

Staying Ahead

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Government Enforcement Litigation

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What is Government Enforcement Litigation?

Government Enforcement Litigation comprises all phases of government investigations, enforcement proceedings, and litigation; and typically involves companies that contract with the government or are heavily regulated. Saul Ewing's White Collar and Government Enforcement Practice Group has extensive experience in "white collar" criminal defense, civil fraud proceedings, regulatory enforcement matters, and government contract disputes. Our government enforcement attorneys assist clients in the defense, healthcare, financial services, pharmaceutical, insurance and other heavily regulated industries.

Recovering Attorneys' Fees For An Improper Federal Investigation

By James A. Keller

Your company has been the subject of a six-year civil fraud investigation by the Department of Justice ("DOJ") that the company has defended vigorously and expensively. The DOJ's efforts to wear the company down and force a settlement failed, and the company decided to take the case to trial. Minutes ago, the jury came back with a verdict in the company's favor. Your excitement is mixed with frustration: why did DOJ put the company through this? Isn't there something we can do?

There may be.

For years, the Equal Access to Justice Act ("EAJA") permitted a party aggrieved by Government legal action to recover attorneys' fees and costs, but in limited amounts and under limited circumstances. Now, based on the Court of Appeals' decision in *Tri-State Hospital Supply Corporation v. United States*, 341 F.3d 571 (D.C. Cir. 2003), attorneys' fees and costs may be recoverable against the United States Government under the Federal Tort Claims Act ("FTCA"). The two pertinent statutory schemes, and the implication of the *Tri-State* decision, are discussed below.

Attorneys' fees and costs may be recoverable against the United States Government under either the Equal Access to Justice Act or the Federal Tort Claims Act.

The Equal Access To Justice Act

The EAJA allows a "prevailing party" in a *civil* action brought by or against the United States to recover attorneys' fees under certain circumstances. The EAJA permits the award of attorneys' fees accrued during the course of litigation; for example, fees accumulated while defending a breach of contract case by the Government where the contract provides that the "prevailing party" may recover attorneys' fees.

Recent decisions¹ have determined that there are two distinct avenues for relief under the EAJA: 1) a discretionary fee award that the Court *may* provide to a prevailing party "to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award";² and 2) a mandatory fee award that the Court *must* provide to a prevailing party if a) no other common law fee-shifting or statutory fee provision exists; b) the Government cannot

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demonstrate that the position(s) it took in the matter were substantially justified;³ and c) no special circumstances would make award of the fee unjust.⁴

However, the EAJA severely limits who may recover attorneys' fees and costs, and in what amount. Individuals with a net worth of over \$2 million at the time the underlying civil action was filed may not proceed under EAJA for either discretionary or mandatory relief. Corporations and partnerships with a net worth of more than \$7 million and/or with more than 500 employees may not proceed under the EAJA.

A party may recover fees accumulated while defending a breach of contract case by the Government where the contract provides that the "prevailing party" may recover attorneys' fees.

There are other significant concerns regarding the EAJA. To be a prevailing party, a party must "receive at least some relief on the merits of his claim,"⁵ but the case law is not clear on what, exactly, this encompasses. For instance, in some circumstances (such as eminent domain proceedings) a favorable settlement clearly does not translate into prevailing party status under the EAJA.⁶ Moreover, if no common law or statutory right to attorneys' fees exists, a party is at the mercy of the EAJA's mandatory fee-award provision. Under that provision, absent extraordinary circumstances, attorney fees will not be awarded in excess of \$125 per hour.⁷

The FTCA & The Tri-State Decision

Despite its limitations, the EAJA for many

years was the only option to recover attorneys' fees against the Government. The Court of Appeals' decision in *Tri-State* makes the FTCA an alternative and, for larger companies or larger litigations, a more attractive avenue to recover fees and costs against the Government. The FTCA allows any person to bring a cause of action against the United States:

For injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.⁸

Unlike the EAJA, the FTCA is not specifically a fee-award statute. It is the codification of the United States Government's waiver of immunity for certain tort claims, and requires, therefore, that the plaintiff have a viable tort cause of action. *Tri-State* suggests two such causes of action for recovering fees and costs against the United States: wrongful use of civil proceedings (also known as malicious prosecution) and abuse of process. Those legal claims will be discussed below, after the *Tri-State* decision is fleshed out in more detail.

Tri-State: The Underlying Investigation And Trial

The plaintiff in *Tri-State* imported hospital supplies from Pakistan and sold them throughout the United States. In 1994, the United States Customs Service ("Customs") instituted an investigation into Tri-State's reporting practices, even though the practices resulted in no loss of revenue to Customs.⁹ As a result of its investigation, Customs requested that the

United States Attorney bring criminal charges against Tri-State. The United States Attorney declined to proceed.

Customs then turned its focus to alleged civil wrongdoing by Tri-State, contending that Tri-State had falsely overstated the prices it paid for the Pakistani instruments and, as a result, was engaged in an international money laundering scheme. Customs issued penalty notices to Tri-State over Tri-State's objections, and Tri-State refused to honor the notices or pay the penalties.

Customs referred the matter to DOJ. DOJ sued Tri-State in the United States Court of International Trade in 1997, bringing claims of fraud, gross negligence, and negligence. The matter proceeded to trial. At trial, the pertinent evidence confirmed that Tri-State had not engaged in any fraudulent scheme and DOJ dismissed its fraud claim before verdict. Shortly thereafter, the Court dismissed DOJ's gross negligence claim. Finally, a jury returned a verdict in Tri-State's favor on the negligence count.

Tri-State's FTCA Claim

Tri-State incurred \$3.2 million in attorneys' fees defending itself against the Government's investigation, civil prosecution, and trial. In June 2000, Tri-State sued the United States under the FTCA. Tri-State sought to recover its \$3.2 million in fees under two tort theories of liability: 1) malicious prosecution; and 2) abuse of process.

The United States moved to dismiss the claims. The District Court granted the motion, noting, among other things, that it was unaware of any precedent authorizing the award of attorneys' fees under the FTCA, whether for malicious prosecution, abuse of process, or otherwise. The District Court also emphasized that the EAJA should control and, accordingly,

preclude any action for attorneys' fees under the FTCA.

The District of Columbia Court of Appeals reversed the District Court ruling. The Court initially noted that an FTCA claim is proper when it is:

1. against the United States;
2. for money damages;
3. for injury or loss of property, or personal injury or death;
4. caused by the negligent or wrongful act or omission of the Government;
5. while acting within the scope of his office or employment;
6. under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

The Court determined that Tri-State's claim for attorneys' fees expended in defending itself from improper Governmental investigation and prosecution met every prerequisite for a viable FTCA claim. Specifically:

1. the claim was brought against the United States;
2. for the \$3.2 million in money damages that Tri-State suffered;
3. as a result of the injuries (indictment, investigation) and/or property loss (loss of money);
4. caused by the malicious prosecution and abuse of process engaged in by Customs and the DOJ;
5. performed by Customs and DOJ officials acting within the scope of their employment;
6. which actions, if engaged in by a private person in the District of Columbia (presumed to be the pertinent tort forum), would be actionable.

The Court acknowledged that prior FTCA decisions in other jurisdictions contained

general language suggesting that attorneys' fees are not recoverable under the FTCA.¹⁵ In those cases, however, the plaintiff was seeking to recover the attorneys' fees it incurred *as a corollary* to its FTCA action – for example, attorneys' fees incurred while pursuing an automobile accident claim against the Government. There, the “injuries” are the personal injuries suffered in the accident, and the attorneys' fees are a necessary byproduct of seeking compensation for those injuries under the FTCA. In *Tri-State*, by contrast, the underlying injuries *were the attorneys' fees*.

The Court distinguished the EAJA on a similar basis. The EAJA provides for the recovery of attorneys' fees expended as the result of pursuing or defending certain civil actions against the Government – “attorney's fees per se” – as opposed to attorneys' fees wrongfully incurred due to the torts of abuse of process and malicious prosecution – “attorney's fees *qua* damages.” In other words, the EAJA is concerned with awarding attorneys' fees attended to a civil action, while the FTCA is the proper vehicle to recover attorneys' fees *as damages*.

The FTCA's priority is a viable alternative for pursuing recovery of attorneys' fees and costs against the Government via claims for malicious prosecution and abuse of process.

Malicious Prosecution / Abuse Of Process

In sum, *Tri-State* renders the FTCA a viable alternative for pursuing recovery of attorneys' fees and costs against the Government by filing claims for malicious prosecution (also known as “wrongful use of civil proceedings”) and abuse of process.

The question that necessarily follows is: how

do I know if I have such a claim? The answer, as the *Tri-State* court indicated, will be forum-specific. By way of illustration, below is a summary of those causes of action as they exist in the District of Columbia and Pennsylvania.

Malicious Prosecution / Wrongful Use of Civil Proceedings

In the District of Columbia, a plaintiff may prevail on a claim for malicious prosecution when: a) the original action was instituted maliciously and without probable cause; and b) the action terminated in favor of the malicious prosecution plaintiff.¹⁰ “Maliciously” means with a wicked intent, an evil purpose, or with a willful, wanton, reckless or oppressive disregard for the aggrieved party's rights. “Without probable cause” means that no cautious person would believe that his/her action “and the means taken in prosecuting it are legally just and proper.” Finally, the tort of malicious prosecution in the District of Columbia requires that the aggrieved party has followed the matter through to a favorable termination.

The Pennsylvania equivalent of malicious prosecution is a statutory scheme commonly known as the “The Dragonetti Act.”¹¹ Under the Dragonetti Act:

A person who takes part in the procurement, initiation or continuation of civil proceedings against another is subject to liability to the other for wrongful use of civil proceedings [if]: (1) He acts in a grossly negligent manner or without probable cause and primarily for a purpose other than that of securing the proper discovery, joinder of parties or adjudication of the claim in which the proceedings are based; and (2) The proceedings have terminated in favor of the person against whom they are brought.

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As in the District of Columbia, the key elements of this claim are lack of probable cause and a final result, of some sort, in the aggrieved party's favor.

Importantly, although the Dragonetti Act speaks of "civil proceedings", malicious prosecution claims have been maintained in Pennsylvania (pre-Dragonetti) for wrongful *criminal* investigations and complaints.¹² Similarly in the District of Columbia, it is well-settled that a malicious prosecution claim may be brought for improper criminal, as well as civil, legal actions.¹³

In both forums, whether the termination of the underlying matter was sufficiently favorable to the aggrieved party is a critical inquiry. This is a question of law for the Court.¹⁴ Favorable termination does not mean that the party must win after a trial on the merits, but it does require some favorable result "reflecting on the merits of the underlying action."¹⁵ A settlement or compromise of the matter, even if a positive one for the aggrieved party, generally does not constitute the favorable termination required to bring a malicious prosecution claim.¹⁶

Abuse of Process

The tort of abuse of process is essentially the same in the District of Columbia and Pennsylvania. This tort focuses not on the filing or underlying merits of a legal action, but, rather, on whether the action is being used to "compel the party against whom it is used to do some collateral thing which he could not legally and regularly be required to do."¹⁷ Abuse of process is, "in essence, the use of legal process as a tactical weapon to coerce a desired result that is not the legitimate object of the process."¹⁸ It requires an ulterior motive in pursuing the legal action and an affirmative act in support of that ulterior motive.¹⁹ For example, pursuing litigation primarily to harass and cause financial injury to the adverse party supports an abuse of process claim.²⁰ As

opposed to malicious prosecution, the termination of proceedings in the aggrieved party's favor is not an essential element of an abuse of process claim.²¹

So What Does All Of This Mean For Me?

Returning to the introductory hypothetical, depending on the size of your company, you have three options: 1) proceed under the EAJA; 2) proceed under the FTCA; or 3) both. In making your determination, you should consider whether the underlying civil action (particularly if statute-based) itself provides for the award of attorneys' fees, and also analyze your particular forum's requirements for malicious prosecution and abuse of process claims.

In performing a cost-benefit analysis, it also bears noting that in the *Tri-State* case, *Tri-State*, a relatively small corporation, had to endure \$3.2 million in fees before receiving approval to sue the Government for malicious prosecution and abuse of process. Moreover, and somewhat ironically, the attorneys' fees incurred in pursuing its abuse of process and malicious prosecution claims under the FTCA are not, themselves, recoverable.²²

Let's change the hypothetical a bit. You are now at the outset of a Government investigation where you are certain your company has no liability. What, then, to do? Here is one suggested course of action. If you find your company or client subjected to a dubious investigation, send the Government a "*Tri-State* letter" advising that the Government will be on the hook for all attorneys' fees expended in defending the investigation and any subsequent actions. If the investigation continues, make sure that all defense counsel keep meticulous time and billing records, as those records will become prime evidence in your FTCA claim. Finally, be sure to build up your malicious prosecution and abuse of process

claims as you go. Provide repeated written explanation of why the Government's claims are baseless and harassing, and try to get the Government to put in writing its intentions to press forward. ■

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¹ See, e.g., *Newmark v. Principi*, 283 F.3d 172 (3d. Cir. 2002).

² 28 U.S.C. §§ 2412(a)(1) – (b).

³ It is the Government's burden to prove that its position(s) were substantially justified. See, e.g., *Cooper v. United States Railroad Retirement Bd.*, 24 F.3d 1414, 1416 (D.C. Cir. 1994); *E.E.O.C. v. Clay Printing Co.*, 13 F.3d 813, 815 (4th Cir. 1994).

⁴ 28 U.S.C. § 2412(d)(1)(A).

⁵ *Halpern v. Principi*, 313 F.3d 1364, 1369 (Fed. Cir. 2002), quoting *Buckhannon Board & Care Home, Inc. v. West Virginia Dep't of Health & Human Resources*, 532 U.S. 598, 603 (2001).

⁶ 28 U.S.C. § 2412(d)(1)(C)(2)(H).

⁷ 28 U.S.C. § 2412(d)(1)(C)(2)(A).

⁸ 28 U.S.C. § 1346(b)(1).

⁹ 341 F.3d at 572.

¹⁰ *Ammerman v. Newman*, 384 A.2d 637, 639 (D.C. 1978).

¹¹ 42 Pa. C.S.A. §§ 8351 et seq.

¹² See, e.g., *Junod v. Bader*, 458 A.2d 251, 253-54 (Pa. Super. 1983).

¹³ See, e.g., *Gabrou v. May Department Stores Co.*, 462 A.2d 1102, 1104-05 (D.C. 1983).

¹⁴ *DaimlerChrysler Corp. v. Askinazi*, 152 F. Supp. 2d 655, 659 (E.D. Pa. 2001), citing *Miller v. Pennsylvania R.R. Co.*, 89 A.2d 809, 815-16 (1952) (construing Pennsylvania law); *Brown v. Carr*, 503 A.2d 1241, 1245 (D.C. 1986).

¹⁵ *Brown*, 503 A.2d at 1245 (internal citation omitted).

¹⁶ *Electronic Laboratory Supply Co. v. Cullen*, 712 A.2d 304, 310-11 (Pa. Super. 1998); *Nolan v. Allstate Home Equip. Co.*, 149 A.2d 426, 429 (D.C. 1959).

¹⁷ *Bown v. Hamilton*, 601 A.2d 1074, 1079 (D.C. 1992), quoting *Morowitz v. Marvel*, 423 A.2d 196, 198 (D.C. 1980).

¹⁸ *IAMA, Inc. v. Law Offices of Peter E. Meltzer*, 2003 WL 1875107 (Pa. Com. Pl. March 17, 2003), quoting *McGee v. Feege*, 517 Pa. 247, 259 (1987).

¹⁹ *Hall v. Hollywood Credit Clothing Co.*, 147 A.2d 866, 868 (D.C. 1959).

²⁰ *Shiner v. Moriarty*, 706 A.2d 1228, 1236 (Pa. Super. 1998).

²¹ See, e.g., *Hall v. Field Enterprises, Inc.*, 94 A.2d 479, 481 (D.C. 1953).

²² *Tri-State*, 341 F.3d at 577.

False Claims And Subsequent Events: How Government Contractors' Actions Following A Certified Claim For Payment May Give Rise To Liability

By Amy S. Kline

Regardless of the industry, a myriad of rules and regulations are the norm for contractors working with the United States government. In addition to the complexities of the regulations themselves, most agencies require an express certification to the Government of the propriety of all contractual claims for payment. Contractors are well aware of the need to assure the truthfulness and accuracy of these express certifications. Also to be considered, however, is the parallel certification said to be implied with every express certification made to the Government, as well as the effect of subsequent events on the accuracy of the contractor's express and implied certifications. As potential bases for liability, contractors must be mindful of conduct subsequent to their initial certifications. Fortunately, the courts have recently provided guidance in determining what may and may not constitute a "false" claim.

The Theory of Implied Certification

The False Claims Act¹ imposes liability on a contractor that knowingly presents a false or fraudulent claim for payment to the Government.² In addition to expressly false claims, contractor liability may potentially stem from certifications said to be implied in claims made to the Government. Under the so-called "theory of implied certification," a request for payment, by its very submission, implies a certification of contractor compliance with governing federal rules, regulations and contractual provisions.³

Courts differ on whether compliance with the applicable rule or regulation must be an express precondition of payment in order to impose False Claims Act liability, or whether noncompliance with the regulation at the time payment is requested, without more, is sufficient. Other courts have limited the theory to situations where compliance with the governing law is "material" to the Government's decision to pay, or, in other words, would the Government pay if it were aware of the noncompliance with the governing law?

Effect of Subsequent Conduct

In a developing trend, contractors have been charged with violations of the False Claims Act for conduct that occurs *subsequent* to their certification to the Government that allegedly renders that certification false.

For example, *in re Genesis Health and United States ex rel. Quinn*, the defendant contractors – Medicaid provider pharmacies – submitted claims to Medicaid for medications dispensed to Medicaid beneficiaries.⁴ On some occasions, however, the medication – for which the pharmacies had received full reimbursement from Medicaid – was returned to the pharmacies and then resold, a practice known as "recycling." One pharmacy's practice was to reimburse Medicaid for 50% of the cost of the returned medications, while the other pharmacy did not return any money to Medicaid. Both pharmacies sought reimbursement from Medicaid for the sale of the recycled medications to Medicaid beneficiaries.

The defendant contractors' alleged liability was based on several theories: first, that the initial claims to the Government were ren-

dered false by the subsequent recycling of the Medicaid-covered medications; second, that by reselling the medication – and being reimbursed a second time by the Government – the contractors violated the payment certification that "no part of the net amount payable under this claim has been paid"; and third, that the contractors violated their implied certification of compliance with all applicable regulations.

Without an affirmative obligation to repay or adjust a prior claim, subsequent events do not render claims made to the government false.

At issue in *Quinn* was whether the defendant's initial claims were rendered false by its failure to adjust them when it recycled the Medicaid-covered medications. The *qui tam* relator, a former pharmacy employee, alleged that the pharmacy violated the False Claims Act by failing to credit Medicaid 100% of the price of the returned medications. He alleged that each time the pharmacy submitted a claim for payment, it certified that "the services covered by this claim were . . . rendered . . . and . . . the services covered by this claim and the amount charged hereof are in accordance with . . . [Medicaid] regulations." By failing to adjust the claims for payment to reflect the fact that the medication had been returned for recycling, he claimed that the pharmacy submitted a false claim because they were claims for services that were not provided to the intended beneficiaries.

In addressing the issue, the Third Circuit looked first to what regulations, if any, governed the voiding or adjustment of Medicaid claims. It concluded that there were no regulations that established a pharmacy's obligation to credit or adjust a claim when medication has been returned, and

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“no regulatory requirement of the reversal of a claim once a medication has been returned.” Accordingly, “if there is no requirement to adjust the claim, there is no liability for failure to do so.” Moreover, the Court concluded that a claim which is not “false” or “fraudulent” when initially submitted is not later rendered so if the medication is returned.

The two recent cases also addressed whether by reselling a returned Medicaid-covered medication, the defendants made claims for amounts that had already been paid by the Government. The relators alleged that in recycling the medication, the defendants falsely certified to the Government that “no part of the net amount payable under this claim has been paid.”

On both occasions, however, the Court looked at the series of events leading to the subsequent claim, rather than examining the subsequent claim alone. As such, the Court appeared to view the subsequent claim as one for recycled and resold medications, rather than as an independent claim for payment. The applicable regulations permitted medication to be recycled and resold and there were no regulations requiring that Medicaid be credited for returns. Thus, there was no express obligation on the part of the defendants to credit the Government, and no express prohibition on recycling the medication. Therefore, even if a second claim were submitted to Medicaid for the same medication, the court concluded that it would not constitute a false claim.

A failure to comply with regulations that is “not irrelevant” to the Government’s payment decision may render a claim false.

Expanding the Theory of Implied Certification?

Finally, the court considered whether, following the initial claim to and payment by the Government, a subsequent failure to comply with applicable regulations can render a claim false. For example, the plaintiff claimed that the defendant’s process for recycling the returned medications did not comply with the applicable regulations, and therefore resale of that medication constituted a claim in violation of the payment certification. In essence, because the pharmacy certified its compliance with Medicaid regulations, and because the Medicaid regulations expressly incorporate compliance with the state regulations as a condition to participation in the program, if the pharmacy did not comply with the incorporated regulations, it would be ineligible to participate in the program and Medicaid may seek to recover money paid to the provider for the covered services. Although the court rejected the plaintiff’s claim for lack of proof, it did find “compelling” the argument that there should be liability under the theory of implied certification when noncompliance with the underlying regulations would disqualify the provider from participation in the program entirely.

Notably, the court also found “compelling” the argument that even if a regulation or rule does not “expressly condition payment on compliance with its terms,” it may be sufficient that noncompliance with its terms is not “irrelevant to the government’s disbursement decisions” to state a claim under the theory of implied certification. While not determinative in the Court’s reasoning, this statement indicates the court’s inclination to adopt a broader theory of implied certification than other jurisdictions.

Conclusions

Overall, recent decisions from the Third Circuit can be seen as both placing limitations on False Claims Act claims that purport to rely on violations of applicable

regulations to establish falsity, and as potentially opening the door to an expanded definition of falsity under the theory of implied certification. From these decisions contractors can derive some guidance in navigating the requirements of governmental rules and regulations and determining what conduct could give rise to a potential False Claims Act claim.

First, falsity is dictated by the regulations and rules applicable to the contractor’s industry; conduct forming the basis of a False Claims Act claim must be expressly proscribed by a governing rule or regulation;

Second, a contractor’s action subsequent to a certification renders the claim false only where the conduct is expressly proscribed by applicable regulation or rule;

Third, a contractor’s inaction subsequent to a certification renders the claim false only where there is an express obligation to act set forth by applicable regulation or rule;

Fourth, falsity is examined by looking at the contractor’s certification and subsequent conduct in its entirety rather than as individual certifications; *and*

Fifth, a contractor’s express certification of compliance implies certification with all applicable regulations and rules, including those that may apply only after the certification has been made. ■

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¹ 31 U.S.C. § 3729(a) (1994).

² See *Hutchins v. Wilentz, Goldman & Spitzer*, 253 F.3d 176, 182 (3d Cir. 2001) (citing *Young-Montenay, Inc. v. United States*, 15 F.3d 1040, 1043 (Fed. Cir. 1994)).

³ See, e.g. *Mikes v. Straus*, 274 F.3d 687, 699 (2d Cir. 2001); see also *United States ex rel. Augustine v. Century Health Servs., Inc.*, 289 F.3d 409, 415 (6th Cir. 2002).

⁴ *In re Genesis Health Ventures, Inc.*, 112 Fed. Appx. 140 (3d Cir. 2004) (not precedential); *United States ex rel. Quinn*, 382 F.3d 432 (3d Cir. 2004).

Time Up For Qui Tam Retaliation Action? Stay Tuned.

By David L. Hackett

On April 29th, the United States Court of Appeals for the Fourth Circuit ruled in *U.S. ex rel. Wilson v. Graham County Soil & Water Conservation District* that a claim of unlawful retaliation under the False Claims Act was governed by the federal statute's six year statute of limitations provision. The Court of Appeals for the Ninth Circuit, however, had previously concluded that a shorter state-law statute of limitations for wrongful discharge claims governed. The United States Supreme Court recently granted Graham County's petition for appeal and will soon clarify the applicable statute of limitations for retaliation claims.

Background

Karen Wilson was a part-time secretary at the Graham County, North Carolina, Soil & Water Conservation District. In a letter to federal authorities, she reported that several of her former co-workers had intentionally submitted false claims for reimbursement from three programs created or funded by the federal government. Soon thereafter, her supervisors and co-workers allegedly initiated a pattern of harassment that forced her to resign on March 7, 1997.

On January 25, 2001, Wilson filed a *qui tam* action alleging that such action constituted unlawful retaliation for whistleblower activity protected by the False Claims Act, 31 U.S.C. § 3729-3733 ("FCA"). Her former employer replied that Wilson's claim should be dismissed as untimely. Specifically, the employer asserted that the FCA's six-year statute of limitations provision did not apply to retaliation claims and, thus, the timeliness of Wilson's claim should be controlled by North Carolina's three-year statute of limitations for wrongful discharge, measured from the date of the retaliation. The trial court agreed. On appeal, however, the United States Court of Appeals for the Fourth Circuit reversed that decision and held that the FCA's longer six-year statute of limitations applied to retaliation claims brought under that statute.

Court's Analysis

Whether the FCA's six year statute of limitations applies to whistleblower retaliation claims is a matter of statutory construction. Three sections of the FCA are pertinent. Section 3729 imposes liability for presenting a false claim to the federal government. Section 3730 creates three federal causes of action: an action for damages filed by the Attorney General, a *qui tam* action filed by an individual "relator" on behalf of the government; and an action for discharge of other injury to an employee by an employer in retaliation for protected whistleblower activity. Section 3731(b), the statute of limitations section, provides that "a civil action brought under Section 3730 may not be brought (1) more than six years after the date of which the violation of Section 3729 is committed" The Court of Appeals determined that the plain language of the statute provided that any action under Section 3730, which necessarily includes a retaliation action, may be brought no more than six years after the date on which the underlying violation (i.e. the presentation of a false claim) occurred. This interpretation was in line with the United States Court of Appeals for the Seventh Circuit's analysis in *Neal v. Honeywell, Inc.*

In 1998, however, the Court of Appeals for the Ninth Circuit in *United States ex rel. Lujan v. Hughes Aircraft Co.*, reached a dif-

ferent conclusion. That case was relied upon by the dissent in outlining the perceived fallacies in the *Wilson* court's analysis. The dissent noted that the FCA's six year statute of limitations was tied to a "violation of Section 3729" and nothing else. Parting ways with the analysis of the majority, the dissent noted that because an anti-retaliation claim does not necessarily involve a "violation of Section 3729" (presenting a false claim to the federal government), the statute of limitations did not apply to the retaliation provision. For instance, an employer may wrongfully retaliate against a whistle-blowing employee even in the absence of a Section 3729 violation.

Moreover, an employer's retaliation could occur more than six years after the employer committed an alleged false claims violation, leaving the employee without a cause of action. Such a result would be absurd according to the dissent. Based upon this analysis, the dissent reasoned that the FCA's six-year statute of limitations was inapplicable to retaliation claims. Accordingly, the dissent would have found that an FCA anti-retaliation claim was a cause of action without an express statute of limitations, requiring the most closely analogous state law statute of limitations to be applied. In this case, that statute was North Carolina's three year statute of limitations for wrongful discharge claims.

The majority in the *Wilson* case rejected these criticisms. The court found that any claim under Section 3730, including a retaliation claim, requires an alleged violation of Section 3729. Therefore, the reference to Section 3729 in the statute of limitations provision does not preclude this section from applying to a retaliation claim. Further, the court concluded Congress had selected a single, readily identifiable point in time for commencement of the limitations periods for all actions under Section 3730. The court went on to note that it is *continued on page 8*

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easier to determine the date a false claim is submitted than to pin down the time of retaliatory actions which can depend on oral exchanges and are subject to failure of memory. Thus, the limitations period for retaliation claims under the FCA begins when the alleged violation of Section 3729 is found to have occurred according to the court, regardless of when the alleged retaliatory action occurred.

Analysis

For now, government contractors in Maryland, Virginia, West Virginia, North Carolina, South Carolina, Illinois, Indiana, and Wisconsin are governed by the reasoning of the *Wilson* decision, while government contractors in California, Arizona, Nevada, Idaho, Oregon, and Washington must follow the reasoning in *Hughes Aircraft Co.* Government contractors in other states are currently without a controlling decision and, must evaluate the implications of each decision to the factual scenarios they encounter. The United States

Supreme Court should rule within the next year and, thus, provide clear guidance on what interpretation is applicable to government contractors nationwide.

What law applies may have a profound effect upon whether a viable claim exists. For instance, consider the following factual scenario: an alleged false claim is submitted to the government in January 1996; an employee makes a good-faith report regarding this false claim January 2002; the employee is fired from employment in July 2002; the employer files suit in January 2003 alleging a retaliation claim under the FCA. Under the *Wilson* case, the employee's claim would be barred because more than six years had passed between the false claim in January 1996 and the employee's suit filed in January 2003. Under *Hughes Aircraft Co.*, however, the statute of limitations would not begin to run until the date of termination, July 2002. Therefore, by filing suit in January 2003, as long as the applicable state law had more than a six month statute of limitations, the employee would be able to proceed with his claim.

Another twist occurs if the employer has not submitted a false claim but has fired the employee for making a good-faith report on what the employee perceived to be a false claim. Under the *Wilson* rationale, the employee would not have a claim because submission of a false claim is a prerequisite of a retaliation claim. In contrast, no such requirement exists under *Hughes Aircraft Co.* decision and the employee would have a valid claim even though no false claim was made. Stay tuned for which applications will be applied by the United States Supreme Court.

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