

FCA Basics: Statute of Limitations and Timing-Related Defenses

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by Alex Hontos, Chris DeLong, Matthew Gillespie, Annie Boeckers, and Joe Coffey

This is the fourth post in the Dorsey FCANow Blog's FCA Basics Series covering the fundamentals of the False Claims Act ("FCA"), outlining FCA procedure, and highlighting key facets of FCA practice. Today's post focuses on procedural requirements, including the FCA's statute of limitations rules, statute of repose, first-to-file rule, and public disclosure bar.

FCA Statute of Limitations

The statute of limitations on an FCA claim is generous—either six years after a violation "is committed", or within three years of the date when the government learned or should have learned the facts material to the false claim. Accordingly, disputes related to the statute of limitations tend to center on two issues: (1) when a violation is "committed" under the FCA, and (2) how to determine the date of government knowledge.

Courts have taken divergent approaches to identifying when an FCA violation is "committed," but two general approaches have emerged. First, courts hold that the limitations period begins on the date the false claim is "submitted" to the government. Second, other courts have extended the limitations period by determining the violation is "committed" on the date the government pays the claim.

In certain circumstances, the FCA's statute of limitations may be extended beyond the ordinary six years. The FCA allows for a separate three-year statute of limitations when the United States first becomes aware of facts material to a FCA claim. The three-year extended FCA limitations period does not run until material facts are known (or should be known) by a government official with authority to act in the circumstances. Courts generally engage in a two-pronged analysis in assessing when and whether this extended limitations period applies, asking (1) whether the facts are material to an actionable FCA claim, and (2) if the facts were known—or should have been known—to a relevant government official. Therefore, the three-year period has the possibility of

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exceeding the six-year period if the violation is concealed from the government.

While the FCA provides for a generous statute of limitations, it also caps the term of liability with a ten-year statute of repose barring any lawsuit more than ten years after the alleged fraud occurred.

Statute of Limitations in Qui Tam Lawsuits

Until fairly recently, it remained an open question whether relators could rely on the extended limitations period based on the government's knowledge (or lack thereof) in pursuing *qui tam* litigation. The United States Supreme Court addressed this question in *Cochise Consultancy, Inc. v. United States ex rel. Hunt*, 587 U.S. 262 (2019).

In *Cochise*, a relator initiated a *qui tam* action alleging two government contractors committed fraud on the government. The relator filed their claim more than six years after the alleged fraud was "committed," but within the ten-year statute of repose. While the government declined to intervene, the government first became aware of the material facts of the alleged fraud through the relator's suit and disclosure. The Supreme Court held that the extended limitation period applied to the relator in the same way it would to the government. The Court found that relators are afforded the extension based on the government's knowledge, not their own, even when the government declines to intervene. Somewhat counterintuitively, the result is that relators could have up to ten years to pursue claims under the False Claims Act when the government is unaware of the potential fraud. This risk, of course, is that relators are not always privy to what information the government does or does not have related to a potential claim of fraud.

Qui Tam Procedural Considerations

Two other possible defenses to an FCA claim emerge in the context of timing for *qui tam* actions: the public disclosure bar and the first-to-file bar.

The public disclosure bar prohibits relators from bringing a *qui tam* action based on fraud that is already publicly disclosed through judicial or administrative proceedings, government audits or investigations, or news media reporting. The purpose of the bar is to discourage opportunistic relators bringing lawsuits that are misaligned with FCA's whistleblower system. Notably, there is an exception to the public disclosure bar when the person bringing the action is the original source of the information. Under the FCA, an original source is an individual who either: (1) prior to a public disclosure, voluntarily disclosed to the government the information on which the allegations in a claim are based, or (2) has knowledge that is independent and materially adds to the publicly disclosed allegations and voluntarily provided that information to the government before filing an FCA action.

The first-to-file bar prevents multiple relators from obtaining recoveries based on the same underlying facts. In effect, the result of the first-to-file bar is that the first relator in time to file a *qui tam* action tends to have priority when obtaining a relator's share of the government's recovery. In multiple-relator disputes, relators will often seek to distinguish

their claims from prior lawsuits or emphasize the unique value they contributed to the government's recovery. The mandate for *qui tams* to be filed under seal (and are frequently maintained under seal for months or years at a time) often makes it difficult for relator's counsel to determine if they are in fact the first to file a suit. In sum, the first-to-file bar provides an avenue for FCA defendants to avoid defending against multiple *qui tam* suits over the same conduct.