UNITED STATES SUPREME COURT SET TO RESOLVE CIRCUIT SPLIT REGARDING FALSE CLAIMS ACT LIMITATIONS PERIOD

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The False Claims Act ("FCA") permits a private whistleblower (known by the FCA as a "relator") to bring a civil action for violations of the statute in the name of the United States.[1] These whistleblower suits are known as *qui tam* actions. Once a *qui tam* is filed under seal, the United States has a period of time to investigate and must ultimately decide whether or not to intervene.[2] If the government intervenes, it takes over and prosecutes the action, and the relator receives between 15 and 25 percent of the total recovery, if any. If the government declines to intervene, the relator typically has the right to conduct the action and then receives between 25 and 30 percent of the total recovery.[3]

In Fiscal Year 2018, the Department of Justice obtained more than $2.8 billion in settlements and judgments from FCA cases.[4] Of that total, over $2.5 billion was from healthcare-related FCA cases and over $2.1 billion were the result of *qui tam* actions.[5]

The FCA statute of limitations is found at 31 U.S.C. § 3731(b) and provides that a civil action under that statute may not be brought:

> (1) more than 6 years after the date on which the violation of [the FCA] 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.

The *qui tam* relator's filing of a complaint tolls the statute of limitations. If the government decides to intervene, it may file its own complaint and, for purposes of the statute of limitations, such complaint relates back to the filing date of the original *qui tam* complaint to the extent that the government's claims arise "out of the same conduct, transaction, or occurrences set forth" in the relator's complaint.[6]

In November 2018, the United States Supreme Court granted certiorari in *Cochise Consultancy, Inc. and The Parsons Corporation vs. United States ex rel. Hunt.*[7] The question presented in *Hunt* is whether a relator in an FCA *qui tam* may rely on the statute of limitations in Section 3731(b)(2) in a suit in which the government has declined to intervene and, if so, whether the relator constitutes an "official of the United States" for purposes of that provision.

Current Circuit Split Regarding the FCA's Statute of Limitations' Application to *Qui Tam* Actions

Federal courts are currently split on the application of the FCA's statute of limitations to *qui tam* actions; i.e., whether – and if so how – Section 3731(b)(2) applies to such actions.

Fourth, Fifth, and Tenth Circuits

The Fourth, Fifth, and Tenth Circuits have held that Section 3731(b)(2) only applies in FCA cases filed directly by the government (a non-*qui tam*) or where the government has intervened in a *qui tam*.

In *United States ex rel. Sanders v. North American Bus Industries, Inc.*, the Fourth Circuit upheld the district court's ruling that the relator could not avail himself of the longer limitations period found in Section 3731(b)(2) because the government declined to intervene in the *qui tam* action.[8]

The Fourth Circuit noted that the actual text of the provision refers only to the United States, and not to relators. Based on this, the Fourth Circuit held that "[i]t would be problematic to read the text of the statute any other way" and that "Congress intended Section 3731(b)(2) to extend the FCA's default six-year period only in cases in which the government is a party, rather than to produce the bizarre scenario in which the limitations period in a relator's action depends on the knowledge of a nonparty to the action."[9] The Fourth Circuit also noted that Section 3731(b)(2)'s reference to the "facts material to the right of action" only makes sense when referring to an action brought by the government because that particular knowledge notifies the government if it has an actionable FCA claim.[10] The Fourth Circuit continued:

> But applying the statute's language to a relator's action makes no sense whatsoever. The government's knowledge of "facts material to the right of action" does not notify the relator of anything, so that knowledge cannot reasonably begin the limitations period for a relator's claims. Furthermore, once the material facts supporting a right of action are known to the United States, it is doubtful that the government official "charged with responsibility to act in the circumstances" could be charged with any responsibility other than

to see that the government brings or joins an FCA action within the limitations period. After all, government officials are certainly not "charged with responsibility" to ensure that a relator brings a timely FCA action. All of these textual elements demonstrate that Section 3731(b)(2) makes sense only when read to extend the FCA's limitations period in actions brought or joined by the United States.[11]

Similarly, in *United States ex rel. Erskine v. Baker*, the Fifth Circuit (in an unpublished, per curiam opinion) held that Section 3731(b)(2) does not apply to a non-intervened *qui tam* because the text and legislative history of the FCA makes clear that Section 3731(b)(2) "protects the government from fraud that is not immediately discoverable" and that, because the language of Section 3731(b)(2) does not offer similar protection to relators, it is only available to relators if they are in "direct identity" with the government (i.e., if the government has intervened).[12]

In *United States ex rel. Sikkenga v. Regence BlueCross BlueShield of Utah*, the Tenth Circuit held that, although it viewed the language of Section 3731(b)(2) ambiguous, Congress did not intend for that section to apply to a non-intervened *qui tam* action.[13] The court in *Sikkenga* noted that if relators could avail themselves of the tolling provisions of Section 3731(b)(2), "then we are hard pressed to describe a circumstance where the six year statute of limitations in § 3731(b)(1) would be applicable."[14] The court also held that extending Section 3731(b)(2) to a non-intervened *qui tam* would "run afoul of the absurdity doctrine" because Congress "could not have intended to base a statute of limitations on the knowledge of a non-party."[15]

Third and Ninth Circuits

The Third and Ninth Circuits have held that a relator may rely on Section 3731(b)(2) even in cases where the United States does not intervene, but that the limitations period is triggered by the relator's knowledge of the alleged fraud, not by the government's knowledge.

In *United States ex rel. Hyatt v. Northrop Corp.*, the Ninth Circuit held that the language of the FCA's statute of limitations provisions is "clear and unambiguous" and that "[n]o distinction is made between civil actions brought by the government . . . and those brought by *qui tam* plaintiffs...."[16] The Ninth Circuit went on to hold: "Indeed, there is nothing in the entire statute of limitations subsection which differentiates between private and government plaintiffs at all. If Congress had intended the tolling provisions of § 3731(b)(2) to apply solely to suits brought by the Attorney General, it could have easily expressed its specific intent."[17] As to the question of what triggers the running of the statute of limitations against a *qui tam* plaintiff under Section 3731(b)(2), the Ninth Circuit concluded that it is the knowledge of the relator that matters: "The *qui tam* plaintiff is the only person 'charged with responsibility to act in the circumstances.' . . . Thus, as to the *qui tam* plaintiff, the three-year extension of the statute of limitations begins to run once the *qui tam* plaintiff knows or reasonably should have known the facts material to his right of action."[18]

This same reasoning was adopted by the Third Circuit in *United States ex rel. Malloy v. Telephonics Corp.*[19] The court in *Malloy* held – without much analysis – that the relator could avail himself of the limitations period contained in Section 3731(b)(2), and that it was the relator's knowledge that triggered the limitations period, although that provision was of no practical advantage to the relator in that case because the relator filed his suit more than three years after the date on which he had knowledge of the alleged fraud.[20]

Eleventh Circuit

In *Hunt* – the case now pending review by the Supreme Court – the Eleventh Circuit forged a third approach. *Hunt* is not a healthcare case; it is a *qui tam* alleging that the defendants submitted false claims to the U.S. Department of Defense related to a contractor to clear excess munitions in Iraq. Like the Third and Ninth Circuits, the Eleventh Circuit in *Hunt* held that the limitations provision contained in Section 3731(b)(2) applies to a non-intervened *qui tam* action, but concluded that the clock begins to run when the *government* learns of the alleged fraud, not the relator.[21]

As to the common defense-side argument that applying Section 3731(b)(2) to a non-intervened *qui tam* would lead to an "absurd result," the Eleventh Circuit rejected this contention, holding that even when the United States declines to intervene in a *qui tam* action, the United States remains the real party in interest and "retains significant control over the case."[22] "Given this unique role, we cannot say that it would be absurd for Congress to peg the start of the limitations period to the knowledge of a government official even when the United States declines to intervene."[23]

As to the other common defense-side argument that such a reading of Section 3731(b)(2) would render the six-year limitations period of Section 3731(b)(1) superfluous, the Eleventh Circuit held that this overlooked the fact that "[o]ther provisions of the FCA create strong incentives to ensure that relators promptly report fraud."[24] For example, the court held, "[a] relator who waits to report a fraud risks recovering nothing or having his relator's share decreased" under either the FCA's first-to-file bar[25] or public disclosure bar.[26] The court also noted that "because § 3731(b)(2)'s limitations period begins to run when the relevant government officials learns [sic] about the fraud from any source,

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a relator who delays reporting the fraud to the government also runs the risk that the government will learn about the fraud from another source and that § 3731(b)(2)'s three year period will expire before the relator files suit."[27] Finally, the Eleventh Circuit held that "even if there were no risk that the government could learn of the fraud from another source, a relator still would have an incentive to report fraud promptly because the court in setting the relator's share may consider whether he 'substantially delayed in reporting the fraud or filing the complaint.'"[28]

Arguments Raised Before the Supreme Court in *Hunt*

In their brief before the Supreme Court, the petitioners (the original defendants) ask the Court to adopt the rule from the Fourth, Fifth, and Tenth Circuits that Section 3731(b)(2) only applies in FCA cases filed directly by the government (a non-*qui tam*) or where the government has intervened in a *qui tam*. The petitioners argue that such a rule is supported by the text, context, and statutory antecedents of Section 3731(b)(2), as well as the legislative history of the provision.[29]

The petitioners also argue that the Eleventh Circuit's interpretation of Section 3731(b)(2) would lead to counterintuitive results. For example, according to the petitioners:

> Under the Eleventh Circuit's rule, if a relator learns about fraudulent activity one day after it occurred, the relator would have a full ten years to file suit, as long as the government did not learn about the fraud in the interim, because the limitations period in Section 3731(b)(2) would never be triggered. But if the government learns about the fraud the day after it occurred, the government would have only six years to file suit because the limitations period in Section 3731(b)(2) would begin to run immediately and therefore would expire before the close of the six-year limitations period in Section 3731(b)(1).[30]

According to the petitioners, "[t]here is no reason that Congress would have treated a relator more favorably than the government itself in crafting the False Claims Act's statute of limitations. Indeed, the False Claims Act generally affords the government *greater* rights than relators."[31] The petitioners in *Hunt* go on to argue that if the Court decides that relators are permitted to invoke Section 3731(b)(2) where the United States has not intervened in the action, then it should also conclude that, in such cases, it is the relator who is "the official of the United States charged with responsibility to act in the circumstances" and whose knowledge triggers the start of the three-year limitations period."[32] According to petitioners, when the United States declines to intervene in a *qui tam* action, "the statutory context demonstrates that the relator is the 'official of the United States charged with responsibility to act in the circumstances.'"[33]

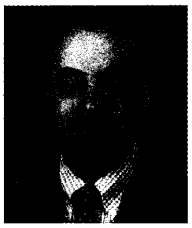
The respondent-relator asks the Court to adopt the Eleventh Circuit's holding.[34] The respondent argues that the Eleventh Circuit's decision follows "unambiguous statutory text and upholds the rational congressional goal of encouraging relators to file False Claims Act suits when the government does not intervene."[35] According to the respondent, "[t]he result countenanced by the Eleventh Circuit is not only not absurd, but entirely consistent with the congressional purpose encompassed by the False Claims Act to encourage the recoupment of stolen taxpayer funds."[36] As to the petitioners' argument that the Eleventh Circuit's reading would eviscerate the six-year limitations period contained in Section 3731(b)(1), the respondent argues that this ignores "the entirely reasonable possibility that Congress would not wish to foreclose relators from bringing *qui tam* actions that could result in dismantling frauds against the government, and thus would not want relators to be prejudiced when, after investigation, the government elects not to intervene after the six-year limitations period under Section 3731(b)(1) has expired."[37] The respondent also echoed the Eleventh Circuit's reasoning that other provisions of the FCA "'create strong incentives to ensure that relators promptly report fraud,' lest their claims be lost or their recoveries diminished."[38]

The U.S. Chamber of Commerce filed an amicus brief in support of the petitioners. According to the Chamber's brief, "allowing relators to lengthen the limitations period under Section 3731(b)(2) imposes significant burdens on False Claims Act defendants."[39] According to the Chamber:

> This Court has repeatedly emphasized that statutes of limitations "embody a 'policy of repose, designed to protect defendants' by fostering "elimination of state claims." . . . Businesses that provide services to the government, like all businesses, are entitled to the "'security and stability to human affairs'" that are "'vital to the welfare of society'" and should not be "'surprise[d] through the revival of claims that have been allowed to slumber.'" . . . The Eleventh Circuit's decision undermines that fairness by requiring False Claims Act defendants to litigate claims over alleged violations that occurred long ago. [40]

Conclusion

As of the writing of this Article, the parties are still in the process of filing briefs and oral argument has not yet been scheduled. FCA attorneys from both the plaintiff and defense bars will be watching closely to see how the Supreme Court resolves this important circuit split.



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Endnotes

1 31 U.S.C. § 3730(b)(1).

2 The FCA gives the government 60 days from the date the *qui tam* complaint is filed to make an intervention decision, with the ability to move for extensions "for good cause." *Id.* § 3730(b)(2)-(3). In reality, the government almost always takes considerably longer to make an intervention decision, often leaving a *qui tam* complaint under seal for many years.

3 *Id.* §§ 3730(c) and (d).

4 https://www.justice.gov/opa/pr/justice-department-recovers-over-28-billion-false-claims-act-cases-fiscal-year-2018.

5 https://www.justice.gov/civil/page/file/1080696/download?utm_medium=email&utm_source=govdelivery.

6 31 U.S.C. § 3731(c).

7 No. 18-315 (petition granted Nov. 16, 2018).

8 546 F.3d 288, 296 (4th Cir. 2008).

9 *Id.* at 293.

10 *Id.* at 294.

11 *Id.*

12 213 F.3d 638, 2000 WL 554644, at *1-*2 (5th Cir. 2000) (unpublished).

13 472 F.3d 702, 723-25 (10th Cir. 2006).

14 *Id.* at 726.

15 *Id.*

16 91 F.3d 1211, 1214 (9th Cir. 1996).

17 *Id.*

18 *Id.* at 1217-18.

19 68 Fed. App'x 270 (3d Cir. 2003).

20 *Id.* at 273.

21 *United States ex rel. Hunt v. Cochise Consultancy, Inc.*, 887 F.3d 1081 (11th Cir. 2018).

22 *Id.* at 1091.

23 *Id.* at 1092.

24 *Id.* at 1093.

25 31 U.S.C. § 3730(b)(5).

26 31 U.S.C. § 3730(e)(4).

27 887 F.3d at 1093.

28 *Id.* at 1093-94 (citing *U.S. ex rel. Shea v. Verizon Commc'ns, Inc.*, 844 F. Supp. 2d 78, 89 (D.D.C. 2012)).

29 Brief for Petitioners at 15-35.

30 *Id.* at 26-27.

31 *Id.* at 27 (emphasis in original).

32 *Id.* at 40.

33 *Id.*

34 Interestingly, although the respondent asks the Court to uphold the Eleventh Circuit's decision, he also asks the Court to grant the petition for a writ of certiorari to "resolve the conflicting interpretations of Section 3731(b)(2) to eliminate the ongoing confusion, unpredictability, and unfairness in the False Claims Act's application in the federal courts." Brief of Respondent at iv.

35 *Id.* at 13.

36 *Id.*

37 *Id.* at 15-16.

38 *Id.* at 16.

39 Amicus brief of the U.S. Chamber of Commerce at 14.

40 *Id.* at 14-15.