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False Claims Act SCOTUS Update: Supreme Court Rules on False Claims Act Qui Tam Statute of Limitations

In a recent 9-0 decision issued by the United States Supreme Court (SCOTUS), the Court has set to rest the applicable statutes of limitations for claims brought under the False Claims Act, 31 U.S.C. §3731(b) (FCA). *Cochise Consultancy, Inc. v. United States* ex rel. Hunt, 587 U.S. _____ (2019). This decision was rendered by Justice Thomas, who appears to have become the Court's government contracts 'guru,' having issued prior decisions in the same general topic.

Over the years there had developed a significant split among the lower courts as to when and how the FCA statute of limitations ran and which applied to private and government parties. SCOTUS has now resolved this question, with a short decision delivered by Justice Thomas.

BACKGROUND:

While we have written about relatively recent developments under the FCA arising out of SCOTUS, a slight FCA refresher may be in order. The FCA is a statute which, in effect, allows the Government or a relator (a private party) to bring suit under the Civil FCA against parties and individuals who they allege have defrauded the U.S. Government from monies. An FCA action can arise out of any number of possible bases, but some recent examples include improper invoicing of personnel; violation of the Service Contract Act and Davis-Bacon Act prevailing wage laws; improper certification as a small business, and the like. Likewise, we have written in the past about SCOTUS' narrowing of the scope and triggers for proving an FCA claim.[1] In summary, the FCA can institute civil liability on "any person" which "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval" to the Government or certain parties acting on the Government's behalf.

This can happen either in the form of the Government initiating the action or a relator under a qui tam action. A relator is a private party which can file suit under seal in federal court seeking recovery of damages. In the case of a *qui tam* or relator action, the Government is afforded a limited time to review the sealed complaint and elect whether to intervene or to allow the case to go forward without the Government taking it over via intervention. Where a *qui tam* action proceeds forward, either through the Government effectuating a takeover, or in the rare case when no intervention happens, the relator proceeding forward, the relator "shares" in any recovery, which amounts can be significant.

A "Statute of Limitations" is "A law that bars claims after a specified time." Black's Law Dictionary 1450-51 (8th Ed. 2004). "The purpose of such as statute is to require diligent prosecution of known claims thereby providing finality and predictability in legal affairs and ensuring that the claims will be resolved while evidence is reasonably available and fresh." *Id*.

The FCA contains two limitations periods relating to civil actions. The first references suits being brought within six years after the statutory violation occurs; and the second within three years after a

United States official charged with the responsibility to file such suit (normally the U.S. Attorney General) knew or should have known of the relevant facts, but under no circumstance more than 10 years after the alleged violation occurred. As written, the relevant statutes of limitation, found at 31 U.S.C. §3737(b), states:

(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.

In *Cochise*, SCOTUS has clarified when suit under a qui tam action where the Government has not intervened runs.

RELEVANT FACTS:

In *Cochise*, Mr. Hunt had filed suit against two government contractors in November 2013, alleging that they had submitted false claims by seeking pay for certain security services they had provided in Iraq from January 2006 to early 2007.Just prior to filing suit three years later, Hunt had been interviewed by FBI agents on an unrelated matter and, during that interview, Hunt revealed the underlying fraudulent scheme.The United States Government refused to intervene in Hunt's action and the Appellants (Cochise and Parsons) sought dismissal of the suit under the FCA's six-year statute of limitations. Hunt admitted that the six-year limitations period had run, but that because it was filed within three years of his disclosure to the FBI agents and less than 10 years after the underlying events occurred, that this latter limitations period controlled.The District Court dismissed and Hunt appealed to the 11th Circuit Court of Appeals.On appeal, the Circuit Court reversed in favor of Hunt and remanded. The appeal to SCOTUS followed.

THE ISSUES PRESENTED:

In summary, the question was whether a relator could rely alternatively on both statutes of limitations, or did only one apply to a relator ((b)(1)) and the other only to the Government ((b)(2))?The Court couched this appeal/petition as it having to answer two questions:

> The first question before us is whether the limitations period in §3731(b)(2) is available in a relator-initiated suit in which the Government has declined to intervene. If so, the second question is whether the relator in such a case should be considered "the official of the United States" whose knowledge triggers §3731(b)(2)'s 3-year limitations period.

Cochise at 4.

FINDINGS:

The Court recognized that the language for the two limitations periods, despite being broken out as one for the Government and one for relators, applied to both situations .As a result, the Court concluded that a plain reading of the statute as a whole required that it be given consistent meaning, regardless of

which entity (the Government or relator) brings suit. As such, in parsing the subsections of Section 3731 and its applicability to Section 3730 (the FCA statute itself), the Court found that both subsections could apply to both the Government and a relator.

Following a brief analysis and refutation of Cochise's arguments, the Court concluded that both (b)(1) and (2) could be relied upon by the relator, Hunt. First, the six-year limitations period was applicable, which Hunt admitted had expired.However, in giving a plain, complete reading of the statute, SCOTUS agreed with the 11th Circuit, concluding that (b)(2)'s language was not limited to the Government, but merely created an alternative statute of limitations, under which the outside 10-year limitation was also applicable.

Here, Hunt had notified the FBI of the facts relating to the suit, and while the Government had elected to not intervene, that suit was filed within the *later of*, three years of when the facts were made known to the official "charged with responsibility to act in the circumstances (the Attorney General, albeit through the FBI), and that date that was 10 years from the date after which the alleged violation had occurred. As a result, when read as a whole, the suit was timely filed.

CONCLUSION:

Given this conclusion, SCOTUS ruled that, at least where a relator reports the facts giving rise to the alleged violation to the Attorney General (and by extension, arguably, the Department of Justice or other like agencies) and the Government does not intervene, the limitations period for a relator is longer than six years and has an outside date of 10 years from then the conduct was known or should have been known. This formally expands the time in which a relator may bring suit under the FCA, from what used generally be considered the six-year limitations period. This means that, under certain circumstances, contractors may have longer exposure to *qui tam* actions than what was previously believed (the six-year period).

While the Court has drawn back and increased the burden to prove an FCA violation through the *Escobar* and other decisions, there are real risks to contractors that will not possibly exist for a longer period of time.

The opinions expressed are those of the author and do not necessarily reflect the views of the firm or its clients,. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

Footnotes

1] *See,* Client Alert and Blog Post at https://www.kilpatricktownsend.com/Insights/Alert/2016/6/Supreme-Court-Finds-The-Department-of-Veterans-Affairs-Violated-Procurement-Law on the Court's *Escobar* Decision of 2017.