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# Time to Resolve a Question About Time: Supreme Court to Consider FCA's Statute of Limitations

Article By:

Peter Hutt

Michael Wagner

Andrew Guy

When does a private party need to file a *qui tam* action under the False Claims Act ("FCA")? Such a seemingly simple question has resulted in three different answers from six different courts. This past Friday, November 16, 2018, the Supreme Court announced it would resolve that circuit split — by granting a request to review the Eleventh Circuit's decision in United States ex rel. Hunt v. Cochise Consultancy, Inc. The case will merit close attention, as the ultimate outcome could help protect government contractors from intentional and prejudicial delay in litigation.

Under the FCA, the United States can bring a suit against a defendant accused of submitting false claims. In addition, a private citizen (known as a "relator") can bring a *qui tam* action against that defendant in the name of the United States. 31 U.S.C. § 3730. The FCA includes the following statute of limitations provision:

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.

31 U.S.C. § 3731(b).

This statute of limitations provision has proven controversial. Imagine a relator who files a *qui tam* action more than six years after the alleged fraud — but the Government only learned of the alleged facts two years ago. If the Government declines to intervene in the case, can the relator

nevertheless rely on the date that the Government learned of the facts and argue that the action is timely under 31 U.S.C. § 3731(b)(2)?

The answer to this question has divided federal appellate courts, and resulted in three distinct approaches.

## Approach 1: Relators must file within six years.

The Fourth Circuit, Tenth Circuit, and Fifth Circuit (in an unpublished decision) have held, consistent with the plain text of the statute, that section 3731(b)(2) applies to the United States and *not* to relators. Therefore, relators must file their FCA claims within six years of the alleged fraud, in accordance with section 3731(b)(1).

As these courts have noted, the statutory language refers to *the Government's*knowledge of "facts material to the right of action," and not *the relator's* knowledge. Accordingly, it would be absurd to apply such a provision when the Government is not even party to the suit.

Moreover, reading the statute to extend the statute of limitations would lead to troubling outcomes. If the longer statute of limitations set forth in section 3731(b)(2) applied to both the Government and relators, then relators would have an incentive to withhold material facts from the Government for as long as possible, so that their potential financial recovery could grow over an additional four years.

In light of the statutory text and these policy concerns — not to mention the statutory structure and legislative history of the FCA — these appellate courts have refused to allow relators to rely on section 3731(b)(2).

## Approach 2: Relators can wait until three years after the date when facts are known *to the Government.*

Earlier this year, the Eleventh Circuit took a different view in United States ex rel. Hunt v. Cochise Consultancy, Inc. The Eleventh Circuit focused on the introduction to section 3731(b), which explains that the provision applies to "civil action under section 3730." According to the Eleventh Circuit, a *qui tam* action in which the Government has not intervened still constitutes a "civil action under section 3730," so relators can rely on the longer statute of limitations set forth in section 3731(b)(2).

This reading is difficult to square with the Supreme Court's recent decision in Graham County Soil and Water Conservation District v. United States ex rel. Wilson, in which the Supreme Court considered *the exact same phrase at issue here*: "civil action under section 3730." The Court explained that "[s]tatutory language has meaning only in context" and that Congress "sometimes used the term to refer only to subset of § 3730 actions." Thus, the *Graham County* Court chose a more limited interpretation of the term.

The Eleventh Circuit believed that its reading could be reconciled with *Graham County*, and that applying a longer statute of limitations would not produce absurd results. But it also conceded that, as discussed above, the Fourth and Tenth Circuits had found several reasons to conclude otherwise.

## Approach 3: Relators can wait until three years after the date when facts are known *to the relator.*

The Ninth Circuit and the Third Circuit (in an unpublished decision) have adopted an approach that falls somewhere in the middle. These courts are in agreement with the Eleventh Circuit that section 3731(b)(2) applies to *qui tam* actions. However, according to these courts, the relevant question under section 3731(b)(2) is not when *the Government* found out about the alleged fraud, but instead when *the relator* found out about the alleged fraud. Under this view, "because *qui tam* plaintiffs are merely agents suing on behalf of the government," they can be treated as government officials for the purposes of section 3731(b)(2). Therefore, the statute of limitations begins after the relator (and not the Government) learns of the relevant facts.

The principal problem with the Ninth and Third Circuits' approach, of course, is that there is nothing in the text of the FCA that suggests relators can be treated as government officials for purposes of section 3731(b)(2), and it is not clear that the Supreme Court will be eager to read such an interpretation into the text of the FCA.

## Conclusion

The Supreme Court will soon resolve these questions in a manner that, one hopes, will provide consistency and predictability to FCA litigation. The timing and posture of the decision to grant cert in *Hunt* suggests that the Court may not approve of the Eleventh Circuit's expansively permissive approach, but practitioners and litigants should watch this space in the next few months for analysis of the Court's eventual opinion.



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