AHLA PG Alert

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Eleventh Circuit Revives False Claims Act Qui Tam, Adding to Circuit Split on Statute of Limitations Issue

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In 2013, Relator Billie Joe Hunt sued his former employer and others under the qui tamprovisions of the federal False Claims Act (FCA) for alleged "rampant war-time contract fraud." The case is captioned *United States ex rel. Hunt v. Cochise Consultancy, Inc.*[1] After an investigation, the Department of Justice declined to intervene in the case, and the defendants filed a motion to dismiss for failure to state a claim on statute of limitations grounds. The FCA's statute of limitations (found at 31 U.S.C. § 3731(b)) provides that an FCA action may not be brought:

1. More than six years after the date on which the violation of section 3729 is committed, or
2. **More than 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**, but in no event more than 10 years after the date on which the violation is committed, whichever occurs last (emphasis added).[2]

There was no question that Hunt failed to file his qui tamaction within six years after the date on which the alleged violation occurred and, therefore, unless Section 3731(b)(2) applied, the action was barred by the statute of limitations. Hunt argued, however, that his action was timely under Section 3731(b)(2) because he filed it within three years of when he first disclosed the fraud to the government. The District Court for the Northern District of Alabama concluded that the limitations period contained in Section 3731(b)(2) did not apply in cases where the United States has declined to intervene, and dismissed the case as untimely.

On appeal, the Eleventh Circuit noted that the question before it-"whether § 3731(b)(2)'s three year limitations period applies to a relator's FCA claim when the United States declines to intervene in the *qui tam* action"-was a matter of first impression. After going through a history of the FCA, the Eleventh Circuit stated that the question before the court was "whether Congress intended to allow relators in non-intervened cases to rely on § 3731(b)(2)'s limitations period." To answer this question, the court first analyzed the statute's plain language, and concluded that nothing in the actual language of Section 3731 precluded subsection (b)(2) from applying in non-intervened cases. Accordingly, the Eleventh Circuit held that the text supported allowing relators in non-intervened cases to rely on Section 3731(b)(2)'s limitations period. The court went on to hold that, to the extent that the FCA's legislative history was relevant, it bolstered the conclusion that Section 3731(b)(2) can apply in non-intervened cases.

After concluding that the statute of limitations contained in Section 3731(b)(2) is available to a relator in a non-intervened case, the Eleventh Circuit went on to address whether that limitations period is triggered by the knowledge of a government official or by the knowledge of the relator. The court held that "it is the knowledge of a government official, not the relator, that triggers the limitations period." The Eleventh Circuit rejected a contrary holding by the Ninth Circuit, which held that the statute of limitations in Section 3731(b)(2) is triggered by the relator's knowledge.[3] The Eleventh Circuit criticized the Ninth Circuit's reasoning as creating a "new legal fiction" and noted that nothing in text of the FCA or the statutory context supported the Ninth Circuit's holding in this regard.

Applying its holdings to the facts of the case, the Eleventh Circuit concluded that it was not apparent from the face of Hunt's complaint that his FCA claim was untimely and, accordingly, that the district court erred in dismissing his complaint on statute of limitations grounds. The court remanded the case for further proceedings.

The Eleventh Circuit's first holding-that the limitations period contained in Section 3731(b)(2) applies in non-intervened cases-is in the minority, as the Fourth, Fifth, and Tenth Circuits have each held that Section 3731 does not apply in non-intervened cases.[4] While the Ninth Circuit has held that Section 37371 does apply in non-intervened cases, as discussed above, it differs from the Eleventh Circuit's decision in *Hunt* by holding that the statute of limitations is triggered by the relator's knowledge, rather than the government's knowledge.[5] This developing circuit split may well garner the attention of the Supreme Court, which may ultimately have to decide this issue conclusively.

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[1] Case No. 5:13-cv-02168 (N.D. Ala. 2013).
[2] 31 U.S.C. § 3731(b).
[3] *U.S. ex rel. Hyatt v. Northrop Corp.*, 91 F.3d 1211, 1217 (9th Cir. 1996).
[4] *U.S. ex rel. Sanders v. N. Am. Bus. Indus., Inc.*, 546 F.3d 288, 293 (4th Cir. 2008); *U.S. ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702, 725 (10th Cir. 2006); *U.S. ex rel. Erskine v. Baker*, 213 F.3d 638 (5th Cir. 2000).
[5] *Hyatt*, 91 F.3d at 1216.

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