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Whistleblower Defense Alert: Supreme Court Extends Limitations Period in Non-Intervened FCA Cases

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As expected, the Supreme Court has just resolved a circuit split over the statute of limitations for non-intervened False Claims Act cases by maximizing the time a relator has to file a complaint. The decision in *Cochise Consultancy, Inc. v. United States ex rel. Hunt*, No. 18-315 (May 13, 2019) will greatly expand a defendant's time frame for potential FCA liability and lead to more cases involving faded recollections, costly document recovery, and potential damages for decades-old alleged fraud.

The Relator alleged that Cochise, a defense contractor who provided security services in Iraq, submitted false claims for payment "from some time prior to January 2006 until early 2007." *Cochise Consultancy*, slip op. at 3. He revealed the alleged fraud to federal agents during a November 30, 2010 interview investigating an unrelated contracting fraud. Almost three years later, the Relator filed his complaint against Cochise. *Id.* The Government declined to intervene, and Cochise moved to dismiss the complaint as untimely. The district court granted the motion to dismiss, but the Eleventh Circuit reversed, holding that the claim was within the statute of limitations. Noting a circuit split concerning the appropriate statute of limitations to apply in a non-intervened case, the Supreme Court granted certiorari.

The FCA's statute of limitations provision provides for two different limitations periods, stating that "a civil action under section 3730" cannot be brought

(1) more than 6 years after the date on which the [FCA violation] 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.

31 U.S.C. § 3731(b). The Relator admitted that the suit would be time barred under subsection (1), but he argued the suit was timely under subsection (2) because he filed the complaint within three years of disclosing the alleged fraud to government investigators. Cochise, meanwhile, argued that subsection (2) *only* applies when the Government has intervened in a case, because the “default rule” for statutes of limitation is that they begin to run when the party entitled to bring the claim learns the relevant facts.

Relying on the statutory text and rules of construction, the Supreme Court agreed with the Relator. Finding that Section 3731(b) expressly applies to civil actions “under section 3730,” the Court concluded that Section 3730 controls *both* Government-initiated claims and relator-initiated claims—including intervened and non-intervened claims. The Supreme Court thus concluded that the statute’s plain text meant that both limitations periods apply to all types of FCA suits. In so doing, the Court rejected Cochise’s contrary interpretation as violating “fundamental rules of statutory interpretation.” *Id.* at 5 (citing *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 329 (2000)).

Cochise further argued that the decision in *Graham County Soil & Water Conservation District v. United States ex rel. Wilson*, which found that § 3731(b) did not provide the appropriate statute of limitations for § 3730(h) retaliation claims, meant that § 3731(b)(2) should not apply to non-intervened relator cases. But the Supreme Court disagreed. While the *Graham County* decision did find that an FCA retaliation claim was not a “civil action under section 3730” because it did not depend on an underlying FCA violation, a non-intervened relator suit is different, because it does in fact require an underlying FCA violation. *Cochise Consultancy*, slip op. at 6. The Court acknowledged that its decision would greatly extend the limitations period in some cases, but saw “nothing unusual about extending the limitations period when the Government official did not know and should not reasonably have known the relevant facts, given that the Government is the party harmed by the false claim and will receive the bulk of any recovery.” *Id.* at 8.

Finally, the Court rejected Cochise’s argument that, in a non-intervened case, the relator is in fact “the official of the United States charged with responsibility to act in the circumstances,” meaning that once the relator knew of the fraud, the three-year limitations period in §3731(b)(2) should begin. This argument was easily dismissed, as the Court noted that a relator is neither an appointed officer nor an employee of the United States, and is not required to investigate or prosecute an FCA action. With each argument disposed of, the Court thus found the Relator’s complaint—based on a fraud that began at an indeterminate time and ended twelve years ago—timely.

Although observers of the Court expected this decision, its impact is not tempered by its apparent inevitability. The extended limitations period will revive and prolong otherwise time-barred non-intervened FCA cases. And defendants in those cases will face significant additional burdens: witnesses who have long since moved on will need to be tracked down, faded memories will have to be refreshed (if they can be), and volumes of physical and electronic data and documents will need to be retrieved from archives. Absent (unlikely) legislative action to blunt the Court’s decision, FCA defendants will have to adjust to a more difficult and costly world.