# When Must a Relator File a Notice of Appeal Within 30 Days?

*by Michael Kurs*

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The case presents an opportunity for the Supreme Court to address a split between the circuit courts of appeals over whether a person who pursues a False Claims *qui tam* action in the federal government's name in a case where the government does not participate loses his right to appeal 30 days after judgment or whether a 60-day deadline applies.

## Issue

What appeal deadline applies to individuals who bring claims under the federal False Claims Act when the United States government does not participate in the case?

## Facts

The United States Court of Appeals for the Second Circuit dismissed the case of *United States of America ex rel. Eisenstein v. City of New York,* which includes a federal False Claims Act count, because Mr. Eisenstein filed his appeal 54 days after the district court judgment in his case. According to the Second Circuit, he should have filed within 30 days. Eisenstein did not have a lawyer representing him before the Second Circuit court until the circuit court questioned the timeliness of his appeal. The court at that point directed that a lawyer be appointed to address the appeal deadline issue on Eisenstein's behalf. It also ordered the United States to brief the issue. Up until the government's filing of its brief, as an amicus curiae "friend of the court," the government played no role in the case.

Eisenstein had represented himself before the federal district court, which had first considered and dismissed his claims. He contends that the City of New York and its mayor, Michael Bloomberg, along with an unidentified John Doe and Jane Doe, have violated federal law and his constitutional rights by applying to him and others a New York City Charter provision that affects city employees who live outside the city. The provision requires nonresident employees as a condition of employment to pay New York City the dif-

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*United States ex rel. Irwin Eisenstein v. City of New York et al.*
Docket No. 08-660

Argument Date:
April 21, 2009
From: The Second Circuit



# Case at a Glance

The federal False Claims Act provides the United States with a remedy for fraud practiced on the government and permits actions to be brought in the government's name by persons who can share in penalties paid under the act to the government. This case concerns which appeal deadline applies when an individual pursues a False Claims Act lawsuit in the government's name and may determine whether other pending False Claims Act appeals were timely filed.

ference between the lesser city income and earnings tax they pay to their city of residence and the higher tax they would have paid to New York City had they lived in the city. Eisenstein had worked for New York City and resided in New Jersey for at least part of his tenure as a city employee. He maintains that the charter provision "hoodwinks" the federal government out of tax revenue because it reduces a taxpayer's federal tax obligation and therefore violates the federal False Claims Act. *United States ex rel. Eisenstein v. City of New York,* 2006 WL 846376 at *2, fn. 5, (S.D.N.Y. Mar. 31, 2006).

Under the federal False Claims Act, ordinary citizen "relators" who become aware of fraud against the federal government may share with the government in substantial penalties recoverable through *qui tam* actions. *Qui tam* is a shortened reference to a Latin phrase that translates as "who pursues this action on our Lord the King's behalf as well as his own." A relator-initiated False Claims Act case *must* be "brought in the name of the Government." 31 U.S.C. § 3730(b)(1). Thus, Eisenstein's case is brought in the name of the United States *ex rel.,* that is, "on behalf of," himself.

Congress passed the False Claims Act in 1863 in response to widespread fraud against the government during the Civil War. "The Union government had been billed for nonexistent or worthless goods, had been charged exorbitant prices, and had its treasury plundered by profiteering defense contractors." See *United States ex rel. Eisenstein v. City of New York,* 2006 WL 846376 at *3, fn. 5 (citations omitted).

A relator commences a False Claims Act case by filing a complaint in court. The government then has an opportunity to intervene and take charge of the case. 31 U.S.C. § 3730. The government in this case declined to pursue the claim filed by Eisenstein and opted not to intervene in the case. The district court found that Eisenstein's complaint did not satisfactorily allege violations of the False Claim Act. U.S. District Court Judge Deborah A. Batts, noting that nothing in the complaint indicates any defendant applied the city's tax provision to procure federal funds in a manner that would violate the Act, dismissed the case, including the other counts, which she also found deficient.

A party who wishes to appeal from an unfavorable federal court decision has to meet the applicable filing deadline specified in the Federal Rules of Appellate Procedure and in the statutes governing appeals. Federal law gives the United States Supreme Court the power to make rules of practice and procedure for all cases within the jurisdiction of the federal appeals courts. The applicable rules include limitations upon the authority of a court to extend the time to appeal a federal court decision.

Generally speaking, in a federal civil case, a notice of appeal must be filed within 30 days after the judgment or order appealed from is entered. Fed. R. App. P. 4(a)(1)(A) and 28 U.S.C. § 2107(a). "When the United States or its officer or agency is a party," a notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered. Fed. R. App. P. 4(a)(1)(B) and 28 U.S.C. § 2107(b). The Second Circuit ruled in Eisenstein's case that the government had not participated as a party. Circuit Court of Appeals Judge Ralph K. Winter, writing on behalf of a unanimous three-judge panel, explained that where the United States declines to intervene in a false claims action, the United States is not a party to the action within the meaning of the federal appellate rule that establishes the deadline for appeals. *United States ex rel. Eisenstein v. City of New York,* 540 F.3d 94, 98 (2nd Cir. 2008).

The Second Circuit noted that the term *party* is not expressly defined by the statute governing appeal deadlines or the appellate rules. It concluded that the United States is not a party to Eisenstein's action since it did not intervene or "raise or resist" any legal claim made by the case. In support of this conclusion, Judge Winter's opinion discusses the various statutory provisions of the False Claims Act pertaining to the litigation of a case when the government does not participate, including those governing: (1) the choice by the government not to participate; (2) the fact that the relator and not the government then conducts the action; (3) the good-cause showing that the government must make if it later decides to participate; (4) that pleadings need not be served on the government absent specific request; and (5) the fact that the government is not liable for expenses the relator incurs.

For purposes of determining the applicable notice deadline, the Second Circuit reasoned, the word *party* refers to "the person participating in the proceedings with control over the litigation. … The inability to participate without moving to intervene is simply not consistent with the principal characteristics of being a party to litigation." 540 F.3d at 98. Judge Winter's opinion acknowledges that the court's holding "puts us in conflict with three of four courts of appeals that have considered this issue." (Since the Second Circuit's decision, the Third Circuit has held the 60-day

deadline applies, making it another circuit in conflict with the Second and Tenth.) Judge Winter remarks:

> Ultimately, we are more inclined to agree with the views of the Tenth Circuit, the first court of appeals to have taken up this issue. … Under such circumstances [as these], the Tenth Circuit properly characterized the United States' participation in the case as 'tangential or nominal,' and soundly recognized that it 'was merely a statutory formality' that the relator brought the suit in the name of the United States.

The case before the Supreme Court should now resolve the conflict among the circuit courts.

## Case Analysis

Can it really be said that the government is not a party to a case when the government is identified in the case filings as the party plaintiff? The False Claims Act itself requires a case to be brought in the name of the government. A stranger to this case would have good reason to assume the United States is the petitioner and a party to the case considering the case name. Counsel for Eisenstein says in petitioner's brief that "the naming requirement, although formal and simple, critically ensures that the Government is bound by any judgment … and is the only condition necessary to render the Government, as a real party in interest here, a 'party' under Rule 4(a)(1)(B)."

According to petitioner, the four circuits who apply the 60-day deadline "focus on the Government's substantive interest in the case." The False Claims Act requires service of the complaint on the government. 31 U.S.C. § 3730(b)(2). Petitioner argues the government is "uniquely and pervasively present in qui tam actions, even after declination." The government "has an unfettered right to dismiss a qui tam action" even before it decides whether to conduct the case itself. "The Government may settle or dismiss the case without the relator's approval." The government may require service of pleadings upon it, veto a settlement or dismissal, obtain a stay of discovery, and seek to appeal even without intervening.

Petitioner also maintains that the need for clarity in rule interpretation favors application of the 60-day rule. In support of the argument, petitioner cites the proposition that procedural rules must be interpreted to avoid traps for the unwary. He asserts that since the government's name appears in the caption and filings in the case, only a 60-day deadline will eliminate confusion over the application of the rule governing deadlines in this sort of case. Petitioner says that "confusion on this issue has snared not only pro se [unrepresented] litigants but counsel as well. Even the current split in the circuits demonstrates a history of confusion at the judiciary's highest levels … ."

Petitioner disputes the Second Circuit definition of "party." He argues that the plaintiff in a *qui tam* action is the entity identified in the filings and caption. Actual intervention should not be a requirement of establishing party status. Since the government may still appeal without having intervened, the rationale for the 60-day rule also applies.

Respondents (the City of New York, Mayor Bloomberg, John and Jane Doe) and amicus curiae the United States all maintain the shorter 30-day appeal rule applies to petitioner. Possibly indicative of the linguistic limitations involved in characterizing the nature of the government's participation in petitioner's action, the respondents at one point in their brief refer to the government as "an involuntary party." Even then, they carefully submit that there is no reason to hold that the government is a party for purposes of determining the relator's time to appeal. They tie this position to the notion articulated by the Fifth Circuit that the government is not necessarily a party for all purposes in a *qui tam* case.

Respondents do not hesitate to acknowledge that the government and the relator are both "real parties in interest" in a False Claims Act case. But "real party in interest" status does not equate to party status, they say. Respondents cite the decision in *Vermont Agency of Natural Resources v. United States ex rel. Stevens,* 529 U.S. 765 (2000), as instructive. They argue the decision in *Stevens* distinguishes between a "party" and a "real party in interest." "The relator may stand in the shoes of the Government but the relator is not the Government."

The naming requirement, they say, "begs the question" presented because the requirement would not be necessary if the government were considered a party. Unlike a party, the government has no right to copies of any discovery. The government may not withdraw or settle an action over a relator's objection, except after a judicial determination following a hearing that the proposed settlement meets fairness, adequateness, and reasonableness requirements. See 31 U.S.C. § 3730(c)(2)(B). These factors support the conclusion that the government is not a party to an action when it has declined to conduct the case itself.

One comment by Second Circuit Judge Winter merits particular attention in evaluating the strength of the arguments for and against

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application of the 60-day rule. That is that the Second Circuit found itself "more inclined to agree with the views of the Tenth Circuit, the first court of appeals to have taken up this issue." This suggests that neither relators nor their attorneys can maintain they had "no reason" to believe the shorter deadline applied, since the Tenth Circuit decision predated all the others. Arguably then, while *qui tam* plaintiffs might successfully argue in other circuits that the longer deadline should apply, they would do so still facing a risk that the Tenth Circuit ruling that applied the shorter deadline might ultimately be deemed the correct interpretation of the law.

Amici Patricia Haight and In Defense of Animals, who support petitioner's position, are appellants in a pending Ninth Circuit case who filed their notice of appeal 51 days after final judgment. They note that at the time they filed their appeal, the 60-day rule was at least a decade old. That is one reason these amici ask that the Court, if it adopts the 30-day rule, make its ruling prospective only.

In the final analysis, however, there is little to suggest that any of the litigants participating in this case would be done a great injustice were the justices to decide this case one way or the other. In fact, the statement of the case in petitioner's brief makes no reference to the gravamen of the petitioner's false claims allegation. The inference one might reasonably draw is that the claim itself is not particularly compelling. Litigants and the public should never forget that oftentimes appeals are unsuccessful because a trial court's decisions are often correct, or, at least, sufficiently correct to be upheld on appeal. On the other hand, should the justices decide that petitioner is entitled to have the merits of his appeal heard, respondents will still have a full and fair opportunity to present their defenses.

## Significance

To those litigants wishing to preserve their rights of appeal, this case is a warning not to put off for tomorrow what can be done today. Appeal deadlines are not always readily determinable, and care must be taken to avoid an unintentional waiver of appeal rights. And while this particular case is probably of more significance to *qui tam* litigators than to the general public, it deserves a broader degree of attention. As we approach another annual Law Day celebration on May 1, this case represents another example of a legal system that often goes to great lengths not to unfairly deprive a citizen of his or her right to seek redress of grievances. The Second Circuit did not summarily dispose of Eisenstein's appeal even though the district court had found no basis for the underlying claim. Instead, it arranged for the appointment of an attorney to represent Eisenstein. Now the procedural issue that will determine his appeal rights is before the nation's highest court. Although Eisenstein's case will not likely garner the public attention as some Supreme Court cases ultimately do, it is noteworthy for the extent to which Eisenstein has enjoyed due process.

Whether or not the decision is favorable to him, it will likely help others avoid an unintentional loss of their appeal rights and thereby extend their opportunities for due process a bit further.

## Attorneys for the Parties

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**For Respondents City of New York, Michael Bloomberg, John Doe, and Jane Doe** (Michael A. Cardozo (212) 788-0704)

## Amicus Briefs

**In Support of Petitioner United States, ex rel. Irwin Eisenstein**

Patricia Haight and in Defense of Animal (Jeremy L. Friedman (510) 530-9060)

Taxpayers Against Fraud Education Fund (Joseph E.B. White (202) 296-4826)

**In Support of Respondents City of New York, Michael Bloomberg, John Doe, and Jane Doe**

United States (Elena Kagan (202) 514-2217)