

Supreme Court Considers Whether to Extend FCA Statute of Limitation

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by Alan J. Iverson

On Tuesday, March 19, the Supreme Court considered whether to extend the FCA's alternate 10-year statute of limitations to cases in which the government does not intervene. The case, *Cochise Consultancy Inc. v. United States, ex rel. Hunt*, involves a whistleblower's *qui tam* action alleging that two defense contractors defrauded the government.

The case centers on the FCA's two statutes of limitations. One allows lawsuits to be filed within six years of the alleged fraud. 31 U.S.C. § 3731(b)(1). The other allows lawsuits to be filed three years after the federal government knows of facts "material to the right of action," but never more than 10 years after the alleged fraud. 31 U.S.C. § 3731(b)(2).

In *Cochise*, the relator filed his complaint in 2013, more than six after the alleged fraud, which took place in 2006 and 2007. The relator argued that his complaint was timely under the 10-year limitations period of § 3731(b)(2) because he filed it within three years after the FBI learned of the fraud in 2010.

It was undisputed that if the government had intervened, the 10-year limitations period would have applied. At issue was whether that period can apply in cases where, as in *Cochise*, the government does not intervene. The Fourth and Tenth Circuits had previously ruled that it could not, but the Eleventh Circuit created a split when it ruled—in the decision on appeal in *Cochise*, and as previously reported by this blog [here](#)—that that period could apply to cases in which the government is not a party.

At Tuesday's argument, defense contractors' counsel argued that extending the 10-year limitations period would result in increased claims, impose higher evidentiary burdens, and allow relators to "wait in the weeds" while developing their cases. But relator's counsel argued that, in practice, relators have a strong incentive to file as soon as possible, because otherwise the potential plaintiff risks their claim being dismissed under the "first to file bar," which is intended to avoid duplicative FCA litigation by prohibiting subsequent FCA actions based upon the same essential facts as a previously filed *qui*

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tam action. The Solicitor General's Office also argued the relator's position was consistent with the FCA's purpose because "the majority of any recovery would go to the United States" even where the government does not intervene.

Although it is difficult to predict the Court's decision based on oral argument, it seems at least possible that the Court will extend the FCA's 10-year statute of limitations to cases where the government does not intervene. That result would likely increase risk and costs for defendants facing FCA claims.