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Eleventh Circuit Deals Blow to Defense Contractors in Key False Claims Act Statute-of-Limitations Tolling Case, Deepening Circuit Split

False Claims Act

Arent Fox attorneys D. Jacques Smith, Randall Brater and Michael Dearington write that a recent Eleventh Circuit action to revive a whistleblower suit against defense contractors deepened a circuit split on a significant False Claims Action issue, making the question potentially ripe for Supreme Court review.



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Earlier this month, in *United States ex rel. Hunt v. Cochise Consultancy, Inc.*, the Eleventh Circuit revived a False Claims Act whistleblower suit against defense contractors and deepened a circuit split on a significant FCA statute-of-limitations issue. No. 16-12836, 2018 WL 1736788, — F.3d — (11th Cir. Apr. 11, 2018). The Eleventh Circuit's decision in *Hunt* significantly halted a trend of cases that prohibit relators from benefiting from the second, more plaintiff friendly prong of the FCA's statute of limitations.

The FCA's statute of limitations generally provides that a case must be brought before the later of (1) six years after the violation or (2) three years after the Government knew or should have known about the violation, capped at 10 years from the violation (sometimes referred to as the FCA's ''tolling provision''). In *Hunt*, the Eleventh Circuit held as a matter of first impression that a *qui tam* relator whose claims would be time-barred by the first prong can benefit from the second prong—even where the Government declined to intervene in the case. The court further held that the date the Government had actual or constructive knowledge for

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purposes of the second prong turns on when the relevant Government official—not the relator—had such knowledge.

In the current era of heightened FCA enforcement, the *Hunt* case and its concomitant circuit split could be ripe for Supreme Court review.

Facts in Hunt In *Hunt,* the relator alleged that two defense contractors defrauded the U.S. Department of Defense in connection with a bid-rigging scheme. According to the complaint, the DOD awarded defendant prime contractor a $60 million contract to clean up excess munitions in Iraq left behind by retreating or defeated enemy forces. The prime contractor allegedly conspired with defendant subcontractor to rig the award process in favor of the subcontractor, who was consequently retained to provide security services associated with the cleanup efforts. The scheme allegedly resulted in DOD paying millions of dollars in excess of what it would have paid to the top bidder for services rendered from February to September 2006.

On November 30, 2010, the relator reported the alleged fraud to the FBI while agents interviewed him about a different fraud scheme, for which he later pleaded guilty and served time in prison. After his release from prison, on November 27, 2013—a few days shy of three years after he reported the subcontracting fraud to the FBI—he filed a sealed *qui tam* complaint in federal district court, alleging that the defense contractors engaged in bid-rigging and violated the FCA.

The Government declined to intervene, and the defense contractors moved to dismiss the relator's complaint as time-barred under the FCA's six-year statute of limitations in the first prong of section 3731(b). The district court granted the motion, holding that the second prong did not apply in a *qui tam* suit where the Government declined to intervene. The relator appealed.

The Court's Opinion On appeal, the Eleventh Circuit held that ''[section] 3731(b)(2)'s three year limitations period applies to an FCA claim brought by a relator even when the United States declines to intervene.'' The court further held that, ''because the FCA provides that this period begins to run when the relevant federal Government official learns of the facts giving rise to the claim, when the relator learned of the fraud is immaterial for statute of limitations purposes.'' The court therefore reversed the district court's dismissal.

In ruling that the second prong of the FCA's statute of limitations applies to relators and not just to the Government, the court started with the text of the provision at issue, 31 U.S.C. § 3731(b), which provides:

″(b) A civil action under section 3730 may not be brought—
(1) More than six years after the date on which the violation of section 3729 is committed, or
(2) More than three 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 court reasoned that ''the phrase 'civil action under section 3730' in § 3731(b) refers to civil actions brought under § 3730 that have as an element a violation of § 3729, which includes § 3730(b) *qui tam* actions when the Government declines to intervene,'' and ''nothing in § 3731(b)(2) says that its limitations period is unavailable to relators when the Government declines to intervene.'' The court also found that its holding comported with the broader statutory context of the FCA, and, to the extent the legislative history was relevant at all, it bolstered the court's conclusion. The court rejected the defense contractors' argument that it would lead to an absurd result insofar as the limitations period would depend on the knowledge of a nonparty—the Government—because despite declining to intervene the Government ''remains the real party in interest and retains significant control over the case.''

Circuits Split In finding that a relator can avail itself of the second prong of section 3731(b), the Eleventh Circuit joined the Ninth Circuit and a handful of district courts, and split with the Fourth and Tenth Circuits and a growing number of district courts that have held that the second prong of the FCA's statute of limitations applies only to the Government and not to a relator. *Compare United States ex rel. Hyatt v. Northrop Corp.*, 91 F.3d 1211, 1217 (9th Cir. 1996) (holding that section 3731(b)(2) applies not just to the Government but also to *qui tam* suits brought by relators, reasoning that ''[i]f Congress had intended the tolling provisions of § 3731(b)(2) to apply solely to suits brought by the Attorney General, it could have easily expressed its specific intent''), *United States ex rel. Malloy v. Telephonics Corp.*, 68 Fed Appx. 270, 272–73 (3d Cir. 2003) (unpublished decision) (same), *United States ex rel. Wood v. Allergan, Inc.*, 246 F. Supp. 3d 772, 801 (S.D.N.Y. 2017) (same), *United States ex rel. Ven-A-Care of the Fla. Keys, Inc. v. Actavis Mid Atlantic LLC*, 659 F. Supp. 2d 262, 273–74 (D. Mass. 2009) (same), *United States ex rel. Gonzalez v. Fresenius Med. Care N. Am.*, No. EP-07-247-PRM, 2008 WL 4277150, at *7–8 (W.D. Tex. Sept. 2, 2008) (same), *United States ex rel. Pogue v. Diabetes Treatment Ctrs. of Am., Inc.*, 474 F. Supp. 2d 75, 85 (D.D.C. 2007) (same), and *United States ex rel. Salmeron v. Enter. Recovery Sys., Inc.*, 464 F. Supp. 2d 766, 769 (N.D. Ill. 2006) (same), *with United States ex rel. Sanders v. N. Am. Bus Indus., Inc.*, 546 F.3d 288, 294 (4th Cir. 2008) (holding that ''Congress intended Section 3731(b)(2) to extend the FCA's default six-year period only in cases in which the Government is a party, rather than to produce the bizarre scenario in which the limitations period in a relator's action depends on the knowledge of a nonparty to the action,'' and collecting cases), *United States ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702, 725 (10th Cir. 2006) (same), *United States ex rel. Erskine v. Baker*, 213 F.3d 638 (5th Cir. 2000) (unpublished decision) (same), *United States ex rel. Griffith v. Conn,* 117 F. Supp. 3d 961, 985 (E.D. Ky. 2015) (same), *United States ex rel. Shemesh v. CA, Inc.*, 89 F. Supp. 3d 36, 53 (D.D.C. 2015) (same), *United States ex rel. Landis v. Tailwind Sports Corp.*, 51 F. Supp. 3d 9, 36 (D.D.C. 2014) (same), *United States ex rel. Finney v. Nextwave Telecom, Inc.*, 337 B.R. 479, 486 (S.D.N.Y. 2006) (same), *United States ex rel. Thistlewaite v. Dowty Woodville Polymer, Ltd.*, 6 F. Supp. 2d 263, 265 (S.D.N.Y. 1998) (same), *and United States ex rel. Amin v. George Washington Univ.*, 26 F. Supp. 2d 162, 172 (D.D.C. 1998) (same).

The cases that have held that a relator cannot benefit from the second prong of the FCA's statute of limita-

tions have generally reasoned that Congress would not have intended for the statute of limitations to turn on knowledge of a nonparty, and the Government is a nonparty once it declines to intervene. The court in Hunt asserted that those ''cases do not persuade us,'' however, and that they ''reflexively applied the general rule that a limitations period is triggered by the knowledge of a party,'' but ''failed to consider the unique role that the United States plays even in a non-intervened *qui tam* case.''

The court then split with the Ninth Circuit, holding based on the plain language of the second prong of the FCA's statute of limitations that ''it is the knowledge of a Government official, not the relator, that triggers the limitations period.'' This issue, too, has historically divided those courts that allow the relator to benefit from the FCA's tolling provision. *Compare Hyatt*, 91 F.3d at 1218 (holding that the tolling period begins when the relator had actual or constructive knowledge of the fraud), *and Malloy*, 68 Fed Appx. at 272–73 (same), *with Wood*, 246 F. Supp. 3d at 801 (holding that the tolling period begins when the relevant Government official had actual or constructive knowledge of the fraud), *Ven-A-Care,* 659 F. Supp. 2d at 274 (same), *Gonzalez,* 2008 WL 4277150, at *7–8 (same), Pogue, 474 F. Supp. 2d at 85 (same), *and Salmeron,* 464 F. Supp. 2d at 769 (same).

The Ninth Circuit in *Hyatt* held that the relator's knowledge triggered the statute of limitations in the second prong because, ''[a]lthough he acts in the name of the United States, his suit must be founded on private facts known to him,'' and he should not be allowed to ''sleep on his rights'' by waiting to disclose the fraud to the Government. The Eleventh Circuit disagreed. The court stated, ''[b]ecause the text unambiguously identifies a particular official of the United States as the relevant person whose knowledge causes the limitations period to begin to run, we must reject the Ninth Circuit's interpretation as inconsistent with that text.''

Applying the foregoing principles, the court in *Hunt* reversed the district court's dismissal of the relator's claims as time-barred, and held that ''it is not apparent from the face of [the relator's] complaint that his FCA claim is untimely,'' because he filed his *qui tam* complaint within three years of disclosing the alleged fraud to the Government. The court therefore remanded the case for further proceedings.

Impact of Decision and Potential for Supreme Court Review The Eleventh Circuit's decision in *Hunt* halted a trend in which courts largely ruled that the more plaintiff-friendly second prong of the FCA's statute of limitations is unavailable to *qui tam* relators. It is also the first precedential federal appellate decision to have taken the additional step of holding that the tolling period begins in these cases when the Government official—not the relator—has actual or constructive knowledge of the fraud.

It is possible that the defendant defense contractors could seek a writ of certiorari with the Supreme Court, and that the Court could even accept the case. The court may be interested in resolving the case because of the purely legal issues it raises, the substantial circuit split, and the importance of the issues in the current era of heightened FCA enforcement under the FCA's *qui tam* provisions. Indeed, relators filed 674 of the 799 total FCA suits filed in fiscal 2017, leading to more than $3.4 billion of the $3.7 billion in overall FCA recoveries in fiscal 2017. The Supreme Court's increased interest in the FCA is evidenced by the fact that it heard FCA cases in each of the last three terms.

At least for now, however, defendants will need to be cognizant of the appellate and district court opinions in their circuit when moving for dismissal under the FCA's statute of limitations, or when evaluating pre-suit risk or potential FCA liability. Moreover, although the *Hunt* case involved defense contractors, its impact will be felt across numerous other industries—including the health-care industry, which was responsible for the greatest amount of FCA recoveries in fiscal 2017—as the FCA can ensnare anyone who directly or indirectly receives federal funds.

Hunt also serves as an important reminder that defense contractors, health-care companies, and others who do business with the Government should carefully document any disclosures of potential noncompliance that they make to the Government. We noted in a recent article that this type of evidence can help demonstrate in a later FCA investigation or litigation that the noncompliance was not material to the Government's payment decision under the Supreme Court's decision in *United States ex rel. Escobar v. Universal Health Servs., Inc.*, 136 S. Ct. 1989 (2016). See Smith, Brater & Dearington, *Another One Bites the Dust: Court Tosses Nearly $350 Million False Claims Act Verdict Under Escobar*, Pratt's Government Contracting Law Report (2018) (forthcoming). But this type of evidence could also support an argument that the tolling provision is unavailable to a *qui tam* relator, if the disclosure occurred more than three years before the relator brings a suit.

The FCA's statute of limitations can be a powerful defense in some cases. But it can also present pitfalls. The *Hunt* case thus evinces yet another example of why entities confronting potential FCA liability should consult with experienced counsel.