Health Alert: Supreme Court Clarifies Statute of Limitations in Nonintervened False Claims Act Qui Tam Suits

May 31, 2019

On May 13, 2019, the United States Supreme Court held that the False Claims Act's (FCA) 10-year statute of limitations applies to *qui tam* actions where the U.S. Department of Justice (DOJ) does not intervene and take over the case. The Court also held that it is the government's (and not the whistleblower's) knowledge of the facts giving rise to a claim that triggers the Act's three-year tolling period. The opinion, *Cochise Consultancy, Inc. v. United States ex rel. Hunt*, 139 S.Ct. 1507 (May 13, 2019), resolves a split among federal circuit courts on both issues.

Implications for Health Care Providers

The concept of "intervention" is very important. It stands for the idea that the DOJ has an opportunity to review and take over (i.e., intervene) in an FCA case filed by a whistleblower (called the "relator"). When the DOJ intervenes, the full weight of the government's resources can be brought to bear to prosecute actions against a health care provider. This means the relator does not have to incur the costs of litigating the case, but can still take home a share of the recovery if the DOJ prevails. In addition, defendants are much more likely to settle in intervened FCA cases because they know that it is very difficult to match the resources of the DOJ. Further, the potential costs of losing can be so high that many businesses cannot risk the exposure. However, if the DOJ does not intervene, the relator is responsible for litigating the matter against the defendant. This often puts the defendant on a more level playing field because it is essentially battling in court against another private party.

The general perception in health care fraud and abuse enforcement is that if the DOJ does not intervene and take over a *qui tam* case, the agency is sending a signal that it does not believe the relator's case to be very strong. This makes sense given how important FCA enforcement has been to the DOJ over the years — the total amount recovered in health care related FCA cases increased in the last year, and 2018 was the 10th consecutive year in which the agency recovered more than $2 billion in health care FCA recoveries. As a result, defendants in FCA cases in which the DOJ has declined to intervene tend to view themselves as being in a stronger position to fight back.

Prior to *Cochise*, it was not clear whether the statute of limitations for cases where the DOJ did not intervene (known as "nonintervened cases") lasted as long as the statute of limitations where the DOJ did intervene. The maximum statute of limitations in FCA cases has always been 10 years, but before *Cochise,* health care providers had hope that they could rely on a shorter limitations period for relators bringing a *qui tam* action in which the DOJ decided not to intervene. Providers now know that an FCA action can be brought against them up to 10 years after an alleged violation of the Act, even in a nonintervened case.

This has at least a couple of implications for providers:

1. The fact of nonintervention does not mean that a potential FCA action can no longer proceed after the 6-year period found in the statute has run. Providers will need to remain diligent about having to litigate against a relator who decides to move forward without the DOJ's assistance for the full 10-year period. There are many law firms that specialize in relator-side *qui tam* suits that trumpet the riches that can be earned from successful FCA actions. There is scant chance that the number of FCA cases filed annually will do anything but continue to increase. As a result, the pressure faced by providers to retain documentation of compliance for 10 years across a range of activities will likely grow.

2. All of this occurs against the backdrop of the 60-day "overpayment" requirement enacted as part of the Affordable Care Act. As discussed by GPM in other Alerts, providers have a duty to conduct reasonable diligence after receiving credible information of a potential overpayment made to them by the government and to conduct "proactive" compliance efforts. The failure to do so runs the risk of an overpayment being inadvertently identified (which can be prosecuted as a reverse false claim under the FCA). The holding in *Cochise* may bring within the scope of the 10-year statute of limitations providers' failure to evaluate information about a potential overpayment even when the DOJ has passed on intervention.

A more in-depth look at *Cochise* is below:

Analysis of Court's Opinion

The FCA's statute of limitations, 31 U.S.C. § 3731, provides:

"(b) A civil action under [the Act] may not be brought —

(1) more than six years after that date on which [the Act was violated], or

(2) more than three 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 the 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."

Two questions arose as courts struggled to interpret Section 3731(b) in *qui tam* actions where the government did not intervene. First, did subsection (b)(2) apply when the government did not intervene? Second, if subsection (b)(2) *did* apply in nonintervened cases, did the relator's knowledge of the facts giving rise to an FCA claim trigger the subsection's three-year tolling period?

Multiple federal circuit courts had answered the first question in the negative, thus, restricting relators to a six-year limitations period in nonintervened cases. Others had held that while subsection (b)(2) applied in nonintervened cases, the relator's knowledge of the alleged fraud triggered the three-year tolling period since the relator acts as an agent suing on behalf of the government in a *qui tam* action. Only the Eleventh Circuit, in *Cochise*, had held that subsection (b)(2) applied in nonintervened cases and that the relator's knowledge did not trigger the tolling period.

In *Cochise*, the relator filed a complaint on November 27, 2013, concerning FCA violations that had allegedly occurred up to "early 2007." The relator had disclosed the allegedly fraudulent scheme to the government during an interview on November 30, 2010, but the government did not intervene. Following the majority of circuits to have confronted the issue, the district court held that either subsection (b)(2) of the FCA's statute of limitations did not apply, or, if it did, the relator's knowledge of the facts giving rise to the lawsuit triggered the subsection's three-year tolling period and the relator had been aware of the alleged fraud more than three years before filing the complaint. Under either interpretation, the relator's claims were barred. The Eleventh Circuit and, ultimately, the Supreme Court disagreed.

In reaching its holding, the Supreme Court relied on the plain language of the FCA's statute of limitations. First, it held that the statute's text provides no basis to distinguish between intervened and nonintervened cases. The Court declined to ascribe multiple meanings to the statute's single introductory phrase "a civil action" — i.e., a nonintervened case could not somehow constitute a "civil action" under subsection (b)(1) while ceasing to be one under subsection (b)(2). Second, again relying on the statute's plain language, the Court held that a relator is not an "official of the United States," but a private person; thus, a relator's knowledge of the facts giving rise to an FCA claim does not trigger the Act's three-year tolling period.

The *Cochise* Court declined to opine on exactly who from the government constitutes an "official of the United States" under the Act, leaving open the question of whether the knowledge of government

representatives other than the Attorney General (or his delegates) may trigger the tolling provision.

In light of the Court's decision in *Cochise*, a relator in an FCA *qui tam* action must generally bring suit within three years of the date on which the requisite government "official" — whoever that may be — becomes aware of the facts giving rise to the claim (unless the government becomes aware of such facts within three years of the violation, in which case the statute's six-year limitations period applies), but no more than 10 years after the claim arises. The ruling represents a change to the law in several circuits, potentially keeping alive claims that previously would have been time-barred and/or extending the period of time over which the government, and a relator, may recover damages.

For additional information, please contact a member of the Health Law team at Gray Plant Mooty.