WILMERHALE

The Supreme Court's *Schindler Elevator* Decision on the False Claims Act's "Public Disclosure" Bar

2011-05-18

On May 16, 2011, the US Supreme Court issued an important decision in Schindler Elevator Corp. v. United States ex rel. Kirk, holding that a federal agency's written responses to Freedom of Information Act (FOIA) requests are "reports" within the meaning of the "public disclosure" bar of the False Claims Act (FCA). The decision provides additional and important support for defendants seeking to dismiss *qui tam* suits on this frequently litigated ground.

The *Schindler Elevator* Case

In 2005, Daniel Kirk, a former employee of Schindler Elevator, filed an FCA action against Schindler alleging that the company had submitted false claims for payment under federal contracts. (In particular, the alleged falsity derived from the company's failure to file certain reports, known as VETS-100 reports, required under the Vietnam Era Veterans' Readjustment Assistance Act of 1972, as well as its inclusion of false information in the reports it did file.) To support his allegations, Kirk relied on information that his wife received from the Department of Labor in response to FOIA requests seeking all of Schindler's VETS-100 reports. The Department responded to those requests in writing, providing copies of the reports it had on file and

informing Kirk's wife that no reports were found for certain years.

The company moved to dismiss on multiple grounds, including the public disclosure bar (as previously codified at 31 U.S.C. § 3730(e)(4)). The district court ruled that the relevant claims were based on either an administrative "report" or "investigation" under the statute and were therefore barred. The Second Circuit reversed, concluding that a federal agency's response to a FOIA request was neither a "report" nor an "investigation" under the FCA. That holding was consistent with the Ninth Circuit's decision in *United States ex rel. Haight v. Catholic Healthcare West*, 445 F.3d 1147 (9th Cir. 2006), but conflicted with the Third Circuit's decision in *United States ex rel. Mistick PBT v. Housing Authority of Pittsburgh*, 186 F.3d 376 (3d Cir. 1999).

The Supreme Court reversed, holding that a federal agency's written response to a FOIA request constitutes a "report" as that term is used in the public disclosure bar—and that "[a]ny records the agency produces along with its written FOIA response are part of that response." Slip op. 9. (The Court left open whether agency records that are released under FOIA, but not attached to a written response, fall within the public disclosure bar. *Id.* at 11.) In reaching this conclusion, the Court explained *inter alia* that the case "seems to us a classic example of the 'opportunistic' litigation that the public disclosure bar is designed to discourage," because "anyone could have filed the same FOIA requests and then filed the same suit" or "simply submit FOIA requests until he discovers a federal contractor who is out of compliance, and potentially reap a windfall" under the FCA. *Id.* at 11. The Court did not reach the broader question of whether the public disclosure bar precluded Kirk's suit, leaving for remand whether other statutory requirements of the bar were met.

Implications

This is the second time in two years that the Supreme Court has construed the public disclosure bar expansively to foreclose potential sources of information available to prospective *qui tam* relators. In *Graham County Soil and Water Conservation District v. United States ex rel. Wilson*, 130 S. Ct. 1396 (2010), the Court held that the bar encompassed reports and investigations from state or local agencies in addition to those at the federal level. Together, *Graham County* and *Schindler Elevator* reflect the Court's understanding of a broad public disclosure bar. In *Graham County*, the Court explained that the bar is intended to have "a broad[] sweep," *id.* at 1404, and that the statutory "touchstone" is whether the allegations have, in fact, been "public[ly] disclose[d]," *id.* at 1410. In *Schindler Elevator*, the Court further explained that the statute reflected "a wide-reaching public disclosure bar" and an "intent to avoid underinclusiveness." Slip op. 6.

Shortly after the Court decided *Graham County*, however, Congress abrogated that decision by amending the FCA to clarify that the bar was limited to reports and investigations at the federal level. *See* 31 U.S.C. § 3730(e)(4)(A)(i)-(ii). The dissenting justices in *Schindler Elevator* likewise called on Congress to do so again, noting that the Court's decision "severely limits whistleblowers' ability to substantiate their allegations" and that the matter was "worthy of Congress' attention." Unless and until that occurs, *Schindler Elevator* provides strong support for defendants seeking dismissal of *qui tam* suits under the public disclosure bar.

Click here to read the *Schindler Elevator* decision.

Authors

Christopher E. Babbitt

PARTNER

Co-Chair, False Claims Act Practice

christopher.babbitt@wilmerhale.com

+1 202 663 6681