Eleventh Circuit Sets Up Circuit Split on False Claims Act Statute of Limitations Issues

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When a *qui tam* relator files a lawsuit alleging violations of the federal False Claims Act (FCA),[1] the statute imposes one of two potential deadlines. Specifically, the FCA's statute of limitations provisions require that a civil action alleging an FCA violation be brought within the later of:

- "6 years after the date on which the violation is committed";[2] or
- "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."[3]

Moreover, in addition to § 3731(b)(2)'s three-year limitations period, that section further provides that "in no event [shall an FCA action be brought] more than 10 years after the date on which the violation is committed."[4] Last month, in *United States ex rel. Hunt v. Cochise Consultancy, Inc.*, the Eleventh Circuit Court of Appeals, in a matter of first impression for the Court, considered the question of "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."[5]

In that case, relator Billy Joe Hunt filed an FCA action against his former employer, Parsons Infrastructure & Technology, and Cochise Security (both defense contractors), alleging that both companies defrauded the U.S. Defense Department as part of a $60 million contract to clean up excess munitions in Iraq left behind by enemy forces.[6] According to his complaint, Hunt had served as a manager for Parsons when it won the contract.[7] One provision of the contract required that Parsons provide security for the staff and subcontractors executing the cleanup.[8] Although Parsons initially awarded the security subcontract to ArmorGroup, an Army Corps of Engineers contracting officer, upon allegedly accepting bribes from Cochise, intervened.[9] The contracting officer allegedly forged a document rescinding the contract with ArmorGroup and awarding it to Cochise instead.[10] The alleged fraudulent scheme took place from February through September 2006, during which Cochise provided security services under the subcontract.[11]

Years later, on November 30, 2010, FBI agents questioned Hunt about his role in a separate kickback scheme. In cooperating with the FBI, Hunt disclosed the allegedly fraudulent security contract granted to Cochise by his former employer, Parsons.[12] Hunt pled guilty in 2012 to his involvement in the unrelated kickback scheme and served ten months in federal prison.[13]

Shortly after his release, on November 27, 2013, Hunt filed an FCA complaint against Parsons and

1 31 U.S.C. § 3729-33.
2 *Id.* at § 3731(b)(1).
3 *Id.* at § 3731(b)(2).
4 *Id.*
5 887 F.3d 1081, 1083 (11th Cir. 2018).
6 *Id.*
7 *Id.*
8 *Id.* at 1084.
9 *Id.*
10 *Id.*
11 *Id.*
12 *Id.*
13 *Id.* at 1084-85.

Cochise. When the Department of Justice (DOJ) declined to intervene in the case, the defendants moved to dismiss, arguing that Hunt's "claim was time barred under the six year limitations period in 31 U.S.C. § 3731(b)(1), and Hunt had waited more than seven years after the fraud occurred to file suit."[14] However, although there was no question that Hunt filed his November 2013 claim seven years after the alleged fraudulent scheme ended in September 2006, Hunt responded that pursuant to § 3731(b)(2), his claim was timely "because he had filed suit within three years of when the government learned of the fraud at his FBI interview and ten years of when the fraud occurred."[15] Yet, the District Court for the Northern District of Alabama granted the defendants' motion to dismiss, concluding that the three-year limitations period under § 3731(b)(2) was either unavailable because of the DOJ's decision not to intervene, or that the three-year limitations period had expired because Hunt had known about the fraud for more than three years.[16]

In overturning the district court, the Eleventh Circuit first noted that "[a]lthough the United States is not a party to a non-intervened case, it nevertheless retains a significant role in the litigation," in that DOJ may seek copies of all pleadings and transcripts, may stay discovery if it would interfere with an ongoing investigation, and may even override a relator's attempt to voluntarily dismiss the case.[17] And, nothing in the language of the statute itself says that the § 3731(b)(2) limitations period is unavailable to relators when the government declines to intervene.[18] Thus, the Court concluded, even though the three-year limitations period is triggered by a federal official's knowledge, it is immaterial whether the United States remains a party to the litigation.[19] Indeed, "even though the United States is not a party to a non-intervened *qui tam* action, the United States remains the real party in interest and retains significant control over the case."[20]

The Court further rejected the defendants' argument that permitting relators to utilize § 3731(b)(2) in non-intervened cases would cause relators to delay informing the government about the fraud in order to increase the potential damages. In doing so, the Court noted that the FCA's first-to-file and public disclosure bars provide sufficient incentive for the relator to report fraud to the government before the government learns about the fraud from another source, thereby barring the relator's claims.[21] Thus, the Court held that § 3731(b)(2) applies even where the United States declines to intervene.

Furthermore, in contrast to the district court's conclusion, the Eleventh Circuit held that the three-year limitations period provided by § 3731(b)(2) is triggered by the knowledge of a government official, not the relator.[22] In so holding, the Court simply looked to the language of the statute, stating that "[n]othing in the statutory text or broader context suggests that the limitations period is triggered by the relator's knowledge."[23]

The Court's two holdings – (1) that § 3731(b)(2) applies in non-intervened cases, and (2) that the limitations period of § 3731(b)(2) is triggered by the government's knowledge rather than the relator's – creates a circuit split on both issues. With respect to the first holding, the Court took the minority position, disagreeing with the Fourth, Fifth, and Tenth Circuits, each of which have held that § 3731(b)(2) does not apply in non-intervened cases.[24] And, although the Ninth Circuit has also taken the minority position with regard to the availability of § 3731(b)(2) in non-intervened cases, that court held that the relator's knowledge of the alleged fraud triggers the three-year limitations period.[25] Given this two-level circuit split, the Supreme Court may ultimately have to decide these issues.

14 *Id.* at 1085.
15 *Id.*
16 *Id.*
17 *Id.* at 1087 (citing 31 U.S.C. § 3730(b)(1), (c)(3), (c)(4)).
18 *Id.* at 1089.
19 *Id.* at 1091.
20 *Id.*
21 *Id.* at 1093.
22 *Id.* at 1096.
23 *Id.*
24 *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).
25 *U.S. ex rel. Hyatt v. Northrop Corp.*, 91 F.3d 1211, 1217 (9th Cir. 1996).

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