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Little v. Shell - Bad News for Government Contractors

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On July 31, in United States ex rel. *Little v. Shell Exploration and Production Company*, the Fifth Circuit ruled that a federal employee is a "person" capable of bringing a whistleblower action under the False Claims Act. See No. 11-20320 (5th Cir. July 31, 2012). Importantly, however, the court limited when certain federal employees can bring whistleblower suits based on publicly disclosed information, ruling that government employees charged with alerting the government to fraud cannot take advantage of the original source exception and remanding the case for a determination of whether the public disclosure bar had been triggered.

In the case, two auditors for the Mineral Management Service (MMS), a former agency that administered the defendants' leases, brought a whistleblower action alleging that the defendants had defrauded the U.S. Department of the Interior of $19 million in royalties. Specifically, the auditors alleged that the defendants took unauthorized deductions for offshore oil storage expenses.

It was undisputed that the allegations came to light in the course of the auditors' official duties and that the auditors were required to, and did in fact, report the allegations to their supervisor. When the MMS and the Department of the Interior failed to act on the auditors' allegations, the auditors filed this qui tam action.

Overruling the district court, the Fifth Circuit held that government employees can have standing to bring whistleblower suits as "private parties" under Section 3730(b). First, analyzing the FCA's construction, the court found it reasonable to conclude that the statutory language

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did not exclude government employees from bringing suit. On the other hand, the court did not find persuasive that its ruling would run counter to federal conflict-of-interest rules.

Further, in reaching its decision, the court declined to adopt the government's argument that the FCA prohibits some classes of federal employees from bringing suit, but not others. The court opined that "fine tuning such exceptions would be based on little more than [the court's] perception of reasonable policy limits" and concluded that Congress was best suited to craft specific limits on government employees' ability to bring FCA suits.

Although the Fifth Circuit concluded that a government employee constitutes a "person" under the FCA, the court's ruling effectively extinguished certain government employees' ability to bring a FCA suit based on publicly disclosed information. In general, a whistleblower can bring an FCA lawsuit based on publicly disclosed information if he: (1) is the original source of the public disclosure and (2) voluntarily brings the fraud to the attention of the United States. Here, however, the Fifth Circuit held that the auditors could not qualify for the original source exception.

Agreeing with the district court and other courts, the court found that a whistleblower who is employed by the government in a job specifically intended to disclose fraud cannot disclose fraud to the government on a voluntary basis - meaning the whistleblower cannot take advantage of the FCA's original source provision. Thus, if on remand the defendants could prove that the auditors' claims were derived from publicly disclosed information, the qui tam action would fail.

At first blush, this ruling is bad news for government contractors and others that regularly do business with the government, as it suggests that contract administrators and other government employees can bring whistleblower actions even if their agency superiors do not find the alleged misconduct worthy of further investigation. This expansion of the FCA could increase the number of meritless qui tam lawsuits brought by disgruntled and self-interested government employees.

Whether courts or agency officials limit government employees' ability to keep their whistleblower proceeds may affect the prevalence of this type of qui tam action in the future. For now, entities that routinely do business with the government should take heart in the court's holding that government employees charged with uncovering fraud cannot take advantage of the original source exception to the public disclosure bar. As such, when a government agency publicly releases information in connection with a fraud investigation, a government employee cannot use the information to bring an opportunistic qui tam lawsuit.