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False Claims Act Trends and Developments

In 2013, the Department of Justice recovered roughly $3.8 billion in civil fraud judgments and settlements involving the False Claims Act ("FCA"). The health care industry alone was responsible for $2.6 billion of those recoveries. Moreover, private *qui tam* litigants filed a record 752 whistleblower complaints in 2013. The breadth and scope of FCA actions are likely to continue to expand as recent judicial action has extended the statute of limitations to reach conduct that occurred over a decade ago.

Statute of Limitations Tolled During Periods of Armed Conflict

The FCA includes its own statute of limitations — six years for claims brought by private *qui tam* plaintiffs, or relators, and for actions brought by the government, three years from when the violation was or should have been discovered, but in no event more than ten years. In several recent cases, however, the government has invoked the Wartime Suspension of Limitations Act ("WSLA") to extend the FCA's limitations period still further. That law provides that all statutes of limitation for the government to pursue claims for fraud against the United States are suspended during times of war or armed conflict. The effected statutes of limitation remain tolled for five years after the termination of hostilities as declared by the president or through a congressional resolution.

In *United States v. Wells Fargo*, No. 12 Civ. 7527, 2013 U.S. Dist. LEXIS 136539 (S.D.N.Y. Sept. 24, 2013), the court applied the WSLA to suspend the statute of limitations in an FCA claim alleging misconduct in the underwriting of government-insured home mortgage loans. There, the court noted that Congress authorized the use of force in Iraq and Afghanistan in 2001 and 2002, and that those hostilities have not been suspended. *Id.* at *35-36. Moreover, the court rejected the argument that the WSLA should be applied only to matters having some nexus to the armed hostilities, finding that a broad application "accords with the purpose of the [WSLA]" to give the government time to investigate fraud committed while the nation is distracted by war. *Id.* at *46. In the end, for purposes of the application of the WSLA, the court found that "it makes no difference" whether the alleged fraud is related to the armed conflict. *Id.*

While it appears fairly well settled that the WSLA will apply to FCA cases, whatever the subject matter of the claim, there is some disagreement among the courts as to whether private relators can also take advantage of that statute. In *U.S. ex rel. Carter v. Haliburton*, 710 F. 3d 171 (4th Cir. 2013), the court ruled that the WSLA's suspension applied in a case brought by a *qui tam* relator, even without government intervention in the matter. The Western District of Pennsylvania, however, has disagreed. In *U.S. ex rel. Emanuele v. Medicor Assoc.*, No. 10-245, 2013 WL 3893323 (W.D. Pa. July 26, 2013), that court found that the legislative history and congressional intent of the WSLA "caution against the application of the WSLA's tolling provisions to private FCA claims." *Id.* at *7.

FCA Statute of Limitations Trumps Shorter Periods in Other Applicable Provisions

Another recent decision by the Second Circuit suggests that certain statutory notice provisions will not apply to limit suits brought under the FCA. In *U.S. ex rel. Grupp v. DHL Express, Inc.*, No. 08-CV-301C, 2012 WL 4060868 (W.D.N.Y. Sept. 14, 2012), the Western District of New York held that the 180-day limit for challenging shipping bills set out in the statute governing rates and billing by motor carriers applied to bar a claim under the FCA brought after that time had passed. Under that statute, a customer needs to

challenge the bill within 180 days "in order to have the right to contest such charges." *Id.* at *3 (citation omitted). The court found that the statute provided that the 180-day rule "applies to all billing errors and disputes," and that plaintiffs' "failure to satisfy a necessary precondition to suit is fatal to the plaintiffs' claims." *Id.* The Second Circuit reversed, finding that application of the 180-day rule as a precondition to filing suit would undermine the purpose of the FCA's long statute of limitations. *U.S. ex rel. Grupp v. DHL Express, Inc.*, No. 12-3829-cv (2d Cir. Feb. 5, 2014). Specifically, the Second Circuit noted that fraud is, by its nature, deceptive, and application of the 180-day rule would nullify the three-year discovery period provided in the FCA. *Id.* at 7-8.

It remains to be seen whether other courts addressing limitations issues will begin to rein in this expansion. But corporations doing business with the government should be aware that neither the statute of limitations set out in the FCA nor specific statutory notice or limitations provisions may be available as defenses to claims challenging conduct that occurred even over a decade ago.

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