KATZ, MARSHALL & BANKS, LLP

Does the Law Mean What it Says? Supreme Court to Decide Time Limits on False Claims Act Lawsuits

By Joseph E. Abboud
May 14, 2019

UPDATE: The Supreme Court ruled to affirm the judgment of the Eleventh Circuit Court of Appeals. Whistleblowers will be able to benefit from section (b)(2)'s longer statute of limitations when bringing qui tam claims under the FCA.

By the end of June, the Supreme Court is likely going to decide an obscure question that could have a major impact on whistleblowers bringing claims under the False Claims Act to report fraud by government contractors. In *Cochise Consultancy Inc. v. United States, ex rel. Hunt*, the Court is grappling with 31 U.S.C. § 3731(b), the section of the False Claims Act which dictates how long the government and whistleblowers can wait before filing their lawsuits. The unfortunate wording of the law, which Justice Alito called "a terribly-drafted statute" during oral argument, has led to contradictory interpretations, and caused great confusion for courts, whistleblowers, and government contractors. However the Court decides the case, hopefully it will issue clear instructions for whistleblowers planning to file suit to stop contractors from fraudulently depleting government coffers.

The Statute

The False Claims Act (FCA) was passed in the wake of the Civil War to empower the federal government to go after contractors who had fraudulently billed the government for services never rendered. In the decades since, Congress has amended the FCA to make it one of the most powerful tools to combat the waste of taxpayer funds, imposing enormous penalties on contractors who submit false claims for payment. The FCA provides two main routes for the government to recoup money spent on fraudulent claims: either the government itself can file a lawsuit against the contractor, or a "relator," a private citizen with nonpublic information about the fraud, can file a "*qui tam*" lawsuit on behalf of the government. After the relator files, the lawsuit remains secret ("under seal") while the Department of Justice investigates the relator's claim and makes a decision about whether it wants to get involved. If the government intervenes in the lawsuit, the Department of Justice takes over the litigation. If the government does not intervene, the relator can proceed to litigate the claim in the name of the government. Regardless of whether the government or the relator prosecutes the government's claim, if the government recovers money from the contractor, the relator can get a percentage of the recovery as an award for bringing the fraud to light.

Although certain sections of the FCA discuss in great detail the differences between a government-brought lawsuit and a *qui tam* action, the section dealing with statutes of limitations is silent on the distinction. 31 U.S.C. § 3731(b) says:

“A civil action under section 3730 may not be brought–

(1) more than 6 years after [the false claim was submitted], 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.”

Section 3730 of the law covers lawsuits filed by the government as well as those filed by relators, whether the government intervenes or not.

Section (b)(2), with its focus on when the government learns of the fraud, clearly allows the government to go after a contractor who managed to hide its fraud for years, so long as the government learns of the fraud and takes action before ten years have passed. However, confusion sets in when a relator enters the mix. What if the relator knew about the fraud early on, but did not file a lawsuit and inform the government until after the six years specified in section (b)(1) had passed? Does section (b)(2) still apply? Does section (b)(2) apply only when the government intervenes? The text’s silence on these questions has generated conflicting answers from courts across the country.

The Qui Tam Case

Billy Joe Hunt worked for The Parsons Corporation in Iraq, supporting a contract to help the United States government recover excess munitions discarded by enemy troops on the battlefield. According to Hunt, between February and September 2006, Parsons and Cochise Consultancy, Inc., participated in a bid-rigging and bribery scheme to charge the United States government millions in grossly inflated rates for services, some of which were never performed. The first time the government learned about the fraud was in November 2010, when Hunt disclosed the fraud to the FBI while being interviewed about an unrelated matter. Hunt filed his *qui tam* lawsuit under the False Claims Act in November 2013, within three years of his disclosures to the government (timely under section (b)(2)), but seven years after the fraud had occurred and Hunt had learned about it (too late under section (b)(1)). The United States declined to intervene in Hunt’s lawsuit, so he proceeded to litigate it himself. However, Parsons and Cochise argued that Hunt filed his lawsuit too late and should not be able to proceed.

The trial court agreed and dismissed the case. On appeal, the Eleventh Circuit Court of Appeals reversed, reinstating the case. In the process, the Eleventh Circuit explicitly disagreed with two different approaches taken by other federal courts of appeal. Now the Supreme Court must decide which approach is right, or perhaps take a totally different route.

The Competing Theories

The Eleventh Circuit’s position is straightforward and its reading of the rule is most beneficial to whistleblowers and the government, but it is not totally satisfying. According to the Eleventh Circuit, the text of 31 U.S.C. § 3731(b) does not distinguish between lawsuits brought by the government and *qui tam* lawsuits, intervened or otherwise, so denying Hunt the benefits of section (b)(2)’s longer limitations period would be inconsistent with what the law actually says. Even though the longer time limit under section (b)(2) is tied to when a government official learns of the fraud, nothing says a relator cannot take advantage of that limitations provision. Maybe Hunt should have brought his lawsuit years earlier when he first learned of the fraud, but it is not for the court to write this limitation into the law, especially when it might let contractors get away with fraud. Thus, the

Eleventh Circuit relied on the plain text of the statute and the power of the government and whistleblowers to root out fraud although it had no clear explanation of why Congress drafted section (b)(2) the way it did. It did not explain why Congress would have tied a relator's suit-filing period to the date when a non-party (the government official) learned of the fraud.

In contrast, the Fourth and Tenth Circuits have held that section (b)(2), with its focus on when "the official of the United States charged with responsibility to act" learned of the fraud, must only apply to those cases where the government actually litigates the case – even though the statute does not contain such a restriction. Under this reading of the statute, if the government itself had brought the lawsuit, or if the government had intervened in Hunt's *qui tam*, then section (b)(2) would apply, but Hunt proceeding on his own would have been out of luck. By waiting to file his lawsuit until more than six years after the fraud occurred, Hunt was gambling on the decision of the Department of Justice. Although this approach tries to give effect to Congress' chosen words, it does so by adding words Congress did not use, thereby judicially creating an exception in the statute that can render a relator's lawsuit timely or untimely based solely the Department of Justice's intervention decision.

The Ninth Circuit has taken a different approach that the Eleventh Circuit termed the creation of a "legal fiction." The Ninth Circuit agrees with the Eleventh Circuit that section (b)(2) applies to relator's actions whether the government intervenes or not, but it differs in its reading of what triggers the expanded limitations period of (b)(2). Under the Ninth Circuit's reading, the relator in a *qui tam* case, by suing on behalf of the government, *becomes* a government agent and thus is "the official of the United States charged with responsibility to act." The Ninth Circuit was persuaded that the government is always the real party in interest and relators sue as agents of the government. Therefore, it is the relator's knowledge of the fraud that triggers the limitations period. Under this approach, Hunt would have had to sue within three years and his suit should have been dismissed as untimely. The Eleventh Circuit did not find this reading persuasive because although *qui tam* relators who litigate cases on their own are litigating on behalf of the United States, they still remain private citizens with no power to bind the government without the Department of Justice's approval.

These various readings and the lower courts' criticisms of them as "absurd" or based on unwarranted legal fictions, highlight the difficulties of interpreting this "terribly-drafted statute." Some of the approaches make matters even worse by both defying common sense and needlessly preventing whistleblowers from pursuing valid FCA claims.

Takeaway for Whistleblowers

While it would best for whistleblowers if the Supreme Court affirms the Eleventh Circuit and allows relators to benefit from section (b)(2)'s longer statute of limitations, any clear decision from the Court will aid whistleblowers and their lawyers in planning to bring *qui tam* claims under the FCA. Once the Court issues its decision in the next month or two, potential whistleblowers should be sure to consult with an experienced lawyer to learn if and how the ruling impacts their cases.