

May 20, 2019

Elisabeth Shumaker  
Clerk of the Court  
United States Court of Appeals  
for the Tenth Circuit  
Byron White U.S. Courthouse  
1823 Stout Street  
Denver, CO 80257-1823

**RE: *U.S. ex rel. Tracy v. Emigration Improvement Dist. et al.*  
Case No. 18-4109**

Citation of Supplemental Authority pursuant to FRAP 28(j) submitted by  
Appellees, Emigration Improvement Dist., Fred A. Smolka, Michael Hughes,  
Mark Stevens, David Bradford, Lynn Hales and Eric Hawkes

Dear Ms. Shumaker:

Appellee advises the Court of supplemental authority: *Cochise v US ex. rel Hunt*, No. 18-315 (U.S. May 13, 2019)(holding 31 U.S.C. § 3730(b)(2) applies even when the United States does not intervene). *Cochise* overrules *US ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702 (10<sup>th</sup> Cir. 2006). [Brief Aplee, 10-16.]

However, *Cochise* does not change the result because Appellant's claim is still barred under a ten-year period. Appellant argues the limitations period began when the final release of retainage from the bond escrow was made, as opposed to the date the last claim for payment was submitted or the date of the bond closing. [Brief Apnt, 30-35.] However, Appellant previously argued the exact opposite: "[b]ased upon the plain language of the statute, when a 'violation' occurs determines when the statute of limitations begins, and not the 'payment.'" [Doc. 88, p. 3.] Notwithstanding his apparent change of statutory interpretation, Appellant's prior statement of the law is correct. *Graham County Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 545 U.S. 409, 415-16 (2005)("the time limit begins to run on the date the defendant submitted a false claim for payment.")

When computed from the date the last claim for payment (as opposed to when the final release from escrow was made), the holding of the District Court must be affirmed. The last possible claim for payment from escrow was submitted on September 13, 2004 – more than ten years before the Complaint was filed. Appellant relies on a partial document attached to the Complaint which begins, "Attached is the final Pay Request (#6) for the Emigration Improvement District project." Appellant conveniently did not include the attachment (the

May 20, 2019  
Page -2-


---

actual pay request), but Appellee submitted the full document to the District Court. [Doc. 227, Ex. G.] The actual pay request was submitted on September 13, 2004, -- outside the ten-year statute of limitations.

Although the District Court ruled on more narrow grounds, this issue was presented below and this Court should sustain the lower court ruling on this basis. *United States v. Davis*, 339 F.3d 1223, 1227 (10th Cir. 2003).

Very truly yours,

**COHNE KINGHORN, P.C.**



Jeremy R. Cook

JRC/jld

cc: Stephen D. Kelson  
Scot A. Boyd  
Kristen C. Kiburtz  
Bryson Brown  
Robert L. Janicki  
Michael L. Ford  
Craig R. Mariger