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INSIGHT: Defendants May Seek to Use Discovery to Soften Impact of SCOTUS Decision

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Defendants in False Claims Act cases may be able to limit the impact of a recent Supreme Court decision, Hogan Lovells attorneys say. The court clarified application of the law's statute of limitations, potentially expanding the number of claims and penalties for which defendants can be liable in FCA litigation.

The Supreme Court's May 13 decision in *Cochise Consultancy Inc. v. United States ex rel. Hunt* clarified application of the False Claims Act's two-part statute of limitations.

The opinion has the potential to expand the number of claims and penalties for which defendants can be liable in declined whistleblower litigation. However, the unanimous opinion by Justice Clarence Thomas leaves open several avenues for defendants to try to limit the impact of court's holding.

In short, the court held that a relator can file a whistleblower action—or qui tam—up to 10 years after a violation of the FCA occurs as long as the whistleblower, also called a relator, files suit within three years of a responsible government official learning of the alleged fraud.

Two Limitations Periods

An FCA action may not be brought (1) more than six years after the date on which the FCA violation is committed, 31 U.S.C. § 3731(b)(1), 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," *id.* § 3731(b)(2), whichever occurs last.

The court explained that the "plain text" of the statute, which applies the limitations periods to "civil action[s] under section 3730," makes the two limitations periods applicable in both government-initiated and relator-initiated suits. Slip. op. 5.

The court dismissed Cochise's arguments that § 3731(b)(2) should only apply when the government is a party as "at odds with fundamental rules of statutory interpretation." Slip. op. 5. By holding that relators in declined cases can take advantage of the 10-year limit in § 3731(b)(2), the Supreme Court rejected the view held by the three other courts of appeals to have addressed this question (the Fourth, Ninth, and Tenth Circuits), which had all held that relators in declined cases were confined to the six-year statute of limitations in § 3731(b)(1).

The Supreme Court also rejected Cochise's argument that the relator in a declined case should be considered "the official of the United States charged with responsibility to act in the circumstance" for purposes of triggering the 3-year period within which the complaint must be filed to get § 3731(b)(2)'s 10-year limitations period. A private relator is not ordinarily an "official of the United States;" nor does the FCA's text contemplate such a result.

Implications for Defendants

This decision has significant implications for defendants. First, although *Cochise Consultancy* involved alleged misconduct during a limited one-year period seven years before the suit was filed, the consequences of the decision are potentially far greater for entities that submit claims on a recurring basis, such as those in the health care field and government contractors with long-term contracts. For these entities, the decision means that relators will be able to seek treble damages plus per-claim penalties for 10 years' worth of false claims.

Second, defendants now have a greater incentive to seek discovery of what the government knew and when because a relator seeking to use § 3731(b)(2)'s 10-year limitations period must file the complaint within three years of when "facts material to the right of action are known or reasonably should have been known" by "the official of the United States charge with responsibility to act in the circumstances."

Relators often focus on suspicious conduct previously known to government agencies, including in the Department of Justice, and the department's decision not to intervene in a qui tam can indicate that its lawyers previously concluded not to take action against a defendant. The Supreme Court's holding suggests that defendants may want to expand their efforts to develop defenses showing the relator failed to meet this requirement because the government knew about the alleged misconduct more than three years before the qui tam suit was filed.

Like Justice Thomas's unanimous decision in *Universal Health v. United States ex rel. Escobar*, this decision may inspire more questions than it answers. The Supreme Court declined to decide who constitutes "the official of the United States" under § 3731(b)(2) or whether that must be the attorney general (or his delegate), as the federal government argued.

As defendants seek to develop factual records showing the appropriate government official knew (or should have known) "material facts," courts will likely need to provide further guidance about what constitutes "material facts" in this context and when government officials reasonably should have known them.

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