U.S. Supreme Court Rules that Up-to-10-Year Filing Deadline is Available to Qui Tam Relators in Non-Intervened Civil False Claims Act Cases

Litigation Alert
05.15.2019

On May 13, 2019, the U.S. Supreme Court in a unanimous decision resolved a circuit split and ruled in *Cochise Consultancy, Inc. et. al. v. United States ex rel. Hunt* that *qui tam* relators in non-intervened civil False Claims Act (FCA) cases can take advantage of a provision in the FCA's statute of limitations that allows a suit to be brought up to 10 years from the date of the alleged violation. The decision is of particular significance in the Fourth and Tenth Circuits, which includes Virginia, Maryland, North Carolina, South Carolina, West Virginia, Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming. Those circuits had previously held that relators in non-intervened actions had only six years from the date of the alleged violation to bring suit. The *Cochise* decision overrules the Fourth and Tenth Circuits' prior holdings and establishes a nationwide rule. On the bright side for potential FCA defendants, however, the Court declined the opportunity to rule that only Department of Justice (DOJ) attorneys can constitute government "officials" whose knowledge triggers the running of the potentially longer statute of limitations.

Analysis

The FCA's statute of limitations, 31 U.S.C. § 3731, provides that a "civil [FCA] action under section 3730" must be brought within one of two periods, whichever is longer: (1) within six years of the alleged violation; ***or*** (2) within three years after the "official of the United States charged with responsibility to act in the circumstances" knew or should have known of the alleged violation, but no later than ten years after the alleged violation.

Prior to *Cochise*, the Fourth and Tenth Circuits had held that only the government could take advantage of the longer statute of limitations period tied to when the government knew or should have known of the alleged violation, and so the longer period was not available to *qui tam* relators in non-intervened cases. *See United States ex rel. Sanders v. N. Am. Bus Indus., Inc* ., 546 F.3d 288 (4th Cir. 2008); *United States ex rel. Sikkenga v. Regence BlueCross BlueShield of Utah* , 472 F.3d 702 (10th Cir. 2006). At the same time, the Ninth Circuit had held that, even though relators in non-intervened FCA cases could rely on the longer statute of limitations period, relators were themselves "official[s] of the United States" within the meaning of 31 U.S.C. § 3731, and so their knowledge of the alleged violation would start the three-year clock running. *See United States ex rel. Hyatt v. Northrop Corp* ., 91 F.3d 1211 (9th Cir. 1996). The Eleventh Circuit, in the *Cochise* case itself, rejected both of these other two approaches and held that relators in non-intervened FCA cases can take advantage of the longer statute of limitations period and that they themselves are not "official[s] of the United States"—and so their knowledge of the alleged FCA violation is irrelevant to determining when the statute of limitations begins to run.

The Supreme Court agreed with the Eleventh Circuit *in toto*. First, relying heavily (and perhaps unsurprisingly) on a textual approach, the Court found that "[b]oth Government-initiated suits … and relator-initiated suits … are 'civil action[s] under section 3730' [and] [t]here is no textual basis to base the meaning of '[a] civil action under section 3730' on whether the Government has intervened." Slip op. at 5. As a consequence, the Court found that both the six-year and 10-year limitation periods set forth in 31 U.S.C. § 3731 apply to a relator-initiated suit, regardless of whether the government intervenes in that suit. In so doing, the Court distinguished its 2005 decision, *Graham County Soil & Water Conservation District v. United States ex rel. Wilson* , 545 U.S. 409 (2005), in which it had ruled that the statute of limitations established by 31 U.S.C. § 3731 did not apply to a retaliation claim under the FCA because such a claim was ***not*** a "civil action under section 3730" (even though the retaliation provision was set forth in section 3730). The Court found that the phrase "civil action under section 3730" was ambiguous with respect to whether it included retaliation claims but not ambiguous with respect to whether it includes both government-initiated and relator-initiated suits alleging fraud. *See id*. at 6-8.

Second, the Court agreed with the Eleventh Circuit that a *qui tam* relator is not an "official of the United States charged with responsibility to act in the circumstances" within the meaning of 31 U.S.C. § 3731, and so when the relator knew or should have known of the alleged violation does not start the three-year clock running. *See id.* at 8-9. The Court, however, left open the question of exactly which government personnel constitute such officials—even though the government had argued that the term refers only to the "Attorney General (or his delegate)." *See id.* at 9.

Takeaways

With the *Cochise* ruling, potential FCA defendants throughout the country—and particularly in the Fourth and Tenth Circuits—will now need to be prepared to litigate non-intervened *qui tam* cases even longer after the alleged violations occurred. This could, at the very least, impact document retention policies as well as personnel decisions involving potential witnesses.

Fortunately for potential defendants, however, the Court has not foreclosed the argument that the "official of the United States charged with responsibility to act in the circumstances" can include government personnel other than DOJ attorneys—such as government contracting officers, auditors, and investigators. Consequently, it will remain important to develop and maintain evidence of the knowledge of any such government personnel of issues that could form the basis for FCA allegations.

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