THE STATUTES OF LIMITATIONS APPLICABLE TO THE GOVERNMENT'S COMMON LAW AND FALSE CLAIMS ACT CLAIMS

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The basic limitations period applicable to the government's common law claims and False Claims Act claims is ***six years***. *See* 28 U.S.C. § 2415(a) (common law);[2] 31 U.S.C. § 3731(b)(1) (False Claims Act).[3] However, because of tolling provisions relating to each statute, their application can be far from simple.

When the basic six-year limitations period has lapsed, the government's claims can survive only if the government can establish that the tolling provisions in the common law statute (28 U.S.C. § 2416(c)) and the False Claims Act (31 U.S.C. § 3731(b)(2)) are applicable. The question that arises under both of these tolling provisions is when did officials of the United States charged with the responsibility to act in the circumstances first have actual or constructive knowledge of the facts material to particular alleged false claims?

The common law statute, 28 U.S.C. § 2416(c), contains a tolling provision that suspends the running of the six-year limitations period when:

> ***facts material to the right of action*** are not known and reasonably could not be known by an ***official of the United States charged with the responsibility to act in the circumstances***. . . .

(Emphasis added.) The False Claims Act tolling provision, 31 U.S.C. § 3731(b)(2), uses the same operative words in describing who in the government must have actual or constructive knowledge of the material facts; however, the Act limits the tolling period to three years, and it bars claims filed more than ten years after an alleged violation, regardless of government knowledge:

> A civil action under [the False Claims Act] may not be brought . . . 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 was committed, whichever occurs last.

(Emphasis added.)

The phrase "official of the United States charged with responsibility to act in the circumstances" is not defined in either 28 U.S.C. § 2416(c) or 31 U.S.C. § 3731(b)(2). But a definition common to both statutes emerges clearly from the legislative histories and judicial interpretations of these provisions.[4]

1. History of the Common Law Tolling Provision

The common law tolling provision, 28 U.S.C. § 2416(c), was enacted in 1966. The Senate Report accompanying the 1966 legislation contained the following explanation of the term "official of the United States charged with the responsibility to act in the circumstances":

> This provision is required because of the difficulties of Government operations due to the size and complexity of the Government. It is not intended that the application of this exclusion will require the knowledge of the highest level of the Government. Responsibility in such matters may extend down into lower managerial levels within an agency. ***As a general proposition, the responsible official would be the official who is also responsible for the activity out of which the action arose***.

S. Rep. No. 1328 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2502, 2507 (emphasis added).

In the twenty-year period between the enactment of the common law tolling provision in 1966, and the enactment of the virtually identical False Claims Act tolling provision in 1986, courts interpreting the common law statute uniformly held that "***the § 2416 bar is dropped***" as soon as the "***relevant officials***" – be they employees or agents of the federal government – have actual or constructive knowledge of the material facts. *See, e.g.*, *United States v. Kass*, 740 F.2d 1493, 1497 (11th Cir. 1984); *United States v. Diaz,* 740 F.2d 1491, 1493 (11th Cir. 1984). In both of these 1984 cases, the Eleventh Circuit determined that the "relevant officials" were employees of Blue Cross & Blue Shield of Florida who were designated as agents of the Department of Health and Human Services for administration of the Medicare Part B program. A year later, in *United States v. Beck,* 758 F.2d 1553, 1558-59 (11th Cir. 1985), the Eleventh Circuit issued a third ruling essentially to the same effect.

The other pre-1986 decisions under § 2416(c) are *United States v. Normandy House Nursing Home, Inc.,* 428 F. Supp. 421, 423 (D. Mass. 1977) (holding that the relevant officials were employees of Blue Shield of Massachusetts who served as agents of the government), and *United States v. Reinhardt College*, 597 F. Supp. 522, 526 (N.D. Ga. 1983) (holding that auditors for the Veterans Administration were "officials of the United States" responsible for acting in the circumstances of that case).

2. History of the False Claims Act Tolling Provision

The False Claims Act tolling provision, 31 U.S.C. § 3731(b)(2), was enacted in 1986 – twenty years after the common law tolling provision. The legislative history of the 1986 enactment shows that Congress intended the term "official of the United States charged with the responsibility to act in the circumstances" in § 3731(b)(2) to be given the same broad, generic meaning as it had been given under the common law statute.

In contrast to the language that was ultimately adopted in § 3731(b)(2), the version of the Senate bill (S. 1562) reported by the Senate Judiciary Committee on July 28, 1986 authorized the tolling of the statute of limitations for three years after facts material to the right of action were known or reasonably should have been known:

> by an ***official within the Department of Justice*** with the authority to act in the circumstances.

See S. Rep. No. 99-345, at 30 (1986), *reprinted in part in* 1986 U.S.C.C.A.N. 5266, 5295 (emphasis added). The bill was amended during the Senate floor debate, however, to *delete* the reference to "official within the Department of Justice" and *replace* that term with the obviously broader term "official of the United States." *See* 132 Cong. Rec. S11240 (daily ed. August 11, 1986). Likewise, the bill that was passed in the House excluded any reference to a Department of Justice official and opted instead for the term "official of the United States" as used in the revised Senate bill. *See* H.R. Rep. 99-660, at 4-5 (1986); 132 Cong. Rec. H6474-78 (daily ed. September 9, 1986).

Senator Grassley, one of the chief sponsors of the amendments, explained during the Senate floor debate that the substituted phrase "official of the United States" was intended to refer to "***an official in a position both to recognize the existence of a possible violation . . . and to take steps to address it***." *See* 132 Cong. Rec. S11244-45 (daily ed. August 11, 1986) (emphasis added).

Senator Grassley also explained during the Senate floor debate that the substituted phrase was "***adopted directly from 28 U.S.C. 2416(c)***." 132 Cong. Rec. S11244 (daily ed. August 11, 1986) (emphasis added). This being so, Supreme Court precedent strongly suggests a presumption that Congress intended the words "official of the United States charged with responsibility to act in the circumstances" "to have the ***same meaning that courts had already given them***" in construing § 2416(c). *See Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992) (interpreting phrase in RICO statute by comparing it to identical phrases in the previously enacted Sherman and Clayton Acts) (emphasis added).

The applicability of the *Holmes* presumption is reinforced by the fact that, while Congress repeated the broad, generic words of § 2416(c) in § 3731(b)(2), other provisions of the False Claims Act refer to particular government officials or to employees of a particular government agency. For example, the Act delegates specific functions and duties to such government officials as the "Attorney General," the "Assistant Attorney General," the "Deputy Attorney General," a "United States marshal," a "deputy marshal," and "false claims law investigator[s]." *See* §§ 3730(a), 3733(a)(1), 3733(a)(2)(F), 3733(c)(1). By choosing to use the broader reference to an "official of the United States charged with the responsibility to act in the circumstances" in § 3731(b)(2) – as it had in § 2416(c) – Congress was plainly stating its intention not to restrict this phrase to a single designated official, such as the "Attorney General," or to a narrow band of designated officials, such as "officials within the Department of Justice." As the Supreme Court said in *Russello v. United States,* 464 U.S. 16, 23 (1983):

> Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally ***presumed*** that Congress acts intentionally and purposefully in the disparate inclusion or exclusion.

(Emphasis added.)

Given this legislative history and the cited rules of statutory construction, the "official of the United States" language in § 3731(b)(2) can only be interpreted broadly and generically – in the same way as the language of § 2416(c) had been interpreted when the amendments were passed.

3. Post-1986 Judicial Interpretations of § 2416(c) and § 3731(b)(2)

a. Decisions Under § 2416(c)

The post-1986 decisions interpreting the phrase "official of the United States" in § 2416(c) have been uniform in their application of the broad, generic pre-1986 interpretation of the phrase. The decisions include *United States v. Boeing Co.,* 845 F.2d 476 (4th Cir. 1988), *rev'd sub nom on other grounds, Crandon v. United States,* 494 U.S. 152 (1990); *United States ex rel. Zissler v. Regents of the University of Minnesota,* 992 F. Supp. 1097 (D. Minn. 1998); *United States v. Government Development Bank,* 725 F. Supp. 96 (D.P.R. 1989); and *United States v. Ruegsegger*, 702 F. Supp. 438 (S.D.N.Y. 1988). Notably, several of these decisions have been expressly concurred in by the Department of Justice.

In *Boeing*, 845 F.2d at 482, the Fourth Circuit held in circumstances very similar to those of the present case that a *Department of Defense* ("DOD") *contracting officer* and *Defense Contract Audit Agency* ("DCAA") *auditors* assigned to deal with Boeing in a particular procurement were "official[s] of the United States charged with the responsibility to act in the circumstances." The Department of Justice concurred that the DOD contracting officer qualified as an "official of the United States." *Id.*

In *Regents of the University of Minnesota,* 992 F. Supp. at 1106, the court relied on the legislative history of § 2416(c) (quoted above at 3) in holding that a National Institutes of Health official charged with administering grants was the responsible "official of the United States." The Department of Justice concurred.

In *Government Development Bank,* 725 F. Supp. at 99-101, the court held that officials of the Department of Agriculture's Food Nutrition Service, as well as officials of the Federal Reserve Bank of New York serving as fiscal agents, were the responsible government officials in a case involving the food stamp program in Puerto Rico. The Department of Justice again concurred.

In United States v. Ruegsegger, 702 F. Supp. at 444-45, the court followed the pre-1986 reasoning of the Eleventh Circuit in *Kass, Diaz,* and *Beck, supra,* in holding that the government had constructive knowledge of the material facts when an employee of its agent, Blue Cross of New York, received a report regarding a provider's over utilization of Medicare.

b. Decisions Under § 3731(b)(2)

The post-1986 decisions interpreting the phrase "official of the United States" in § 3731(b)(2), while clearly less uniform in their reasoning, have in most instances concluded that the government had knowledge of the material facts when the facts were known by government officials or agents ***not*** employed by the Department of Justice. These decisions include *United States ex rel. Kreindler & Kreindler v. United Technologies Corp.,* 777 F. Supp. 195 (N.D.N.Y. 1991), *aff'd on other grounds,* 985 F.2d 1148 (2d Cir. 1993), *cert. denied,* 508 U.S. 973 (1993); and *United States v. Kensington Hospital,* 1993 WL 21446 (E.D. Pa. January 14, 1993); *United States v. Incorporated Village of Island Park,* 791 F. Supp. 354 (E.D.N.Y. 1992); and *United States v. Intrados/International Management Group*, 265 F. Supp. 2d 1 (D.D.C. 2002).

Where courts have reached a different conclusion, they appear to have either relied on a mistaken understanding of the legislative history of § 3731(b)(2) or reached their conclusion

without thorough analysis. *United States v. Tech Refrigeration,* 143 F. Supp. 2d 1006 (N.D. Ill. 2001); *United States ex rel. Colunga v. Hercules, Inc.*, 1998 WL 310481 (D. Utah March 6, 1998); *United States v. Macomb Contracting Corp.,* 763 F. Supp. 272 (M.D. Tenn. 1990); and *JANA, Inc. v. United States*, 34 Fed. Cl. 447 (1995). In *United States ex rel. Condie v. Board of Regents of the University of California*, 1993 WL 740185 (N.D. Cal. Sept. 7, 1993), the court recognized the language change that occurred in S. 1562 and still found that the term "official of the United States" refers to an employee of the Department of Justice. The *Condie* court, however, failed to recognize and take into consideration the parallel between the language of § 3731(b)(2) and § 2416(c), the applicable rules of statutory construction, or the decisions interpreting § 2416(c).

In *Kreindler,* 777 F. Supp. at 205, the court held that a *qui tam* relator's False Claims Act suit was time-barred where *technical officials at the Army's Black Hawk helicopter office* had learned of the facts material to the action – an allegedly concealed mechanical defect – more than six years prior to the filing of the complaint. The court considered these technical officials, as well as the *Army's contracting officer*, to be "official[s] of the United States" within the meaning of § 3731(b)(2). In reaching this conclusion, the court expressly relied on pre- and post-1986 cases decided under § 2416(c), including the Eleventh and Fourth Circuits' decisions in *Kass* and *Boeing,* respectively.

Similarly, in *Kensington Hospital*, 1993 WL 21446 at *12-13, the court rejected the position taken by the Department of Justice in the case that the requirement of knowledge by an "official of the United States charged with the responsibility to act in the circumstances" was not met until a representative of the Civil Division of the Office of the United States Attorney knew or should have known of the material facts. It was enough, the court held, that a ***Medicaid/Medicare investigator*** with no relationship to the Department of Justice had actual or constructive knowledge of the facts.

In *Island Park,* 791 F. Supp. at 363, the court held, based on a clear misreading of the legislative history of § 3731(b)(2), that the official charged with responsibility to act in the circumstances had to be an official within the Department of Justice. The court's error was that it relied on the above-referenced Senate Judiciary Committee report on S. 1562, requiring that knowledge of the material facts be held by an "official within the Department of Justice." (*See* pp. 5-6 *supra*.) The court apparently was unaware that the language of S. 1562 was changed during the Senate floor debate and that "official within the Department of Justice" was replaced with "official of the United States." *Id.* Despite its misreading of the legislative history, the *Island Park* court nonetheless declined to toll the lapsing of the False Claims Act limitations period until knowledge of the material facts actually reached an official within the Department of Justice. Relying on the "should have known" language of § 3731(b)(2), the court held that a report issued by ***auditors from the Department of Housing and Urban Development*** put the Department of Justice on constructive notice of the facts. *Id.*

In *United States v. Intrados/International Management Group*, 265 F. Supp. 2d at 12, the court recognized the differing rationales of *Kreindler* and *Island Park* but did not itself attempt to resolve whether the term "official of the United States" in § 3731(b)(2) is, or is not, limited to officials within the Department of Justice. Rather, the court stated:

> Regardless of whether DOJ is the responsible party charged with uncovering the fraud, the court determines that DOJ knew or should have known of material facts giving rise to the plaintiff's cause of action ***at the time when the DCA[A] audit was released*** on January 7, 1998. Indeed,

> the statute of limitations began to run on the DCA[A] audit's release date and, thus, expired on January 7, 2001. The plaintiff filed its complaint on April 10, 2001, three months too late.

(Emphasis added.) This conclusion – as well as the conclusions in *Boeing* and *Kreindler* – have direct factual relevance to this case because the officials found to have had knowledge of the material facts for purposes of the applicable tolling provisions were DOD procurement officials and/or DCAA auditors.

The ambiguity inherent in the phrase, the existence of inconsistent court rulings, and the Justice Department's continued efforts to narrow the phrase suggest that the issue will remain one of the many unresolved aspects of the False Claims Act.

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1 With appreciation for the assistance of my partner, Peter B. Work.

2 28 U.S.C. § 2415(a) provides that "every action for money damages brought by the United States . . . which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues . . . ."

3 31 U.S.C. § 3731(b)(1) provides that a False Claims Act action may not be brought "more than 6 years after the date on which the violation . . . is committed."

4 *See, e.g., United States ex rel. Purcell v. MWI Corp.*, 254 F. Supp. 2d 69, 77 (D.D.C. 2003) ("Because the test for [28 U.S.C. § 2416 and 31 U.S.C. § 3731(b)(2)] turns on language that is virtually identical, the court analyzes the two statutes together for the purposes of this motion [to dismiss].").