

In One Decision, The Eleventh Circuit Creates Two Circuit Splits

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by Kirk Schuler

Rejecting the views of the Fourth and Tenth Circuits, the Eleventh Circuit held the FCA's three year statute of limitations period in § 3731(b)(2) applies to a relator's claim even when the United States declines to intervene, and in so doing held it is the knowledge of a government official, not the relator, that triggers the three year limitations period, rejecting the contrary view of the Ninth Circuit.

In *United States ex rel. Hunt*, No. 16-12836, 2018 U.S. App. LEXIS 9065 (11th Cir. Apr. 11, 2018), the Eleventh Circuit construed the FCA's statute of limitations provision in § 3731(b) to decide whether the Relator's claim was time-barred. Section 3731(b) states:

(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.

Because the Relator failed to file his qui tam action within the six year limitations period in (b)(1), the question was whether his action was time-barred under (b)(2). The defendants argued that it was, because the government declined to intervene. The Fourth and Tenth Circuits, in fact, had previously held that a Relator can only avail him- or herself of the limitations period in (b)(2) if the government remains a party to the action by intervening. *United States ex rel. Sanders v. N. Am. Bus Indus., Inc.*, 546 F.3d 288, 293 (4th Cir. 2008); *United States ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702, 726 (10th Cir. 2006) ("Surely, Congress could not have intended to base a statute of limitations on the knowledge of a non-party.").

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The Eleventh Circuit, however, found “the phrase ‘civil action under section 3730’ ... includes § 3730(b) *qui tam* actions when the government declines to intervene.” 2018 U.S. App. LEXIS 9065, at *18. The Court further explained:

Nothing in § 3731(b)(2) says that its limitations period is unavailable to relators when the government declines to intervene. In the absence of such language, we conclude that the text supports allowing relators in non-intervened cases to rely on § 3731(b)(2)’s limitations period.

Id. at *18.

The Eleventh Circuit also said the contrary holdings from the Fourth and Tenth Circuits “do not persuade us,” because “[t]hey failed to consider the unique role that the United States plays even in a non-intervened case.” *Id.* at *27. The court described the government’s role in non-intervened cases as “significant” because the government may “request to be served with copies of all pleadings and deposition transcripts, seek to stay discovery[,] . . . veto a relator’s decision to voluntarily dismiss the action,” and may be permitted to intervene later. *Id.* at *12-13.

The court emphasized that the majority of a recovery, even in a non-intervened case, still belongs to the government as the victim of the fraud. *Id.* at *25. “Given this unique role, we cannot say that it would be absurd for Congress to peg the start of the limitations period to the knowledge of a government official even when the United States declines to intervene.” *Id.* at *26.

The court also rejected the defendants’ arguments that such an interpretation rendered the statute superfluous, and found “little” legislative history on the statute and none that undermined the court’s interpretation. *Id.* at *28-39.

The court next had to “address whether that limitations period is triggered by the knowledge of a government official or of the relator.” *Id.* at *39. The court again relied on the statutory text:

Section 3731(b)(2) is clear that the time period begins to run when “the official of the United States charged with responsibility to act in the circumstances” knew or reasonably should have known the material facts about the fraud. 31 U.S.C. § 3731(b)(2). Nothing in the statutory text or broader context suggests that the limitations period is triggered by the relator’s knowledge.

Id. at *39. As a result, the court rejected the “legal fiction” of the Ninth Circuit’s contrary view, *United States ex rel. Hyatt v. Northrop Corp.*, 91 F.3d 1211, 1217 (9th Cir. 1996), and held “that it is the knowledge of a government official, not the relator, that triggers the limitations period” in § 3731(b)(2). *Id.* at *39-40.

As a result of holding that § 3731(b)(2) applies in non-intervened cases and is triggered by the knowledge of a government official, not of the relator, the court reversed the district court's decision dismissing the relator's complaint for untimeliness. *Id.* at *40.