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Is FCA ruling a long-term win?

By Nancy Harris

On May 13, in *Cochise Consultancy, Inc. v. United States ex rel. Hunt,* 2019 DJDAR 3972, the U.S. Supreme Court resolved a three-way split among the court of appeals in favor of allowing relators to bring claims under the False Claims Act, 31 U.S.C. Sections 3729 et seq., to rely, in some circumstances, on the FCA's 10-year statute of limitations. The ruling effectively expands the window in which a private relator may bring a claim, even if the government ultimately decides to stay on the sidelines and not intervene in the lawsuit. However, even though the court unanimously decided *Cochise Consultancy*, the whistleblower provisions of the FCA might be subject to a broader attack in the pending case of *Intermountain Health Care, Inc., et al. v. U.S. ex rel. Polukoff et al.*, which challenges the constitutionality of FCA qui tam provisions under the appointments clause of U.S. Constitution. Looking forward, it is important to understand the *Cochise Consultancy* decision in an era where the Supreme Court seems willing to eschew precedent and new justices have joined the court who lean more in favor of preserving the power of the executive.

Cochise Consultancy: Supreme Court Decision

Under the federal FCA, a false claim action must be brought by whichever is later: (1) six years after the violation or (2) "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." In *Cochise Consultancy*, the question considered by the Supreme Court was whether a qui tam relator could benefit from the longer limitations period provided by Section 3731(b)(2) when the government had declined to intervene in the action. In a 9-0 decision penned by Justice Clarence Thomas, the Supreme Court held that Section 3731(b)(2)'s tolling provision applies to all FCA cases, including ones to which the government has not intervened as a party. This clarifies that a claim under the False Claims Act can extend back as much as 10 years, regardless of whether the government has chosen to directly participate in the lawsuit.

Cochise Consultancy: Facts of the Case

In *Cochise Consultancy*, the relator alleged that two defense contractors submitted false claims for providing security services in Iraq until early 2007. However, the relator did not file its action until November 2013, after the six-year statute provided in Section 3731(b)(1) had expired. The contractors sought to dismiss the claim on the basis that the extension of the statute provided by Section 3731(b)(2) was not available to a relator when the government had not intervened in the action. The relator contended that its action was still timely under Section 3731(b)(2) because federal officials had only learned about the fraudulent scheme when they interviewed the relator on Nov. 30, 2010 and thus the action was filed within three years of the government learning of the action.

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Justice Thomas, applying "fundamental rules of statutory interpretation," found that there is no distinction between the time available to sue for a government plaintiff or a private relator plaintiff. The court thereby approved the 11th U.S. Circuit Court of Appeals' interpretation that Section 3731(b)(2) applies in non-intervened actions and the limitation period begins when "the official of the United States charged with responsibility to act in the circumstances" knew or should have known the relevant facts. In doing so, the court rejected the approaches adopted by 4th, 9th and 10th Circuit's, which were less favorable for relators.

Cochise Consultancy Contradicts DOJ's Qui Tam Skepticism

The *Cochise Consultancy* ruling gives whistleblowers an additional boost under the FCA. In 1986, Congress increased incentives for whistleblowers to file lawsuits alleging false claims on behalf of the government and most claims under the FCA are filed as whistleblower, or qui tam, actions. The Supreme Court's ruling, although not unexpected, is an interesting development in the context of the Department of Justice's recent view of qui tam suits. Qui tam relators file hundreds of FCA complaints annually. In 2018, the DOJ reported 645 cases, an average of more than 12 new cases per week. The United States intervenes in only about 20 percent of those cases, meaning most cases are litigated by private plaintiffs. The DOJ reported that in 2018, it collected $2.8 billion in FCA settlements and judgments and over the last decade the Department has collected more than $18 billion in health care settlements and judgments under the FCA. The vast majority of those funds were collected by whistleblower initiated actions. The court's ruling in *Cochise Consultancy* confirms that, at least from a timing perspective, those private plaintiffs are not at a procedural disadvantage.

Although FCA claims initiated by relators has been a lucrative avenue of recovery for the government, under the current administration, the DOJ has taken steps to narrow the avenues for relators asserting FCA claims. In January 2018, the DOJ issued the "Granston Memo" that outlined criteria for the government to consider in deciding whether to dismiss a whistleblower case. The criteria include determining when a case is abusive, non-meritorious or likely to lead to an unfavorable legal outcome. The "Brand Memo," also issued in 2018, directed civil and criminal prosecutors not to use non-binding sub-regulatory guidance to establish a violation of law, thereby reigning in the grounds on which an FCA violation can be alleged. While previously it was rare for the government to affirmatively seek to dismiss an FCA case, the DOJ has moved to dismiss about two dozen cases since 2017.

Cochise Consultancy vs. Attorney General Barr

The Supreme Court's interpretation expanding the statute of limitations to non-intervened relators stands in interesting contrast to Attorney General William Barr's historic hostility toward relators and qui tam actions. In 1989, Barr wrote an opinion to then-Attorney General Dick Thornburg stating: "These qui tam suits pose a devastating threat to the Executive's constitutional authority and to the doctrine of separation of powers. If qui tam suits are upheld, it would mean Congress will have carte blanche to divest the Executive Branch of its constitutional authority to enforce the laws and vest that authority in its own corps of private bounty hunters." Given the billions of dollars in recovery for federal taxpayers since incentives for qui tam relators were expanded in 1986, it will be interesting to see if Attorney General Barr feels as strongly about protecting the integrity of executive power against the encroachment of private "bounty hunters."

The Supreme Court has saved those harder FCA questions for later in the term. The court is considering a constitutional challenge to the qui tam provisions in *Intermountain Health Care*, 18-911. That case raises more complicated and interesting questions regarding the scope of executive powers. *Intermountain* directly challenges the constitutionality of the FCA under the appointments clause of U.S. Const. art. II, Section 2, cl. 2. The question about *Cochise Consultancy* yet to be answered is could the Supreme Court's 9-0 rejection of the 9th Circuit's interpretation of Section 3731(b)(2) that, for purposes of qui tam jurisdiction, relators are "officials of the United States," be a talisman that the Supreme Court may be more skeptical of FCA "private bounty-hunters" in the months to come?

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