FraudMail Alert®

FRIED FRANK

Please click here to view our archives

Civil False Claims Act: Supreme Court to Determine Time for Appeal in Unintervened *Qui Tam* Cases

The Supreme Court today agreed to resolve a circuit conflict and determine whether a party has 30 or 60 days to file an appeal of a False Claims Act case to the court of appeals from a district court decision. In *United States ex rel. Eisenstein v. City of New York*, No. 08-660 (Jan. 16, 2009), the Court agreed to interpret Federal Rule of Appellate Procedure 4(a) to resolve the issue of whether, in a *qui tam* case in which the government has not intervened, the remaining parties (relator and defendant) have 30 days to file a notice of appeal, as Rule 4(a)(1)(A) allows when the United States is not a party, or 60 days to file the appeal, as Rule 4(a)(1)(B) allows when the United States is a party. This issue is discussed at length in John T. Boese, Civil False Claims and *Qui Tam* Actions §5.09 (Aspen Law & Business) (3d ed. & Supp. 2009-1).

This procedural issue has resulted in a sharp circuit split. A number of circuits have held, for varied reasons, that the time for appeal is 60 days. The Seventh, Fifth, Ninth, and most recently the Third Circuits have allowed appeals to be filed in 60 days on the grounds that the United States is the real party in interest and is required by the statute to be named in the complaint. *See United States ex rel. Lu v. Ou*, 368 F.3d 773 (7th Cir. 2004); *United States ex rel. Russell v. Epic Healthcare Management Group*, 193 F.3d 304 (5th Cir. 1999) (the reader should note that the author argued this case for defendants and lost this issue—but won the appeal on other grounds); *United States ex rel. Haycock v. Hughes Aircraft Co.*, 98 F.3d 1100 (9th Cir. 1996); *United States ex rel. Rodriguez v. Our Lady of Lourdes Medical Center*, No. 06-5207, 2008 WL 5411717 (3d Cir. Dec. 30, 2008).

In addition to the Second Circuit, the Tenth Circuit has also ruled that the 30-day rule should apply. *See United States ex rel. Petrofsky v. Van Cott, Bagley, Cornwall, McCarthy*, 588 F.2d 1327 (10th Cir. 1978). The United States, in an amicus brief in the *Eisenstein* case, took the position that the 30-day rule should apply.

In *United States ex rel. Eisenstein v. City of New York*, 540 F.3d 94 (2d Cir. 2008), the Second Circuit held that the 30-day time limit for filing a notice of appeal is mandatory and jurisdictional. The court held that the United States, once it declines to intervene, is clearly not a "party" to the case, even though it is the real party in interest and even though it receives the lion's share of any recovery. The court interpreted Appellate Rule 4(a)(1) to define a "party" as "the person participating in the proceedings with control over litigation." According to the court, once the

government declines to intervene, the government cannot "participate" without moving to intervene, and "[t]he inability to participate without moving to intervene is simply not consistent with the principal characteristics of being a party to litigation."

The court also held that the purpose of the 60-day period under Appellate Rule 4(a)(1)(B) is not present in a case in which the government does not intervene. The purpose for the longer time period when the government is a party is a recognition that the "slow machinery of government" requires a longer time for the government to consider whether to appeal. Since by definition the government is not participating in a non-intervened case, there is no reason for the longer period.

The Supreme Court's decision to take this case is puzzling for a number of reasons. First, the substantive case is a virtually frivolous *pro se* case brought by city workers somehow arguing that the City's requirement that non-resident city employees pay a fee equal to municipal income taxes paid by city residents results in lower Federal taxes. The District Court had no problem dismissing the case on substantive grounds (without even referring to the tax exclusion in 31 U.S.C. 3729(e)). *See United States ex rel. Eisenstein v. City of New York,* No. 03-413, 2006 WL 846376 (S.D.N.Y. Mar. 31, 2006). Even the Second Circuit recognized there were other grounds for dismissal, such as its holding in another case that *pro se* plaintiffs cannot represent the United States. 540 F.3d at 95 n.1. Second, while a circuit split clearly exists on this issue, it is one that is more important to attorney malpractice matters than to FCA jurisprudence. After all, how hard is it to file a notice of appeal in 30 days?

On the other hand, perhaps the Court is going to use the *Eisenstein* case to look further, and will reconsider portions of its ruling in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), that a *qui tam* relator has independent standing as a partial assignee of the United States. The Second Circuit relied heavily on *Stevens* in its decision, and perhaps the Supreme Court wants to consider whether the Second Circuit properly interpreted *Stevens*. Clearly the Supreme Court will have to resolve some deep philosophical issues regarding the status of the United States in a *qui tam* case when the government elects not to intervene. In addition, resolving the issue of whether the United States is a "party" in an unintervened *qui tam* case could also affect discovery from the government in such cases, and eliminate the needless harassment the government imposes under agency *Touhy* regulations.

There are, then, important issues at stake here, and one hopes the Supreme Court will decide them. If this is simply a case to interpret Appellate Rule 4(a) in a small handful of *qui tam* cases in which a *pro se* plaintiff or a second-rate lawyer misses a deadline, one wishes the Supreme Court would use its resources to resolve some of the many other important issues of FCA law (e.g., materiality) where there are circuit splits that affect hundreds of cases.

Authors and Contributors

For more information regarding this client alert, please contact your usual Fried Frank attorney or any of the attorneys listed below:

Washington, DC

John T. Boese
+1.202.639.7220

Fried, Frank, Harris, Shriver & Jacobson LLP

New York
One New York Plaza
New York, NY 10004-1980
Tel: +1.212.859.8000
Fax: +1.212.859.4000

Washington, DC
1001 Pennsylvania Avenue, NW
Washington, DC 20004-2505
Tel: +1.202.639.7000
Fax: +1.202.639.7003

Frankfurt
Taunusanlage 18
60325 Frankfurt am Main
Tel: +49.69.870.030.00
Fax: +49.69.870.030.555

Hong Kong
in association with
Huen Wong & Co.
9th Floor, Gloucester Tower
The Landmark
15 Queen's Road Central
Hong Kong
Tel: +852.3760.3600
Fax: +852.3760.3611

Shanghai
40th Floor, Park Place
1601 Nanjing Road West
Shanghai 200040
Tel: +86.21.6122.5500
Fax: +86.21.6122.5588

Fried, Frank, Harris, Shriver & Jacobson (London) LLP

London
99 City Road
London EC1Y 1AX
Tel: +44.20.7972.9600
Fax: +44.20.7972.9602

Fried, Frank, Harris, Shriver & Jacobson (Europe)

Paris
65-67, avenue des Champs Elysées
75008 Paris
Tel: +33.140.62.22.00
Fax : +33.140.62.22.29

A Delaware Limited Liability Partnership