Supreme Court Hears Oral Arguments in False Claims Act Statute of Limitations Case

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On March 19, 2019, the U.S. Supreme Court heard oral arguments in *Cochise Consultancy, Inc. v. United States ex rel. Hunt*, a False Claims Act ("FCA") case in which the Court is generally expected to resolve the ongoing circuit court split regarding the correct application of the FCA's statute of limitations provisions where the federal government declines to intervene in a suit brought by a *qui tam* relator. The case is on appeal from an April 2018 decision by Eleventh Circuit Court of Appeals, which we previously discussed here.

The FCA allows a private party whistleblower to serve as a qui tam relator by bringing a civil action on behalf of the federal government.[1] Importantly, however, the relator must bring his or her lawsuit within the timeframe allowed by the FCA's statute of limitations provisions. As originally enacted, the FCA required that lawsuits be filed within "6 years after the date on which the violation is committed."[2] That provision continues to exist at Section 3731(b)(1) of the statute. However, when Congress overhauled the FCA in 1986, it added a second statute of limitations provision, Section 3731(b)(2). With this addition, the FCA now permits a relator to bring an FCA suit within 6 years of the alleged fraud, or within "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 not more than 10 years after the alleged fraud.[3] Section 3731(b)(2) thus extends the FCA's statute of limitations period "up to ten years in situations where the Government learned (or should have learned) of a potential claim, as long as it acted within three years of that knowledge."[4] Both statutes of limitation apply to any civil action brought under the FCA, and the latest deadline controls.[5]

In *Cochise*, the issue before the Supreme Court centers on whether the 3-year limitations period under Section 3731(b)(2) applies in cases where the government declines to intervene. In the underlying action, relator Billy Joe Hunt brought suit against two defense contractors, The Parsons Corporation ("Parsons," Hunt's former employer) and Cochise Security ("Cochise"), alleging that the contractors had submitted false or fraudulent claims for payment to the U.S. Department of Defense ("DOD") in violation of the FCA.[6] According to his complaint, Hunt had served as a manager for Parsons in 2006 when the company won a $60 million DOD contract to clean up excess munitions left behind by enemy forces in Iraq.[7] As part of that contract, Parsons was required to provide security for the cleanup crew.[8] Parsons hired a subcontractor to provide the security services, initially awarding a subcontract to ArmorGroup.[9] However, Hunt alleged, after accepting a bribe from Cochise, an Army Corps of Engineers contracting officer forged a document rescinding the subcontract award to AmorGroup and awarding it to Cochise instead.[10] Hunt alleged that this fraudulent scheme took place from February through September 2006, the time period during which

1 31 U.S.C. § 3730.
2 *Id.* at § 3731(b)(1).
3 *Id.* at § 3731(b)(2).
4 Brief of Respondent, *Cochise Consultancy, Inc. v. United States ex rel. Hunt,* No. 18-315 (S. Ct. Feb. 1, 2019), *available* at https://www.supremecourt.gov/DocketPDF/18/18-315/86715/20190201155344554_HuntMeritsFinal2-1-19.pdf.
5 31 U.S.C. § 3731(b)(2).
6 *United States ex rel. Hunt v. Cochise Consultancy, Inc.*, 887 F.3d 1081, 1083 (11th Cir. 2018).
7 *Id.*
8 *Id.* at 1084.
9 *Id.*
10 *Id.*

Cochise provided security services on Parsons' behalf under the terms of the subcontract.[11]

Hunt did not report the alleged fraud to the government until November 30, 2010, during an interview with the FBI regarding Hunt's role in a separate kickback scheme,[12] and did not file his FCA suit against Parsons and Cochise until November 27, 2013.[13] The parties agree that, because Hunt filed his complaint seven years after the alleged scheme to defraud DOD, his suit would be barred under the 6-year limitations period provided by Section 3731(b)(1). Hunt contends, however, that his claim is timely under Section 3731(b)(2) "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."[14]

Hunt's appeal from the Northern District of Alabama presented two issues for the Eleventh Circuit, both of which are now on appeal to the Supreme Court:

- Whether the 3-year limitations period provided under Section 3731(b)(2) applies in non-intervened cases; and
- If so, whose knowledge of the alleged fraud—the relator's or the government's—"starts the clock" for purposes of determining when the limitations period begins?

The Eleventh Circuit resolved both issues in favor of Hunt, overturning the district court's grant of the defendants' motion to dismiss.[15] In so ruling, however, the appellate court created a circuit split with respect to *both* issues. Indeed, the Fourth, Fifth, and Tenth Circuits have each held that Section 3731(b)(2) does not apply in non-intervened cases.[16] Moreover, although the Ninth Circuit had also previously found that Section 3731(b)(2) did apply in non-intervened cases, it splits with the Eleventh Circuit on the second issue in finding that the relator's knowledge, and not the government's, triggers the 3-year limitations period.[17]

In addition to arguments based on the statutory context and legislative history of Section 3731(b)(2), Parsons and Cochise argued that the Eleventh Circuit's ruling would (i) lead to an anomalous result whereby in certain instances, relators would have a longer period in which to sue than the government[18] (ii) cause the 6-year limitations period in Section 3731(b)(1) to became "superfluous in nearly all" relator-initiated cases in which the government does not intervene;[19] (iii) provide relators with a full ten years to file, suit creating a strong incentive, in cases of ongoing fraud, for relators to decline to disclose the fraud to the government and instead wait the full ten years to file suit;[20] and (iv) require discovery into the government's knowledge even when it declined to intervene in a relator's suit, which would "cause innumerable headaches for both defendants and the government during discovery."[21]

At oral argument, the justices appeared to push back on many of the defendants' assertions. Justice Sonia Sotomayor commented that, while the Eleventh Circuit's interpretation "appears to give the relator more of a statute of limitations than the government," the Court may need to take into account the FCA's broader purpose "to ensure that when some fraud has occurred against the U.S., there is recovery for the United States, and [in] qui tam actions, whether it's the relator or the U.S. prosecuting it, the recovery in bulk . . . goes to the government."[22] Moreover, Chief Justice John Roberts appeared to wave off the defendants' expressed concern that relators would wait 10 years before disclosing fraud to the government as "an academic concern."[23] The Chief Justice stated, further, that "[t]he relators . . . know if they don't move

11 *Id.*
12 *Id.*
13 *Id.* at 1085.
14 *Id.*
15 *Id.* at 1093.
16 *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).
17 *U.S. ex rel. Hyatt v. Northrop Corp.*, 91 F.3d 1211, 1217 (9th Cir. 1996).
18 Brief of Petitioner, *Cochise Consultancy, Inc. v. United States ex rel. Hunt*, No. 18-315, at 26 (S. Ct. Jan. 2, 2019), *available* at https://www.supremecourt.gov/DocketPDF/18/18-315/78026/20190102143440009_Parsons%20Petitioners%20Brief%20TO%20PRINTER.pdf.
19 *Id.* at 27 (citing *Sanders*, 546 F.3d at 295).
20 *Id.* at 28.
21 *Id.* at 32 (citing *Sanders*, 546 F.3d at 295).
22 Transcript of Oral Argument ["Transcript"], *Cochise Consultancy, Inc. v. United States ex rel. Hunt*, No. 18-315, (S. Ct. Mar. 19, 2019), *available* at https://www.supremecourt.gov/oral_arguments/argument_transcripts/2018/18-315_1bn2.pdf.
23 *Id.* at 15.

promptly, another relator might preempt them. They know that if they don't move promptly, the government itself might find out before they have a chance to file, and that would preempt their action as well."[24] Thus, said the Chief Justice, "[t]he theory of a relator just sort of, as you say, waiting in the weeds I think is not a realistic one."[25]

We will continue tracking this case and provide an update if and when the Court issues a decision.

24 *Id.* Here, Chief Justice Roberts appears to be referring to the FCA's "first-to-file" and "public disclosure" rules, which respectively bar a relator's FCA suit if (i) he is not the first to file a complaint relating to the alleged fraud, or (ii) he files his FCA suit after the government has already learned about the fraud from another source. 31 U.S.C. § 3730(e).

25 *Transcript* at 15.

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