Reining In the *Qui Tam* Bar

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Qui Tam Litigation is Booming

False Claims Act *qui tam* litigation continues to be big business for the plaintiffs' bar. According to Justice Department statistics, more than $2.1 billion of the almost $2.9 billion collected by the United States from False Claims Act settlements and judgments during FY 2018 were attributable to suits filed by individual *qui tam* "relators"—essentially private attorneys general authorized by the False Claims Act to file civil suits on behalf of the United States against alleged perpetrators of fraudulent payment or reimbursement schemes. Although most of the FY 2018 *qui tam* recoveries arose out of suits against members of the health care industry, more than $62.7 million in settlements and judgments were attributable to *qui tam* suits involving the Department of Defense. When all False Claims Act *qui tam* settlements and judgments since 1987 are totaled (the current *qui tam* provisions were enacted in 1986), the amount paid by DoD contractors skyrockets to almost $3.3 billion.

As an incentive to prospective whistleblowers, the False Claims Act rewards *qui tam* relators—and by extension, their contingency-fee attorneys—with substantial bounties, ranging from 15% to 30% of settlement or judgment proceeds. During FY 2018, *qui tam* relator awards in connection with False Claims Act suits against DoD contractors were $14.3 million. Since 1987, relator awards attributable to *qui tam* suits filed against DoD contractors add up to almost $586.5 million.

The Plaintiffs' *"Qui Tam Bar"* Continues to Push the Envelope

In view of the statutorily authorized pot of gold awaiting successful relators, it is no wonder the *qui tam* bar is continually pursuing new theories and tactics to expand the universe of False Claims Act filings against a broad range of companies, including services contractors. Each year, between 30 and 50 *qui tam* suits are filed against DoD contractors; since 1987, more than 1,600 such suits have been filed. Without ever having to prove their false claims allegations in court, *qui tam* relators and their attorneys are frequently successful in pressuring defendants to accede to substantial pretrial settlements in order to avoid the very real costs and risks (e.g., treble damages; civil penalties; reputational and competitive harm) of challenging even speculative or frivolous claims allegations.

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During the past few years, *qui tam* filings also have been fueled by the Supreme Court's holding in *Universal Health Services, Inc. v. United States ex rel. Escobar,* 136 S. Ct. 1989 (2016). *Escobar* holds that False Claims Act liability can be imposed where a defendant has submitted a payment claim that, *by implication*, knowingly fails to disclose noncompliance with any of myriad statutory, regulatory, or contractual requirements that are "material" to the government's payment decision. Even worse, Escobar left it to the lower courts to agree (or disagree) on the meaning of materiality for false certification purposes. This lack of clarity has opened federal district courthouse doors to increasingly opportunistic *qui tam* filings.

The Supreme Court Soon Will Be Reviewing the *Qui Tam* Statute of Limitations

This Spring the Supreme Court will have the opportunity to curtail *qui tam* gamesmanship, at least to the extent of enforcing the False Claims Act's 6-year statute of limitations, which is based on when a relator first learns of alleged fraud. Under 31 U.S.C. § 3731(b), a False Claims Act suit, including a *qui tam* action, "may not be brought (1) more than 6 years after the date on which the violation . . . 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."

The issue that the Court will be deciding in *Cochise Consultancy, Inc.* and *The Parsons Corporation v. United States ex rel. Hunt,* No. 18-315, is whether the extended limitations period in § 3731(b)(2)—which is based on when a cognizant government official, *not the relator*, first learns of alleged fraud—can apply to the filing of a *qui tam* suit where the United States, as is true in the vast majority of cases, *declines* to intervene. In *Hunt,* the relator apparently filed his *qui tam* suit seven years after learning of a government contractor's alleged fraud in connection with the award of a war-zone security services subcontract, but within three years of when he informed the FBI about the alleged fraud. Following assessment of the relator's fraud allegations, the Justice Department declined to intervene in the case.

The Supreme Court granted certiorari to resolve a circuit split on the issue of whether a relator is bound by the 6-year limitations period established by § 3731(b)(1), or instead, can take advantage of the extended limitations period in § 3731(b)(2) based on when he or she informs the government of alleged fraud. Although the Eleventh Circuit held in *Hunt* that a relator can rely on § 3731(b)(2) even where the government declines to intervene, other circuits have held that § 3731(b)(2) applies only where the United States directly brings a False Claims Act suit or decides to intervene in a *qui tam* suit. The latter view is consistent with legislative history suggesting that Congress enacted § 3731(b)(2) solely for the benefit of the government, which needs adequate time to investigate False Claims Act allegations.

In *Hunt,* the government contractor petitioners argue that allowing a relator to invoke § 3731(b)(2) "where the United States has not intervened in the case is contrary to the statute's language, structure, purpose, and history, and would create a cascade of congressionally unintended consequences." Petitioners' Br. at 10. They argue, for example, that a relator could exploit § 3731(b)(2) by deliberately deferring disclosure to the government for as much as 10 years after he or she discovers the alleged fraud, and thereby allow damages for ongoing fraudulent misconduct (along with a potential relator share award) to accrue to a maximum extent. The

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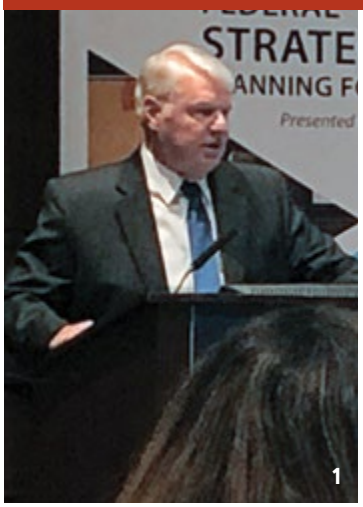
Event Spotlight



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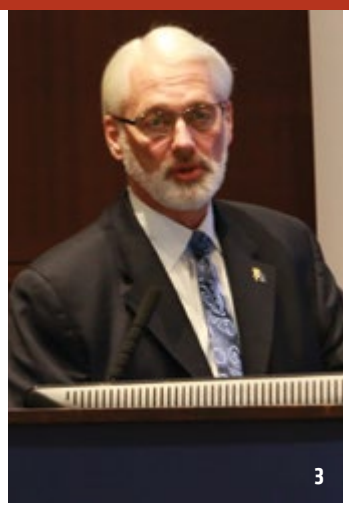
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Vision Strategic Planning Forum

The **14th Annual Vision Strategic Planning Forum** brought together industry strategists offering their views on how to hone corporate strategy during a period of uncertainty. PSC welcomed keynote speaker Admiral Gary Roughead (1), USN (Ret.), who discussed his role as Co-Chair of the Commission on the National Defense Strategy and offered highlights from the report. Pierre Chao (2), co-founder of Renaissance Strategic Advisors, led executive-level panels on the major challenges facing the industry and the longer-term market impact on defense, services, and technology companies. Rich McFarland (3), Vision Defense Chair, wrapped up the forum by discussing the value of the Vision Market Forecast program and encouraged PSC members to get involved by joining one of the 20+ study teams. **To learn more or to join a team, contact Vision Market Forecast Director Michelle Jobse at jobse@pscouncil.org.**

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United States, through the Solicitor General, has weighed in as an amicus curiae (friend of the court), arguing that relators can rely on the extended § 3731(b)(2) limitations period even where the government declines to intervene. According to the Solicitor General, relators have substantial incentives to report fraud expeditiously, and delaying filing a *qui tam* suit runs the risk of being barred by an earlier relator, public disclosure of the fraud, or a False Claims Act suit filed directly by the government.

Nonetheless, several amicus curiae briefs have been filed in support of the petitioners. A joint amicus brief submitted by the Professional Services Council and DRI–The Voice of the Defense Bar argues that allowing relators to take advantage of the § 3732(b)(1) extended limitations period would increase litigation costs and risks for *qui tam* defendants and induce more unwarranted pretrial settlements. Further, if the extended limitations period applies in non-intervened *qui tam* suits, discovery and other litigation burdens imposed on DoD and other departments or agencies would significantly increase. As PSC Executive Vice President and Counsel Alan Chvotkin explained in a press release, allowing *qui tam* relators to invoke § 3731(b)(2) "would require extensive and time-consuming discovery about what the government knew, and when it knew it."

Conclusion

Congress enacted the False Claims Act *qui tam* provisions to help the government root out actual false or fraudulent claims for federal payments or reimbursements. While Congress wanted *qui tam* relators to receive a share of settlements or judgments both as an incentive and reward, there is no indication that the filing of *qui tam* suits is intended to provide a bounty-hunter bonanza for ambitious relators or their attorneys. The Supreme Court should continue to decide cases, such as *Hunt,* which present unresolved legal questions bearing on how the *qui tam* process is intended to work for the benefit of the government and the public. ■

Lawrence S. Ebner is founder of Capital Appellate Advocacy PLLC, a Washington, D.C.-based appellate litigation boutique that represents businesses and industries before the Supreme Court and federal courts of appeals in litigation involving the federal government. A graduate of Harvard Law School and a fellow of the American Academy of Appellate Lawyers, Mr. Ebner has authored amicus curiae briefs for the Professional Services Council and is the immediate past chair of the Amicus Committee for DRI-The Voice of the Defense Bar.