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CIVIL FALSE CLAIMS ACT: Supreme Court Rules That Statute of Limitations for Whistleblower Retaliation Suits Is Not Governed by FCA's 6-Year Limitations Period; Courts Should Now Look to Analogous State Statute in Determining Limitations Period for Section 3730(h) Actions.

The Supreme Court's Ruling.

A majority of the Supreme Court ruled today that whistleblower retaliation suits filed under Section 3730(h) of the FCA are not governed by the six-year statute of limitations found in Section 3731(b) of the Act. See *Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson*, No. 04-169, slip op. at 1 (U.S. June 20, 2005). Justice Clarence Thomas wrote the opinion for the Court and was joined by Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Souter. (Justice Souter did not join the full opinion of the Court.) Justice Stevens concurred in the judgment. Justice Breyer dissented in an opinion joined by Justice Ginsburg.

The Issue.

The Court's ruling resolved a statutory construction issue on which the circuits were split. The issue was whether to interpret the six-year statute of limitations period set forth in Section 3731(b) of the False Claims Act to apply to discrimination/retaliation claims brought under Section 3730(h) as well as to substantive false claims actions brought under Section 3730(a) and (b), or whether the Act simply did not provide a limitations period for retaliation actions. Under the latter interpretation, courts look to the state statute most analogous to an FCA retaliation claim and apply the related state limitations period to the federal claim. The United States Courts of Appeals for the Fourth and Seventh Circuits had applied the FCA's six-year period to retaliation suits, but the Ninth Circuit had applied an analogous state statute. *Compare Wilson v. Graham County Soil & Water Conservation Dist.*, 367 F.3d 245 (4th Cir. 2004), and *Neal v. Honeywell, Inc.*, 33 F.3d 860 (7th Cir. 1994), *with United States ex rel. Lujan v. Hughes Aircraft Co.*, 162 F.3d 1027 (9th Cir. 1998).

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Procedural History.

The Supreme Court heard oral argument in this case on April 20, 2005, and questioning by the Court appeared at that time to signal that the Justices were sharply divided, a fact that is borne out in the opinions issued today. *See* FraudMail Alert® No. 05-04-22. The relator in the case, Karen Wilson, brought a *qui tam* suit against her employer, the Graham County Soil & Water Conservation District in North Carolina, claiming that her co-workers submitted false claims for reimbursement from three federal aid programs. She also alleged that her employer harassed and constructively discharged her as a result of her protected activity preceding the *qui tam* suit.

The district court had held that the FCA's six-year statute of limitations provision did not apply to the retaliation claim, based on its finding that the provision was limited to actions involving "violation[s] of section 3729," or substantive false claims actions. *United States ex rel. Wilson v. Graham County Soil & Water Conservation Dist.*, No. Civ. 2:01CV19, 2002 WL 31455718, at *9 (W.D. N.C. May 30, 2002) (unpublished opinion) (citing *Lujan*, 162 F.3d at 1035). The district court noted that applying the provision to retaliation actions would lead to "absurd or incomprehensible outcomes," including the situation where a retaliation action would not accrue unless the underlying false claims violation both actually occurred and took place within the six-year period preceding the retaliation claim. The district court therefore applied the three-year period of the state's wrongful discharge statute under which the retaliation claim was barred.

The district court subsequently denied the relator's motion for reconsideration of the dismissal of her claim, but agreed to certify the issue for interlocutory appeal. *See United States ex rel. Wilson v. Graham County Soil & Water Conservation District*, 224 F.Supp.2d 1042 (W.D.N.C. 2002). On appeal, a divided panel of the Fourth Circuit reversed. *See Graham County*, 367 F.3d 245 (4th Cir. 2004). The panel majority held that the six-year limitations period applied to both retaliation and false claims suits. Noting that the limitations provision applied to "a civil action under section 3730," the majority held that Section 3730(h) retaliation actions were included under the plain meaning of the statute. *Id.* at 251. The majority also noted that the six-year period was consistent with congressional intent to encourage relators to bring FCA claims and to provide greater protection for employees bringing such claims. *Id.* at 252. Judge Wilkinson filed a lengthy dissent. *Id.* at 257-62.

Specific Statutory Provisions.

Analysis of the issue begins with the statute of limitations provision in Section 3731(b), which was amended in 1986 as part of comprehensive amendments to the FCA. Section 3731(b) provides:

(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.

The 1986 amendments added the cause of action for retaliation in Section 3730(h), but did not expressly provide a statute of limitations for this new cause of action. The absence of a limitations period specifically addressed to retaliation, together with the conflicting court of appeals decisions regarding whether the FCA's express six-year limitations provision should apply to such claim, prompted thorny issues of statutory construction for the courts to resolve. The statutory construction issues were further complicated by the truly strange consequences produced under interpretations of these provisions in some cases, as discussed below.

Brief Summary of Arguments.

In the case before the Supreme Court, the Conservation District defendants argued that the six-year statute of limitations provision was limited to actions brought under Section 3730(a)-brought by the United States-and under Section 3730(b)-brought by *qui tam* relators-for substantive violations of Section 3729, which does not, of course, include the cause of action for retaliation action brought under Section 3730(h). The defendants also emphasized the logic of tying a statute of limitations to the elements of its cause of action. Specifically, their argument was that in retaliation cases, the limitations period should run from the date of the employee's injury rather than from the date of a purported false claim violation, which is an unrelated element of a distinctly different cause of action (namely, a violation of Section 3729).

The relator and the United States, which filed an amicus brief supporting the relator, adopted the Fourth Circuit majority's position that the plain language of the six-year limitations provision specifically covered Section 3730 actions and, therefore, included Section 3730(h) retaliation suits. The United States asserted that this interpretation offered uniformity and certainty in enforcement of the statute, and that the six-year period afforded time for the government to investigate complex allegations under seal before defendants are made aware that they may be targets of FCA allegations.

The Majority Decision.

Justice Thomas' opinion for the Court is simple and straightforward. The opinion observes that the text of Section 3731(b)(1) is ambiguous because that section ties the starting date for the running of the limitations period to the date on which the substantive violation of Section 3729 occurred. *Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson*, No. 04-169, slip op. at 5 (U.S. June 20, 2005).

This is the case even though-and this is a critical point for FCA practitioners-a substantive violation of the False Claims Act is not, according to the majority opinion, an essential element of a violation of the retaliation provision in Section 3730(h). As the opinion states: "[f]or even a well-pleaded retaliation complaint need not allege that the defendant submitted a false claim, leaving the limitations period without a starting point if §3730(b)(1) is applicable. . . . [The language of Section 3730(h)] protects an employee's conduct even if the target of an investigation or action to be filed was innocent." Id. at 6. In footnote 1 of the opinion, the Court cites a number of cases from lower courts discussing the elements of a violation of Section 3730(h), but, except for noting that all of those cases do not require proving a substantive violation of the FCA, the Court does not endorse any of those formulations.

Having found Section 3731(b)(1) to be ambiguous, the Court concludes that the six-year limitations period in that Section was not intended to apply to actions brought under Section 3730(h). Importantly for FCA

practitioners, the majority opinion notes that Section 3731(c), which provides that the burden of proof in FCA actions shall be "a preponderance of the evidence" standard, applies only to actions brought by the United States under Section 3730(a) or actions intervened in by the United States under Section 3730(b). Id. at 8. Defendants can be expected to rely upon this language to argue that, in qui tam cases in which the United States does not intervene, the burden of proof is the more demanding standard of proof in effect prior to the 1986 amendments, namely, a "clear and convincing" or even stricter standard. *See* John T. Boese, *Civil False Claims and Qui Tam Actions*, § 5.08[A] (2d ed., Supp. 2005-1).

The Court also relies on the "default rule that Congress generally drafts statutes of limitations to begin when the cause of action accrues." *Graham County*, slip op. at 8. Applying that rule, the Court concludes: "[t]herefore, where, as is the case here, there are two plausible constructions of a statute of limitations, we should adopt the construction that starts the time limit running when the cause of action (here retaliation) accrues." *Id.* at 9. Footnote 3 of the opinion contains a very useful list of "analogous state statutes" of limitations that may apply to Section (h) claims. The Court has remanded the case back to the Fourth Circuit for that court to address which state statute supplies the most analogous limitations period for the relator's retaliation claim.

The Dissenting Opinion.

Justices Breyer and Ginsburg argue in the dissent that, while it may be "unusual" to find a statute keyed to some related event rather than to the plaintiff's injury, Congress intended that result in this case. They disagree with the majority's finding that the statute is ambiguous, reasoning, instead, that it is "reasonably clear" in Section 3731(b)(1) that "[a] civil action under section 3730 may not be brought . . . more than 6 years after the date on which the violation" of the FCA "is committed." *Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson*, No. 04-169, slip op. at 1 (U.S. June 20, 2005) (Breyer, J and Ginsburg, J., dissenting) (emphasis in original). The dissent argues that when Congress intended to refer specifically to actions under Sections 3730(a) and (b), it did so. *Id.* at 2-3.

Thus, the dissent interprets Section 3731's six-year limitations period to apply to retaliation actions, reasoning that "Congress did not intend for the phrase '[a] civil action under 3730' to mean anything other than what it says." *Id.* at 3. In the dissenters' view, Congress could reasonably have intended the lengthy six-year statute of limitations to apply to all actions related to the *qui tam* suit, including retaliation actions. The dissent noted that, despite hypothetical concerns cited in the majority opinion, nobody has yet identified a case in which retaliation claims were barred because of acts occurring after the six-years provided under Section 3731. According to the dissent,

> [r]ather than shed crocodile tears for the imagined plight of a nonexistent whistle-blower, as petitioners ask us to do, I would read the statute to do what the statute says Congress wanted: to provide a relatively long, single, uniform limitations period that, in practice, seems to protect the many real potential claimants, such as respondent, who will otherwise find themselves shut out of court.

Id. at 6.

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