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CIVIL FALSE CLAIMS ACT: The Supreme Court Hears Oral Argument in *United States ex rel. Eisenstein v. City of New York*

Yesterday, the Supreme Court heard oral argument in *United States ex rel. Eisenstein v. City of New York,* No. 08-660, a case that never should have been before the Court to resolve an issue that never should have arisen. The narrow procedural question presented in *Eisenstein* was whether, in a *qui tam* case in which the government has not intervened, the relator has 30 days to file a notice of appeal, as provided under Rule 4(a)(1)(A) of the Federal Rules of Appellate Procedure when the United States is not a party, or 60 days, as allowed under Rule 4(a)(1)(B) when the United States is a party. The issue, of course, can be avoided by filing a notice of appeal within 30 days, yet it has produced a sharp circuit split. The Third, Fifth, Seventh, and Ninth Circuits allow 60 days for an appeal on the grounds that the United States is the real party in interest in the suit, while the Tenth Circuit, in addition to the Second Circuit in *Eisenstein*, hold that the 30-day rule should apply. *See* FraudMail Alert No. 09-01-16. *See also* John T. Boese, Civil False Claims and *Qui Tam* Actions §5.09 (Aspen Publishers) (3d ed. & Supp. 2009-1). The oral argument reflected that the Court was interested in more than just the deadlines for filing a notice of appeal under Rule 4, and that broader issues involving the government's and the relator's status when the United States declines to intervene in False Claims Act cases could also be decided in *Eisenstein*.

Issues Addressed by the Courts Below in *Eisenstein*

The underlying False Claims Act allegations of the *pro se* relator and three other City workers in *Eisenstein* were so far-fetched that the district court dismissed them for failure to state a claim. They contended that the City's requirement that non-resident employees pay a fee equal to resident employees' municipal income taxes resulted in the payment of lower federal taxes by non-residents because they deducted the fee as an expense. After the district court's dismissal of the suit on April 12, 2006, Eisenstein filed a notice of appeal on June 5, 2006. The Second Circuit, *sua sponte*, ordered the parties to brief the Rule 4 time limit issue, noting that the United States had not intervened. The court found that the United States was not a party for purposes of filing the notice of appeal because it had declined to intervene, that its interest in a portion of the recovery in the suit as the real party in interest did not conflict with that finding, and that the 30-day

limit in Rule 4(a)(1)(A) applied to the relator's notice of appeal filing. It also noted that its ruling was consistent with the Supreme Court's finding in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000) that the relator's standing was based on a partial assignment of the United States' claim to recovery.

Potential Risks of Party Status for the Government

Yesterday's oral argument made clear that the Justices view the Rule 4 question raised in *Eisenstein* as not just one of procedural orderliness in unintervened FCA cases, but as an issue with an important jurisdictional effect on litigants involved in prior decisions in the circuits and a potentially far-reaching impact on the government's role in FCA litigation. Indeed, the Chief Justice pointed out that the 30-day notice of appeal deadline in Rule 4 was jurisdictional, and characterized it as a "trap for the unwary" that the Second Circuit raised *sua sponte*. Justice Stevens queried whether, because their decision could require the judgments of several circuits to be vacated, "a really rather important decision is being called for."

Arguing as an amicus in opposition to the Petitioner, the government took the position that it was not a party for purposes of Rule 4 because it had declined to intervene in *Eisenstein* and had studiously avoided participating at all stages in the case. Justice Scalia's questions revealed the fallacy in this position—the United States does not consider itself to be a party in a declined case despite the fact that it is the real party in interest, that it is named as the plaintiff in the case, that it is a "potential appellant," and that it is entitled to the lion's share of the recovery. With apparent glee, Justice Scalia caused laughter by describing the government's argument as one in which the government becomes a party in *qui tam* litigation "when it reaches a certain ineffable degree of activity." Counsel for the City responded that there should be a bright line rule for party status in FCA cases where the United States declined intervention, and that the right rule was intervention. The government's main concern appeared to be avoiding any ruling that would make the government a party for purposes of discovery. This position, of course, causes all types of havoc in litigating non-intervened *qui tam* cases.

Counsel for the government even extended the argument that the government is not a party for purposes of Rule 4 to a hypothetical case in which the government clearly would want to consider intervening and filing an appeal, arguing that if the government was not a party when judgment was entered, it should be given only 30 days to consider filing for an appeal, despite the 60 days allowed under Rule 4(a)(1)(B). Counsel for the government summarized its position as follows:

> If Petitioner is able to foist on the government a status that it actively attempted to decline, as was its right afforded it by Congress, then . . . Petitioner can equally try to foist on the government, though it doesn't here, in future cases party status. And this Court will have to decide case by case: Is the United States a party for purposes of each rule of civil and appellate procedure? And . . . that approach threatens much more uncertainty than the approach the government is outlining where intervention is a simple, workable, administrable test to determine whether the United States is a party to a qui tam suit.

The Justices clearly understood that an interpretation of Rule 4 that confers party status on the government in declined FCA cases would carry the risks and the burdens that accompany that status, and that these could be forced upon the government under other federal rules, particularly those governing civil discovery. Justice Scalia summarized this concern at the end of the argument:

> This is a self-denying position on the part of the government. You would expect the government to come in and say, . . . give us 60 days to think this over. They're saying, no, we'll only take 30, because they're worried if we come out [the Petitioner's] way on that issue, there are other issues on which they're also going to be considered a party, and it's not worth the risk.

While it is not clear whether the Court will adopt the government's "ineffable activity" rule or the City's bright line intervention rule, it is equally unclear whether it will decide to allow the parties in FCA cases 60 days to file a notice of appeal and limit its decision to the specific provisions of Rule 4. What is clear from yesterday's argument, however, is that the Justices understand that, because it is a *qui tam* case, *Eisenstein* presents unique issues and risks, and that any decision has ramifications far beyond the time for filing a notice of appeal.

Author

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

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