407. The statute defines "original source" as meaning 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)(A)--(B) (2000).
\textsuperscript{79} \textit{Rockwell}, 127 S. Ct. at 1407.
\textsuperscript{80} \textit{Id.}
\textsuperscript{81} \textit{Id.} at 1410.
In sum, the much-anticipated decision of the Court fell far short of expectations, and there remains a great need for a uniform standard. Nevertheless, the decision resolved several issues discussed in detail below, followed by an examination of the likely implications for future cases.

A. The Original Source Exception is a Jurisdictional Determination

The FCA states that after a public disclosure of facts occurs, "[n]o court shall have jurisdiction over an action under this section . . . unless the action is brought by the Attorney General or the person bringing the action is an original source of the information."82 The Supreme Court ruled the public disclosure bar acts as a "jurisdiction-removing provision" for a relator.83 In other words, original source status is a threshold jurisdictional issue, and if the relator fails to fulfill the necessary requirements, he will be dismissed for lack of jurisdiction.

The Court did not state that a district court had no jurisdiction over the case if the public disclosure bar is raised or applicable.84 Rather, the Court chose careful wording to mean that in situations where the allegations had been previously disclosed, the relator must meet the original source exception for a court to maintain jurisdiction over the relator and his claim.85 The Court clarified that the only avenue for a court to retain jurisdiction once the public disclosure bar is triggered is for the relator to establish himself as an original source under that particular statutory provision, ruling out any other FCA sections that would purport to give a court jurisdiction over the relator’s claim.86

Because a qualifying public disclosure occurred in Rockwell prior to the filing of Mr. Stone’s qui tam suit, lower courts continued to have

82. 31 U.S.C. § 3730 (e)(4)(A) (emphasis added).
83. Rockwell, 127 S. Ct. at 1406.
84. Id. at 1411.
85. Id. (providing that "an action originally brought by a private person, which the Attorney General has joined, becomes an action brought by the Attorney General once the private person has been determined to lack the jurisdictional prerequisites for suit"). In other words, once a court determines the relator is not an original source of the information underlying his claim, jurisdiction over the relator and his claim disappear. Id. at 1401 (stating that "The False Claims Act, 31 U.S.C. §§ 3729-3733, eliminates federal-court jurisdictions over actions under § 3730 of the Act that are based upon the public disclosure of allegations or transactions 'unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.'"); see also id. at 1405 (asserting that "[t]he issue is . . . whether a clear and explicit withdrawal of jurisdiction withdraws jurisdiction. It undoubtedly does so.").
86. Rockwell, 127 S. Ct. at 1406 (providing that this "is surely the most natural way to achieve the desired result of eliminating jurisdiction over a category of False Claims Act actions – rather than listing all the conceivable provisions of the United States Code whose conferral of jurisdiction is being eliminated").
jurisdiction over his claims only if he qualified for the original source exception. As discussed below, Mr. Stone did not meet the definition.

The Court did not discuss the rights of a relator where a trial court finds the relator is not an original source. This raises many nettlesome questions without easy answers. Specifically, what rights, if any, does the relator in the action have pending appeal? For instance, if the government had already joined the suit and is continuing to proceed, will the relator be allowed to participate in discovery or other activities (which can take years) pending appeal? Specifically, what if the defendant and government settle the FCA case before the relator’s appeal is heard?

Normally, a relator has the right to contest a proposed settlement between the government and the defendant. However, if lacking jurisdiction over the relator means that he cannot further participate in the FCA action, what happens if the appellate court reinstates the relator after the case is settled?

Because the United States is the real party in interest, arguably it is a burden to stay proceedings or postpone a settlement pending the relator’s appeals. Yet, many rights of the relator are lost absent a stay, even if he is later granted a statutory share of the proceeds, plus attorney fees and costs from the defendant, upon reinstatement. Treating the public disclosure bar and original source exception as jurisdiction-removing provisions undoubtedly raises many new and challenging issues for courts.

87. Id. at 1404-05. Mr. Stone admits that there was a public disclosure and that his qui tam action was based upon it. Id. at 1405.

88. See infra note 165 and accompanying text.

89. Furthermore, the government may settle over the objection of the relator if there is a hearing and the court determines that the settlement is fair, adequate, and reasonable. 31 U.S.C. § 3730 (c)(2)(B) (2000).

90. Under the FCA, the government may ask the court to restrict the relator’s participation in the litigation if it “would interfere with or unduly delay the Government’s prosecution of the case.” 31 U.S.C. § 3730 (c)(2)(C).

91. Because the government is the one that is to pay the relator’s share of the proceeds, there is no concern that the government would have funds to pay the newly reinstated relator. However, because the relator is also entitled to attorney fees and costs from the defendant, ability to pay may be a real factor. See 31 U.S.C. § 3730 (d)(1)-(2). Often, the total amount a defendant pays depends on how much it may have to pay in attorney fees. See supra note 13.
B. Government Intervention Does Not Provide Jurisdiction Over the Relator

If the relator does not qualify as an original source, which removes the Court's jurisdiction over his claim, the Court clearly states that government intervention in the suit does not rescue the relator from procedural disqualification. In short, government intervention does not cure the relator's jurisdictional ills; if the relator does not qualify as an original source, he will be dismissed from the case.

The Court pointed out that the FCA's provisions contain a "sharp distinction" between suits initiated by private citizens and those brought by the Attorney General. While the government's intervention provided jurisdiction for its own case, it did not grant jurisdiction over Mr. Stone's position as a relator. The clear language of the FCA prevents such melding of jurisdiction. Claims under the FCA are either brought by a citizen or by the Attorney General; government intervention does not automatically classify a privately brought suit as one brought by the Attorney General. The relator may not join with the government when he is not an original source.

This aspect of the Court's opinion did not materially affect qui tam cases. The Court reiterated that the original source exception is a jurisdictional requirement. Because government intervention does not save a relator, a defendant will examine the public disclosure bar in all cases and file a motion to dismiss if it thinks the bar applies. As was expected even prior to Rockwell, before filing a qui tam suit, regardless of how strong of a fraud case exists, a relator and his counsel must closely examine whether a public disclosure occurred and if the relator can satisfy the original source exception. Otherwise, they may incur huge litigation costs while aiding the government in FCA cases, only to be tossed out years later if appellate courts rule they do not satisfy the exception.

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92. As stated earlier, a relator need only meet the requirement of an original source if there had been a qualifying public disclosure prior to filing the qui tam. See supra note 66 and accompanying text.

93. Rockwell, 127 S. Ct. at 1411 (the Court asserted, "Even assuming that Stone was an original source of allegations in his initial complaint, we reject respondents' 'intervention' argument").

94. Id.

95. Id.

96. Id.

97. Id.

98. See Hesch, supra note 5, at 111 n.1 (noting that the relator's counsel in Rockwell incurred $10 million in attorney fees).
C. If the Relator is Dismissed for Lack of Jurisdiction, the Government’s Action Continues as an Action Brought by the Attorney General

When a relator is dismissed for lack of jurisdiction, the government’s FCA claim does not succumb to the jurisdictional fire. Rather, jurisdiction over the relator is “removed” when a court determines the relator does not meet the jurisdictional requirement of the statute. As in Rockwell, if the government has intervened in the case, whether the relator is removed does not affect the court’s jurisdiction over the government’s claims.

At first blush, the wording of the FCA appears to demand that a claim be brought by either (1) the Attorney General, or (2) a relator satisfying the original source exception. Since Mr. Stone was not an original source, it appears the FCA claim in Rockwell was initially brought by neither. The Court, however, did not entertain the idea that the government would fail a jurisdictional inquiry if the relator is later dismissed. Rather, once a private person is dismissed from a case, it becomes an action brought by the Attorney General.

Citing the concept of diversity-jurisdiction cases where courts “have the authority to cure a jurisdictional defect by dismissing a dispensable nondiverse party,” the Court ruled that dismissal of the relator merely changes the characterization of the action. The FCA case is no longer one brought by a failed original source, but reclassified as one “brought” by the Attorney General.

Because the government intervened before the relator was dismissed, whether this same principle applies in a declined qui tam is disputed. If the government intervened in a qui tam suit before the relator was dismissed, the government is allowed to continue the case uninterrupted by the relator’s departure. The Court already stated the case is treated as though the government brought the suit.

99. Rockwell, 127 S. Ct. at 1406. Of course, the dismissal is not fully effective until all appeals are extinguished.
100. Id.
101. Id. at 1411 (citing 31 U.S.C. § 3730 (a), (b)).
102. In fact, the Court characterized that possibility as a “bizarre result,” which not even the defendant was willing to suggest. Id.
103. Id. (“an action originally brought by a private person, which the Attorney General has joined, becomes an action brought by the Attorney General once the private person has been determined to lack the jurisdictional prerequisites for suit”).
105. Id. at 1411-12.
106. Id. at 1411. Thus, the filing of a qui tam by a relator acts to toll the FCA’s statute of limitations, regardless of whether the relator is subsequently dismissed.
The *Rockwell* decision does not clarify whether the tolling aspect applies if the government declines to intervene in the *qui tam* case when the relator is dismissed. The FCA allows the government to elect whether to intervene or allow the relator to proceed alone and receive a higher award fee. There are many reasons why the government may not wish to intervene, and it is not obligated to explain its actions. For instance, the government has previously declined out of a desire to preserve resources by allowing the relator to bear the brunt of litigation costs. Accordingly, it is inequitable for a court to dismiss the entire action without providing the government an opportunity to join a case.

Such an inequitable result was reached by a district court confronting this issue. In *Kerr-McGee Oil & Gas*, the government declined to intervene and the relator proceeded to trial. After the jury awarded a FCA judgment of $7.5 million, the district court dismissed the case because the public disclosure bar applied and the relator was not an original source. The government moved to stay the order to allow it to intervene, but the court denied the request, stating that it lacked jurisdiction over the entire case when the relator was dismissed. Rejecting the argument that *Rockwell* allows the government to pick up where the relator left off, the court distinguished *Rockwell* because the government intervened in that case.

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107. 31 U.S.C. § 3730 (c), (d) (2000). See also United States ex rel. Williams v. Bell Helicopter Textron, Inc., 417 F.3d 450, 455 (5th Cir. 2005) ("The [FCA] statute . . . does not require the government to proceed if its investigation yields a meritorious claim. Indeed, absent any obligation to the contrary, it may opt out for any number of reasons."); United States ex rel. Chandler v. Cook County, Ill., 277 F.3d 969, 974 n.5 (7th Cir. 2002) ("There is no reason to presume that a decision by the Justice Department not to assume control of the suit is a commentary on its merits. The Justice Department may have myriad reasons for permitting the private suit to go forward including limited prosecutorial resources and confidence in the relator's attorney."); United States ex rel. Berge v. Bd. of Trs. of the Univ. of Ala., 104 F.3d 1453, 1458 (4th Cir. 1997) (finding that the Government's decision not to intervene was "not an admission by the United States that it has suffered no injury in fact, but rather [the result of] a cost-benefit analysis."); United States ex rel. DeCarlo v. Kiewit/AFC Enters., Inc., 937 F. Supp. 1039, 1047 (S.D.N.Y. 1996) ("Non-intervention does not necessarily signal governmental disinterest in an action, as it is entitled to most of the proceeds even if it opts not to intervene."). A similar issue arises when a court refuses to give the government more time to finish its investigation before requiring it to make a decision to intervene or decline. See supra note 13. Historically, the government declines the case in those instances but continues with its investigation. Id.


109. Id.

110. Id.

111. Id.

112. Id. at 1236-37.
The result in *Kerr-McGee Oil & Gas* is clearly wrong. It violates the spirit and text of the FCA. The *Rockwell* case supports the opposite conclusion. In *Rockwell*, the government initially declined to intervene and the relator proceeded for several years by himself through counsel.\(^{113}\) Rockwell contested the government’s later intervention through a series of creative arguments, including that Rockwell’s own subjective interpretation of “good cause” for intervention after initial declination must be applied because it entered into a criminal plea agreement with the government under the belief that the United States could not later join the civil *qui tam* suit.\(^{114}\) The Tenth Circuit, however, rejected Rockwell’s arguments and affirmed the government’s right to intervene.\(^{115}\)

The right of the government to intervene is not based simply on policy, but also on a direct statutory entitlement. Specifically, the FCA contains a provision allowing the government to intervene after initially declining.\(^{116}\) The Supreme Court had previously outlined the procedure as follows:

If the Government declines to intervene within the 60-day period, the relator has the exclusive right to conduct the action, and the Government may subsequently intervene only on a showing of “good cause.” The relator receives a share of any proceeds from the action — generally ranging from 15 to 25 percent if the Government intervenes (depending upon the relator’s contribution to the prosecution), and from 25 to 30 percent if it does not (depending upon the court’s assessment of what is reasonable) — plus attorney’s fees and costs.\(^{117}\)

Several additional courts have applied this section of the FCA to motions by the government to intervene after declining.\(^{118}\) Based upon

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114. *Id.* at 1198-1200.
115. *Id.*
116. The FCA provides that even after the government declines to intervene in a *qui tam* action, the court may still permit the government to intervene at a later date “upon a showing of good cause.” 31 U.S.C. § 3730(c)(3).
118. One district court discussed the cases addressing this issue as follows:
Though there is little case law defining ‘good cause,’ several courts have found that good cause exists when new and significant evidence is produced during discovery. Indeed, the legislative history behind § 3730 indicates that the purpose of late intervention is to allow the government to intervene if new evidence, discovered after the first sixty (60) days of litigation, escalates the magnitude or complexity of the fraud, causing the government to reevaluate its initial assessment of the case. As interpreted by the Tenth Circuit, the purpose of § 3730(c)(3) is “to pursue litigation, not dismiss it.” Nonetheless, even if the court allows a late intervention, the intervention must not limit the status and rights of the relators.
the language of the FCA and cases interpreting it, the FCA clearly allows the relator to initially proceed alone, subject to the government later joining at any stage of the case.

The Supreme Court in *Rockwell* relied on a concept of curing a jurisdictional defect to reach its decision that the government may proceed in a *qui tam* case initiated by the relator who is later dismissed. 119 Accordingly, the Court extended the principle that a real party in interest can substitute for the dismissed party when the court lacks jurisdiction over the dismissed party to FCA cases. Since the government is the real party in interest, 120 *Rockwell* supports the premise that the government may still intervene in a declined *qui tam* case where a relator is dismissed under the public disclosure bar.

Allowing the government to take over a declined *qui tam* case if a relator is pending dismissal or immediately after dismissal conforms with the correct reading of the FCA. 121 Thus, even when the government has declined to join a case, courts should ask the government if it desires to take over the case before dismissing it, or the public may unintentionally lose its rights. 122

United States *ex rel.* Lam v. Tenet Healthcare Corp., 481 F. Supp. 2d 689, 694 (W.D. Tex. 2007) (citations omitted). In *Tenet*, the court ruled that the government had not attempted to establish "good cause" in the case by relying upon newly discovered evidence, but, rather, based upon its interest "in whether the Relators are entitled to object to or obtain a share of the global Tenet settlement agreement, because any recovery on the part of the Relators will come out of the Government's pocket." Id. at 694-695. The ruling allowed good cause to be established in ways apart from newly discovered evidence. Specifically, the court found good cause to intervene because "the prejudice which would result to the Government if it is not permitted to intervene far outweighs the prejudice to the Relators if the Government is permitted to intervene." Id. at 695. The court continued, "Finally, the status and rights of the Relators will not be limited by this intervention because the Relators still have the possibility of obtaining recovery in the form of a percentage of the settlement agreement." Id.

119. See *supra* notes 101 and 102 and accompanying text.

120. See United States *ex rel.* Karvelas v. Melrose Wakefield Hosp., 360 F.3d 220 (1st Cir. 2004); United States *ex rel.* Kreindler & Kreindler v. United Techs. Corp., 985 F.2d 1148 (2d Cir. 1993); United States *ex rel.* Laird v. Lockheed Martin Eng'g & Sci. Servs. Co., 336 F.3d 346 (5th Cir. 2003); United States *ex rel.* Zissler v. Regents of the Univ. of Minn., 154 F.3d 870 (8th Cir. 1998); United States *ex rel.* Rodgers v. Arkansas, 154 F.3d 865 (8th Cir. 1998); United States *ex rel.* Killingsworth v. Northrop Corp., 25 F.3d 715 (9th Cir. 1994); United States *ex rel.* Walker v. R & F Props., Inc., 433 F.3d 1349 (11th Cir. 2005).

121. 31 U.S.C. § 3730 (c), (d) (2000).

122. Perhaps the biggest issue affecting the government upon a dismissal of the entire case is the statute of limitations. By allowing the government to intervene prior to dismissal of the relator, the government can benefit from the tolling of the statute of limitations as a result of the relator's complaint. Otherwise, if the dismissal were to take place after the statute of limitations had expired on some or all of the claims, should the court dismiss the entire case and force the government to file a separate suit, the defendant would argue that the claims are time-barred. The author argues that this could not have been the intent of Congress when it allowed a relator to pursue a FCA claim on behalf of the government.
D. Original Source Jurisdictional Analysis Must Be Conducted at Every Stage of the Litigation

The Court ruled the jurisdictional qualification for the original source exception continues throughout litigation.\(^{123}\) The analysis cannot, and does not, stop at the relator’s original complaint; jurisdiction is determined with each amended complaint throughout the litigation, including the pretrial order.\(^{124}\) As allegations evolve throughout the case, a court must reevaluate whether the relator continues to satisfy the original source exception, thus maintaining the FCA’s jurisdictional requirement. If a claim that maintained proper jurisdiction is withdrawn or dismissed, that claim must be replaced by another claim that satisfies the FCA’s jurisdictional requirement. Otherwise, the relator, or certain claims of the relator, will be dismissed for lack of jurisdiction.

The fluidity of litigation affords many opportunities for amendments to the claims and allegations against the defendant. In *Rockwell*, Mr. Stone’s allegations shifted during the course of the litigation.\(^{125}\) Thus, the question became: If the relator alleged a claim in the initial complaint for which he qualified as an original source but, for tactical reasons, that claim was altered sufficiently such that he was not an original source of the amended allegations, would jurisdiction continue or be removed? The Court answered that question in the negative; jurisdiction is removed because original source status must be established at every stage of the case.\(^{126}\)

The FCA does not state that allegations forming the basis for jurisdiction are limited to those in the original complaint, and the Court declined to interpret the Act to include such a limitation.\(^{127}\) While Mr. Stone’s initial complaint in the district court potentially could have stated claims providing jurisdiction over him, the complaint as amended, culminating in the final pretrial order, alleged the insolent pondcrete was the result of an improper cement/sludge ratio, not the faulty piping to which Mr. Stone directed the government.\(^{128}\)

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123. *Rockwell Int’l Corp. v. United States*, 127 S. Ct. 1397, 1409 (2007). Although the Court may have retained jurisdiction over Stone’s initial claim, he did not satisfy the original source exception under the pretrial order, which superseded all other allegations. *Id.*

124. *Id.*

125. *Id.* at 1403-05.

126. *Id.* at 1408.

127. *Id.*

128. “Respondents clarified their allegations even further in a statement of claims which became part of the final pretrial order . . . The statement of claims again did not mention the piping problem asserted by Stone years earlier.” *Rockwell*, 127 S. Ct. at 1404. “Stone did not have direct and independent knowledge of the information upon which his allegations were based . . .” *Id.* at
Court determined Mr. Stone was not an original source of the allegations presented at trial.\textsuperscript{129} Therefore, he was not entitled to a share of the proceeds under the FCA.\textsuperscript{130}

An ongoing jurisdictional inquiry increases the likelihood of a strained, rather than cooperative, relationship between the government and relator. In \textit{Rockwell}, the relator agreed to amend the complaint to streamline the case for trial. The decision worked as the jury returned a verdict for the plaintiffs—finding that Rockwell violated the FCA for eighteen months.\textsuperscript{131} However, this decision ultimately failed the relator because he was ineligible to receive a reward from the government.\textsuperscript{132}

This finding will likely have lasting consequences in future \textit{qui tam} cases, which make up more than sixty percent of all FCA cases pursued by the government.\textsuperscript{133} The issue is farther reaching than whether co-plaintiffs can get along and share information. Rather, if the relator believes the government will drop or significantly alter his jurisdiction-bearing claim in favor of a streamlined trial—one which presents only the strongest claims—he may decline to combine his claim with the government's.

The relator may maintain his broader allegations while the government tries to streamline the case for trial, slowing litigation as joint plaintiffs move in different tactical directions. Thus, courts will face difficult decisions, including whether to allow the government, the real party in interest, to amend the complaint over the objection of the relator, or to provide the jury with two separate claims and sets of instructions for closely related claims.

The government will likely want to shape the allegations for trial. Thus, the government may modify a claim to fit the evidence obtained during discovery. In other words, the government may determine it does not need to rely upon information supplied by the relator because it obtained documents or testimony from the defendant during discovery. In fact, it often makes sense for the government not to call

\begin{itemize}
\item 1410. In this case, it is apparent that Mr. Stone lacked direct and independent knowledge regarding any fraud relating to pondcrete regardless of the final pretrial order because his only allegation was that the piping system did not work, and the Court found his prediction was wrong. \textit{Id.} at 1404.
\item 129. \textit{Id.} at 1410 ("Stone did not know that the pondcrete failed; he predicted it.").
\item 130. \textit{Id.} at 1411.
\item 131. \textit{Id.} at 1404 (providing that the violations occurred April 1, 1987 through September 30, 1988).
\item 132. Actually, it does not appear that Mr. Stone would have prevailed under his original complaint because the Court determined his prediction was wrong. \textit{Rockwell}, 127 S. Ct. at 1403-04.
\item 133. \textit{See Dep't of Justice, supra} note 6.
\end{itemize}
the relator as a witness because the defendant will attempt to show bias by pointing out the relator-witness stands to gain up to twenty-five percent of what the jury awards in damages.134

By eliminating certain factual support, however, the relator may be concerned a court will discount the information he provided and be more inclined to find he was not an original source. In fact, the Supreme Court noted Mr. Stone was not a witness at trial and none of the documents he provided to the government were introduced at trial.135 Accordingly, although the government would not call the relator as a witness for the reasons stated above, in light of the Rockwell decision, relators may always want to be a testifying witness. Thus, a fight will likely occur between otherwise cooperative co-plaintiffs.

Under the FCA, the relator is allowed to call witnesses at trial unless the government convinces the court it would be disruptive.136 The relator may call himself to testify and seek to admit every shred of evidence of which he has direct and independent information, regardless of whether it might confuse the jury or be cumulative, in order to bolster his original source status. This certainly will lead to disputes between co-plaintiffs regarding what evidence to present at trial.

When the government declines to intervene on one of multiple claims raised by the relator in the qui tam complaint, the relator has the right to proceed alone on the declined claim.137 Because the relator cannot afford the risk of losing a jurisdiction-bearing claim, he is less likely post-Rockwell to drop a declined claim. In those situations, however, a court may bifurcate the intervened and the declined claims into separate trials.138

Thus, the ruling in Rockwell heightened the prospects for extended trials and multiple trials for related claims.

134. See 31 U.S.C. § 3730(d)(1) (2000) (providing that the relator generally is entitled to between fifteen percent and twenty-five percent of the recovery when the government joins the case).
135. Rockwell, 127 S. Ct. at 1404.
136. 31 U.S.C. § 3730 (c)(2)(C) (providing that the government may ask the court to restrict the relator's participation in the litigation if it "would interfere with or unduly delay the Government's prosecution of the case").
137. The government can choose in which claims to intervene or decline. See 31 U.S.C. § 3730 (c), (d). If the government declines to intervene in a claim, the relator has the right to proceed on it. 31 U.S.C. § 3730 (c)(3). Under Federal Rule of Civil Procedure 42, a court may order a separate trial of any type of claim including a counterclaim "for convenience, to avoid prejudice, or to expedite and economize." FED. R. CIV. P. 42(b). In Mr. Stone's initial qui tam complaint, he alleged that Rockwell also lied about plutonium being in the ductwork, and the government declined that claim. Rockwell, 127 S. Ct. at 1402. The district court bifurcated that claim and it was stayed pending the outcome of the intervened claims. See id. at 1404; supra note 13.
138. See 31 U.S.C. § 3730 (c), (d).
E. One Claim that Satisfies the Jurisdictional Qualification Does Not Allow the Relator to Bring Insufficient Claims in the Same Action

The Rockwell Court ruled that although one of the relator's claims satisfies the original source exception, jurisdiction does not necessarily exist over a different claim in the same qui tam suit. A jurisdictional evaluation must be done on a claim-by-claim analysis, preventing a relator from asserting unrelated claims for which he is not an original source. Due to this ban against what the Court termed "claim smuggling," the plaintiff's decision to join all of his or her claims in a single lawsuit should not rescue claims that would have been doomed... if they had been asserted in a separate action. Rather, the relator must have direct and independent knowledge of each type or category of claim he asserts.

Mr. Stone argued that even if he was not an original source over the claim that Rockwell lied about pondcrete blocks leaking, he was an original source for purposes of his qui tam action because he had direct and independent knowledge that Rockwell also lied about its practice of disposing of waste through spray irrigation. There were two flaws with this argument. First, the jury rejected the allegation that Rockwell violated the FCA through its spray irrigation practices. Second, a claim regarding concealing improper techniques for spraying liquid waste on fields is not the same as a claim regarding reducing the amount of cement in pondcrete and lying about blocks being insolid and leaking hazardous waste onto the parking lots in which they were stored.

Rejecting the idea that original source status can be obtained through totally unrelated claims, the Court held the relator must be the original source of each fraud claim. In other words, when a prior public disclosure occurred, a relator cannot simply combine alle-

139. Rockwell, 127 S. Ct. at 1410.
140. Id.
141. Id. (quoting United States ex rel. Merena v. SmithKline Beecham Corp., 205 F.3d 97, 102 (3d Cir. 2000)).
142. See id. at 1404 n.4; supra note 13.
143. The spray irrigation allegations were for the period of time prior to the pondcrete allegations, and the jury found that the violations of the FCA did not occur then. See supra note 13. Thus, because the only time period when violations of the FCA were found were related to the time period when Rockwell allegedly lied regarding pondcrete, it is clear that the jury did not determine that Rockwell violated the FCA regarding spray irrigation.
144. Rockwell, 127 S. Ct. at 1410.
gations failing to satisfy the original source exception with those that meet it.\textsuperscript{145}

Although this aspect of the decision may appear instinctive, a court examining future \textit{qui tam} matters must understand the scope and meaning of the claim-by-claim approach announced by the Supreme Court. Applying a claim-by-claim standard does not disqualify a relator from bringing broad allegations of an overall fraudulent scheme, such as Medicare upcoding allegations.\textsuperscript{146} In other words, the relator need not have direct and independent knowledge of all of the facts or false claims comprising a fraud scheme.

For instance, a coding clerk working for a large hospital may attend a meeting in which all of the clerks are instructed to upcode claims on the Medicare reimbursement forms. The manager might give the clerk an example of a Medicare patient who has bronchitis and should be billed one code level higher than the treatment, i.e. billed for pneumonia. That clerk has direct and independent knowledge of a scheme to upcode Medicare billings.

Assume the clerk calls a government hotline and tips off the government that the hospital is upcoding. During its investigation, the government discovers the hospital was also paying kickbacks to doctors who referred patients to the hospital. The media somehow learns of the allegations and publishes a story identifying the two allegations.

The hospital coding clerk reads the article in the paper and his attorney files a \textit{qui tam} lawsuit on his behalf, alleging two claims against the hospital: (1) upcoding, and (2) kickbacks. After the case is unsealed, the hospital files a motion to dismiss the relator based upon the public disclosure bar. The relator argues that he meets the original source exception.

The proper analysis of the original source exception, based upon Rockwell's claim-by-claim approach, is to evaluate both claims separately. In the first instance, the clerk will satisfy the original source exception.

\textsuperscript{145} Id.

\textsuperscript{146} The author worked on several upcoding cases while at the Department of Justice. Upcoding is the term used when a hospital knowingly selects a code one or more levels above what the true diagnosis would support. Medicare provides all hospitals with a manual that lists every treatment that is eligible for reimbursement when a hospital or doctor treats a patient eligible for Medicare. The manual assigns a code for each treatment, and Medicare pays a fixed amount for each code. Essentially, Medicare pays the average cost for each type of treatment as a fixed rate. The hospital receives that amount regardless of whether it actually costs more or less for that particular treatment. It is presumed that, in the long run, the hospital will break even. Naturally, the payment for treating a cold or bronchitis is less than treating pneumonia. There are many graduating codes and fee payments relating to each type of illness. Coding clerks are required to examine the patient charts and select the Medicare code which best meets the diagnosis and description written in the chart by the treating doctor.
exception regarding the upcoding claim. Clearly the clerk, who attended the meeting in which all clerks were instructed to upcode and later participated in upcoding numerous bills to Medicare, has direct and independent knowledge of the scheme. It is not necessary for the clerk to know of every instance of the fraud within the same plan. The “claim” is that the hospital engaged in a scheme to upcode.

However, the kickbacks allegation is unrelated to the upcoding claim. It is entirely different, involving the hospital asking doctors to refer patients to the hospital, and paying them a referral fee, which is prohibited by Medicare rules. In this situation, the relator did not have any first-hand knowledge of the kickback scheme. Rather, his knowledge is based on what he read in the newspaper. This is the exact type of situation the public disclosure bar is designed to prevent. That he is an original source for upcoding will not establish him as an original source for the kickbacks. Accordingly, the court should find the relator is an original source for upcoding, but not for kickbacks, and dismiss his kickback claim.

The claim-by-claim analysis evaluates each broad allegation, not every minute detail within a claim. Accordingly, the relator may appropriately report that a company has committed fraud, leaving the specific details for trial. If the relator's broad allegations meet the jurisdictional burden, a court maintains jurisdiction over that broad claim. However, the relator may not bring an unrelated claim in the face of the public disclosure bar unless he is also an original source for that claim.

### F. Allegations that Must be Based Upon the Relator's Information are the Relator's Claims

Prior to *Rockwell*, a few courts were confused about what the relator must personally know if a public disclosure occurred to satisfy the

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147. Thus, the clerk would not need to know of every instance in which other clerks also upcoded or even every type of procedure that was upcoded. Generally, when a hospital engages in an upcoding scheme, it upcodes thousands of codes over many years resulting in millions of dollars in loss to the government. If the courts were to demand that the relator must have direct knowledge of every instance within the same fraud scheme it would render the FCA useless, as relators would not step forward. The government is enticing relators with direct and independent knowledge of fraud schemes to step forward because it needs the inside information to prove the fraud. Often, a relator can supply inside knowledge, such as what was spoken at a meeting, which the government might not otherwise be able to obtain. In other words, government lawyers and accountants can readily determine the amount of damages, but they often need to rely upon the relator to help establish the scienter required under the FCA.

148. Of course, the government may still proceed with the kickback claim.

149. *See infra* Part III.B (providing that it is sufficient if a relator has direct and independent knowledge of an essential element of the claim).
original source exception: the allegations in the *qui tam* complaint or the allegations in the public disclosure.\(^{150}\) It is nonsensical to require that a relator have firsthand knowledge of publicly disclosed fraud. According to the Court:

> It is difficult to understand why Congress would care whether a relator knows about the information underlying a publicly disclosed allegation (e.g., what a confidential source told a newspaper reporter about insolid pondcrete) when the relator has direct and independent knowledge of different information supporting the same allegation (e.g., that a defective process would inevitably lead to insolid pondcrete).\(^{151}\)

The Court found an individual qualifies as an original source when he has "direct and independent knowledge of the information on which the allegations are based," meaning the information underlying the relator's claims.\(^{152}\) Thus, the relator's allegations must be based on his own knowledge; he need not have independent knowledge of the public disclosure.\(^{153}\)

Once a public disclosure is made (which was stipulated in *Rockwell*), the relator's ability to bring the case depends on whether a claim is based on his own direct and independent knowledge of the allegations in the complaint. The only remaining question is the level of information needed to satisfy the standard; this question is addressed below.\(^{154}\)

G. *Mere Guesses Cannot Qualify as Direct and Independent Knowledge*

Rockwell's violations of the False Claims Act occurred during 1987 and 1988, well after Mr. Stone stopped working for Rockwell in 1982.\(^{155}\) Therefore, the only hands-on involvement or direct knowledge Mr. Stone had regarding the false claims Rockwell submitted in violation of the FCA was his prediction in 1982 that the piping system would likely fail. This prediction was made five years before the con-

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\(^{151}\) *Rockwell*, 127 S. Ct. at 1407-08.

\(^{152}\) *Id.* at 1407 (emphasis added).

\(^{153}\) *Id.*

\(^{154}\) See *infra* Part III.B.

\(^{155}\) *Rockwell*, 127 S. Ct. at 1409-10. "The only false claims ultimately found by the jury . . . involved false statements with respect to environmental, safety, and health compliance over a one-and-a-half-year period between April 1, 1987, and September 30, 1988 . . . [T]he only pertinent problem with respect to this period of time for which Stone claimed to have direct and independent knowledge was insolid pondcrete." *Id.*
duct occurred for which Rockwell was found liable. The Supreme Court had little difficulty finding Mr. Stone was not an original source because his prediction amounted to a guess.

Mr. Stone predicted Rockwell’s pondcrete plan would fail because of a possible problem in the piping system’s removal of sludge. This estimate was made in the planning stage—long before the system was built. In fact, Mr. Stone left the plant before the piping system was assembled and had no idea whether Rockwell built it according to the preliminary plans he reviewed in 1982. In any event, the jury concluded Rockwell violated the FCA by lying about its knowledge that pondcrete blocks were leaking and continuing to claim its environmental performance deserved award fee bonuses. The government argued Rockwell violated the FCA because it lied about the pondcrete being insolud and leaking, not because the piping system was faulty.

According to the Court, Mr. Stone was unaware “the pondcrete was insolud . . . he did not know that Rockwell would fail to remedy the defect; he did not know that the insolud pondcrete leaked . . . he did not know that Rockwell made false statements to the Government regarding pondcrete storage.” In fact, Rockwell succeeded in creating solid pondcrete blocks after Mr. Stone had predicted the process would fail. It was only after Rockwell reduced the amount of cement that the pondcrete blocks began leaking. Therefore, when Rockwell’s failure to make solid pondcrete blocks was discovered, the failure was not for a reason Mr. Stone knew about or could reasonably foresee. In short, Stone’s prediction for system failure did not come to fruition, and he had no way of having direct knowledge about the insolud and leaking pondcrete. He “did not know that the pondcrete failed; he predicted it.” Moreover, he was never in a position to know Rockwell lied about leaking pondcrete, which was the crux of the FCA case.

156. Id. at 1401-02.
157. Id. at 1410.
158. Id. at 1402. Stone’s engineering order stated that he “foresaw that the piping system . . . would not properly remove the sludge.” Id.
159. Id. at 1401, 1404.
160. Id. at 1404.
161. Rockwell, 127 S. Ct. at 1410. He had no knowledge of the misconduct for which Rockwell was found liable, i.e. concealing its knowledge from DOE that the pondcrete blocks were leaking toxic waste in 1987 and 1988.
162. Id. at 1404.
163. Id. Again, the reason was that Rockwell reduced the amount of cement. Id. at 1401-06, 1409.
164. Id. at 1410.
According to the Court, predictions not founded in direct and independent knowledge do not qualify as direct and independent knowledge.\(^{165}\) Because Mr. Stone was not in a position to have direct and independent knowledge of the facts which rendered Rockwell's bonus claims false, there was no possibility he met any definition of the original source exception to the FCA. Mere guesses do not qualify as direct and independent knowledge of FCA allegations.

This case contained such unusual facts that its usefulness is extremely limited. However, the Court's holding may have implications beyond Mr. Stone's situation. Can a prediction satisfy the original source exception? The Court wisely left that door open by stating: "Even if a prediction can qualify as direct and independent knowledge in some cases (a point we need not address), it assuredly does not do so when its premise of cause and effect is wrong."\(^{166}\)

The Court is against allowing would-be relators to qualify as original sources through speculation, whether or not accompanied by a prediction. Speculation allows any individual to make a blind or educated guess about the existence of a fraudulent scheme. But what if a prediction happens to be accurate—would an individual meet the test of an original source?

The answer hinges upon the person's knowledge. It also depends on the type of prediction more than on its accuracy. In fact, the Court noted, "[o]f course a \textit{qui tam} relator's misunderstanding of why a concealed defect occurred would normally be immaterial as long as he knew the defect actually existed."\(^{167}\) In other words, it was not the prediction that mattered to the Court so much as what it was based on. The Court grasped that a person might have significant direct and independent knowledge of facts supporting a fraud allegation, but be wrong in predicting some of the results. Such a wrong prediction would not sweep away the otherwise proper direct and independent knowledge of the underlying fraud.

An example could include a hospital administrator who told a group of employees to upcode bills submitted to Medicare. Assume the hospital carried out the fraudulent scheme. At this point, the employee could only predict the hospital actually submitted false invoices in line with its scheme.\(^{168}\) Of course, there would be little reason for the hospital administrator to ask its employees to upcode the forms if

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165. \textit{Id.}
166. \textit{Rockwell}, 127 S. Ct. at 1410.
167. \textit{Id.}
168. Recall that the relator must only meet the definition of an original source if there had been a prior public disclosure of the fraud allegations. \textit{See supra} note 66 and accompanying text.
the hospital was not submitting them to the government for payment. Thus, the prediction makes sense. Its accuracy is not the linchpin.

In this setting, the fired employee's knowledge is precisely the type which satisfies the original source exception. It is based upon direct and independent knowledge of facts underlying the fraud. Thus, his prediction that the hospital was carrying out a scheme orchestrated by the administrator is not a blind guess. He was told of a plan to put a fraud scheme in place. He would provide valuable information about the fraud, well worthy of receiving a share of the recovery.

There are undoubtedly many instances where a prediction makes up part of a relator's claim of fraud; accuracy should not be the litmus test. Rather, the FCA looks to the strength of the relator's direct and independent knowledge of an essential element of the fraud allegations. Such an analysis is best made on a case-by-case basis.

IV. ADDRESSING UNRESOLVED ISSUES

After working through threshold issues, the Court was finally poised to tackle whether Mr. Stone actually qualified as an original source. The groundwork was laid to address the circuit split—the reason the Court accepted the case—and establish a standard for evaluating the original source exception to the FCA's public disclosure bar. Unfortunately, the unusual facts of the case did not lend themselves to the Court clarifying the proper analysis for the original source exception. Rather, it was clear Mr. Stone was unable to meet any standard used by any circuit court of appeals. In other words, the Court simply ruled Mr. Stone could not possibly be an original source.169 It did not provide any meaningful guidance as to which, if any, of the competing standards were correct. At most, the Court held that guesses or inaccurate predictions are insufficient for a relator to be an original source.170

Thus, circuits remain split; a uniform standard is desperately needed. Many courts apply a gateway analysis,171 but use a combination of two-, three-, or four-prong approaches for evaluating

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169. Rockwell, 127 S. Ct. at 1410. Specifically, the Court did not address what is necessary to satisfy direct and independent knowledge. Id. Nor did it explain what level of knowledge is required to meet the exception. Id.
170. See supra Part II.G.
171. See Hesch, supra note 5, at 123 n.78 (describing the Sixth Circuit's use of a series of gateway questions).
172. See id. at 123 n.79 (describing the Seventh Circuit's use of two questions and the D.C. Circuit's two-step approach).
173. See id. at 123 n.80 (describing the approach of the Fourth and Fifth Circuits).
174. See id. at 123-24 n.81 (describing the approach of the Tenth and Eighth Circuits).
direct and independent knowledge, the lynchpin of the original source exception.\footnote{175} Even then, they apply different meanings to the same statutory language when addressing the direct and independent knowledge requirement.\footnote{176} Additionally, courts lack uniformity on a related question: What type and extent of knowledge must a private person possess to qualify as an original source? Most courts fail to directly address this question.\footnote{177}

Because there is a decidedly dramatic circuit split on the basic framework used to analyze the original source exception, cases with similar facts receive different treatment under the same federal statute. Thus a relator must engage in forum shopping to find a sympathetic jurisdiction applying lower standards for meeting the original source exception. Accordingly, a uniform standard is needed.

This section proposes standards for courts to apply to all original source exception disputes. It lays out a flowchart (or gateway) to aid courts in applying the standards consistently and efficiently.

A. The Meaning of “Direct and Independent Knowledge”

The FCA removes jurisdiction from a court over a relator’s claim when a qualifying public disclosure precedes filing his 

\textit{qui tam} 

complaint, \textit{unless} he qualifies as an original source.\footnote{178} The operative language of the statute requires a relator have “direct and independent knowledge” of the information forming the primary basis for his allegation that the defendant knowingly submitted or caused to submit false claims to the government.\footnote{179} Thus, the most critical inquiry is whether the relator possessed direct and independent knowledge of the fraud scheme.

The phrase “direct and independent knowledge” under the original source exception requires two discrete inquiries: (1) Does the relator have “direct” knowledge of an essential element of the FCA allegations; and (2) Is his knowledge “independent” of the public disclosure?

“Direct” knowledge of information upon which allegations are based is defined in a variety of ways.\footnote{180} Relying on a dictionary defini-
tion, the Fifth Circuit concluded that direct means "knowledge derived from the source without interruption or gained by the relator's own efforts rather than learned second-hand through the efforts of others." This definition closely captures the purpose of the section because it distinguishes between one who directly obtains information from one who receives information through the efforts of others. Restating this standard to incorporate the full meaning of the FCA, the term direct knowledge means: knowledge derived directly from the source or that is gained by the relator's own efforts rather than through the efforts of others.

In light of the purpose of the FCA, the most accurate definition of "independent" knowledge is that knowledge must not be derived from or dependent upon the public disclosure itself. This satisfies the purpose without opening the gate too wide. In other words, under this standard, even if a person claims that knowledge gained by reading an indictment gave him "direct" knowledge, he could not be credited with "independent" knowledge because he derived the information from a public disclosure.

Properly read, the direct and independent knowledge component of the original source exception requires the relator to possess knowledge derived directly from the source or gained by the relator's own efforts rather than through the efforts of others, and he must have independent knowledge not derived from or dependent upon the public disclosure itself.


181. Laird, 336 F.3d at 355 (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, UNABRIDGED 640 (3d ed. 1961)).

182. The purpose of setting a single standard is to provide guidance to the courts and foster uniform decisions. See Hesch, supra note 5, at 128-29. The author's proposed definition best captures the meaning of the various definitions of the term "direct." However, the author is not stating that each of the ways the federal circuits have defined the term "direct" is necessarily wrong. Rather, using a uniform definition promotes judicial economy and best ensures uniform results.

183. This definition best captures the meaning of the various ways of defining the term "independent." See Hesch, supra note 5, at 129-30. The author is not stating that each of the ways the various circuits have defined the term "independent" are necessarily wrong. However, using a uniform definition promotes judicial economy and best ensures uniform results.

184. The FCA was amended in 1943 to provide that there would be no jurisdiction over qui tam suits "whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought." Minn. Ass'n of Nurse Anesthetists v. Allina Health Sys. Corp., 276 F.3d 1032, 1039 (8th Cir. 2002) (citing 31 U.S.C. § 232(C) (1946); S. REP. NO. 99-345, at 12 (1946)). "The provision was explained as an attempt to curtail parasitical suits in which the informer 'rendered no service' to the government." Id. at 1041 (citing 89 CONG. REC. 10846 (1943)). The author's definition provides this protection.
B. The Level of Information Required

The correct definition of direct and independent information is alone insufficient to properly evaluate whether a relator meets the original source exception. A court must also adopt a standard addressing the level of information required for direct and independent knowledge. Specifically, is it sufficient to directly know just one fact supporting the allegations or must a relator have independent knowledge of every fact needed to prove a FCA claim?

The Rockwell case failed to provide much direction regarding the amount or type of information necessary to satisfy the original source exception. Although the Court did not address this precise question, language from the decision provides some insight. When addressing whether the relator's information relates to his knowledge of allegations in the complaint or in the public disclosure, the Court stated:

It is difficult to understand why Congress would care whether a relator knows about the information underlying a publicly disclosed allegation (e.g., what a confidential source told a newspaper reporter about insolent pondcrete) when the relator has direct and independent knowledge of different information supporting the same allegation (e.g., that a defective process would inevitably lead to insolent pondcrete). Therefore, the Court indicated that a relator need not know every fact supporting a FCA violation. This language contemplates that another person might have different information than that which the relator is relying upon to support the allegations in his complaint. Accordingly, the Court did not demand the relator possess knowledge of all facts supporting the FCA violation alleged in his complaint.

Thus, the Court indicated that a relator need not know every fact supporting a FCA violation. This language contemplates that another person might have different information than that which the relator is relying upon to support the allegations in his complaint. Accordingly, the Court did not demand the relator possess knowledge of all facts supporting the FCA violation alleged in his complaint.

Therefore, the remaining question is: What level of knowledge must the relator actually possess to qualify as an original source? By analyzing the plain language of the original source exception, the graduated knowledge standard built into the FCA, and evaluating the cases discussing the issue, the phrase "direct and independent knowledge of the information on which the allegations are based" means: The rela-

186. Id at 1407. Prior to Rockwell, two circuits also adopted a "third prong," where the relator not only had to have direct and independent knowledge of his own claim, but also had to be the one who actually triggered the public disclosure. See United States ex rel. Dick v. Long Island Lighting Co., 912 F.2d 13, 16 (2d Cir. 1990); United States ex rel. Wang v. FMC Corp., 975 F.2d 1412, 1418 (9th Cir. 1992). After Rockwell, this third prong is no longer an accurate interpretation of the FCA. The Second and Ninth Circuits therefore can no longer appropriately implement this so-called third prong. This also rules out the "trigger" approach that the Ninth Circuit had adopted, requiring the relator to trigger a government investigation leading to additional fraud that has been rejected by the majority of the circuits. See Hesch, supra note 5, at 150.
187. See id. at 134-47.
A relator must have direct and independent knowledge of information that supports an essential element of the FCA cause of action. In other words, the relator must possess some direct and independent knowledge of information of the alleged fraud. 188 This language is truest to the text and purpose of the statute.

C. A Framework for Applying the Original Source Exception

Rockwell left too many questions unresolved. The courts are in great need for a uniform standard, applicable to all qui tam cases. Indeed, part of the reason district courts reach inconsistent results is the lack of a uniform framework to follow when addressing the original source exception.

If a qualifying public disclosure exists, the jurisdictional inquiry mandated by the Supreme Court in Rockwell requires courts to determine whether the relator meets the FCA's definition of an original source. Based upon the foregoing analysis, this article proposes the following standard for courts to adopt: 189

1. Was there a recognized "public disclosure" under 31 U.S.C. §3730(e)(4)(A) of the False Claims Act?
   If yes, go to 2. If no, end of inquiry. The relator may proceed.
2. Was the qui tam complaint "based upon" the public disclosure?
   If yes, go to 3. If no, end of inquiry. The relator may proceed.
3. Was the relator an "original source" of information in the complaint that supports an essential element of the FCA cause of action?
   A. Did the relator have "direct" knowledge of such information?
      If yes, go to 3B. If no, end of inquiry. The relator may not proceed.
   B. Did the relator have "independent" knowledge of such information?
      If yes, go to 3C. If no, end of inquiry. The relator may not proceed.
   C. Did the relator "voluntarily provide" such information to the government prior to filing the qui tam suit?
      If yes, the relator may proceed. If no, the relator may not proceed.

188. See id.
189. The proposed framework is virtually the same as proposed in the author's prior Article. See id. at 153. Because the Court did not address the key elements of the original source exception, the Rockwell decision did not materially affect the proposed standard. However, because there have been additional lower court decisions relating to the original source exception, the discussion of the meaning of the elements to the proposed framework has been updated and expanded.
As suggested by this framework, the “public disclosure bar” only applies if the answers to both of the first two questions are affirmative—there was a recognized public disclosure\(^{190}\) and the *qui tam* complaint was “based upon”\(^{191}\) such public disclosure. If the answer to either question is “no,” then the public disclosure bar does not apply, and the *qui tam* relator may proceed.

If the public disclosure bar applies, there is a four-part test to determine whether the “original source exception” applies. The relator must possess both “direct” and “independent knowledge” of the information on which the allegations are based.\(^{192}\) In addition, the information must support an essential element of the FCA cause of action. Finally, the relator must have voluntarily provided the information to the government prior to filing the *qui tam* suit.\(^{193}\)

The first two subparts should be addressed together: Did the relator have both direct and independent knowledge of the information? This means the relator must possess knowledge directly derived from the source or gained by the relator’s own efforts rather than through the efforts of others, and he must also have independent knowledge not derived from (or dependent upon) the public disclosure itself.\(^{194}\)

The next inquiry addresses the level of information required.\(^{195}\) The relator’s direct and independent knowledge cannot be merely background information, such as the name of the parties or description of contracts or programs. Rather, the relator must have direct and independent knowledge of information which supports an essential element of the FCA cause of action. However, this does not require the relator to possess direct and independent knowledge of the actual misrepresentations made to the government (e.g., an invoice).\(^{196}\) In addition, as we can infer from *Rockwell*, the relator need not be the source of, or have had a hand in, the public disclosure.\(^{197}\)

Finally, the FCA appears to require the relator to inform the government of the FCA allegations shortly before filing the *qui tam*

\(^{190}\) See *supra* note 65 and accompanying text (defining a qualifying public disclosure).

\(^{191}\) The courts are divided over what “based upon” means. Compare United States *ex rel. Paranich v. Sorgnard*, 396 F.3d 326, 334-35 (3d Cir. 2005) (based upon means “supported by” or “substantially similar to,” and not “actually derived from” the public disclosure), with United States *ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1348 (4th Cir. 1994) (based upon means actually derived from the public disclosure). This article does not fully analyze that standard.


\(^{194}\) See *supra* Part III.A.

\(^{195}\) See *supra* Part III.B.

\(^{196}\) The author evaluated this issue in his prior article. See *Hesch, supra* note 5, at 134-47.

\(^{197}\) See *supra* Part IV.
case.\textsuperscript{198} In other words, the relator must contact an appropriate government official, such as an Assistant United States Attorney, and inform him of the allegations. However, courts have not uniformly stated how far in advance such notice must be provided. A few courts have stated it cannot be simultaneous with filing the \textit{qui tam}.\textsuperscript{199} At least one court, however, has disregarded this requirement entirely, stating that if the relator cooperates with the government, the provision's intent is satisfied.\textsuperscript{200} There does not appear to be much value in demanding any prior notice, but if required, it should be very limited.

In sum, a relator falls into the original source exception if he satisfies the proposed gateway criteria.

\section*{V. Conclusion}

As the federal government's primary anti-fraud tool, it is important to properly understand and apply the standards for one of the most contested aspects of a \textit{qui tam} suit: whether a prior qualifying public disclosure bars a relator's suit. Despite hopes that the Supreme Court's \textit{Rockwell} decision would resolve the circuit split and articulate a uniform "original source exception" standard to the "public disclosure" bar of the False Claims Act, the Court failed to satisfy practitioners litigating FCA cases and federal courts alike. If adopted, this article's proposed standards and gateway flowchart would lead to uniform and appropriate FCA decisions for courts evaluating whether a relator meets the jurisdictional requirements necessary to satisfy the original source of information requirement in light of a prior qualifying public disclosure.

\begin{footnotesize}
\begin{itemize}
\item[198.] 31 U.S.C. § 3730(e)(4)(B). In \textit{Rockwell}, the Supreme Court did not address this issue. \textit{Rockwell}, 127 S. Ct. at 1410 (holding that "[b]ecause Stone did not have direct and independent knowledge of the information upon which his allegations were based, we need not decide whether Stone met the second requirement of original-source status, that he have voluntarily provided the information to the Government before filing his action").
\item[199.] \textit{E.g.}, United States \textit{ex rel.} Mathews \textit{v.} Bank of Farmington, 166 F.3d 853, 865-66 (7th Cir. 1999).
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