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PRATT'S  
**GOVERNMENT  
CONTRACTING  
LAW**  
REPORT



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Victoria Prussen Spears

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# Supreme Court Extends False Claims Act *Qui Tam* Limitations Period

*By Michael J. Navarre, Patrick F. Linehan, and Paul R. Hurst\**

*In a unanimous decision, the U.S. Supreme Court adopted the U.S. Court of Appeals for the Eleventh Circuit's reading of the civil False Claims Act's statute of limitations provision, providing private qui tam plaintiffs (or relators) potentially even more time to bring suits under the Act. The authors of this article discuss the decision.*

The U.S. Supreme Court provided government contractors and other potential defendants of civil False Claims Act (“FCA”) lawsuits with a measure of clarity, though not quite the news for which some were hoping. In a unanimous decision in *Cochise Consultancy Inc. v. United States, ex rel. Hunt*,<sup>1</sup> the Court adopted the U.S. Court of Appeals for the Eleventh Circuit’s reading of the FCA’s statute of limitations provision, providing private *qui tam* plaintiffs (or relators) potentially even more time to bring suits under the Act.

The specific holding found that a knowledge-based statute of limitations period in 31 U.S.C. § 3731(b)(2), which provides that an action may not be filed more than three years after “the official of the United States charged with responsibility to act in the circumstances “knew or should have known the relevant facts, but “not more than 10 years after the violation,” applies in a *qui tam* suit in which the federal government has declined to intervene.

The Court thereby resolved a three-way circuit split and provided all relators access to the potentially more generous limitations period in (b)(2), regardless of the government’s decision to intervene.

## THE FCA’S STATUTE OF LIMITATIONS

The civil FCA authorizes the Department of Justice and private plaintiffs, acting on behalf of the United States government, to pursue civil liability against any person that, *inter alia*, “knowingly presents, or causes to be

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<sup>1</sup> No. 18-315, [https://www.supremecourt.gov/opinions/18pdf/18-315\\_1b8e.pdf](https://www.supremecourt.gov/opinions/18pdf/18-315_1b8e.pdf).

presented, a false or fraudulent claim for payment or approval” to the United States government. The FCA identifies two limitation periods for filing a civil action under the Act.

The first, contained in 31 U.S.C. § 3731(b)(1), provides that any civil action, including one filed by a relator, may not be brought more than six years after the date of the alleged violation.

The second, which is contained in § 3731(b)(2) and described above, provides a three-year limitations period based on government knowledge and a 10-year statute of repose, providing that suits must be filed three years after the date when certain government officials knew or “should have known” of certain relevant facts underlying the claim, but not “more than 10 years after the date on which the violation is committed.”

Circuit courts were split over whether the three-year period under (b)(2) applied to an FCA action being pursued by the relator after the government had declined to intervene in the action.

### **THE CASE BELOW**

The initial lawsuit in the case arose from alleged fraud that occurred from 2006 to 2007. The relator in the case, Billy Joe Hunt, sued a United States military contractor and its subcontractor for allegedly submitting false claims for payment as part of a Department of Defense contract to clean up excess munitions in Iraq left behind by retreating or defeated enemy forces. Hunt allegedly informed FBI agents about the alleged fraud during a November 30, 2010 meeting, but then waited nearly three years, until November 27, 2013, to file suit against the contractors. The suit therefore, was filed seven years after the alleged fraud, but within three years of alerting FBI agents. The Department of Justice declined to intervene in the case.

The district court in the case initially dismissed the suit as untimely without deciding whether (b)(1) or (b)(2) applied, finding that the relator’s complaint was untimely under both. The Eleventh Circuit, however, revived the suit in an April 11, 2018 decision that departed from all prior Circuit decisions interpreting (b)(2).

Prior published Circuit decisions had found that (b)(2)’s three-year tolling period applied only to cases (a) where the Department of Justice intervened on behalf of the United States (the U.S. Courts of Appeals for the Fourth and Tenth Circuits) or (b) where the suit was brought within three years of when the relator knew or should have known of the facts that gave rise to the lawsuit (the U.S. Court of Appeals for the Ninth Circuit). Bucking these decisions, the Eleventh Circuit held that the FCA’s limitations period under (b)(2) applied

regardless of the Department of Justice's decision on intervention and found that the relevant officials, for purposes of § 3731(b)(2), must be actual government officials, not the relator.

### THE SUPREME COURT'S DECISION

The Supreme Court, in a unanimous (and relatively short) opinion written by Justice Thomas, followed the Eleventh Circuit's reasoning, holding that neither of the other Circuit interpretations was reasonable under the statute.

Addressing the Fourth and Tenth Circuit reasoning, the Court rejected a reading that premised the limitations period in (b)(2) on intervention by the Department of Justice, applying the rule that a "single use of a statutory phrase must have a fixed meaning" and holding that the three-year period is meant to apply regardless of whether the Government has intervened.

It further reasoned that there is nothing "unusual about extending the limitations period when the government official did not know and should not reasonably have known the relevant facts, given that the government is the party harmed by the false claim and will receive the bulk of any recovery."

The Court also rejected the Ninth Circuit's logic, which had treated the relator as a "responsible government official" under (b)(2). Instead, the Court found that the statutory scheme "does not make the relator anything other than a private person, much less 'the official of the United States' referenced by the statute."

Thus, the Court found that Hunt's suit was timely filed within three-years of FBI agents learning about the alleged fraud, even though the Department of Justice declined to intervene in the lawsuit and the suit was filed more than six years after the alleged violation.

### TAKEAWAYS

The decision in *Cochise Consultancy* will provide a degree of uniformity for applying the limitations period—confirming that there is potentially a long tail for any potential FCA liability—and discourage forum shopping by *qui tam* relators.

The extended statute of limitations for all FCA actions (even non-intervened ones), however, may provide opportunities for relators to game the timing of the disclosure of alleged fraud to the government in order to gather additional information for a potential lawsuit or to allow the dollar value of the contract performed, and thus their potential recovery, to increase. Such potential for gamesmanship should provide contractors with additional food for thought regarding disclosures under FAR 52.203-13, particularly in light of the



Department of Justice's recent emphasis on "voluntary disclosure" in its updated guidance<sup>2</sup> relating to cooperation credit for defendants in civil False Claims Act investigations.

Thus, while added certainty is welcome for contractors, the decision may present additional challenges as the decision is implemented by lower courts. Finally, contractors assessing the relevant limitations period of a potential FCA claim should consider not only the recent decision in *Cochise Consultancy*, but also the Wartime Suspension of Limitations Act (WSLA), which could potentially suspend the limitations period for some criminal FCA offenses (but not civil ones, as the Supreme Court held in *Carter*) committed during a time of war.

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<sup>2</sup> <https://www.justice.gov/opa/pr/departments-justice-issues-guidance-false-claims-act-matters-and-updates-justice-manual>.