

## False Claims Action Dismissed for Government's "Bad Faith" Delay

A federal district court in Massachusetts dismissed a False Claims Act ("FCA") action under the FCA's statute of limitations while admonishing the government's prosecutors for engaging in bad faith delay tactics while the case remained under seal. *United States ex rel. Health Outcomes Technologies v. HealthMark Health Systems, Inc.*, No. CIV A 01-11375-NMG, 2006 WL 137308 (Jan. 6, 2006).

The case originated in federal district court in Pennsylvania in 1996 when the qui tam relator filed a false claims action against 100 hospitals from all over the country alleging "upcoding" of Medicare reimbursement claims. Upcoding involves overcharging for services by billing under a Medicare code that results in greater reimbursement amounts than are otherwise owed. As it often does, the Department of Justice repeatedly sought and obtained extensions of time to consider whether to intervene in the action. In 2001, the Pennsylvania district court severed the claims brought against three hospitals located in Massachusetts and transferred them to district court in Massachusetts. In 2003, the government intervened in the Massachusetts action, and in 2004 it filed an amended complaint containing additional allegations.

### Instructive Dicta on Venue for FCA Actions

Notwithstanding that the FCA allows suits to be filed in any judicial district in which any one of the defendants resides or does business (31 U.S.C. § 3732(a)), the court observed that this provision does not operate independently of Fed.R.Civ.P. 20(a), which provides that if venue is proper as to one defendant, other non-resident defendants may be joined in the action only if their conduct arises out of the same transaction. *Health Outcomes* at \*4. With regard to qui tam actions against multiple defendants who allegedly engaged in the same industry-wide practice, the court rejected the notion that they could all be joined in one venue simply because they were accused of similar but unrelated conduct.

The government was unable to proffer any legitimate argument to refute the defendants' assertion that the three Massachusetts defendants had been improperly joined in the original Pennsylvania action. The government asserted that neither the relator nor the government had acted in bad faith by bringing suit against all 100 defendants in Pennsylvania. Nevertheless, the court held that the Pennsylvania action was predicated on a misjoinder of parties.

### The Government's Bad Faith

Normally, even if a case were transferred because of improper venue, the transferred action would relate back to the original filing date for purposes of applying the statute of limitations. That tolling rule (28 U.S.C. § 1406(a)), provides relief for plaintiffs who merely guessed wrong as to the factual basis for venue in the initial filing. In that regard, the court cited the rule that "some measure of good faith

### UPCOMING EVENTS

**March 28, Washington, DC:**

[Drawing The Line Between Lobbying and Public Corruption in an Era of Heightened Scrutiny](#)

### CONTACTS

If you would like more information, please contact any of the McKenna Long & Aldridge attorneys or public policy advisors with whom you regularly work. You may also contact:

**Mark Troy**  
213.243.6170

expectation of proceeding in the court in which the complaint is [originally] filed is essential.” *Health Outcomes* at \*6. However, here, the court found that the relator and the government deliberately selected an improper forum by filing in Pennsylvania and using that action as a holding pen for cases they would later either settle or transfer to other venues. The relator and the government made no effort to serve the Massachusetts defendants in a timely manner so that the defendants could correct the error, and the government ultimately moved *ex parte* to transfer the action to Massachusetts in order to try to avoid a finding in Pennsylvania of misjoinder. In sum, the court found that the plaintiffs never intended to proceed in Pennsylvania. In contrast to the FCA’s goal of permitting the government a reasonable time to investigate and decide whether to intervene, the government’s investigation “dragged on incessantly.” *Id.* at \*7. During this seven-year delay, “the government strategically chose not to intervene in the action but rather to stand to one side and pick off defendants *seriatim.*” *Id.*

Absent any factual basis for its contention that it acted in good faith, the government argued that government attorneys conducting litigation for the U.S. enjoy a “special presumption of good faith.” The court rejected that notion, observing that the case cited by the government (*Am-Pro Protective Agency v. United States*, 281 F.3d 1234 (Fed. Cir. 2002)), applies that presumption to government officials carrying out their duties, “but it does not hold that the presumption is extended to *government lawyers* with respect to the conduct of civil litigation.” *Health Outcomes* at \*7 (emphasis in original). Such a presumption would permit “an end-run around the Federal Rules of Civil Procedure for all government lawyers.” *Id.*

Because the court found that the government had acted in bad faith by delaying the transfer of the case to Massachusetts, there was no basis to toll the statute of limitations. Accordingly, the Massachusetts action was deemed to have commenced not in 1996 when the action was initiated in Pennsylvania but in 2001 when the action was transferred to Massachusetts. As a result of the new “deemed filed” date, the allegations of wrongful conduct prior to August 1995 were barred by the FCA’s six year statute of limitations (31 U.S.C. § 3731(b)(1)). (While the court did not discuss the statute of limitations provision allowing suit to be brought within three years of the government learning of the allegations, the fact that the relator’s suit put the government on notice back in 1996 would have precluded the government from taking advantage of the three-year tolling provision.)

### **Amended Complaint Concerning Subsequent Conduct Does Not Relate Back to the Filing of the Original Action**

The statute of limitations barred not only the pre-August 1995 allegations from the original complaint but also the 1996-1997 claims raised for the first time in the government’s amended complaint filed in 2004. The government’s amended complaint contained allegations of wrongful conduct occurring in 1996 and 1997 – after the filing of the original complaint in early 1996. Under Fed.R.Civ.P. 15(c), an amendment of a pleading relates back to the date of the original pleading if the new claim arose out of the same conduct, transaction or occurrence set forth in the prior pleading. The court held that the government’s additional allegations “cannot expand or modify facts alleged in the earlier pleading because they were not asserted in the original complaint.” *Id.* at \*9. Thus, because those claims did not relate back to the 1996 filing, they were deemed filed in 2004, which meant they too were barred by the six-year statute of limitations.

### **Comments and Practice Tips**

First, the court’s admonishment of the government for abusing its right of investigation while *qui tam* actions remain under seal is long overdue. Lengthy government investigations often put a cloud over defendants who cannot begin their formal defense until they are served with the complaint. Furthermore, the government has used the FCA’s investigatory tools, such as civil investigation demands, to conduct *ex parte* civil discovery in lieu of simply commencing the litigation and allowing discovery to occur in the adversarial setting. Apart from the impact of the decision on the application of the statute of limitations, the decision may prod the government to make its intervention decisions on a more timely basis.

Second, as to venue, defendants in multi-party litigation involving allegations of improper industry practices should examine whether there is any basis for the particular venue chosen by the plaintiff. A defendant with no ties to that venue should consider seeking a transfer of the case to its home venue. And, as in this case, if there were no basis for venue in the original action, the newly transferred action might give rise to a statute of limitations defense.

Third, if government has delayed making its intervention decision and there is a basis to challenge venue, defendants might be on the receiving end of a government request for a tolling agreement. Before considering signing such an agreement, defense counsel should carefully consider whether, under this and other decisions, the action might already be time-barred.

Finally, the court's ruling on the "relation-back" rule regarding the amended complaint provides a meaningful limitation on amendments which do nothing more than add allegations of more recent conduct. Because FCA litigation can sometimes drag on for years, qui tam relators and the government sometimes seek to amend the original complaint by including more recent conduct. The court's decision suggests that if the amended allegation describes the same pattern of wrongful conduct but merely adds the more recent time period, the amended complaint will not relate back to the original filing. Thus, the statute of limitations defense should be considered whenever the plaintiff seeks to amend the complaint.

#### About Us

McKenna Long & Aldridge LLP is a full-service law firm of approximately 400 lawyers and public policy advisors. The firm provides business solutions in the areas of corporate law, government contracts, intellectual property and technology, complex litigation, public policy and regulatory affairs, international law, real estate, environmental, energy and finance.

#### Subscription Info

If you would like others to receive future mailings of the Government Contracts Advisory, please email their contact information to us at [information@mckennalong.com](mailto:information@mckennalong.com)

If you would like to be removed from the Government Contracts Advisory mailing list, please email [information@mckennalong.com](mailto:information@mckennalong.com)

---

\*This **Government Contracts Advisory** is for informational purposes only and does not constitute specific legal advice or opinions. Such advice and opinions are provided by the firm only upon engagement with respect to specific factual situations. This message is intended as a transactional message for clients of the Firm. If you are not a client of the Firm, you have received it for informational purposes only and should not consider it an advertisement or solicitation.

© Copyright 2006, [McKenna Long & Aldridge LLP](http://mckennalong.com), 1900 K Street, NW, Washington DC, 20006

ATLANTA BRUSSELS DENVER LOS ANGELES PHILADELPHIA SAN DIEGO SAN FRANCISCO WASHINGTON DC