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What High Court's Expansion Of FCA Time Limits Would Mean

By **Brian Tully McLaughlin, Jason Crawford and Sarah Hill** (April 4, 2019, 3:05 PM EDT)

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On March 19, 2019, the U.S. Supreme Court heard oral argument in Cochise Consultancy Inc. et al. v. United States ex rel. Hunt to resolve a circuit split as to whether qui tam relators can invoke the tolling provision in the False Claims Act in cases where the material facts are learned after the standard six-year statute of limitations has run, and if so, whose knowledge — the relator's or the government's — starts the running of the clock.[1] This article examines the case and considers what the Supreme Court's decision in Hunt could mean for practitioners.

The FCA's Statute of Limitations

Prior to 1986, all FCA actions had to be filed within six years of the alleged fraud. Over time, Congress became concerned that viable causes of action were being time-barred when the fraud was discovered after the six-year window had elapsed. Congress addressed these concerns in the seminal 1986 amendments to the FCA by adding a tolling provision such that the statute now reads as follows at 31 U.S.C. Section 3731(b):

A civil action under section 3730 may not be brought:

> (1) more than 6 years after the date on which the violation of section 3729 is committed,
>
> or
>
> (2) more than 3 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, but in no event more than 10 years after the date on which the violation is committed, whichever occurs last.

Notably, there is no mention of "relators" in (b)(1) or (b)(2) and the statute simply refers to when a "civil action" can be brought. As a result, the question of whether a qui tam relator can invoke Section 3731(b)(2) in cases where the government has declined intervention has led to widely varying results among the lower courts.

Factual Background

The back-and-forth at oral argument in Hunt focused primarily on questions of statutory interpretation and congressional intent, but the underlying facts of the case are worth repeating because they illustrate how various interpretations of Section 3731(b)(2) can currently be outcome determinative depending on where a case is filed.

In 2006, the relator, Billy Joe Hunt, was working for a prime contractor in Iraq that was responsible for cleaning up munitions left behind by retreating soldiers. Cochise Consultancy was awarded a subcontract to provide security services on this cleanup project. In the qui tam complaint, Hunt alleges that the subcontract was originally awarded to another company, but this was rescinded and awarded to Cochise at the direction of an Army Corps of Engineers contracting officer whom Cochise allegedly bribed with trips and gifts.

Hunt would eventually report these facts to the government, but not until 2010 when he was interviewed by FBI agents in connection with his role in a separate kickback scheme to which he pled guilty and served ten months in federal prison.

After his release from prison, Hunt filed a qui tam suit under seal in 2013. The government declined intervention and in 2016 the district court dismissed, finding that the claim was time barred under the six-year limitations period at Section 3731(b)(1) and rejecting Hunt's argument that his suit was timely because the three-year tolling provision at Section 3731(b)(2) had not started to run until the government knew about the facts material to the right of action.

Two years later, the U.S. Court of Appeals for the Eleventh Circuit reversed, finding that nothing in Section 3731(b)(2) says that its three-year period is unavailable to relators when the government declines to intervene. The court also concluded that the three-year period in Section 3731 (b)(2) begins to run when the pertinent federal government official — not the relator — first learns of the fraud.

Applying this standard, the court found that Hunt's suit was timely because he had filed suit within three years of when the government learned of the fraud in connection with his FBI interview and within ten years of when the fraud occurred. In response, Cochise filed a petition of writ of certiorari which the Supreme Court granted in order to address a circuit split over the interpretation of this limitations provision.

The Circuit Split

The outcome of the Hunt case may well have been different if the relator had filed in another circuit. For instance, in the U.S. Court of Appeals for the Fourth Circuit or the U.S. Court of Appeals for the Tenth Circuit, Hunt would have been out of luck because those circuits have found that Section 3731(b)(2)'s provision is for the benefit of the government and based on government knowledge and therefore not available to relators in cases where the government declines to intervene and is instead a nonparty.[2]

If Hunt had filed suit in the U.S. Court of Appeals for the Ninth Circuit, his suit would still be time-barred, but for different reasons. Under Section 3731(b)(2) the three-year period begins to run when material facts are known or should be known. In contrast to the Fourth and Tenth Circuits, the Ninth Circuit has held that a relator may utilize Section 3731(b)(2)'s three-year tolling period in a nonintervened case.

However, the Ninth Circuit in such cases equates the relator with "the official of the United States charged with the responsibility to act" in analyzing the triggering date of when facts material to the action were known or should have be known, not a formal government official.[3] Hunt's case would be time barred under this standard because even though the government did not learn of the facts until 2010, Hunt knew of the material facts earlier in 2006, such that both the six-year and three-year windows had elapsed at the time he filed his suit in 2013.

Oral Argument

At oral argument, Hunt argued that the Supreme Court should affirm the Eleventh Circuit's ruling that the complaint was timely because a plain language reading of Section 3731(b) makes clear that the provision applies to FCA actions, including qui tams, regardless of the government's subsequent decision whether to intervene or not.

In contrast, defendant Cochise argued that the Eleventh Circuit got it wrong when it employed an overly literal reading of Section 3731(b)(2). He argued that the court should follow the approach used in Graham County Soil & Water Conservation District v. United States, ex rel. Wilson in which the court looked beyond the plain language of Section 3731(b)(1) and considered the broader statutory context when deciding that that the six-year statute of limitations does not apply to FCA civil actions for retaliation.[4]

According to Cochise, when Section 3731(b)(2) is read in context it becomes clear that it should not apply to nonintervened relator actions because it uses language similar to other provisions of the statute that do not cover nonintervened suits.

As an alternative argument, Cochise drew upon the Ninth's Circuit's reasoning that even if Hunt could invoke Section 3731(b)(2), the three-year clock started running when Hunt, the relator — rather than the government — knew of the material facts because the statute deputizes private individuals to stand in the shoes of the government such that a relator functions as the official of the United States charged with the responsibility to act.

Cochise's argument that the court should look beyond the plain text of Section 3731(b) was met with opposition by several justices. On the question of who could take advantage of the tolling provision, Justice Ruth Bader Ginsburg commented that there is "no distinction in the text between the United States stepping in as intervenor or the qui tam plaintiff going it alone."

And Justice Brett Kavanaugh stated that he did not see any ambiguity in the plain language of the provision such that — as a matter of statutory interpretation — the court could conclude that Congress did not mean what it said in Section 3731(b)(2).

While much of the questioning focused on issues of statutory interpretation, the argument also included discussion of how Section 3731(b) fits within the text of the broader statutory scheme. Cochise argued that under the Eleventh Circuit's ruling, a relator could intentionally delay the filing of a suit in cases of ongoing fraud to increase the size of the potential recovery.

This prompted Chief Justice John Roberts to observe that the likelihood of a relator "waiting in the weeds" was largely an academic concern because there are practical safeguards in place — such as the first-to-file bar — that discourage relators from delaying the disclosure of fraud lest they miss their opportunity to share in any recovery altogether.

And Justice Sonia Sotomayor noted an additional incentive for timely filing: If a relator is dilatory in bringing their action, a court could reduce the relator's share of the proceeds of any recovery.

The U.S. solicitor general also argued before the high court, taking the position that the statute of limitations should be the same for relators regardless of whether the government intervenes. Moreover, the solicitor general argued that a relator's knowledge of fraud does not trigger the running of the clock under Section 3731(b)(2) because, even when the relator steps into the shoes of the government, it is not acting as an "official[s] of the United States."

What Comes Next

While there is always risk in trying to read the tea leaves at oral argument, based on the questions from a lively bench, it appears that a majority of justices were persuaded that the plain text of the statute does not support the interpretation presented by Cochise.

Thus, it appears likely that the court will hold that Section 3731(b)(2)'s tolling provision applies to all FCA cases, including nonintervened ones to which the government is not formally a party, This means that the default for pleading false claims would reach back 10 years from the date of the complaint, unless the defendant can prove that the government knew or should have known about the material facts sooner.

There's little doubt that FCA defendants would prefer that Section 3731(b)(2) be limited to intervened cases in order to limit the ability of relators to reach back ten years in nonintervened cases. This is so even though allowing relators to take advantage of the 10-year period of repose may not be altogether likely to lead to a significant uptick in recoveries.

Indeed, the qui tam success rate — i.e., cases that end in a judgment or settlement — hovers around 10 percent in cases where the government declines intervention. One can imagine that would be even lower in cases filed seven to 10 years after a false claim is submitted, as memories fade and evidence dissipates with time.

That said, the potential leverage afforded to a relator who can now claim damages dating back 10 years, given that many FCA cases allege fraudulent schemes spanning years, not just points in time, is a significant concern where the FCA provides for treble damages plus penalties.

In addition, the effect of the court's probable ruling in Hunt will likely pose significant practical challenges for companies defending against stale allegations, even if the claims are ultimately unsuccessful. As counsel for Cochise noted at oral argument, many qui tam cases remain under seal for years after they are filed such that, by the time the case is litigated, the parties could very well be seeking discovery about facts from over a decade ago. This in turn places a very real cost and time burden on defendants who may be required to collect, review and produce communications and documents going back years.

Moreover, should the court decide that the clock should start running under Section 3731(b)(2) based on the government's knowledge of material facts, defendants will face both challenges and opportunities in nonintervened cases in attempting to show that the government knew or should have known facts material to the right of action.

One of the most interesting parts of the forthcoming Hunt opinion may very well be discussion of issues

not directly before the court. In its briefing and at argument, the solicitor general takes the standard DOJ position that only an officer of the Department of Justice can be the relevant government official for purposes of Section 3731(b)(2).

It will be interesting to see if this issue gets addressed in the forthcoming Hunt opinion because it is another area where the law is unsettled, with some courts agreeing with the solicitor general's position that only the DOJ's knowledge matters for purposes of Section 3731(b)(2)[5] and other courts saying that other government officials' knowledge — such as an office of the inspector general — can trigger the running of the clock.[6]

If the court weighs in, it could potentially impact the way in which FCA cases are investigated and litigated considering that it is not uncommon for an inspector general's office to investigate qui tam allegations for an extended period of time before making a formal referral to the DOJ.

The Hunt opinion will also be worth reading to see if it provides any insight into the justices' thoughts about the cert petition currently pending before the Supreme Court in Intermountain Health Care, Inc. v. United States, ex rel. Gerald Polukoff, in which a hospital system argues that the qui tam provisions violate the appointments clause in Article II of the Constitution.

Namely, Intermountain argues that relators function as "inferior officers" when they file actions and prosecute cases in the name of the United States, yet relators are not appointed under the appointments clause. The court's opinion in Hunt could potentially touch upon this question of whether a relator is an officer or official when standing in the shoes of the government if the court grapples with the Ninth Circuit's interpretation of Section 3731(b)(2), which considers the relator to be the "official of the United States charged with responsibility to act" in cases where the DOJ declines intervention.

During oral argument, Justices Ginsburg and Sotomayor both seemed disinclined to accept the Ninth Circuit's interpretation and noted that, even if a relator functions as an "agent" for the government, this is not the same as an "official" of the United States.

We will have to wait for the court's opinion for a final answer to the questions posed as to the application of Section 3731(b)(2), but with the end of the term less than three months away, practitioners thankfully will not have to wait the seven years that Hunt delayed filing suit to hear it.

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[1] Cochise Consultancy Inc. v United States ex rel. Hunt, ___US___, 139 S Ct 566 (2018)

[2] United States ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah, 472 F.3d 702, 726 (10th Cir. 2006); United States ex rel. Sanders v. N. Am. Bus Indus. Inc., 546 F.3d 288, 293 (4th Cir. 2008). See also United States ex rel. Erskine v. Baker, 213 F.3d 638 (5th Cir. 2000) ("[T]he Erskines cannot benefit from a tolling provision passed exclusively for the government's benefit") (per curiam).

[3] United States ex rel. Hyatt v. Northrop Corp., 91 F.3d 1211, 1217 (9th Cir. 1996). See also United States ex rel. Malloy v. Telephonics Corp., 68 F. App'x 270 (3d Cir. 2003) ("Because Malloy had knowledge of the alleged fraud more than three years before this action was filed, his only basis for asserting that his claims are timely is to proceed under the six year limitations period of § 3731(b)(1)").

[4] Graham County Soil & Water Conservation District v. United States, ex rel. Wilson, 545 U.S. 409 (2005).

[5] United States v. Kellogg Brown & Root Servs. Inc. ("KBR"), Civ. A. No. 12-4110, 2016 WL 5344419, at *6 (C.D. Ill. Sept. 16, 2016) (finding that only the Attorney General or designees within DOJ Have statutory "authority to investigate violations and to file a civil action under the statute.")

[6] See, e.g., United States ex rel. Frascella v. Oracle Corp., 751 F. Supp. 2d 842, 853 (E.D. Va. 2010) (finding that an audit report sent to an official within the GSA Office for Investigations went to "an official in a position both to recognize the existence of a possible violation of [the FCA] and to take steps to address it.").