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Attys React To High Court FCA Statute Of Limitations Ruling

By **Daniel Wilson**

Law360 (May 13, 2019, 9:23 PM EDT) -- The U.S. Supreme Court ruled Monday in Cochise Consultancy Inc. et al. v. U.S. ex rel. Hunt that the "government knowledge" statute of limitations in False Claims Act cases applies whether or not the government is directly involved in the litigation, effectively extending the maximum time qui tam relators have to file FCA claims from six to 10 years.

Here, attorneys tell Law360 why **the decision** is significant, and what may follow in its wake.

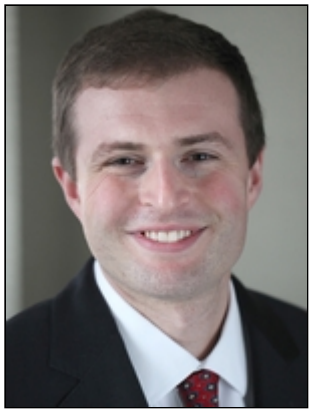
Randall Brater (with contributions from Michael Dearington and Jacques Smith), Arent Fox LLP

"As expected, the Supreme Court focused on the plain meaning of the text of Section 3730 of the False Claims Act, affirmed the decision of the Eleventh Circuit, and harmonized the statute of limitations periods for both the government and relators. The Court also found that the three year limitations period in 3730(b) applied to knowledge of the Government and not the relator. The decision sets up a dynamic in future, non-intervened cases, where the relator and the defendants will litigate the actual or constructive knowledge of the government to determine if the statute of limitations bars the suit. As a result of Cochise, the government should have a preservation obligation, and discovery with the government about its knowledge of the underlying facts of the alleged fraud should be permissible. This holding creates yet another incentive for regulated entities to carefully consider self-disclosure to the government of actions that potentially may run afoul of the False Claims Act."

David Chizewer, Goldberg Kohn

"The number of cases, in practice, that actually will be materially affected by the Cochise decision may be limited. But the broader message is impactful. The Court affirmed that whistleblowers pursuing cases without government intervention are fulfilling a function on par with cases the government brings or joins. The entire purpose of the whistleblower provisions in the FCA is to allow a whistleblower, who has special knowledge of a fraud against the government, to vindicate the government's rights. Limiting the time by which a whistleblower must bring a case to something more restrictive than the government is allowed would have made no sense. It is not surprising that the Court affirmed the 11th Circuit decision."

Jason Crawford, Crowell & Moring LLP



"In holding that a relator is not the 'official of the United States' whose knowledge triggers the three-year [statute of limitations] period, the Court observed that a private whistleblower is not appointed as an officer of the United States. This reasoning would appear to foreclose the argument recently put forward in a petition for certiorari that the qui tam provisions violate the appointments clause in Article II of the Constitution. Nonetheless, the fact that the Court did not address whether the 'official of the United States' is limited to the Department of Justice leaves open the possibility that the three-year period could start running when another government official, such as an inspector general, has knowledge of the material facts."

Jessica Ellsworth, Hogan Lovells

"First, although the context of the case before the Court was allegedly improper conduct by a subcontractor during a one-year period seven years before the suit was filed, the consequences of the decision are potentially far greater for entities that submit claims on a recurring basis (like those in the health care field), because for them, the decision means that relators will be able to seek treble damages for 10 years' worth of false claims. Second, by bringing [FCA Section] 3731(b)(2) into play for declined cases, defendants will have more incentive to seek discovery into what the government knew and when. This statutory provision also includes a three-year limitations based on when facts material to the right of action were known or should have been known to the U.S. official with responsibility to act. As a result, like the Supreme Court's decision in Escobar addressing materiality — also a Justice [Clarence] Thomas-authored unanimous decision — the Court's holding suggests that defendants may want to expand their efforts to developing defenses based on what the government knew, when it knew that information, and what it did in response."

Alex Hontos, Dorsey & Whitney LLP

"The court's unanimous decision broadens the reach of the False Claims Act — expanding the time period for conduct actionable under the FCA. The decision clarifies an issue that had split the circuits, whether a relator in a declined qui tam could take advantage of the second (and longer) of two statutes of limitations in the FCA. This decision is good for relators. Private whistleblowers have more time to file qui tam lawsuits. This decision likely will increase recoveries by the United States Government, which gets the lion's share of relator recoveries, because it extends the time period of covered conduct. [It] comes at a time when the department has been more aggressive in seeking the dismissal of declined qui tam lawsuits — a ray of sunshine for the relator who has brought a declined qui tam."

Megan Jeschke, Holland & Knight LLP<

"The Court left unanswered the question of *which* government official's knowledge triggers the limitations period. The statute refers to 'the official of the United States charged with responsibility to act in the circumstances[.]' Relator Hunt provided his disclosures to the Federal Bureau of Investigation. The government argued in its briefs and at oral argument this refers to the Attorney General or delegate. The Court's decision does not rule on this question, though it hints at an interpretation that includes only the Attorney General. Actual knowledge of investigative bodies such as Offices of Inspectors General, Criminal Investigative Services, or the Federal Bureau of Investigation would therefore not trigger the tolling provision unless their knowledge can be imputed to DOJ under the 'should have known' standard. The case on remand and subsequent cases will likely flesh out this issue."

Craig Margolis, Arnold & Porter

"Perhaps sensible as a matter of strict statutory construction, today's decision simply makes no sense as policy. Relators now sit in an even better position than the government, able to file up to ten years after a putative violation knowing all the while about it as long as the government remains in the dark."

Kirsten Mayer, Ropes & Gray LLP

"Cochise will facilitate expensive litigation of stale claims in certain cases. Nonetheless, its approach to statutory construction presents an important opportunity. Lower courts often look to legislative history and other contextual arguments when interpreting the FCA and other key statutes in FCA litigation. Cochise suggests this approach may be overused."

Katie McDermott, Morgan Lewis & Bockius LLP

"The oral argument questions from the justices were a good heads up that the Court did not want to recognize different limitation periods for FCA actions, notwithstanding some strong judicial decisions in different circuits that have done so. The statutory construction announced by the Court may be an odd result, as Justice Thomas suggests, but is not absurd enough to read the three-year tolling provision that allows tolling for facts known or reasonably known by a responsible government official to apply only to the government when it pursues an FCA action by intervention or filing an original complaint. Fortunately, the Court declined the invitation to label relators as responsible government officials, as that would open another muddle for the statute. The practical effect is to allow the opportunity for limitations to extend to the 10-year statutory end point in declined qui tam cases, which may further exacerbate real world inequities related to excessive seal durations and partial interventions, both practices not intended by the statute. It may artificially up the leverage in declined cases, which are often declined after years of costly investigative effort. This odd result is a good reason for Congress to fully examine the serious issue of 'procedural equity' in the FCA statute which contributes to its gross inefficiencies and undue costs in processing these cases, which are mostly declined."

Gordon Schnell, Constantine Cannon LLP

"The decision increases the statute of limitations period for most non-intervened whistleblower cases from six to 10 years, greatly expanding the potential exposure of False Claims Act defendants. Perhaps just as important, the decision provides a unanimous pronouncement by the Supreme Court that both intervened and non-intervened whistleblower cases are treated the same under the statute: 'If the Government intervenes, the civil action remains the same – it simply has one additional party.' This may prove useful for whistleblowers down the road in responding to defense arguments that non-intervened cases have less merit or should be viewed with skepticism."

Scott Stein, Sidley Austin LLP

"The outcome is not entirely unexpected given the tenor of the oral argument. But the Court's holding that the statute of limitations in non-intervened cases — which comprise the vast majority of FCA cases — extends up to ten years, is a shockwave that will reverberate in ongoing and future FCA investigations and litigation for years to come. In one fell swoop, the decision significantly expands the scope of potential liability in the lion's share of FCA cases which, given the availability of treble damages and civil penalties, was already substantial even with a six-year statute of limitations. The ruling will also exacerbate the serious practical difficulties in defending FCA cases, particularly when one considers that a case could now be filed up to ten years after the underlying conduct — and then remain sealed for several more years while the government investigates. All the while, memories fade, witnesses become unavailable, and damages may continue to accrue. And while the headline of the decision is the blanket expansion of the 10 year statute of limitations to all FCA cases, the Court also summarily disposed of a long-simmering Constitutional challenge to the FCA under the Appointments Clause, holding that relators are not Constitutional 'officers' who must be appointed by the President."

Mike Wagner, Covington & Burling LLP

"In theory, the Court's ruling could incentivize qui tam plaintiffs to wait years to bring their claims, in the hopes of allowing their potential recovery to increase. This incentive to delay is at odds with the spirit of the FCA's qui tam provision, which aims to encourage private citizens to bring potential misconduct to the government's attention. Practically, the decision is not a game-changer, for a few reasons. First, this ruling will have a relatively narrow application. Second, plaintiffs that delay bringing claims will find themselves exposed to other defenses, such as the first-to-file bar. And third, the decision does nothing to disturb the Court's watershed ruling in Escobar, which held that government knowledge is a strong defense on materiality grounds."

--Editing by Breda Lund.
