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CIVIL FALSE CLAIMS ACT: Supreme Court Rules That Extended 10-year FCA Limitations Provision Applies to *Qui Tam* Relators in Nonintervened Cases, Leaves Other Questions Unanswered

In a unanimous decision in *Cochise Consultancy, Inc. v. United States ex rel. Hunt,* No. 18-315 (U.S. May 13, 2019), the Supreme Court resolved two questions regarding the application of the False Claims Act's statute of limitations to *qui tam* suits in which the government declines to intervene. First, the Court held that *qui tam* relators can take advantage of the extended limitations period in § 3731(b)(2) whether or not the government intervenes in their suits. Second, the Court ruled that, for purposes of § 3731(b)(2), a relator is not the "official of the United States charged with responsibility to act in the circumstances." However, the Court chose to avoid deciding whether "the official" must be the Attorney General or his designee—as the government urged—and the Court did not mention, let alone decide, the open question of whether the *qui tam* enforcement mechanism itself runs afoul of the Appointments Clause in Article II.

Summary of the Court's Holding in *Cochise*[1]

In an opinion authored by Justice Thomas, the Court began its analysis by noting that the language of § 3731(b) of the False Claims Act ("FCA") sets forth two limitations periods. That section 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 [the False Claims Act] 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.

Observing that both government-initiated actions under § 3730(a) and relator-initiated actions under § 3730(b) are "civil action[s] under section 3730," the Court found that the plain text of the statute makes

[1] For the additional background on the case, refer to FraudMail Alert No. 18-04-17.

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both limitations periods applicable to both types of suits. As such, the Court rejected Cochise's contention that the limitations period in § 3731(b)(1) applies to all relator-initiated actions (both intervened and nonintervened), while the limitations period in § 3731(b)(2) applies only to *qui tam* actions when the government intervenes. Cochise had advocated for this interpretation by citing to the default rule of tolling provisions that the limitations period commences only when the party entitled to bring a claim—in this case, the government—learns the relevant facts. The Court dispensed with this argument by finding that the default rule has no application in the face of clear statutory language:

> [U]nder Cochise's reading, a relator-initiated, nonintervened suit is a "civil action under section 3730" for purposes of subsection (b)(1) but not subsection (b)(2). This reading is at odds with fundamental rules of statutory interpretation. In all but the most unusual situations, a single use of a statutory phrase must have a fixed meaning…. Here, either a relator-initiated, nonintervened suit is a "civil action under section 3730"—and thus subject to the limitations periods in subsections (b)(1) and (b)(2)—or it is not. It is such an action. Whatever the default tolling rule might be, the clear text of the statute controls this case.

Slip op. at 5 (internal citations omitted).

The Court also rejected Cochise's reliance on the Court's decision in *Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U. S. 409 (2005) ("*Graham County I*"), an argument that occupied much of the oral argument in *Cochise* in March. *See* FraudMail Alert No. 19-03-20. In *Graham County I*, the Court found that, notwithstanding that an action brought pursuant to the anti-discrimination provision in § 3730(h) of the FCA is a civil action that arises "under section 3730," the limitations periods in § 3731(b) do *not* apply to such an action. The Court distinguished *Graham County I* as parsing the specific context of § 3730(h), which does not require a primary FCA violation, and of § 3731(c) (now § 3731(d)), which uses similar phrasing in discussing the government's burden of proof. Slip op. at 6-8.

Even while hewing closely to its reading of the plain statutory language, the Court recognized that its decision could lead to inconsistent and even incongruous results. For instance, a relator's claim would not be time barred even if he knew about an alleged FCA violation on the day that it occurred and waited 9 years and 364 days before filing a complaint, as long as he brought the claim within three years of when the responsible government official first became aware of the underlying facts. Yet, the government itself would have no more than six years to bring suit if it were aware of the same facts on the day the alleged fraud occurred. The Court seemed untroubled by this disparity, saying that it was acceptable because, while perhaps "odd," it is not "absurd." *Id.* at 8.

The second ruling of consequence in the Court's decision is that a private relator is not an "official of the United States" for purposes of § 3731(b)(2) because the relator is neither appointed as an officer of, nor employed by, the United States. Rather, the relator sues "as a partial assignee of the United States." *Id.* at 9 (quoting *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 773 n.4 (2000)). In so holding, the Court rejected Cochise's alternative argument that the suit nevertheless was time barred because the relator had filed suit more than three years after he first learned of the requisite facts.

Takeaways

As we observed previously in FraudMail Alert No. 19-03-20, this particular fact pattern—where a relator waits until year seven, eight, nine, or ten to bring suit and the government declines to intervene—has been relatively uncommon and is unlikely to surface more often going forward because relators have strong financial incentives to bring their actions earlier (thereby avoiding the first-to-file or public disclosure bars to *qui tam* relator recovery). As a result, this decision should not have much impact on

the day-to-day operations of most *qui tam* cases. In those few cases where it does arise, however, the government can expect to face probing discovery into when it knew or should have known about the underlying facts. This discovery may prove to be particularly unwelcome given the government's declination, and could perhaps become a factor in the government's exercise of its dismissal authority. If the frequency of these types of cases markedly increases, courts and/or Congress may have to explore whether the first-to-file and public disclosure bars still are providing the proper motivation for early relator disclosure to the government.

Of more practical relevance to FCA practitioners and litigants is an ongoing lower court debate over whether the "official of the United States charged with responsibility to act" is limited to the Attorney General and delegated Department of Justice employees who have the ability to file FCA suits, or whether it applies to other government representatives with responsibility to investigate, report, and otherwise act upon potential fraud, including various agency inspector generals. While the Justice Department sought to have the Court state that "official" refers only to the Attorney General or his delegate, the Court declined to wade into those waters at this time, determining *qui tam* applicability "[r]egardless of precisely which official or officials the statute is referring to." Slip op. at 9.

Also left open is the constitutional question of whether the *qui tam* enforcement mechanism violates the Appointments Clause in Article II of the U.S. Constitution. This Appointments Clause question is raised in a pending petition for certiorari in *Intermountain Health Care, Inc. v. United States ex rel. Polukoff,* No. 18-911. *See also* John T. Boese & Douglas W. Baruch, *Constitutional Challenges to the FCA's Qui Tam Mechanism: Ripe for a Revival?* Washington Legal Found., Critical Legal Issues Working Paper Series No. 206 (Feb. 2018).

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