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LAWFLASH

FALSE CLAIMS ACT STATUTE OF LIMITATIONS DESTINED FOR TIMELY SUPREME COURT REVIEW

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Let's be honest. The question can stump the most experienced False Claims Act (FCA) practitioner: What is the correct statute of limitations under the FCA? Is it three years, six years, or 10 years, all time periods referenced in the FCA statute?[1] Does the government's intervention decision in a qui tam action impact the limitations analysis? Well, it is always safe to answer, "It depends," but FCA limitation periods until recently had a few reasoned assumptions, one of which was that relators had a shorter limitations period than the United States to pursue an action. Now, there is clear conflict in the circuit courts and an opportunity for the US Supreme Court to clarify a quirky but consequential FCA procedural issue.

In issuing *certiorari* to the US Court of Appeals for the Eleventh Circuit, in *Cochise Consultancy Inc. v. United States, ex rel. Hunt, –S.Ct. –, 2018 WL 4385694 (2018),* the Court will address whether relators may assert the same limitations tolling period allowed for the United States when the government has declined to intervene in the action. This legal issue has significant potency in the context of the growing litigation trend in declined qui tams, the de facto lengthy duration of FCA seal periods when sued defendants have no idea they have been sued for years and their litigation rights are held in statutory abeyance, and the new US Department of Justice (DOJ) policy on intervening to dismiss qui tams when there is a DOJ declination of the action.

All of these important procedural issues in FCA practice can be impacted by the applicable FCA statute of limitations and have a direct impact on how FCA cases are fairly processed. The *Cochise* appeal is a hot case to watch then as we can expect the Court to level set the FCA statute of limitations provisions, determine if relators may invoke the three-year tolling period in declined FCA cases, and, potentially, confirm whether relators are government officials under the statute—a status that may be consequential beyond the limitations question.

FCA STATUTE OF LIMITATIONS IN PLAIN ENGLISH

To begin with, as a statutory matter, the FCA limitations provision is not an easy read but also is not written in Old English. 31 U.S.C. 3731(b) provides that:

> (b) A civil action under section 3730 may not be brought—
>
> (1) more than 6 years after the date on which the violation of section 3729 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**. (emphasis supplied).

Section 3731(b)(2), often called the discovery exception or toll, has been construed to allow the government, not the relator, to have a longer limitations period than the six-year period in 3731(b)(1). The 10-year absolute bar on any FCA action is effective only when coupled with the three-year tolling period. For eons, many practitioners have suggested the far outside potential exposure in FCA cases is ten years when pursued by the government. Government subpoenas and civil investigative demands often by rote seek documents that go back ten years prior to any intervention decision by the government. In the declined qui tam context, the litigation may then proceed, years after it was filed under seal, unless there are jurisdictional or statutory bars or pleading deficiencies.

The statutory language reasonably suggests that the longer or tolled limitations period is intended only in those circumstances where the government originates the action or intervenes in the sealed FCA proceeding. The Fourth, Fifth, and Tenth Circuits have held this provision applies only when the government has intervened to pursue the action or filed its own direct action. *United States ex rel. Sanders v. N. Am. Bus Indus., Inc.*, 546 F.3d 288, 293 (4th Cir. 2008); *United States ex rel. Sik- kenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702, 726 (10th Cir. 2006); United States ex rel. Erksine v. Baker, 213 F.3d 638 (5th Cir. 2000)(per curiam). Another jurisdiction has held that the tolling provision does apply in declined qui tams with the knowledge requirements triggered by the relator's knowledge, not the government's knowledge. *U.S. ex rel. Hyatt v. Northrop Corp., 91 F.3d 1211* (9th Cir. 1996).

THE COCHISE DECISION

The Eleventh Circuit in *Cochise,* however, came to a different result from other Circuits, holding that the 3731(b)(2) longer limitations period may be relied upon by the relator when the United States has not intervened in the action, noting settled FCA precedent that the government remains the real party in interest in a declined qui tam action with significant control and rights over the proceedings including entitlement to the majority of any recovery.[3] The court also declined to recognize relators as government officials—a position for which there is substantial circuit court precedent—though that is where the reasoning may begin to fall off the rails since the government official status reads like an essential predicate in the FCA statutory toll provision. The court created new precedent, moreover, in further holding that the limitations period still remains triggered by the government's knowledge of the alleged violation, not a relator's knowledge. In the whistleblower context, however, the government's knowledge often will be later unless the action is parasitic or opportunistic.

This different statutory construction in effect extends the limitations period significantly beyond six years to the 10-year statutory end point in government declined FCA cases. Given that many cases involve the threat of extrapolated damages that must be trebled, these extra years of damages can be highly consequential and, as a practical matter, can create undue leverage in resolving or litigating cases. More significantly, there is the increased risk of inadvertent evidence spoliation and the loss of reliable evidence, particularly where the relator's complaint is delayed or remains under seal via ex-parte seal extensions for several years before a government intervention decision.

The interesting facts in *Cochise* illustrate the concerns of allowing relators the longer limitations period. Cochise was a subcontractor to the Parsons Corporation, the prime on a US Army Corps of Engineers munitions clearing contract. It was contracted to provide security services to Parsons employees and others. Relator Billy Joe Hunt was a Parsons employee who worked on the munitions contract and alleged that he had knowledge that the subcontract was procured by acts of fraud and bribery in 2006. In 2010, Hunt was interviewed by the FBI regarding a separate kickback scheme and disclosed to the FBI the fraud and bribery related to the *Cochise* subcontract. Hunt then goes to prison for his role in a separate kickback scheme.

When Hunt emerges from prison, he files an FCA qui tam action related to the 2006 kickback schemed in 2013, which is over seven years after the alleged conduct related to the *Cochise* subcontract occurred to his knowledge. DOJ declined to intervene in the action but notably did not move to dismiss the action under its new policy to dismiss declined qui tam actions.[4]

Under the six-year limitations provision, if applicable, the action is late and completely barred. If the three-year tolling provision applies, however, there are now different legal roads to travel. Putting aside whether the relator was a government official after the government declined to intervene, if the government's knowledge in 2010 is the triggering event to apply the longer limitations period, then the action is allowed and the relator is rewarded for withholding that information from the government for several years. If the relator's knowledge in 2006 is the triggering event, the action is barred.

The Eleventh Circuit declined to recognize 2006 as the triggering event, which is when the relator was aware but did not report the fraud, imputing the relator's 2006 knowledge to the government in 2010 when the FBI interview occurred. The Eleventh Circuit then applied the limitations toll but did not recognize the relator as a government official. This is the statutory interpretation position that the US Supreme Court may resolve.[5] It is also why the best legal answer to any FCA question on the applicable statute of limitations is: "It depends."

ARE RELATORS ASSIGNEES, GOVERNMENT OFFICIALS, OR BOTH?

Any holding that relators are an "official" of the United States may surface unintended legal inconsistencies. Prior Supreme Court decisions have affirmed the relator's status as a partial assignee of United States' claim because after the declination the United States remains the real party in interest with control over the dismissal and settlement of the action. *Vermont Agency of Natural Resources v. United States ex rel. Stevens, 529 U.S. 765, 773 (2000).* So, can a relator be an assignee for some parts of the statute and a government official for other parts of the statute? Many courts have rejected constitutional challenges to the False Claims Act qui tam provisions on the basis that the relator is not a government officer. *U.S. Taxpayers Against Fraud v. Gen. Elec., 41 F.3d 1032, 1041-42 (6th Cir. 1994).*

Generally, moreover, relator procedural rights have not been held to be the same as the United States' rights in FCA proceedings. So, for example, the right of appeal in FCA declined cases is not the 60 days as afforded the United States but rather the 30-day period that applies to nongovernment litigants. *United States ex rel. Eisenstein v. City of New York, 556 U.S. 928 (2009).* There may be concerns that relators, if now government officials, may take on quasi-law enforcement status and that is not the intention of the statute. It is difficult to identify the benefit to the government's public service or law enforcement mission to have relators viewed as government officials when it is well recognized that their respective roles are different. A relator's personal commercial interests in FCA recoveries should be a powerful reason not to accord government official status for limitation purposes or any other purpose under the statute.***[6]***

LONGER LIMITATIONS MAY DEEPEN FCA PROCEDURAL INEQUITIES AND INEFFICIENCIES

Longer limitation periods in declined FCA action also do not harmonize well with other longstanding but questionable FCA practices; notably, (1) the practice of lengthy ex parte seal durations; and, (2) the more recent practice of relators asserting that they may pursue any allegation in the sealed complaint not covered by the government's intervenor complaint or settlement agreement (so-called partial intervention), notwithstanding the statutory fact that government is authorized only to intervene or not intervene in the entire "action" on behalf of the United States—*not* piecemeal allegations or claims. *United States ex rel. Bennett v. Biotronik, Inc.*, 876 F.3d 1011, 1020 (9th Cir. 2017) ("The [FCA] does not state that the Government may intervene in part of the action or as to certain counts or certain claims for relief. …nothing in the statute allows for such division.") The government always retains control over the proceeding, including what allegations may be asserted on its behalf. These oddities of FCA practice are further confounded by allowing a tolling period for declined qui tams and that circumstance may raise serious due process issues.

The duration of seal issue is particularly compelling and the negative consequences of lengthy seal durations are surely aggravated by a latent tolling issue to be litigated in a declined qui tam years after a case is filed. By statute, the FCA qui tam actions are filed ex parte under seal for a period of 60 days to be extended only for good cause shown. In practice, the FCA seals are extended ex parte for years with no input from defendants with some civil investigations morphing into one-sided litigation under seal contrary to the statute. *U.S. ex rel. Martin v. Life Care Centers of Am., Inc.*, 912 F. Supp. 2d 618, 623 (E.D. Tenn. 2012) ("FCA seal not to be used as a means of conducting unchecked discovery in an effort to build a more complete case against Defendant"); *U.S. ex rel. Costa v. Baker & Taylor*, 955 F. Supp. 1188, 1189 (N.D. Cal. 1997) ("The legislative history of the False Claims Amendments Act makes abundantly clear that Congress did not intend that the government should be allowed to prolong the period in which the file is sealed indefinitely.")

What is usually known to the government and relator but not the defendant during the lengthy seal period is who brought the civil suit, the full scope of necessary evidence preservation, or whether any limitations may eventually apply in the event of a DOJ declination.

Some FCA practitioners are raising these issues, under seal, with mixed results in district courts. These seal skirmishes, however, do not have any transparency nor is there any accountability to the public or the defendant's interests during these seal periods. *U.S. ex rel. Costa v. Baker & Taylor, Inc.*, 955 F. Supp. 1188 (N.D. Cal. 1997) at 1189-90 ("There is nothing in the statute or legislative history to suggest that, in

evaluating requests for such extensions, the court should disregard the interests of the defendant and the public. Defendants have a legitimate interest in building their defense while the evidence is still fresh. The public has a right to monitor the activities of government agencies and the courts.")

Lengthy seal periods negatively impact fair judicial administration and also forestall or foreclose prompt corporate corrective action or case resolution. It is disquieting to note that the average length of seal is well over two years with many cases going well beyond this mark. Given that the government's declination rate for qui tams has remained at 75-80% for decades since the 1986 amendments, the practice of lengthy seals contributes to gross inefficiencies in the statute, with direct costs borne by the named defendants but also important costs to the relators and the public. If the relator action is also time barred, however, this is an even greater issue of fair judicial administration and not just an inconvenient symptom of the gross inefficiencies of the statute's qui tam provisions. The practice of lengthy ex parte FCA seals combined with a potential 10-year limitation periods for relators in declined cases deepens a troublesome inequity in the FCA statutory scheme that is unsupported by the statutory language or legislative intent. [7]

For all these reasons, navigating FCA procedural issues before and after a government's intervention decision have always been a highly consequential strategic challenge. Financiers, investors, insurers, corporate boards, and other stakeholders do not like 10-year cases or the threat of relators pursuing "partially declined" allegations 10 years or more after the alleged violations, especially after spending years in expensive one-sided discovery under seal prior to a government's intervention decision. Earlier intervention decisions and DOJ dismissals of meritless or improvident actions can swing the statutory protections back to a state of equipoise though under current practice those protections leave all parties to the whim of unexplained or unaccountable discretion. Finding that relators are equivalent to government officials for limitations tolling may swing the imbalance even farther away from a sensible statutory process.

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[1] The False Claims Act is located at 31 U.S.C. 3729 *et seq.* The private citizen "qui tam" provisions are located at 31 U.S.C. 3730. Private citizens are called relators in reference to the *ex rel* nature of the proceeding. FCA qui tam actions are filed ex parte under seal for a period of 60 days to be extended only for good cause shown for the purpose of DOJ undertaking a review of the allegations and making a decision to intervene and take over the action or not. 3730(b)(3). If DOJ declines to intervene and take over the action, the relator may proceed with the action on behalf of the United States for a percentage recovery of any settlement or judgement. During the pre-intervention seal period, the summons is withheld from service on the named defendant parties and the complaint is not served. All communications with the Court are ex parte with the government or relator during the seal period. This status usually goes on for years.

[2] District courts also have significantly grappled for years with the question of whether the FCA three-year tolling provisions may be invoked by relators in declined qui tams. See e.g., *U.S. ex rel. King v. Solvay S.A.*, 823 F.Supp.2d 472 (S.D Texas 2011); *U.S. ex rel. Bauchwitz v. Holloman*, 671 F.Supp.2d 674, 684 -694 (E.D. Pa 2009)(collecting cases and holding toll is for government only).

[3] 887 F.3d 1081 (11th Cir. 2018).

[4] Justice Manual, 4-4.111-DOJ Dismissal of Civil Qui Tam Action. DOJ issued written standards for dismissing declined qui tams under 3730(c)(2)(A), delineating considerations of avoiding adverse precedent, protecting DOJ litigation prerogatives and resources, and avoiding parasitic or opportunistic qui tams. www.justice.gov/jm/jm-4-4000-commerical-litigation#4-4.111.

[5] The Ninth Circuit has also held that 3731(b)(2) may apply to relators simply because the language does not exclude relators who act as agents of the government. *See United States ex rel. Hyatt v. Northrop Corp. 91 F.3d 1211, 1218 (9th Cir. 1996); United States ex rel. Saaf v. Lehman Brothers, 123 F.3d 1307,1308 (9th Cir. 1997).* Assuming an agent is not tantamount to a government official status, this analysis does not resolve the pesky "government official" predicate, but the court found the triggering event is when the relator knew of the fraud.

[6] *See e.g. U.S. ex rel. Foulds v. Texas Tech Univ., 171 F.3d 279 (5th Cir. 1999).*

[7] Modern FCA practice is out of sync with the statute in this respect. Really, why should a relator be allowed to go forward when DOJ declines to proceed with the allegations after spending years of taxpayer resources evaluating the allegations under seal at enormous direct and indirect cost to all parties. If the 60-day rule for ex-parte review was real and meaningful then it makes sense for relators to truly fulfill a private attorney general role by moving forward for the United States after a declination. The statute in practice, however, does not remotely work that way notwithstanding sporadic good recoveries in declined qui tams. Some states have addressed this issue in their FCA provisions by not allowing relators to proceed after a government declination. Such a provisions avoids limitations and other conflicting procedural issues and assures that the statute is efficient and not overly leverage to pursue unmeritorious cases.