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ALERT

Qui Tam Cases Rise from the Dead: Supreme Court Extends Statute of Limitations Even When the Government Declines to Intervene

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WHAT: In a new opinion on the False Claims Act (FCA), the Supreme Court unanimously held that *qui tam* relators can seek damages for up to ten years of fraudulent payments, even if the Government declines the case. Resolving a three-way circuit split, the Court also held that the Government's knowledge of the facts material to the case - not the relator's knowledge - starts the clock to file a complaint when the longer statute of limitations is invoked. The Court declined to opine on whose knowledge within the Government starts that clock.

WHEN: Issued May 13, 2019, the ruling will have immediate implications for pending *qui tam* cases.

WHAT DOES IT MEAN FOR INDUSTRY: This decision raises the risk for companies doing business with the Government by exposing as much as ten years of payments (which are trebled under the FCA) to suits by whistleblowers, regardless of whether the Government intervenes and takes over the litigation. The decision also emphasizes even further the importance of discovery into the Government's knowledge of the alleged fraud when litigating any FCA case.

As detailed in our previous article on this case, *Cochise Consultancy, Inc. v. U.S. ex rel. Hunt* gave the Supreme Court an opportunity to resolve a three-way circuit split as to whether relators are limited to the standard, six-year FCA statute of limitations or can take advantage of the longer, alternative ten-year statute of limitations, and whose knowledge starts the clock when a relator invokes the longer limitations period.

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The FCA has two statute of limitations provisions, and "whichever occurs last" is applicable. *See* 31 U.S.C. § 3731(b). Under the first provision, which is relatively straightforward, an FCA complaint must be filed within six years after the date a violation is committed. *See* § 3731(b)(1). Under the second provision, which was at issue in this case, an FCA complaint can be filed up to three years "after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances." *See* § 3731(b)(2). The only limit on this three-year window is that the complaint must be filed within ten years after the violation is committed. *Id.*

In this case, the relator, an employee of a government contractor who ended up serving prison time for his involvement in unrelated contract fraud, filed a *qui tam* action against The Parsons Corporation and Cochise Consultancy, Inc. for allegedly submitting false claims to the U.S. Department of Defense related to a contract to clear excess munitions in Iraq. The district court determined that the statute of limitations had expired. The relator had filed his action more than six years after the date of the alleged violation but within three years after he disclosed the violation to the Government. Following the lead of a plurality of the circuits, the district court held that the three-year statute of limitations does not apply in *qui tam* actions in which the Government has declined to intervene and dismissed the case.

On appeal, the U.S. Court of Appeals for the Eleventh Circuit reversed, holding that the three-year limitations period applies even where the Government declines to intervene. However, instead of following the lead of the Third and Ninth Circuits, which allows relators to take advantage of the three-year limitations period but starts the clock for that period when the relator acquired the requisite knowledge of the action, the Eleventh Circuit concluded the "period begins to run when the relevant federal government official learns of the facts giving rise to the claim, when the relator learned of the fraud is immaterial for statute of limitations purposes." Under the Eleventh Circuit's interpretation of the FCA, a relator may file a claim within three years of the date on which the Government first knows or should know of the alleged fraud - even if the relator has known of the alleged violation for much longer - as long as the filing occurs within ten years of the violation.

The Supreme Court unanimously affirmed the Eleventh Circuit's novel approach to this long-standing circuit split. To reach that conclusion, the Court reasoned that the plain meaning of "a civil action under 3730" encompassed both intervened and non-intervened *qui tam* action under the cannon of interpretation that requires a single use of a statutory phrase to have a fixed meaning. Writing for the Court, Justice Thomas concluded that "there is no textual basis to base the meaning of '[a] civil action under 3730' on whether the Government has intervened."

The Court also ruled that the statutory language cannot support the conclusion that the relator in a non-intervened action is the "official of the United States charged with responsibility to act." Put simply, "a private relator is not an 'official of the United States' in the ordinary sense of that phrase." Not only is a relator neither appointed as an officer of the United States nor employed by the United States, section 3730(b) identifies an action brought by a relator as an "action[] by *Private Persons*," not a Government official. (emphasis added)

As a result, a relator who knows about a false claim of which the Government is not otherwise aware can file an action after the six-year statute of limitations expires because his or her complaint will provide the Government with knowledge of the action and activate the alternative three-year statute of limitations. The Government's decision to intervene or decline will not affect that result. To the extent a relator wants to risk that the Government may have previously learned of the fraud, a relator may file an action under the FCA up to ten years after the violation occurred.

Unlike in *United Sates ex rel. Escobar*, the Court declined to wade into related topics that could have a broader impact on FCA litigation. When the Court took *Hunt*, many saw the case as an opportunity for the Court to clarify who exactly within the government is "the official charged with responsibility to act." The United States' brief put heavy emphasis on its belief that the Attorney General and his/her designees are the only ones whose knowledge starts the limitations clock, but the Court sidestepped the issue completely noting instead "[r]egardless of precisely which official or officials the statute is referring to, § 3731(b)(2)'s use of the definite article 'the' suggests that Congress did not intend for any and all private relators to be considered 'the official of the United States."

The Court's determinations that relators can take advantage of the alternative, longer statute of limitations means that companies doing business with the Government face the same potential damages in FCA litigation against *qui tam* relators as they do when the Government intervenes.

Meanwhile, by clarifying that the knowledge of the Government - not the relator - commences the three-year statute of limitations, and by declining to define who in the Government is the "official of the United States charged with responsibility to act in the circumstances," the Supreme Court has created one big implication for litigants on both sides of the bar: more discovery of Government agencies. In cases where relators take up to ten years to file their cases, defendants will want access to any and all information from Governmental agencies that could demonstrate awareness of the fraud, thus starting the statute of limitations clock.

This could affect the strategic thinking of both government contractors and the Government. Government contractors may have an extra incentive to disclose misconduct, even where it does not rise to "credible evidence" of an FCA violation, to trigger the limitations period. The Government, meanwhile, could be forced to expend greater resources responding to or fighting discovery requests in cases where it has declined to intervene. Or, as foreshadowed in last year's Granston Memo, the Government could use the prospects of such burdensome discovery as justification to affirmatively dismiss the case. Perhaps that possibility could serve as a silver lining in the *Hunt* decision for those who regularly do business with the Government.