COSMOS
Navigate the Compliance Universe

# Compliance Today - August 2019
# Supreme Court delivers important victory for qui tam whistleblowers

By Michael A. Morse, Esq., CHC

**Michael A. Morse** (MAM@Pietragallo.com) is a Partner of Pietragallo Gordon Alfano Bosick & Raspanti, LLP in Philadelphia.

- linkedin.com/in/michaelmorseesquire

On May 13, 2019, the Supreme Court of the United States, in a unanimous decision, delivered an important victory for qui tam whistleblowers in United States ex rel. Hunt v. Cochise Consultancy, Inc., (Hunt).[1] The decision, authored by Justice Clarence Thomas, held that private qui tam whistleblowers are entitled to the extended statute of limitations period in the federal False Claims Act (FCA) that many federal courts had previously reserved only for FCA lawsuits filed by the government. This decision is important because: (1) it affords whistleblowers the same amount of time as the government to file a claim against those who defraud taxpayer-funded programs; and (2) it resolves a split in the lower federal courts as to how to interpret the statute of limitations provisions in the FCA.

The Supreme Court's decision resolves the application of the FCA's statute of limitations provisions, which provide:

> (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.[2]

Although federal courts have unanimously applied the six-year statute of limitations to qui tam lawsuits, there was a split between lower federal courts as to whether Section 3731(b)(2)'s three-year limitations period also applied to qui tam lawsuits. In particular, the Circuit Courts of Appeal were split along the following lines:

- The Fourth and Tenth Circuit Courts of Appeal had ruled that Section 3731(b)(2) did not apply to a relator-initiated action in which the government elects not to intervene.[3] ,[4]
- The Ninth Circuit Court of Appeals had ruled that Section 3731(b)(2) applied in non-intervened whistleblower actions, and that the limitations period begins when the relator knew or should have known the relevant facts.[5]
- The Eleventh Circuit Court of Appeals had ruled that Section 3731(b)(2) applied in non-intervened whistleblower actions, and that the limitations period begins when "the official of the United States charged with responsibility to act in the circumstances" knew or should have known the relevant facts.[6]

In Hunt, the Supreme Court unanimously resolved this split in the Circuit Courts by holding that Section 3731(b)

(2) does apply to relator initiated actions, regardless of whether the government intervenes in the action.

Justice Thomas, writing for the Court, held that "both Government-initiated suits under §3730(a) and relator initiated suits under §3730(b) are "civil action[s] under section 3730. Thus, the plain text of the statute makes the two [statute of] limitations periods applicable to both types of cases."[7] The Court also refused to limit the three-year statute of limitations to intervened cases because whistleblower lawsuits are "civil action[s] under Section 3730," regardless of the government's intervention. The Court explained that "in all but the most unusual situations, a single use of a statutory phrase [here, the phrase "civil action under section 3730"] must have a fixed meaning." That "fixed meaning" meant extending the three-year statute of limitations to all whistleblower initiated actions.

The Supreme Court also made clear that when applying the three-year limitations period in section 3731(b)(2), the relator's knowledge of the fraud does not start the clock on the statute of limitations, because private relators are not "responsible official[s] of the United States charged with responsibility to act."[8] The Court explained that a "relator is neither appointed as an officer of the United States…nor employed by the United States. Indeed, the provision that authorizes qui tam suits is entitled 'Actions by Private Persons.'" The Court added that "[m]ore fundamentally, private relators are not 'charged with responsibility to act' in the sense contemplated by Section 3731(b), as they are not required to investigate or prosecute a False Claims Act action."[9]

This decision is important because whistleblowers, many of whom are employees working for the defendant, might gain knowledge of the fraud long before "the responsible government official." The Supreme Court has now made clear that the statute of limitations clock under Section 3731(b)(2) of the FCA does not begin to run as a result of the private whistleblower's knowledge of the fraud.

The Supreme Court's decision in Hunt will ensure that whistleblowers who file FCA lawsuits across the United States have the full benefit of the extended statute of limitations period in Section 3731(b)(2). This will allow all whistleblowers more time to file their lawsuits and will ultimately enhance the effectiveness of the FCA's qui tam provisions in combatting fraud, waste, and abuse in government-funded programs, such as Medicare and Medicaid.

## Another challenge to FCA's qui tam provisions

The Supreme Court's decision in Hunt also appeared to signal a resolution of another, unrelated challenge to the FCA's qui tam whistleblower provisions. In United States ex rel. Polukoff v. Intermountain Health Care, Inc., (Intermountain),[10] the defendant had filed a petition for certiorari (i.e., an order by which a higher court reviews the decision of a lower court) to the Supreme Court arguing that the qui tam whistleblower provisions in the FCA were unconstitutional, because they violated the "Appointments Clause" in Article II of the Constitution. The Appointments Clause specifies the permissible means of appointing "Officers of the United States" to public offices "established by Law."[11]Intermountain argued in its petition that the FCA's qui tam provisions improperly appointed private citizens as "Officials of the United States." Although similar challenges had previously been rejected by numerous federal courts, this case caught the eye of many when the Supreme Court ordered the whistleblower and the United States to file a response to Intermountain's petition. Many observers questioned whether the Supreme Court was signaling its interest in taking up this constitutional challenge to the FCA's qui tam provisions.

The Supreme Court's decision in Hunt does not specifically reject Intermountain's petition, but Justice Thomas clearly stated that a private relator "is neither appointed as an officer of the United States…nor employed by the United States."[12] This portion of the Hunt decision appears to flatly reject Intermountain's challenge that the

qui tam provisions violate the Constitution's Appointments Clause. However, the Supreme Court may not get to rule directly on Intermountain's petition. On April 29, 2019, Intermountain requested that the Supreme Court defer its petition, because it has reached a settlement in principle of the underlying FCA lawsuit, and its petition may become moot if the government approves that settlement.

Thus, the Supreme Court's unanimous decision in Hunt delivers two important victories for qui tam whistleblowers under the federal False Claims Act.

## The high court's active role in FCA cases

The Hunt decision also continues the Supreme Court's active interest in the False Claims Act. Since 2015, the high court has issued four decisions interpreting various provisions within the FCA, including:

- On May 26, 2015, the Supreme Court decided Kellogg Brown & Root Services, Inc v. United States ex rel. Carter (12-1497), in which the Court held, in part, that the FCA's first-to-file bar applies only to "pending" cases, and that cases are no longer "pending" under the FCA once they have been dismissed.
- On June 16, 2016, the Supreme Court issued its landmark decision in Universal Health Services, Inc. v. United States ex rel. Escobar (136 S.Ct. 1989) in which the Court: (a) approved of FCA cases based upon an implied certification theory; (b) recognized that liability in implied certification cases extended only to violations that were material to the government's decision to pay the claims at issue; and (c) held that materiality was a fact-specific inquiry, but included consideration of the government's actions related to the specific violation at issue.
- On December 6, 2016, the Supreme Court decided State Farm Fire & Casualty Co. v. United States ex rel. Rigsby (137 S.Ct. 436), in which the Court held, in part, that a violation of the FCA's seal provisions does not mandate a dismissal of the relator's complaint; but instead the trial court has the discretion to dismiss based upon factors including the impact of seal violation on the government's investigation.
- On May 13, 2019, the Supreme Court decided the Hunt case discussed above.

These decisions demonstrate the high court's keen interest in the FCA and its willingness to accept cases that define key aspects of this critical and unique law enforcement statute. Moreover, in a time when the Supreme Court is often deeply divided on many legal issues, it is truly remarkable that the Court's recent decisions involving the FCA, including KBR-Carter, State Farm-Rigsby, Escobar, and Hunt, have all been unanimous.

The high court's interest in the FCA is not likely to end any time soon. Given that the Circuit Courts continue to wrestle with the standard for materiality following Escobar, it is very likely that the high court will accept another FCA case to provide guidance on this important issue. When that might occur remains an open question. Recently, the Court declined to hear three cases that each would have presented an opportunity for the Court to further address the standard for materiality post-Escobar. In particular, the Court this year rejected certiorari on the following three cases:

- United States ex rel. Prather v. Brookdale Senior Living Communities, reversing a motion to dismiss, and finding that the relator need not plead facts relating to past government practices related to the alleged violation or plead facts showing that defendant had knowledge that alleged violation was material to government.[13]
- United States ex rel. Campie v. Gilead Sciences, Inc., reversing a motion to dismiss, and finding that the relator's complaint sufficiently alleged materiality under the FCA despite defendant's argument that the FDAs continued approval of HIV drugs at issue rendered immaterial their alleged false statements about

compliance with FCA regulations.[14]

- United States ex rel. Harman v. Trinity Industries, reversing a $664 million jury award on grounds that the alleged fraud did not satisfy FCA's materiality standard.[15]

Despite the high court's rejection of these recent cases, many observers fully expect the Court to soon take on another case addressing materiality under the FCA. When the Court does, healthcare entities, compliance professionals, attorneys, and potential whistleblowers should all pay careful attention, because that case will likely have a substantial impact on the future of many FCA cases.

## Takeaways

- In Hunt, the Supreme Court held that the three-year statute of limitations in Section 3731(b)(2) of the False Claims Act (FCA) applies to qui tam whistleblower lawsuits.
- In Hunt, the Supreme Court held that the whistleblower's knowledge of the fraud does not start the clock on the three-year statute of limitations.
- Private whistleblowers now have the same amount of time as the government to file a FCA case.
- The Hunt decision continues the Supreme Court's active interest in the shaping FCA litigation.
- The Supreme Court's interest in the FCA will likely continue as courts grapple with the post-Escobar standard for materiality under the False Claims Act.

**1**United States ex rel. Hunt v. Cochise Consultancy, Inc., No. 18-315, 587 US (2019)
**2** 31 U.S.C. §3731(b). https://bit.ly/2I9YOHv
**3**United States ex rel. Sanders v. North Am. Bus. Industries, Inc., 546 F.3d 288, 293-294 (4th Cir. 2008)
**4**United States ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah, 472 F.3d 702, 725-726 (10th Cir. 2006).
**5**United States ex rel. Hyatt v. Northrop Corp., 91 F.3d 1211, 1216-1218 (9th Cir. 1996).
**6**United States ex rel. Hunt v. Cochise Consultancy, Inc., 887 F.3d 1081, 1089-1097 (11th Cir. 2018).
**7**Hunt Opinion, p.5.
**8**Hunt Opinion, pp. 8-9.
**9** Idem at p. 9.
**10**United States ex rel. Polukoff v. Intermountain Health Care, Inc., No 18-911, https://bit.ly/2ITnMdt
**11** U.S. Const. Art. II, § 2, Cl. 2.
**12** Ibid, Ref #6
**13** 892 F.3d 822 (6th Cir. 2018); cert. denied, 139 S.Ct 1323 (Mar. 18, 2019)
**14** 862 F.3d 890 (9th Cir. 2017); cert. denied, 139 S.Ct. 783 (Jan. 7, 2019)
**15** 872 F.3d 645 (5th Cir. 2017); cert denied, 139 S.Ct. 784 (Jan. 7, 2019)