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False Claims Act fundamentals: Statute of limitations

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Previous False Claims Act (FCA) Fundamentals posts have focused on the primary elements of an FCA claim, including falsity,[1] materiality,[2] scienter,[3] and damages.[4]

But even if a claim meets all of the requisite elements for a valid FCA claim, it may still be barred if the relator or the government fails to file their claim within the specified statute of limitations. While the concept of a statute of limitations is not exclusive to the FCA, the unique dual-framework limitations period adopted by the FCA, which Supreme Court Justice Alito called "terribly drafted," can easily result in what he called "a statutory interpretation dilemma."

What is unique about the FCA's statute of limitations is that even the applicable period can vary significantly based on underlying facts.

This post will assist the reader in determining which of multiple statutes of limitation may apply to a specific FCA claim.

The statutory framework

While the running of any statute of limitations depends on the facts underlying the claim, what is unique about the FCA's statute of limitations is that even the applicable period can vary significantly based on those facts. The relevant law establishes two separate statutes of limitations for substantive FCA claims that could apply depending on the circumstances.

Under 31 U.S.C. § 3731(b), an FCA claim "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."

In contrast, under 31 U.S.C. § 3730(h)(3) the limitations period for a whistleblower's FCA-related retaliation claims remains three years from the retaliatory act, regardless of the period applicable to the substantive claim.

For substantive FCA claims, this unique statutory construct can result in different limitations periods depending primarily on the knowledge of the government officials tasked with addressing the alleged fraud.

If the "official of the United States charged with responsibility to act" knows of or reasonably should have known of the material facts within three years of the alleged violation, then a six-year statute of limitations would apply. This is the case even though the government may have known about the fraud for more than three years.

However, if the relevant government official learned or should have learned of the alleged fraud *more* than three years after the alleged violation occurred, then the limitations period would extend for an *additional* three years after the government obtained or should have obtained this knowledge.

By way of example, if the government became aware of the fraud five years after the violation, the limitations period would extend to eight years. This is true even if the government learned or should have learned of the alleged fraud more than six years after the alleged fraud.

It is now possible for a relator to file an FCA claim as long as ten years after the alleged fraud if the government never learned of the material facts underlying the claim.

Although the statute of limitations can be extended based on the delayed discovery of the fraud by the government, the statute also includes a statute of repose provision that caps any claim at ten years after the violation occurred.

Regardless of whether or not the government learned or should have learned of the material facts underlying the fraud, a claim cannot be brought more than ten years after the date of the alleged fraud. This means that even if the government does not discover the fraud until nine years after the violation was committed, the claim must nonetheless be brought within one year to avoid being barred by the ten-year statute of repose.

Cochise and expansion of the statute of limitations

Notably, 31 U.S.C. § 3731(b) only refers to the knowledge of the relevant government official, not any potential relators. As a result, applying the statute of limitations can become even more complicated when relators are the parties bringing the claims. This is particularly true when the government declines to intervene in the relator's case.

In 2019, the United States Supreme Court directly addressed a growing circuit split regarding this issue in the case *Cochise Consultancy, Inc. v. U.S. ex rel. Billy Joe Hunt*.[5]

The exact date of the government's knowledge has become paramount to defendants seeking to bar FCA claims based on the statute of limitations.

In that case, the relator informed the government in 2010 about false claims related to security services in Iraq which were submitted to the government for payment in 2006 and 2007. The relator filed his FCA claim in 2013, more than six years after the alleged claims but less than three years after the government became aware of the underlying material facts.

The government ultimately declined to intervene in the action, but the relator chose to pursue the claims on his own.

The defendant contractor then moved to dismiss the claim as being barred by the six-year statute of limitations, arguing that because the extended statute of limitations is based upon the government's knowledge, it should only apply to cases in which the government intervenes.

The U.S. Supreme Court disagreed, ultimately ruling that because the text of the FCA makes no distinction between an action initiated by the government and an action initiated by a relator, the extended limitations period could still apply to cases in which the government declines to intervene.

The Court also determined that a relator is not considered an "official of the United States" for the purposes of calculating the statute of limitations.

As a result of the Court's decision in *Cochise*, it is now possible for a relator to file an FCA claim as long as ten years after the alleged fraud if the government never learned of the material facts underlying the claim. As the justices acknowledged in the oral argument, relators still have incentives to quickly bring false claims act claims, such as the first-to-file bar and the public disclosure bar.

However, for claims involving alleged repeated fraud, as is often the case for regular medical billing, there is a potential for realtors to seek treble damages for as much as ten years' worth of claims.

Since the application of this longer statute of limitations extends even to declined FCA complaints, the exact date of the government's knowledge has become paramount to defendants seeking to bar FCA claims based on the statute of limitations. Therefore, defendants in FCA cases must use the discovery process to determine exactly what the government knew and when.

Defendants should seek to identify evidence that even if the official never actually knew of the alleged fraud, the official "reasonably should have ... known" the material facts underlying the claim. Doing so may be crucial to preventing a relator from extending the statute of limitations the full ten years.

The government in *Cochise* sought to narrowly define "the official of the United States charged with responsibility to act," as the attorney general or his delegate. While the Supreme Court made clear that a relator is not a government official for the FCA, it declined to determine "precisely which official or officials the statute is referring to."

As a result, defendants in future FCA cases should also seek to more broadly define "the official" to include other government officials charged with investigating fraud.

Notes

[1] https://bit.ly/3q3dLnc

[2] https://bit.ly/3s73XGM

[3] https://bit.ly/3q0GskH

[4] https://bit.ly/43K3LOz

[5] 139 S. Ct. 1507 (2019).

About the author

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