A TIMELY SPLIT – ELEVENTH CIRCUIT STRAYS FROM COMMON APPLICATION OF THE FALSE CLAIMS ACT'S STATUTE OF LIMITATIONS

On April 11, 2018, the Eleventh Circuit Court of Appeals split from the Fourth and Tenth Circuits when it issued an order effectively granting relators in *qui tam* actions an additional three years to file. The court ruled that § 3731(b)(2)'s three-year limitation, which has traditionally only been applied when the United States is a party to the action, is equally applicable to relators when the government declines to intervene, thereby allowing "more fraud to be discovered, more litigation to be maintained, and more funds to flow back into the Treasury."[1]

BACKGROUND

The relator brought a *qui tam* action against his former employer and another company alleging that the defendants violated the False Claims Act ("FCA") when they fraudulently awarded subcontracts for work they performed as defense contractors in Iraq.[2] The relator alleged that the two companies fraudulently induced the government to enter into a subcontract to purchase services by providing illegal gifts to individuals and that the defendants had violated their obligation to disclose credible evidence of improper conflicts of interests and illegal gratuities.[3]

The defendants moved to dismiss these allegations, arguing that the claims were time barred under the six-year limitations period in 31 U.S.C. 3731(b)(1) and that the relator had filed his suit more than seven years after the fraud occurred.[4] The district court dismissed the action, but the Eleventh Circuit reversed, ruling that subsection (b)(2) of the FCA's statute of limitations applied to the relator, allowing him to bring his action within three years after notifying the United States of the fraudulent activity.[5]

ANALYSIS

The FCA's statute of limitations prohibits relators from bringing an action more than six years after the date on which the fraud occurred. 31 U.S.C. 3731(b)(2) also prohibits actions filed "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..." This provision has traditionally only been applied when the U.S. intervenes in a relator's *qui tam* action. However, the court entertained the relator's argument that this provision is applicable even when the United States declines to intervene.

The Eleventh Circuit held that applying this provision to relators is consistent with the broad underlying purpose of the FCA—allowing more fraud to be discovered.[6] The court ruled that the United States' unique role as a real party in interest, even when it declines to intervene, overrides any potential absurd result that may occur due to the application of the statute of limitations.

The defendants also argued that if relators have three years from the date when the government learned of the fraud to file suit under § 3731(b)(2), relators will always delay telling the government about the fraud to increase the damages in the case. The court rejected this argument, stating that a relator who waits to file risks recovering nothing or having his share of damages decreased. The court also stated that a race to the courthouse encourages relators to file as quickly as possible.

Finally, the court rejected arguments that the statutory construction and legislative history pertinent to the statute of limitations suggests that § 3731(b)(2) should not be available to relators when the government declines to intervene. The court found that the legislative history does not squarely address Congress' intent and does not lend credence to the defendants' arguments.

PRACTICAL TAKEAWAYS

- Now, even in actions where the government has declined to intervene, relators have three years to bring a *qui tam* action once the government has been informed of fraudulent acts.
- The Eleventh Circuit's split from the Fourth and Tenth Circuits will surely create some interesting case law, making the issue ripe for review by the Supreme Court.

If you have any questions, please contact:

- Matthew Schappa at (317) 429-3604 or mschappa@hallrender.com;
- David Honig at (317) 977-1447 or dhonig@hallrender.com; or
- Your regular Hall Render attorney.

[1] *U.S. ex rel. Hunt v. Cochise Consultancy, Inc.*, No. 16-12836, 2018 WL 1736788, at *10 (11th Cir. Apr. 11, 2018).

[2] *Id*. at *2.

[3] *Id.*

[4] *Id*. at *3.

[5] *Id*. at *1.

[6] *Id.* *2.