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*Rockwell International, Pondcrete, and an A La Carte
Three-Step Test for Determining an “Original
Source” in Qui Tam Lawsuits*

In 1999, George Couto, a former Bayer marketing executive, attended a management meeting on ethics.¹ As he compared Bayer’s practices in the marketing department with the ethical principles discussed in the meeting, he grew increasingly uncomfortable with the prices the company charged Medicaid for some of its pharmaceutical products. Ignored by management, he decided to file a civil suit in federal district court on behalf of the United States. The lawsuit he initiated led to a \$257 million dollar settlement for the taxpayers, a small portion of which he and his lawyers kept for blowing the whistle.² Mr. Cuoto’s situation is not isolated.

The United States will spend a staggering \$2.918 trillion in the 2008 fiscal year.³ Of that amount, the government will pay a significant portion to companies providing goods and services via government contracts. In the immense federal acquisitions bureaucracy, some of those companies will seek to defraud taxpayers, and the resulting government payments made to these companies will become needles in the budget haystack. Well-meaning whistleblowers are often the taxpayers’ first line of defense—by alerting the Justice Department of alleged fraud, they help ferret out

1. QuiTamHelp.com, Why Become a Whistleblower?, <http://quitamhelp.com/static/stories/stories.html> (last visited Oct. 8, 2008). Couto explained in a deposition why he blew the whistle:

I continuously got more uneasy as the private labeling program expanded, as more people learned about it, as Bayer began to use it almost as a routine marketing practice. It was one drug and then it was two drugs and now it’s three drugs . . . I attended a compliance training program in February of [1999], I’m told by Joe D’Arco, our lead counsel, and I’m told by [CEO] Helge Wehmeier on video to not only follow the letter of the law but the spirit of the law as well. So here I am, a market manager with full knowledge and awareness of a program that clearly is not within the spirit of the law at a minimum . . . It’s the only ethical thing to do.

Id.

2. QuiTamHelp.com, Executive Whistleblowers, http://quitamhelp.com/static/popup/article_01.html#bayer (last visited Oct. 8, 2008).

3. OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, MID-SESSION REVIEW: BUDGET OF THE U.S. GOV’T, FISCAL YEAR 2008, at 15 (2007), *available at* <http://www.whitehouse.gov/omb/budget/fy2008/pdf/08msr.pdf>.

the needle. The False Claims Act (“FCA”) authorizes these lawsuits,⁴ which are commonly referred to as *qui tam* actions—*qui tam* are the first two words of the Latin phrase describing the English law that allowed a private party to file a lawsuit on behalf of the government.⁵

Not every *qui tam* action results in a large recovery for taxpayers, but the combined efforts of whistleblowers are the basis for the majority of recovered funds. During the fiscal year ending September 30, 2007, the United States recovered \$2 billion from companies either accused of or found guilty of defrauding the government.⁶ Of this total, whistleblowers initiated lawsuits that led to \$1.45 billion in settlements and judgments against these companies,⁷ a figure that represents 72.5% of the total recoveries.

Despite whistleblower success in *qui tam* actions, it may be more difficult than necessary to bring these cases to trial because the language of the FCA is, in many instances, ambiguous. This fact is unfortunate for the Justice Department because it makes litigation more difficult and expensive than it needs to be. It is also unfortunate for whistleblowers and their attorneys who face the prospects of financing the law’s clarification. Jurisdictions have interpreted the Act’s language differently, causing various circuit court splits. The consequence of these splits has been inconsistent application of the law to similar fact situations and the related vice of forum shopping by whistleblowers and their counsel.⁸ One such circuit court split which has particular forum shopping incentive is the meaning of the legislative phrase “direct and independent knowledge.” In short, when a case of fraud on the federal government has been made public, the law bars jurisdiction of a *qui*

4. 31 U.S.C. §§ 3729–31 (2000).

5. See 3 WILLIAM BLACKSTONE, COMMENTARIES *125, *161–62 (explaining that “*qui tam*” derives from the Latin phrase *qui tam pro domino rege, etc. quam pro se ipso in hac parte sequitur*: “who prosecutes this suit as well [as] for the king, etc. as for himself”).

6. Press Release, U.S. Dep’t of Justice, Justice Dep’t Recovers \$2 Billion for Fraud Against the Gov’t in Fy 2007; More than \$20 Billion Since 1986 (Nov. 1, 2007), available at http://www.usdoj.gov/opa/pr/2007/November/07_civ_873.html.

7. *Id.*

8. Forum shopping leads to inefficiency by preventing out-of-court settlements and, philosophically, makes the legal system seem susceptible to manipulation. It is more famously seen in the world of patent litigation. See, e.g., Kimberly A. Moore, *Forum Shopping in Patent Cases: Does Geographic Choice Affect Innovation?*, 79 N.C. L. REV. 889, 893–94 (2001) (arguing that forum shopping shows that the promise of justice is unattainable and that it is economically inefficient because, by preventing accurate forecasting of the outcome of litigation, forum shopping prevents parties from settling out of court).

tam claim unless the claimant had “direct and independent knowledge” of the alleged fraud.⁹ As such, *qui tam* claimants have great incentive to file in a court where their claim may survive a motion to dismiss for lack of jurisdiction. In 2007, the Supreme Court decided *Rockwell International Corp. v. United States*, an FCA case that, while not resolving every circuit split, may provide some guidance to aid in determining whether a court may assert jurisdiction over a whistleblower’s case. The thesis of this Comment is that *Rockwell’s* reasoning created a three-step, *a la carte* test that enables the circuit courts to apply a predictable jurisdictional standard to whistleblowers’ suits. When applying the proposed three-step test, circuit courts need only apply the applicable portions of the test, thus eliminating unnecessary changes to current case law beyond what has already been established by *Rockwell*.

This Comment proceeds by introducing the legislative and historical context of *qui tam* actions under the FCA in Part I. Part II summarizes the circuit court split on the meaning of the phrase “direct and independent knowledge.” Part III applies *Rockwell’s* holding to the split to show that “independent” no longer has a discrete meaning from “direct” and that “knowledge” could now include a prediction. Part IV proposes a three-step test that would resolve the circuit court split while staying true to *Rockwell*.

I. UNDERSTANDING THE FALSE CLAIMS ACT

During the Civil War, Congress enacted the FCA to encourage government contractors to bill honestly despite a lack of government oversight.¹⁰ The FCA allows a private party, or relator, to sue a government contractor for fraud on behalf of the government and to keep a portion of any award recovered.¹¹ Theoretically, the FCA encouraged contractor employees to betray co-conspirators in order to collect a portion of the government’s recovery, thereby making up for inadequate policing during a time of war by “setting a rogue to catch a rogue.”¹² Unfortunately, Congress used vague language in the FCA, and in 1943, the Supreme Court interpreted the Act to

9. 31 U.S.C. § 3730(e)(4)(b) (2000).

10. Act of Mar. 2, 1863, ch. 67, § 4, 12 Stat. 698 (1863) (current version at 31 U.S.C. §§ 3729–31).

11. 31 U.S.C. §§ 3729–31 (2000). The FCA effectively allows any relator to become an attorney general for the United States.

12. CONG. GLOBE, 37th Cong., 3d Sess. 955–96 (1863).

allow private litigants to bring civil suits on behalf of the government even if the relator had done no more than copy the complaint from published criminal indictments.¹³ Predictably, attorneys nationwide began to file parasitic *qui tam* civil suits—parasitic because the attorney obtained all the information for the civil suit from a criminal indictment by the Justice Department. This problem siphoned funds that would otherwise have been returned to the taxpayers into the private coffers of these attorneys, which provided incentive for congressional action. Within months, Congress amended the FCA to bar *qui tam* suits “based upon evidence or information in the possession of the United States”—an effort to curtail parasitic civil suits in those cases where the government already had the information it needed to pursue a civil action.¹⁴

This congressional remedy had its own problems, however. Over time, the number of *qui tam* suits decreased markedly, and as it did, government contractors more frequently engaged in fraudulent activities involving increasingly higher dollar amounts.¹⁵ This version of the FCA went too far, “kill[ing] the goose that laid the golden egg”: a whistleblower could no longer inform government enforcement agencies of false claims and successfully file a *qui tam* complaint because once the government had the information from the whistleblower, the courts dismissed the relator’s civil case.¹⁶ Effectively, these precedents cut off the FCA’s monetary incentive for an insider to blow the whistle on his company. In 1986, Congress decided to change course again to encourage

13. United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 546–47 (1943).

14. Act of Dec. 23, 1943, 57 Stat. 608 (codified at 31 U.S.C. § 3730(b)(4) (1976)).

15. The False Claims Amendments Act of 1986, S. REP. NO. 99-345, at 2 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5266–302 [hereinafter *Senate Report*].

Evidence of fraud in Government programs and procurement is on a steady rise. In 1984, the Department of Defense conducted 2,311 fraud investigations, up 30 percent from 1982. Similarly, the Department of Health and Human Services has nearly tripled the number of entitlement program fraud cases referred for prosecution over the past 3 years. Detected fraud is, of course, an imprecise measure of how much actual fraud exists. The General Accounting Office in a 1981 study found that ‘most fraud goes undetected.’ Of the fraud that is detected, the study states, the Government prosecutes and recovers its money in only a small percentage of cases The Department of Justice has estimated fraud as draining 1 to 10 percent of the entire Federal budget.

Id. at 2–3, reprinted in 1986 U.S.C.C.A.N. at 5266–68.

16. United States *ex rel.* Findley v. FPC-Boron Employees’ Club, 105 F.3d 675, 680 (D.C. Cir. 1997).

whistleblowers by repealing the “government knowledge” bar and replacing it with the current “public disclosure” bar, which allowed an “original source” to file a *qui tam* complaint even if the allegations of the false claim were available to the public.¹⁷ According to the language of the 1986 amendment, an “original source” is one who “has direct and independent knowledge of the information on which the allegations are based.”¹⁸ By this change, Congress hoped to find the right balance between encouraging whistleblowers and preventing parasitic suits.

Courts have struggled to interpret the 1986 amendment,¹⁹ however, and its ambiguities further muddled *qui tam* litigation. Due, at least in part, to the poor drafting of the statute, the circuits have split on interpretation of the FCA. A current split exists in regards to the original source exception to the public disclosure bar that blatantly encourages forum shopping.²⁰

The Supreme Court waded into the bog by taking a *qui tam* case, *Rockwell International Corp. v. United States*,²¹ in the 2006–07 term, which clarified at least two circuit court splits, but left others alive and well.²² Of those alive and well is the issue of how much “direct and independent knowledge” a *qui tam* relator must have in order to be an original source.²³ The courts of appeals have defined “direct” in similar terms, but definitions of “independent” vary: some have held that it has a separate meaning from direct, while

17. 31 U.S.C. § 3730(e)(4)(A) (2000).

18. 31 U.S.C. § 3730(e)(4)(B) (2000). The details of this definition are often litigated. See discussion *infra* Part II.

19. See, e.g., Tipton F. McCubbins & Tara I. Fitzgerald, *As False Claim Penalties Mount, Defendants Scramble for Answers: Qui Tam Liability*, 31 U.S.C. § 3729 *et seq.*, 62 BUS. LAW. 103, 125 (2006) (“[N]o two circuit courts of appeals who have been called upon to apply the [original source] definition seem to have interpreted it in exactly the same manner.”).

20. See discussion *infra* Part II.B.

21. 127 S. Ct. 1397, 1410 (2007).

22. Aaron P. Silberman & David F. Innis, *The Supreme Court Raids the Public Disclosure Bar: Cleaning Up After Rockwell International v. United States*, 42 PROCUREMENT LAW. 1, 1 (2007). Silberman and Innis point out that among the still unsettled *qui tam* issues are: “sufficiency of public disclosure to trigger the jurisdictional bar; quantum of direct and independent knowledge necessary to be an original source; and whether a relator must have been the catalyst for a public disclosure in order to qualify as an original source.” *Id.* at 20.

23. United States *ex rel.* Findley v. FPC-Boron Employees’ Club, 105 F.3d 675, 686 (D.C. Cir. 1997) (identifying six circuit splits based on phrases from the FCA). Judge Wald, writing for the majority, asserts that despite the disagreement in the circuit courts, they do all agree that “the language of the statute is not so plain as to clearly describe which cases Congress intended to bar.” *Id.* at 681.

others have applied a definition that roughly collapses the two terms together.²⁴ *Rockwell*'s holding does not specifically adopt definitions, but its analysis points to a consolidated definition and introduces the idea that a prediction could qualify as "knowledge." In this way, *Rockwell* extinguishes the separate meanings for the terms "direct" and "independent."

II. "DIRECT AND INDEPENDENT KNOWLEDGE" TESTS IN THE CIRCUIT COURTS

Whether the 1986 amendment's public disclosure bar and original source exception were jurisdictional was unsettled for a time,²⁵ but in *Rockwell* the Supreme Court clearly holds that the public disclosure bar, at least, is jurisdictional.²⁶ This means that when the public disclosure bar applies, it removes subject matter jurisdiction, and it takes effect on a claim-by-claim basis instead of on a case-by-case basis,²⁷ unless the attorney general or a relator who qualifies as an original source brings the action. Thus the bar may result in dismissing only some claims of a relator, leaving the case to continue in litigation. Although *Rockwell* clearly held that the public disclosure bar was jurisdictional, the case had a complicated and unique fact pattern that may affect its precedential value regarding specific circuit court splits.²⁸ One complex split still exists regarding the public disclosure bar: how the courts decide if a relator is an "original source."

A. The FCA's Public Disclosure Bar and the Original Source Exception

By passing the 1986 amendments to the FCA, Congress hoped to encourage whistleblowers to report fraud against the government and to bar parasitic lawsuits by litigants who discovered fraud via a

24. See discussion *infra* Part II.B.

25. Compare *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 951 (1997) (stating that the 1986 amendment "creates jurisdiction where none previously existed"), with *United States ex rel. Fallon v. Accudyne Corp.*, 97 F.3d 937, 940-41 (7th Cir. 1996) (observing that "jurisdiction is a notoriously plastic term" and holding that the public disclosure bar does not destroy subject matter jurisdiction).

26. *Rockwell*, 127 S. Ct. at 1405-06 (considering the arguments for and against before holding that the public disclosure bar is jurisdictional).

27. *Id.* at 1410 (concluding that the FCA applies to *qui tam* actions on a claim-by-claim basis because to hold otherwise would permit "claim smuggling").

28. See *id.* at 1401.

third party or intermediary.²⁹ Taking advantage of the statute, many whistleblowers have filed suit and their cases have created a substantial, though varied, case history. Most litigation involving the FCA has dealt with the public disclosure bar³⁰ and often with the specific issue of whether the putative relator truly qualifies as an “original source.” The FCA provides:

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.³¹

This statutory provision preserves jurisdiction in all cases when the attorney general brings the suit, but complicates jurisdiction for a *qui tam* relator. Courts often must decide if a “public disclosure” has occurred, and the circuits have reached different outcomes on similar fact patterns. For example, the Second and Third Circuits have held that allegations resulting from information obtained through discovery in a civil case were publicly disclosed; but the Seventh, Ninth, Tenth, and District of Columbia Circuits have held that allegations resulting from the same type of information were not publicly disclosed, but only became potentially available to the public.³² Because the resolution of this issue determines jurisdiction, this split encourages forum shopping.

29. *Senate Report*, *supra* note 15, at 13, *reprinted in* 1986 U.S.C.C.A.N. at 5278.

30. *See* ROBIN PAGE WEST, ADVISING THE QUI TAM WHISTLEBLOWER: FROM IDENTIFYING A CASE TO FILING UNDER THE FALSE CLAIMS ACT 10 (2001) (“[T]he ‘public disclosure bar’ is the most confusing and most-often litigated” part of the FCA that makes claims non-actionable.); Silberman & Innis, *supra* note 22, at 1 (asserting that the public disclosure bar is “the most important, most litigated, affirmative defense to *qui tam* actions”).

31. 31 U.S.C. § 3730(e)(4)(A) (2000).

32. WEST, *supra* note 30, at 10–11. For cases in which discovery in a civil trial is public disclosure, see *United States ex rel. Kreindler & Kreindler v. United Techs.*, 985 F.2d 1148, 1157–58 (2d Cir. 1993); *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1158 (3d Cir. 1991). For cases in which discovery in a civil trial is not public disclosure, see *United States v. Bank of Farmington*, 166 F.3d 853, 860 (7th Cir. 1999); *United States ex rel. Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512, 1519–20 (9th Cir. 1995), *vacated*, 520 U.S. 939 (1997); *United States ex rel. Ramseyer v. Century Healthcare Corp.*, 90 F.3d 1514, 1519 (10th Cir. 1996); *United States ex rel. Springfield Terminal Ry., v. Quinn*, 14 F.3d 645, 652–53 (D.C. Cir. 1994).

If a public disclosure has occurred, the court must confront another difficult issue: deciding what Congress specifically intended by allowing an “original source” to bring a *qui tam* suit when the fraud had previously been publicly disclosed. In formulating the statutory definition, Congress tried to remedy the problem of the “government knowledge” test and to protect whistleblowers’ *qui tam* suits,³³ so courts are rightly concerned about getting the standard correct. The FCA defines an “original source” as “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.”³⁴

Almost every phrase in the definition has generated its own case history,³⁵ including “direct and independent knowledge.” Although circuit splits exist, since the change in law the number of *qui tam* suits has increased and *qui tam* relators have collected larger amounts in damages, suggesting that the pendulum has shifted in the direction of discouraging corporate silence and encouraging more whistleblowers.³⁶ This may indicate that those knowing of fraud against the government are increasingly deciding to report the wrongdoing and that they are doing so when more money is at stake.³⁷ Standardizing the existing FCA jurisprudence may further this trend, thereby making the FCA a more effective tool to protect the fiscal resources of our national government. One necessary step is to standardize the amount of “direct and independent knowledge” a relator must have in order to be an original source.

33. *Senate Report*, *supra* note 15, at 4, *reprinted in* 1986 U.S.C.C.A.N. at 5269 (noting that the “original source” definition should permit suits by “individuals who are either close observers or otherwise involved in the fraudulent activity”).

34. 31 U.S.C. § 3730(e)(4)(B) (2000).

35. *See, e.g.*, *United States ex rel. Findley v. FPC-Boron Employees’ Club*, 105 F.3d 675, 681 (D.C. Cir. 1997) (“Predictably, these jurisdictional provisions . . . have led to extensive litigation and to circuit splits concerning the meaning of the words ‘based upon,’ ‘public disclosure,’ ‘allegations or transactions,’ ‘original source,’ ‘direct and independent knowledge’ and ‘information.’”); PROCUREMENT FRAUD COMMITTEE, ABA, QUI TAM LITIGATION UNDER THE FALSE CLAIMS ACT 48–52 (2d ed. 1999) (examining the various definitions of “original source” in court holdings).

36. *McCubbins & Fitzgerald*, *supra* note 19, at 103.

37. The statute also controls the awarding of damages to a successful *qui tam* relator. In short, the relator receives between 10 and 25 percent if the government intervenes in the suit, and between 25 and 30 percent if the government does not. The court reduces that amount if the relator planned or initiated the fraud. *See* 31 U.S.C. § 3730(d)(3) (2000).

B. The Circuit Split on “Direct and Independent Knowledge”

Each word in the phrase “direct and independent knowledge” has been litigated, and the circuit courts differ so much with regard to “independent” that there is no true “majority” test.³⁸ This section categorizes the circuit splits by analyzing how courts have analyzed “direct and independent knowledge.” Some courts have analyzed the two adjectives separately, while others have only one test for the phrase “direct and independent.” Because of the split, the current circuit court jurisprudence resolves similar factual scenarios differently. In one circuit, a relator’s knowledge might be considered direct but not independent; in another, it might be independent but not direct. In addition, some circuits might hold that the relator’s knowledge is both direct and independent but that the relator is still not an original source because he did not cause the public disclosure. A complete summary of the circuit court splits in this area is beyond the scope of this Comment,³⁹ but it is enough to consider the four categories into which the circuits’ approaches fall.

The circuit courts agree in their interpretations of “direct.” Generally, “direct knowledge” is “marked by absence of an intervening agency, instrumentality or influence,”⁴⁰ or “gained by the relator’s own efforts and not acquired from the labor of others.”⁴¹ The central idea is that for a relator to be an “original source,” he must have obtained knowledge of the information in his complaint, or of publicly disclosed information, without the aid of an intermediary. So, for example, if employee *A* reads a document at work and discovers fraud through his reading, this conduct would

38. McCubbins & Fitzgerald, *supra* note 19, at 124–125. The authors categorize the circuits into four schools of thought, with the Tenth Circuit being alone in its approach, using the courts’ interpretations of “direct and independent knowledge” as the major differentiation for each school. *Id.*

39. For such a summary, see McCubbins & Fitzgerald, *supra* note 19, at 124–25.

40. United States *ex rel.* Minn. Assoc. of Nurse Anesthetists, 276 F.3d 1032, 1048–49 (citing United States *ex rel.* Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co., 944 F.2d 1149, 1160 (3d Cir. 1991)).

41. United States *ex rel.* Hafter v. Spectrum Emergency Care, Inc., 190 F.3d 1156, 1161 (10th Cir. 1999); *see also* United States v. Mackby, 261 F.3d 821, 826 (9th Cir. 2001) (asserting that the government/relator must show (1) a fraudulent claim (2) presented by the defendant to the United States for approval, and (3) that the defendant knew the claim was false); United States *ex rel.* Aflatooni v. Kitsap Physicians Servs., 163 F.3d 516, 526 (9th Cir. 1999) (holding that a relator who only alleges the fraud, but who cannot offer individual knowledge as proof, is not an original source).

satisfy the test for direct knowledge because it is an unaided, first-hand effort. If, however, employee *B* writes a report detailing the fraudulent situation and later asks *A* to read it for errors, then *A* is not an original source because his effort was helped by a third party, *B*, who first discovered the fraud, so *A*'s information is secondhand. In circuits where there is no distinction between the terms "independent" and "direct," this test would satisfy "independent" as well.

Of the four split categories, the first two groups differ in that the Sixth, Seventh, and District of Columbia Circuits generally do not allow the relator to be an original source where the public disclosure occurred before the relator reported to the government, while the Third, Fourth, Fifth, Eighth, and Eleventh Circuits will still allow the relator be an original source in such a circumstance. In general the Second, Ninth, and Tenth Circuits have not worried too much about separate definitions for "direct" and "independent," instead treating them as a cohesive phrase, but in the Second and Ninth Circuits the relator must satisfy a third requirement, that of having caused the public disclosure.

In circuits holding that "information" refers to the allegations in the relator's complaint, the terms "direct" and "independent" have a combined meaning.⁴² For these courts, the meaning of "direct and independent" collapses into what is substantially the same meaning as "direct": "unmediated by anything but [the relator's] own labor."⁴³ Moreover, while some of these courts address each term separately, the definition they assign to "independent" is that the knowledge is "not derivative of the information of others."⁴⁴ Defined as such, there is really no distinction between the meaning of "independent" and "direct"—both terms would require the *qui tam* relator to have firsthand knowledge of the fraud.⁴⁵ Using this

42. *Hafter*, 190 F.3d at 1162–63. In *Hafter*, the Tenth Circuit held that to satisfy the "direct and independent knowledge" requirement, a relator must offer more than "secondhand information, speculation, background information or collateral research." *Id.* The relator "must allege specific facts . . . showing exactly how and when he or she obtained direct and independent knowledge of the fraudulent acts alleged in the complaint and support those allegations with complete proof." *Id.*

43. *Wang v. FMC Corp.*, 975 F.2d 1412, 1417 (9th Cir. 1992).

44. *Hafter*, 190 F.3d at 1161.

45. *United States ex rel. Laird v. Lockheed Martin Eng'g & Sci. Servs. Co.*, 336 F.3d 346, 354–55 (5th Cir. 2003) (summarizing the definitions of the terms, then noting that

construction, courts could provide one definition of “direct and independent” and perform one analysis instead of performing two analyses or defining both terms prior to performing one analysis. Conversely, courts that have distinct definitions require two separate analyses to make a determination.

In those circuits that have held that “information” refers to the publicly disclosed allegations, the two terms do have discrete and distinct definitions. “Direct” refers to information that is “first-hand knowledge” obtained only through the relator’s efforts,⁴⁶ as is the case in the other circuits. In order to qualify as “independent,” however, the relator’s information may not “derive[] from the public disclosure.”⁴⁷ This definition subtly differentiates directness from independence by examining the source of the knowledge against the public disclosure.

In applying the words as a cohesive phrase—“direct and independent” knowledge—the Second and Ninth Circuits require the *qui tam* relator to have caused the public disclosure, if one exists, in order to be an original source.⁴⁸ Indeed, the Ninth Circuit expressly held that a relator who had not revealed his knowledge of fraud on the government until after the same information had been disclosed was barred from bringing a *qui tam* suit even though his knowledge was “direct and independent.”⁴⁹ This takes the analysis a step beyond the statutory language by looking to congressional intent and the practical motivation for *qui tam* suits. The court reasoned that if “direct and independent” means only first-hand knowledge, then a person possessed of that knowledge has it for all time. Therefore, even if a case of fraud has already been publicly disclosed, a would-be relator possessing first-hand knowledge would qualify as an original source because the “direct and independent”

“[w]e fail to see a distinction between these terms as so defined”), *overruled in part by* *Rockwell Int’l Corp. v. United States*, 127 S. Ct. 1397 (2007).

46. *United States ex rel. Findley v. FPC-Boron Employee’s Club*, 105 F.3d 675, 690 (D.C. Cir. 1997); *see also* *United States ex rel. Kreindler & Kreindler v. United Techs. Corp.*, 985 F.2d 1148, 1159 (2d Cir. 1993) (holding that knowledge of background information that enables an understanding of the significance of publicly disclosed information does not qualify a relator as an original source).

47. *United States ex rel. Minn. Ass’n of Nurse Anesthetists v. Allina Health Sys. Corp.*, 276 F.3d 1032, 1048 (8th Cir. 2002) (citing *United States ex rel. Barth v. Ridgedale Elec., Inc.*, 44 F.3d 699, 703 (8th Cir. 1995)).

48. *Wang*, 975 F.2d at 1418–20; *United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13, 16–18 (2d Cir. 1990).

49. *Wang*, 975 F.2d at 1417–18.

test is satisfied. Of course, the value of this outcome is doubtful because if the public knows of the fraud, the Attorney General no longer needs a whistleblower to come forward—prosecutorial attention has already been drawn. In such a case there is no hero who saves the public from fraud, for a true whistleblower “sounds the alarm; he does not echo it.”⁵⁰ Congress wanted *qui tam* suits to reward “those brave enough to speak in the face of a ‘conspiracy of silence,’ and not their mimics” who have done nothing to break the “conspiracy of silence.”⁵¹ Accordingly, the Ninth Circuit has inferred a requirement from the statute that the relator be the whistleblower in order to qualify for the exception. While this approach seems to satisfy congressional intent, other circuits have expressly rejected it as adding to the actual language of the statute.⁵²

The following table summarizes the splits, although in some jurisdictions there are cases that would blur bright boundaries:⁵³

50. *Id.* at 1419.

51. *Id.* (quoting *Senate Report*, *supra* note 15, at 6).

52. *See, e.g., Minn. Ass'n of Nurse Anesthetists*, 276 F.3d at 1048 n.11 (“That rule would perhaps be an improvement in the operation of the original source provision, but it has no basis in the statutory language and we therefore decline to adopt it.”).

53. *E.g., compare Wang*, 975 F.2d at 1417 (holding that a relator’s knowledge “was ‘direct and independent’ because it was unmediated by anything but [the relator’s] own labor”), *with United States v. Alcan Elec. & Eng'g, Inc.*, 197 F.3d 1014, 1020–21 (9th Cir. 1999) (holding that a relator’s knowledge was “independent” because it preceded the public disclosure but was not direct because the relator obtained it through an intermediary).

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*A La Carte Three-Step Test in Qui Tam Lawsuits*Table 1. Summary of Circuit Court Splits for “Direct and Independent”⁵⁴

Circuit Court Group	Test for “Direct”	Test for “Independent”	Test for “Direct and Independent”	Additional Test
6th, 7th, & D.C. Circuits ⁵⁵	Relator has first-hand knowledge	Relator is “the” first source of information		
3d, 4th, 5th, 8th, & 11th Circuits ⁵⁶	Relator obtained knowledge without an intermediary	Relator is “a” source of information		
10th Circuit ⁵⁷			Relator has first-hand knowledge	
2d & 9th Circuits ⁵⁸			Relator obtained knowledge without an intermediary	Relator caused the public disclosure

The split over directness and independence causes forum shopping. Consider again the situation of employees *A* and *B*, in

54. See McCubbins & Fitzgerald, *supra* note 19, at 124–31.

55. United States *ex rel.* Findley v. FPC-Boron Employees’ Club, 105 F.3d 675, 690 (D.C. Cir. 1997); United States v. Bank of Farmington, 166 F.3d 853, 865 (7th Cir. 1999); United States *ex rel.* McKenzie v. Bell South Telecomms., Inc., 123 F.3d 935, 943 (6th Cir. 1997), *cert. denied*, 522 U.S. 1077 (1998).

56. *Minn. Ass’n of Nurse Anesthetists*, 276 F.3d at 1042–43; Fed. Recovery Servs., Inc. v. United States, 72 F.3d 447, 451–52 (5th Cir. 1995); Cooper v. Blue Cross & Blue Shield of Fla., Inc., 19 F.3d 562, 568 (11th Cir. 1994); United States *ex rel.* Siller v. Becton Dickinson & Co., 21 F.3d 1339, 1347 (4th Cir. 1994), *cert. denied*, 513 U.S. 928 (1994); United States *ex rel.* Stinson, Lyons, Gerlin & Bustamante, P.A., v. Prudential Ins. Co., 944 F.2d 1149, 1160 (3d Cir. 1991). Under this construction, relators can be an original source even when they come to the government after the public disclosure; this is in direct conflict with the Second and Ninth Circuits.

57. United States *ex rel.* Hafter v. Spectrum Emergency Care, Inc., 190 F.3d 1156, 1162 (10th Cir. 1999) (“Direct and independent knowledge is ‘marked by the absence of an intervening agency . . . [and] unmediated by anything but the relator’s own labor.’” (quoting United States *ex rel.* Fine v. MK-Ferguson Co., 99 F.3d 1538, 1547 (10th Cir. 1996))).

58. *Wang*, 975 F.2d at 1417–18; United States *ex rel.* Dick v. Long Island Lighting Co., 912 F.2d 13, 16–18 (2d Cir. 1990).

which *A* has discovered a document written by *B* that details *B*'s discovery of fraud. In the majority of the circuits, *A* fails the directness test, but passes the independence test because her knowledge does not derive from a public disclosure. Altering the scenario slightly can yield the opposite result. If *B* publishes a document that evidences fraud but does not recognize that the fraud exists and *A* discovers the fraud by reading *B*'s published document, then *A*'s knowledge satisfies the directness test because it is first-hand but fails the independence test because it derives from a public disclosure. In this scenario only a court in the Tenth Circuit would take jurisdiction over *A*'s *qui tam* complaint. If, however, employee *A* was in charge of the publishing of *B*'s document, then jurisdiction would also exist in the Second and Ninth Circuits.

Thus, based on its interpretation of the term "direct and independent," a federal court in one circuit might accept jurisdiction over a *qui tam* action even though the courts of another circuit would refuse jurisdiction on the very same case. These differing results create a significant incentive for forum shopping. This incentive may be particularly strong in the *qui tam* context because the often widespread operations of government contractors provide a broad range of potential forums and because a jurisdictional bar will defeat an otherwise meritorious case. Recognizing the importance of forum differences, at least one practitioner's guide for *qui tam* litigation specifically advises attorneys to forum shop based on the public disclosure bar.⁵⁹

Currently, the circuits employ a variety of tests. Some focus heavily on the words of the statute while failing to consider thoroughly the usefulness of the relator's information to the government's case. Others focus more on the intent of Congress, which has resulted in the addition of requirements not included in the statutory language, namely, that the relator must be responsible for any public disclosure. A uniform test would allow courts to more effectively utilize the FCA by discouraging, if not eliminating, the incentive for forum shopping and by making the jurisdictional success of *qui tam* cases more predictable.

59. WEST, *supra* note 30, at 10–11 ("[T]he cautious lawyer will develop his or her case and select a forum only after a careful review of the applicable case law.").

III. THE SUPREME COURT SPEAKS (OR DOESN'T): *ROCKWELL INTERNATIONAL CORP. V. UNITED STATES*

The facts giving rise to *Rockwell* presented several *qui tam* issues for the Court to resolve, among them the quantum of direct and independent knowledge necessary for a relator to qualify as an original source. Although the Court never reached a holding on this point, the majority's analysis provides new guidance that should resolve some of the ambiguity in the current jurisprudence.

A. *Toxic Sludge and Pondcrete*

In 1975, the United States Department of Energy hired Rockwell International Corporation to operate the Rocky Flats nuclear weapons manufacturing facility in Colorado.⁶⁰ The manufacturing process at Rocky Flats created toxic waste that collected in evaporation ponds on the site.⁶¹ Relator James Stone worked at the plant from November 1980 until Rockwell laid him off in March 1986.⁶² While at Rocky Flats, Mr. Stone reviewed for approval a project to dispose of the toxic pond sludge by mixing it with concrete; he informed management that the project “would not work” because the piping system for removing the sludge “would lead to an inadequate mixture of sludge/waste and cement such that the pond crete blocks would rapidly disintegrate”⁶³ Rockwell's management disregarded Mr. Stone's prediction and proceeded with the pondcrete project, which successfully produced pondcrete until “cost-saving” engineers cut the ratio of concrete to sludge in an effort to increase production.⁶⁴ The pondcrete blocks produced after the change became chemically unstable and leaked toxins.⁶⁵

In June of 1987, after Rockwell fired Mr. Stone, Mr. Stone went to the Federal Bureau of Investigation and informed the agency that Rockwell had been violating environmental laws at Rocky Flats.⁶⁶ After meeting with Mr. Stone to review his evidence, the FBI began

60. *Rockwell Int'l Corp. v. United States*, 127 S. Ct. 1397, 1401 (2007).

61. *Id.*

62. *United States ex rel. Stone v. Rockwell Int'l Corp.*, 92 F. App'x 708, 714 (10th Cir. 2004) (reh'g granted), *rev'd on other grounds sub nom. Rockwell*, 127 S. Ct. at 1412.

63. *Rockwell*, 127 S. Ct. at 1401–02 (internal quotation marks omitted).

64. *Id.* at 1402, 1404.

65. *Id.* at 1402.

66. *Stone*, 92 F. App'x at 714 (reh'g granted).

an investigation, and in June 1989, pursuant to a search warrant, seventy-five agents from the FBI and the Environmental Protection Agency searched Rockwell's plant.⁶⁷ The FBI disclosed the investigation to news media three days after the search,⁶⁸ and in July of that year Mr. Stone, relying on original source status, filed a *qui tam* complaint.⁶⁹ He alleged, *inter alia*, that Rockwell committed violations of various environmental laws and regulations and fraudulently billed the government, including charging for pondcrete that successfully stored the toxic waste when it actually leaked toxins.⁷⁰

While Stone's claim proceeded, in 1992, Rockwell entered into a plea deal with the United States.⁷¹ Rockwell admitted to various violations of environmental laws and paid \$18.5 million in fines.⁷² Following the plea deal, Rockwell moved to dismiss Mr. Stone's *qui tam* complaint for lack of subject matter jurisdiction under the FCA because the information in the complaint had been publicly disclosed and Stone did not qualify as an "original source."⁷³ Rockwell argued that the FBI leak triggered the public disclosure bar and that Mr. Stone could not satisfy his burden of showing that he was an original source.⁷⁴ The district court held that Mr. Stone satisfied the burden of showing that he was an original source because he had "direct and independent knowledge that Rockwell's compensation was linked to its compliance with environmental, health and safety regulations and that it allegedly concealed its deficient performance so that it would continue to receive payments."⁷⁵

The United States then decided to intervene in the case, and in November 1996 the United States and Mr. Stone filed a joint amended complaint containing six counts against Rockwell.⁷⁶ Mr. Stone joined with the government only in count one, which stated a

67. *Id.*

68. *Id.* (citing Bruce Finley & Thomas Graf, *Rocky Flats Illegally Burned, Dumped Waste*, *U.S. Claims*, DENVER POST, June 10, 1989; Sue Lindsay & Janet Day, *FBI: Flats Burned Waste Secretly*, ROCKY MOUNTAIN NEWS, June 10, 1989).

69. *Id.* at 715.

70. *See id.*

71. *Id.* at 715-16.

72. *Id.* at 716.

73. *Id.*

74. *Id.*

75. *Id.* (internal quotation marks omitted).

76. *Id.* at 716-17.

claim under the FCA, and he asserted count six separately, which alleged that Rockwell knowingly made fraudulent claims for payment to the Government.⁷⁷ A jury trial was held on counts one through five, and in April 1999 the jury returned a verdict in favor of the plaintiffs on count one.⁷⁸ The trial judge awarded the plaintiffs treble damages, as allowed by the FCA, of about \$4.2 million.⁷⁹ Had the judgment at trial stood, Mr. Stone's share could have been over \$1 million.⁸⁰ Rockwell would also have been responsible to pay Stone's attorneys' fees, estimated at \$10 million.⁸¹

Rockwell appealed the decision as to Mr. Stone being an original source, knowing that if it were successful it would still have to pay the entire civil award to the government but that it would not be liable for Mr. Stone's attorneys' fees. The Tenth Circuit affirmed, agreeing that Mr. Stone was an original source with "direct and independent knowledge,"⁸² and the Supreme Court granted certiorari to determine whether the Tenth Circuit had properly interpreted the FCA's definition of an "original source."⁸³

B. Rockwell's *Holding and Dictum*

The Supreme Court reversed the Tenth Circuit by a 6–2 majority.⁸⁴ The Court's opinion recounted the facts of the case in some detail and then waded into the circuit court splits regarding the FCA's language.

The Court first decided that the phrase "information on which the allegations are based" refers to the relator's allegations and not to the publicly disclosed allegations, which precludes the independence test.⁸⁵ The majority's holding looked first to the language of the act and then to "the sense of the matter"—in other words, the Court considered congressional intent without directly discussing it.⁸⁶ The Court explained:

77. *Id.* at 717.

78. *Id.*

79. *Id.* at 718.

80. Silberman & Innis, *supra* note 22, at 18.

81. *Id.*

82. *Stone*, 92 F. App'x at 711 n.6 (internal quotation marks omitted).

83. *Rockwell Int'l Corp. v. United States*, 127 S. Ct. 1397, 1401 (2006).

84. Justice Breyer did not take part in the decision. *See Rockwell*, 127 S. Ct. at 1400–01.

85. *Rockwell*, 127 S. Ct. at 1407.

86. *Id.*

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.) Not only would that make little sense, it would raise nettlesome procedural problems, placing courts in the position of comparing the relator's information with the often *unknowable* information on which the public disclosure was based.⁸⁷

This line of reasoning has important precedential value because it runs counter to those circuit courts that require an analysis of the public disclosure in the independence inquiry. Indeed, the Court's analysis explicitly disavowed and effectively overruled the test employed by the Fifth Circuit.⁸⁸ Because the phrase "information on which the allegations are based" refers not to the information underlying the public disclosure, but to the information in the relator's *qui tam* complaint,⁸⁹ any test of "direct and independent knowledge" will need to examine what information the relator knew as shown in the complaint.

Having made this determination, the Court next examined which version of the complaint was relevant to the analysis. The FCA's language is unhelpful; in defining an "original source," it speaks only of the "information on which the allegations are based" and fails to mention a complaint at all.⁹⁰ Mr. Stone's first complaint had been amended several times, but in the final version, after the United States decided to intervene in the case, it was reduced to only two counts. Mr. Stone argued that the Court should consider the allegations in his original complaint, but the Justices rejected this argument in favor of including "at least the original complaint *as amended*."⁹¹ Appealing to logic, or "common sense," the Court asserted that to hold otherwise "would leave the relator free to plead a trivial theory of fraud for which he had some direct and

87. *Id.* at 1407–08.

88. *Id.* at 1408 (citing *United States ex rel. Laird v. Lockheed Martin Eng'g & Sci. Servs.*, 336 F.3d 346, 354 (5th Cir. 2003)).

89. *Id.*

90. 31 U.S.C. § 3730(e)(4)(B) (2000).

91. *Rockwell*, 127 S. Ct. at 1408 (emphasis added).

independent knowledge and later amend the complaint to include theories copied from the public domain or from materials in the Government's possession."⁹² The government objected to this approach because of its fear that relators, after the United States intervenes, "might decline to 'acquiesc[e]' in the Government's tactical decision to narrow the claims in a case if that would eliminate jurisdiction with respect to the relator."⁹³ This argument proved unpersuasive, because "[e]ven if this policy concern were valid, it would not induce us to determine jurisdiction on the basis of whether the relator is an original source of information underlying allegations that he no longer makes."⁹⁴ In deciding *Rockwell*, the Court was manifestly more concerned about prohibiting relators from pleading sham claims in order to obtain jurisdiction than it was worried about relators being denied a profit from their whistleblowing if the allegations in an amended complaint became too narrow.

Without delving into the meaning of "direct and independent knowledge," the Court determined that Mr. Stone's knowledge fell short of qualifying him as an original source.⁹⁵ Having held that "information" refers to the complaint as amended, the Court's analysis narrowed to compare what Mr. Stone had alleged with what the jury actually found.⁹⁶ The jury only found that false claims existed in the period from April 1, 1987 to September 30, 1988, but Mr. Stone's only allegation relating to that period was that Rockwell knowingly produced faulty pondcrete.⁹⁷

The Court categorized Mr. Stone's "knowledge" as a prediction.⁹⁸ According to his own evidence, Mr. Stone did not sign off on the pondcrete program plans due to his opinion that Rockwell could not successfully manufacture hard pondcrete. Rockwell did actually succeed in making pondcrete, however, using the plans that Mr. Stone had predicted would fail. It was only after Rockwell had laid off Mr. Stone and other engineers reduced the ratio of concrete to pond sludge that the blocks became unstable and began to leak

92. *Id.* at 1408.

93. *Id.* at 1409 (quoting Brief for the United States 44).

94. *Id.*

95. *Id.*

96. *Id.* at 1409–10.

97. *Id.*

98. *Id.* at 1410.

toxins. Consequently, Mr. Stone could not have *known* that Rockwell manufactured any faulty pondcrete, concealed its existence from the United States, or billed the United States for solid pondcrete when it actually leaked toxins.⁹⁹ He did not have actual knowledge of the violations that the jury found, but only predicted such an outcome—based on an engineering theory that turned out to be wrong.

The Court held that Mr. Stone’s “prediction” was insufficient to qualify him as an original source.¹⁰⁰ Without deciding that a prediction could never qualify a relator as an original source, the court held that a prediction does not satisfy the “direct and independent knowledge” requirement “when its premise of cause and effect is wrong.”¹⁰¹ The Court then also said that, “a *qui tam* relator’s misunderstanding of *why* a concealed defect occurred would normally be immaterial as long as he knew the defect actually existed.”¹⁰²

This analysis disregarded the role that Mr. Stone had in initiating the lawsuit, instead focusing on the immateriality of his evidence at trial to decide that Mr. Stone’s claims were irrelevant.¹⁰³ As Justice Stevens pointed out in dissent, however, it may fairly be said that but for Mr. Stone’s report to the FBI, the investigation would not have occurred.¹⁰⁴ The circuit courts using the “independent” knowledge tests would likely endorse this view, arguing that Mr. Stone’s knowledge was independent because he was a source, or even *the* source, of information that started the litigation. Additionally, Mr. Stone would have satisfied the third requirement imposed by the Second and Ninth Circuits because he was in the causal chain that led to the public disclosure of the toxin-leaking pondcrete. In other

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *See id.* at 1404. The Court explained:

None of the witnesses Stone had identified during discovery as having relevant knowledge testified at trial. And none of the documents Stone provided to the Government with his confidential disclosure statement was introduced in evidence at trial. Nor did respondents allege at trial that the defect in the piping system predicted by Stone caused insolid pondcrete.

Id.

104. *Id.* at 1413 (Stevens, J., dissenting).

words, Mr. Stone blew the whistle¹⁰⁵ and became the reason the government discovered the fraud and recovered damages.

C. The Leftovers: Direct Knowledge and Predictions

With the holdings and analysis of *Rockwell*, the Supreme Court has resolved some circuit court splits, but it has, perhaps, also contributed to the confusion over the “direct and independent knowledge” tests. The Court has effectively eliminated the separate test for “independent” knowledge by holding that the independence requirement looks only to the allegations in the complaint and not in the public disclosure.¹⁰⁶ The Court has also created the possibility that a prediction can satisfy the requirements of the FCA to be an original source through use of a cause-and-effect analysis instead of applying a test for “direct and independent knowledge.”¹⁰⁷

As the Fifth Circuit noted in *United States ex rel. Laird v. Lockheed Martin Engineering and Science Services Co.*, those circuits that have defined “information” as referring to the allegations in a *qui tam* complaint have not been able to define directness and independence as “discrete and necessary concepts under the ‘original source’ definition.”¹⁰⁸ This issue should now be resolved because in holding that “information” refers to the allegations in the relator’s complaint, the Court deprived circuit courts of the ability to define “independent knowledge” in terms of the information in a public disclosure. Under the jurisprudence of the first two groups of circuits, a relator’s knowledge had to be “independent” of the public disclosure.¹⁰⁹ As courts are now unable to look to the information in the public disclosure, the separate test for “independent” knowledge has no importance.

A Tenth Circuit case decided after *Rockwell* supports the view that *Rockwell*’s methodology silences the “independent” test. In *United States ex rel. Boothe v. Sun Healthcare Group, Inc.*, the court acknowledges that in some prior cases it had looked to the initial

105. *See id.* (“The search warrant . . . and the [FBI] affidavit that was released to the news media . . . were both based, in part, on interviews with Stone and on information Stone had provided to the Government, including his prediction of insolid pondcrete.”).

106. *See id.* at 1408.

107. *See id.* at 1410.

108. 336 F.3d 346, 354 (5th Cir. 2003).

109. *See United States ex rel. Minn. Assoc. of Nurse Anesthetists v. Allina Health Sys. Corp.*, 276 F.3d 1032, 1048 (8th Cir. 2002).

public disclosure in deciding whether a relator qualified as an “original source,” and admits that this analysis now “asks the wrong question.”¹¹⁰ The court then follows the pattern of analysis suggested in *Rockwell*, but without addressing the issue of prediction or knowledge, by examining the relator’s knowledge against the information in the complaint to determine if it is “direct and independent.”¹¹¹ Therefore, while *Rockwell* did not explicitly disfavor the test for “independent” knowledge, its holding requiring that the circuit courts examine a relator’s knowledge with the information in their complaint and not in the public disclosure, has effectively relegated the “independent” knowledge test to the past.

Circuit courts, now without a controlling precedent for the definition of “direct and independent knowledge,” may either turn to those circuits that have employed a combined definition or create their own definition. Courts may also reconsider the Second and Ninth Circuit precedents that require a relator to have been the source of the public disclosure, which may now stand in the place of the arguably defunct test for independence in the Sixth, Seventh, and District of Columbia Circuits that required the relator to be the source of information to the government.¹¹² The “direct” tests remain valid. As stated by the Tenth Circuit, “direct” knowledge is “gained by the relator’s own efforts and not acquired from the labor of others.”¹¹³ Similarly, “independent” knowledge is “not derivative of the information of others.”¹¹⁴ In all the circuits, “direct and independent” will probably now only impose one requirement: that an original source must obtain the information underlying the allegations in his *qui tam* complaint through first-hand efforts.

110. United States *ex rel.* Boothe v. Sun Healthcare Group, Inc., 496 F.3d 1169, 1175 (10th Cir. 2007).

111. *See id.*

112. The distinction between the two is subtle but does have ramifications, with the “information” test being less stringent. Under this test, the relator need only be the source relied upon by the government (perhaps as shown by having given information to the government before the public disclosure was made), whereas under the additional test the relator must actually have been the cause of the public disclosure of information.

113. United States *ex rel.* Hafter v. Spectrum Emergency Care, Inc., 190 F.3d 1156, 1161 (10th Cir. 1999).

114. *Id.*

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A La Carte Three-Step Test in Qui Tam Lawsuits

Based on the framework of the circuit splits laid out in Table 1, Table 2 indicates the impact that the Court's *Rockwell* holdings will likely have on the circuit splits.

Table 2.¹¹⁵ Rockwell's Projected Influence on "Direct And Independent" Tests

Circuit Court Group	Test for "Direct"	Test for "Independent"	Test for "Direct and Independent"	Additional test
6th, 7th, & D.C. Circuits	No longer relevant	No longer relevant	Relator has first-hand knowledge	
3d, 4th, 5th, 8th, & 11th Circuits	No longer relevant	No longer relevant	Relator obtained knowledge without an intermediary	
10th Circuit ¹¹⁶			Relator has first-hand knowledge	
2d & 9th Circuits			Relator obtained knowledge without an intermediary	Relator caused the public disclosure

Because the public disclosure bar is frequently litigated, it will not be long before each of the circuit courts will have an original source case. When that happens, the courts will have to decide what quantum of "direct and independent knowledge" a relator must have in order to be an original source.

IV. A THREE-STEP, *A LA CARTE* TEST

In addition to *Rockwell's* impact on the current tests for "direct and independent knowledge," the Court introduced a unique

115. See McCubbins & Fitzgerald, *supra* note 19, at 124–25.

116. See *Boothbe*, 496 F.3d at 1174–75 (10th Cir. 2007).

analysis that circuit courts had not previously used: a cause-and-effect test to determine if a prediction can qualify as knowledge. In *Rockwell* the Court addressed the idea that “knowledge” may not be as fixed an idea as first appears because it is possible that a relator’s prediction can satisfy the statutory requirement of knowledge if that prediction is correct.¹¹⁷ While the Court used this analysis because the facts of *Rockwell* involved a prediction, the test may be integrated with the “direct and independent” tests from the statutory language to form a holistic approach to resolving original source status under the FCA. A court applying a *Rockwell* three-step test would examine each word in the FCA phrase “direct and independent knowledge.” A court would determine (1) whether the relator’s information is “knowledge,” (2) if so, whether the relator’s knowledge is “direct and independent,” and (3) whether the relator’s knowledge is valuable to the government investigation. Each step of the test is a requirement to obtain standing as a relator under the FCA, not just a factor.

A. Theorizing the Three-Step Test

The first prong of analysis springs from the *Rockwell* Court’s reasoning that “[e]ven 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.”¹¹⁸ A significant number of cases would not address this issue because a *qui tam* relator often knows of a concealed defect, which obviates the need to analyze a prediction.¹¹⁹ It is probable, however, that this language will invite further *qui tam* litigation on the subject, as scenarios for correct predictions abound, especially as whistleblowers may turn information over to the government when a project is in the planning stages.¹²⁰

Indeed, the policy underlying the FCA encourages whistleblowers to come forward as early as possible. Early investigation or media coverage increases the likelihood of preventing fraudulent activities from continuing. A large portion of

117. See *Rockwell Int’l Corp. v. United States*, 127 S. Ct. 1397, 1410 (2007).

118. *Id.*

119. See *id.*

120. It is beyond the scope of this Comment to conduct an empirical study examining the number of cases in which a prediction could be at issue in litigation under the FCA.

qui tam litigation concerns health care services,¹²¹ and in these cases, society may find it especially important to value a correct prediction regarding a medical procedure as a matter of public policy to prevent unnecessary surgeries or other medical procedures. Additionally, given the technical engineering involved in many expensive government research and development projects for the Department of Defense, NASA, and other agencies,¹²² engineers in those companies may be just as likely (or more likely) to have a prediction about a technical flaw as to have actual knowledge of a contractor billing the government for a defective product or service. But not every prediction should be the foundation of a *qui tam* action; public policy also demands a rule that does not overly burden the court system with unmeritorious cases. The Court is right on this account; analyzing a prediction's cause and effect premise differentiates well between meritorious claims and those that would merely burden the federal district courts.

Rockwell's holding provides a precedent that invalidates certain predictions: those with incorrect premises as to cause and effect. The Court did not hold that a prediction with a correct premise as to cause and effect would satisfy the FCA's requirement that the relator have "knowledge." The Court's reasoning, however, elucidates the fatal flaw in Mr. Stone's case, and that reasoning may build a complete test. *Rockwell* held that a prediction wrong as to cause does not make a relator an original source even when it is right as to effect.¹²³ Mr. Stone did correctly predict the effect at issue in the government's successful litigation against Rockwell International—faulty pondcrete—but he did not correctly predict the method, or cause, of the failure. According to Mr. Stone, Rockwell International's machinery was incapable of producing working pondcrete, but in fact, the machinery was capable. It was only when too much water was added to the mixture that the resulting pondcrete was unstable and leaked toxins. Thus, even though Mr.

121. See John P. Krave & Mark E. Jacobowitz, *Doctored Claims*, L.A. LAW., July–Aug. 2007, at 24, 24.

122. See, e.g., William A. Davis, Jr. & Edward B. Roberts, *The Management of Department of Defense Laser Research Contracts*, J. OF BUS. 44, 44 (1970) (detailing the technical nature of defense contracts, which has only increased since 1970); DEPARTMENT OF DEFENSE, PROGRAM ACQUISITION COSTS BY WEAPON SYSTEM, DEPARTMENT OF DEFENSE BUDGET FOR FISCAL YEAR 2008 i–iii (2007) (listing the costs of unclassified research and development projects).

123. *Rockwell*, 127 S. Ct. at 1410.

Stone correctly alerted the government investigators to check the quality of the pondcrete stored at Rocky Flats, he could not have had “knowledge” of the defect because his theory of its cause was an incorrect prediction.¹²⁴

This factual situation describes one possible scenario of four cause and effect situations, explaining that the courts have no subject matter jurisdiction to hear a publicly disclosed *qui tam* action if the relator correctly predicted the fraud but was incorrect in predicting why it occurred. The other three premise scenarios would be when the relator’s prediction is wrong as to both cause and effect, when the relator’s prediction is wrong as to the effect but rightly identifies a cause for concern, and when the relator is right as to both cause and effect.

The case of a relator whose prediction is wrong as to both cause and effect is easily dispatched. Such a prediction would not qualify as knowledge, for to hold otherwise would allow any prediction to satisfy the test and would allow for a standard less than that already established in *Rockwell*.

More difficult is the scenario when a relator’s prediction does not come true, but the identified cause associated with the incorrect prediction does correctly lead to the discovery of some other fraudulent effect. Correctly alerting authorities to a faulty process is meritorious, and the public could conceivably welcome a whistleblower in this category as a well-intentioned hero who succeeded in saving taxpayer dollars. The Court’s language, using the typical phrase with the conjunction—“cause and effect”—could be construed to mean that a failure of either the cause or effect portions disqualifies the prediction as knowledge. This construction is, however, perhaps too literal, but the Court’s reasoning demonstrates that a performance of meritorious service for the public is not part of the prediction/knowledge requirement.

Indeed, Mr. Stone was the instigator of the investigation into Rockwell International’s fraudulent activities at Rocky Flats. His prediction, right as to effect but wrong as to cause, presented enough evidence for the government to obtain a search warrant.¹²⁵ Three days after the resulting search, the warrant was unsealed and

124. *Id.*

125. United States *ex rel.* Stone v. Rockwell Int’l Corp., 92 Fed. App’x. 708, 714 (10th Cir. 2004) (“Using the information he had learned from Stone, Agent Lipsky sought and received a search warrant to search Rocky Flats.”), *rev’d*, *Rockwell*, 127 S. Ct. at 1412.

media coverage began.¹²⁶ Thus, Mr. Stone successfully blew the whistle on Rockwell International's fraud at Rocky Flats. While this argument was enough for the Tenth Circuit,¹²⁷ the Supreme Court rejected it because Mr. Stone's prediction failed, and therefore was not knowledge.¹²⁸ Even if a whistleblower were right as to a theory of cause and successfully alerted the Government to actual fraud (albeit not the fraud predicted) a failed prediction still would not qualify as knowledge.

A correct prediction, however, should allow the prediction to qualify as "knowledge" for the meaning of the statute. A correct prediction fulfills all the FCA's policy goals for allowing whistleblowers original source status, instigates and directs the government's investigation, and identifies the exact fraud to be proved in court. The whistleblower offering a correct prediction lacks actual knowledge that the prediction has come true, but this lack of knowledge does not adversely affect the subsequent investigation, which must confirm the relator's allegation whether that allegation is premised on a prediction or knowledge. Failed predictions require an additional step that of the subsequent investigation discovering additional information not part of the original allegation. As such, in operation a relator's allegation functions identically whether it be premised on knowledge or a correct prediction.

The matrix in Figure 1 displays *Rockwell's* holding as well as inferred solutions to the other three possible scenarios.

126. *Id.*

127. *Id.* at 724 ("[W]hether the alleged design flaws noted by Stone in his Engineering Report actually caused the production of malformed pondcrete blocks is immaterial. . . . [T]he relator need only show that he possessed direct and independent knowledge of the information upon which his claim is based, not that his claim is factually correct.")

128. *See supra* Part III.B.

Figure 1. Cause and Effect Matrix for Predictions

		Effect	
		Right	Wrong
Cause	Right	Qualifies as Knowledge, Proceed with Test	No Jurisdiction
	Wrong	No Jurisdiction (<i>Rockwell</i>)	No Jurisdiction

As shown in the matrix, if the relator failed to predict the right effect, the relator would not advance a *qui tam* case on the merits because there would be no fraud under the FCA. From *Rockwell*, we know that if the relator's prediction is right as to effect but wrong as to cause there is no jurisdiction. Therefore, only when a relator predicts fraud and is right as to both cause and effect, may it be possible for the relator to be an original source.

The second and third requirements of the test derive directly from *Rockwell's* holding and prior *qui tam* holdings in the circuit courts. As discussed in Part III.C, previous court tests in various jurisdictions that discretely analyzed "direct" and "independent" are no longer valid. Instead, *Rockwell* favors a single test that combines directness and independence into a single analysis. The last requirement, that the relator caused the media disclosure, would remain valid in those jurisdictions that currently use it.

B. Applying the Three-Step in a Thought Experiment

This proposed test for "direct and independent knowledge," which incorporates *Rockwell's* holdings and rationale, does not operate as a true three-step test with mandatory consecutive examinations. While the test does have three sequential steps, depending on the circuit court and factual scenario, each step may or may not be applied. Hence, I have also described this test as *a la*

carte. A hypothetical illustrates how the *Rockwell* three-step test would proceed with the question whether a prediction may qualify as knowledge being addressed first.

An employee, Annie, works for a large defense contractor, Microfraud. Annie reads an engineering paper and sees that the manufacturing design is flawed because a microchip used in circuit boards cannot function properly under the high temperatures that will occasionally occur within the unit. She calculates that the faulty chips will lead to one failure for every 1000 operations when the contract calls for a tolerance of only one failure for every 10,000 operations. She duly brings her concerns to the attention of Microfraud's management, who appoint a team to study the issue. The team confirms that Annie is probably right.

Microfraud management accepts the report, and internally classifies the "flaw" as a pre-production estimate. Microfraud then makes a "business decision" to ignore the flaw because all the possible pre-production solutions would delay production and lead to contractual penalties. Instead, management decides that Microfraud will produce a correct part that meets the failure tolerance requirement and have service technicians replace the broken part with the correct part as failures occur. Management reassigns Annie to another division to make room for a "team player" on the project, and she loses access to the details of the operation. At this point, Annie reports her prediction and Microfraud's management plan to the FBI, which initiates an investigation. Microfraud manufactures the products, delivers them to the government and bills according to the delivery. After the government makes the payment, the FBI investigation progresses to the point of discovering that Annie was right about the chips and Microfraud has committed fraud in violation of the FCA. Reporters with inside sources discover the FBI's investigation and write news articles about the incident, resulting in a public disclosure.

In this scenario, Annie, the whistleblower, has no actual knowledge that the fraud occurred, but rather predicted that it would occur and so initiated the investigation of Microfraud by reporting the prediction to the government. If Annie then files a *qui tam* complaint in district court, Microfraud will argue that the public disclosure bar deprives the court of subject matter jurisdiction. If the court finds that there has been a public disclosure, then the burden of proof shifts to Annie to convince the court that she has original

source status. The court will then have to decide if the employee had “direct and independent knowledge of the information on which the allegations are based.”¹²⁹

In the circuits using a collapsed, joint test for “direct and independent knowledge,” the question is whether the relator had first-hand knowledge.¹³⁰ Annie’s hypothetical describes a first-hand discovery without an intermediary, but the court would have to address whether or not a prediction is “knowledge.” The most probable answer is that when the prediction is right as to cause and effect, it is knowledge. In *Rockwell*, the Supreme Court indicated that where there is direct knowledge of a defect, the relator’s knowledge of the cause of that defect is immaterial.¹³¹ But as putative “knowledge” shifts into mere prediction, causation becomes increasingly material to the analysis because a correct prediction with a faulty account of causation does not qualify as “direct and independent knowledge.”¹³² The more correct the prediction’s account of causation, the more likely that prediction can qualify as “direct and independent knowledge.” Annie rightly predicted the effect and correctly identified the cause of the failures in Microfraud’s product, and therefore should be an original source.

An analysis of whether or not a prediction can qualify a relator as an original source does not alter the *qui tam* jurisprudence in the Second and Ninth Circuits. Courts in these jurisdictions would follow the analysis of “direct and independent knowledge” as previously described for the other circuits, but would include the additional requirement that the relator be the source of the public disclosure.¹³³ Annie would succeed in obtaining original source status by showing that her report to the FBI was a direct, or ultimate, cause of the news reporters’ publishing the story. If we alter the hypothetical so that Annie reported to the FBI but the news reporters broke the Microfraud story on information from a third

129. 31 U.S.C. § 3730(e)(4)(B) (2000).

130. *See supra* Part III.C, Table 2.

131. *See Rockwell Int’l Corp. v. United States*, 127 S. Ct. 1397, 1410 (2007) (“Of course a *qui tam* relator’s misunderstanding of *why* a concealed defect occurred would normally be immaterial as long as he knew the defect actually existed.”).

132. *See id.*

133. *See United States v. Alcan Elec. & Eng’g Inc.*, 197 F.3d 1014, 1020 (9th Cir. 1999) (“[The relator] also had a hand in the public disclosure of allegations that are a part of his suit, a third requirement for original source status.” (internal quotation marks and citations omitted)).

party, then the court would probably not hold that Annie was an original source.

V. CONCLUSION

Congress intended the FCA to encourage whistleblowers to help the government fight fraud via *qui tam* actions while preventing parasitic lawsuits. Courts have struggled to interpret the language of the statute. The complex split over how to apply the FCA's language of "direct and independent knowledge" evidences the difficulty courts have had in determining if a relator is an original source. The Supreme Court's opinion in *Rockwell* should do much to clear up some of the circuit court confusion. Although it did not directly resolve the issue of how much "direct and independent knowledge" a relator must have to qualify as an original source, the Court's holding that "information" refers to the allegations in the complaint and method of analysis should provide significant guidance to the circuit courts in resolving *qui tam* litigation. Courts analyzing the original source question should implement a *Rockwell* three-step test, basing subject-matter jurisdiction under the FCA on the following determinations: (1) whether the relator's information represents knowledge, (2) whether his knowledge is "direct and independent," and (3) whether his knowledge is valuable to the government investigation. This new structure will standardize the application of the original source exception to the public disclosure bar of the False Claims Act across the circuits, thereby lessening the incentive for *qui tam* relators to engage in forum shopping, increasing the probability that more suits will settle out of court, and producing a fairer judiciary.

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* The author serves as a Captain in the United States Air force. The views expressed in this Comment are those of the author and do not reflect the official policy or position of the United States Air Force, Department of Defense, or the U.S. Government.

