# The Government Contractor®

THOMSON REUTERS

Information and Analysis on Legal Aspects of Procurement

**Vol. 62, No. 19** **May 13, 2020**


## *Focus*

### ¶ 133

### FEATURE COMMENT: Fraudulent-Inducement Actions And The FCA's Statute Of Limitations

The federal False Claims Act creates a cause of action against anyone who "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval." 31 USCA § 3729(a)(1)(A). Because the statute is keyed to the presentation of fraudulent "claims" (§ 3729(b)(2))—that is, requests for payment made to the Federal Government—the FCA is properly read as conferring a cause of action only in those cases where the claim itself is fraudulent.

Alas, that is not how the law has been interpreted: As the result of longstanding Supreme Court precedent, *U.S. ex rel. Marcus v. Hess*, 317 U.S. 537, 542–44 (1943), every single claim made under a Government contract obtained through fraud is deemed fraudulent—"automatically tainted," regardless of whether the claim was fraudulent in itself. *U.S. ex rel. Bettis v. Odebrecht Contractors of Cal., Inc.*, 393 F.3d 1321, 1323 (D.C. Cir. 2005) ("automatically tainted," "even without proof that the claims were fraudulent in themselves"); see also *Veridyne Corp. v. U.S.*, 758 F.3d 1371, 1379–80 (Fed. Cir. 2014) (rejecting challenge to applying rule of *Hess*); 56 GC ¶ 242; *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 787–88, 792–94 (4th Cir. 1999) (describing and applying doctrine that has developed from *Hess*); 41 GC ¶ 317.

Massive civil penalties—calculated per claim—can follow. E.g., *U.S. ex rel. Bunk v. Gosselin World Wide Moving*, 741 F.3d 390, 405–09 (4th Cir. 2013) (upholding finding of 9,136 false claims, yielding $50 million penalty, in absence of any shown damages; penalty reduced to $24 million to avoid Eighth Amendment concerns). If, for example, a prospective contractor fraudulently obtains a Government contract by misrepresenting his credentials, then, by operation of law, he submits a "false" claim *every single time* he seeks payment under that contract—even if he performs in exactly the manner he said he would and the requests for payment contain no distinct falsity.

The fraudulent-inducement doctrine is a judge-made amendment of the FCA. So if it is to exist at all, it should exist in its most limited possible form. See *In re One2One Commc'ns*, LLC, 805 F.3d 428, 435 (3d Cir. 2015) (explaining that the judge-made nature of the equitable-mootness doctrine requires that it be narrowly construed). This essay suggests one principled way of advancing that goal: Fraudulent-inducement actions under the FCA should be understood to accrue at the moment of inducement, and the FCA's limitations period should begin to run from that date.

**Fraudulent Inducement and the FCA**—Under the fraudulent-inducement theory, FCA defendants may be held liable "for each claim submitted to the government under a contract, when the contract or extension of government benefit was obtained originally through false statements or fraudulent conduct." *Harrison*, 176 F.3d at 787. The theory lacks support in the FCA's text, which has always imposed liability only for claims that are false or fraudulent. The statute says nothing about, and thus does not impose liability for, non-fraudulent and non-false claims submitted under fraudulently induced contracts. See Antonin Scalia & Bryan A. Garner, Reading Law § 8, at 93 (West 2012) (under the omitted-case canon, "Nothing is to be added to what the text states or reasonably implies," and so "a matter not covered is to be treated as not covered.").

In concluding otherwise, the Supreme Court nearly 80 years ago, in *Hess*, invoked Congress' purported intent. Rather than giving the text its most natural reading, the Court endeavored "to discover … the Congressional will." 317 U.S. at 542. The Court stressed that the FCA imposes liability on anyone who even "caused" a false claim to be presented. Based on this broad imposition of liability, the Court divined "a purpose to reach any person who knowingly assisted in causing the government to pay claims which were grounded in fraud." Id. at 544. From this general purpose, the Court inferred that Congress would have wished to impose liability for *all* claims submitted under a contract obtained through fraud, since all such claims are in some sense "grounded in fraud." And it would have wanted to do so *even if* the individual claims were neither false nor fraudulent.

*Hess*' purpose-driven interpretation of the FCA is certainly debatable. "[N]o legislation pursues its purposes at all costs." *Rodriguez v. U.S.*, 480 U.S. 522, 525–26 (1987) (per curiam). That is why, when it comes to congressional enactments, courts "are bound by *what they say*, not by the unexpressed intention of those who made them." *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 618 (2013) (Scalia, J., concurring in part and dissenting in part). *Hess* took the opposite approach in holding that the FCA bans all claims "grounded in fraud."

It is doubtful that the case, from a "bygone era of statutory interpretation," would have come out the same way today, when the Court focuses more on the meanings of statutes than their purposes, *Food Marketing Inst. v. Argus Media Leader*, 139 S. Ct. 2356, 2362–65 (2019); 61 GC ¶ 199, and when, accordingly, its "recent precedents cast doubt on the authority of courts to extend or create private causes of action," *Jesner v. Arab Bank PLC*, 138 S. Ct. 1386, 1402 (2018). Indeed, in cases under the FCA itself, the Supreme Court now regularly emphasizes that it starts, and often ends, with the language of the statute. E.g., *Cochise Consultancy, Inc. v. U.S. ex rel. Hunt*, 139 S. Ct. 1507, 1512–14 (2019); 61 GC ¶ 149; *Universal Health Servs., Inc. v. U.S. ex rel. Escobar*, 136 S. Ct. 1989, 1999 (2016).

Since the Supreme Court announced the fraudulent-inducement theory in *Hess*, neither it nor the courts of appeals have had many opportunities in judicial opinions to examine its foundation and contours. The reason is both simple and troubling: Because every claim submitted under a fraudulently induced contract is deemed a false claim, and because this logic might lead to a court's ruinously imposing a separate civil penalty for each invoice submitted under such a contract (regardless of actual damages), the risk of a jury's finding fraudulent inducement threatens enormous liability. See, e.g., *Gosselin*, 741 F.3d at 405–09; *Harrison*, 176 F.3d at 793–94. Even the most innocent defendants settle. As a result, the doctrine is simultaneously both underdeveloped and tremendously effective for FCA relators and Government attorneys.

**A Fraudulent-Inducement Action Accrues at the Time of the Inducement**—The *in terrorem* effect of fraudulent-inducement actions would be mitigated by a proper understanding of the FCA's statute of limitations. That is the point of this essay, arguing that fraudulent-inducement claims under the FCA accrue at the time of the alleged fraudulent inducement. This rule is supported by the FCA's text and the policies undergirding the FCA's statute of limitations, by courts' approach to the common-law tort of fraudulent inducement, and by separation-of-powers considerations.

*The Text and Purpose of the FCA's Statute of Limitations Point to Accrual of a Fraudulent-Inducement Action at the Time of Inducement*: The FCA's statute of limitations, 31 USCA § 3731(b), provides that plaintiffs may not sue:

> (1) more than 6 years after the date on which the violation of § 3729 is committed, or
> (2) 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 is committed,
> whichever occurs last.

Either provision can apply, regardless of whether the Government itself sues a contractor it deems to have violated the FCA or, instead, a private relator brings a qui tam suit on the Government's behalf, keeping a share of any recovery (and, as to the latter, regardless of whether the Government intervenes in the relator's suit). *Cochise*, 139 S. Ct. at 1511 et seq. And under either provision, the key question is what it means to "commit[]" an FCA "violation"—the answer to which will also, as to the second provision, § 3731(b)(2), determine what facts are "material to the right of action" for that violation and thus, when appropriately known, can trigger the three-year limitations period.

In general, Government contractors "violate" the FCA by submitting or receiving payment for a false or fraudulent claim. See *U.S. v. Tech Refrigeration*, 143 F. Supp. 2d 1006, 1007 (N.D. Ill. 2001). That makes sense with respect to causes of action created by the statute itself. The Act prohibits presenting false or fraudulent claims, and so there cannot be a violation until a false or fraudulent claim is submitted.

But it makes little sense when it comes to suits based on the fraudulent-inducement theory. Again, when a cause of action is based on a fraudulent-inducement theory, the falsity or fraudulence of the claim submitted is *immaterial* to the defendant's liability. Rather, the only "violation" of the FCA is the violation of the judge-made rule against fraudulently *inducing* Government contracts. Accordingly, the "violation" at issue in fraudulent-inducement suits occurs—and the statute of limitations begins to run—at the moment the contract is fraudulently induced. And, correspondingly, the "facts" that are "material to" the "right of action" for *that* violation are those underlying the fraudulent inducement.

In addition to comporting with the FCA's text, this understanding advances the policies on which the FCA's statute of limitations is based. Statutes of limitations exist because it is "unjust to fail to put the adversary on notice to defend within a specified period of time," and because "the right to be free of stale claims in time comes to prevail over the right to prosecute them." *U.S. v. Kubrick*, 444 U.S. 111, 117 (1979). Limitations periods thus "protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise." Id. The proposed accrual rule furthers these purposes. It ensures that fraudulent-inducement plaintiffs bring suit before "the search for the truth may be seriously impaired by the loss of evidence." Id. The contrary rule, under which a cause of action resting on a fraudulent-inducement theory accrues each time a claim is submitted, does the opposite. Under that rule, a fraudulent-inducement claim could be litigated 15, 20, 50 or 100 years after *the only* fraudulent conduct at issue—the inducement of the contract under which the claims are submitted.

When a statute is susceptible of two readings, courts ought to choose the one that better advances the statute's objective purpose. Scalia & Garner, Reading Law § 4, at 63. The FCA's statute of limitations is more reasonably read as providing that fraudulent-inducement actions accrue at the time of the inducement; it is at least *capable* of being so read. Because that reading better advances the reason for having a statute of limitations, it is preferable to the contrary rule, which does not.

In *Dugan*, the U.S. District Court for the District of Maryland embraced the reading this essay proposes. *U.S. ex rel. Dugan v. ADT Sec. Servs., Inc.*, 2009 WL 3232080 (D. Md. Sept. 29, 2009). The relator, Dugan, accused the defendant of having "fraudulently induced the Government to enter into a contract in 1996." Id. at *4. The defendant had submitted claims under that contract in 1997. Nonetheless, the court held that "all of the conduct on which" the relator's inducement claim "was based" occurred in 1996. Id. In other words, the fraudulent-inducement violation occurred at the time of the 1996 inducement, and *not* in 1997 when the defendant submitted its claims under the allegedly fraudulent contract. As a result, the court in *Dugan* held that the relator's 2003 inducement claim was untimely under the applicable statute of limitations. Id. (The court was applying § 3731(b)(1)'s six-year provision, as its circuit precedent then required. See *Cochise*, 139 S. Ct. at 1511–13. As noted above, however, the question is the same under either provision: What was the "violation"?)

*State Law Fraudulent-Inducement Actions Accrue at the Time of Inducement*: Since *Hess* effectively imported into the FCA the state law cause of action for fraudulent inducement of a contract, state law can provide an additional source of guidance on what constitutes a "violation" of the FCA in this context. Yet there appears to be *no* jurisdiction in which the limitations period applicable to fraudulent-inducement tort claims begins anew with each request for payment submitted under a fraudulently induced contract.

Rather, the state law is that fraudulent-inducement actions accrue either at the time of the fraudulent conduct or at the point at which the conduct should have been discovered by reasonable diligence, whichever comes later. See *Wheeler v. George*, 39 So. 3d 1061, 1081 (Ala. 2009); *Dupree v. Twin City Bank*, 777 S.W.2d 856, 858 (Ark. 1989);

 

*Pivotal Payments Direct Corp. v. Planet Payment, Inc*., 2015 WL 11120934, at *4 (Del. Super. Ct. Dec. 29); *Smith v. Alimenta Processing Corp*., 197 Ga. App. 57, 57, 397 S.E.2d 444, 444–45 (Ct. App. Ga. 1990); *Alexander v. E. Fin. of New Albany, Inc.*, 2007 WL 295220, *3 (N.D. Miss. Jan. 25) (Mississippi law); *RA Glob. Serv., Inc. v. Avicenna Overseas Corp.*, 817 F. Supp. 2d 274, 283 (S.D.N.Y. 2011) (New York law); *Cundall v. U.S. Bank*, 909 N.E.2d 1244, 1250 (Ohio 2009); *Evans v. United Bank, Inc*., 775 S.E.2d 500, 501 (W. Va. 2015).

The point is not that courts should simply import these state accrual rules into the FCA. Indeed, they cannot do so: The Act has its own statutory limitations period, which begins running at the time of the defendant's alleged "violation" (or at the time that a U.S. official should reasonably have known facts material to that "violation"). The relevant question, therefore, is what constitutes the "violation." And it is *that* question that the state accrual rules help to answer. They illustrate that the relevant "violation" of law in a fraudulent-inducement action is the fraudulent inducement itself—not the later submission of requests for payment under the fraudulently induced contract. State law thus bolsters the proposed reading of the FCA's statute of limitations.

*Separation-of-Powers Concerns Support Holding That Causes of Action Resting on Fraudulent-Inducement Theories Accrue at the Time of Inducement*: Even if the proposed rule did not follow from the statute of limitations' text, and from the manner in which such fraudulent claims are understood outside the FCA context, it would still be appropriate. The reason? What judges make, judges can limit.

Courts "cannot limit a cause of action that Congress has created." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 (2014). There is no reason, however, this rule should apply to *judge-made* doctrines. The power to create causes of action implies the power to eliminate them. Indeed, at least when it comes to judge-made causes of action that effectively amend a congressional enactment, "limiting" the cause of action means respecting the law that Congress enacted. That is, limiting a judge-made cause of action amounts to nothing more than limiting the usurpation of congressional authority.

This is not to say that lower courts should set about trimming *Hess*' wings. They must adhere to Supreme Court precedent, unless and until overruled. *Agostini v. Felton*, 521 U.S. 203, 237 (1997). But *Hess* did not itself address the statute of limitations, and the proposal here is otherwise consistent with *Hess*, as nothing in that opinion requires that fraudulent-inducement claims accrue again and again each time the defendant submits a claim under the same allegedly induced contract. But if the lower courts wrongly believe this proposed accrual rule inconsistent with *Hess*, and if stare decisis commands *Hess*' preservation, then the Supreme Court should at least limit the case, just as it has limited other cases inventing causes of action unsupported by the text they purport to interpret. See, e.g., *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855–60 (2017) (limiting *Bivens* actions).

**The Contrary Reading of the FCA's Statute of Limitations Is Not Persuasive**—As noted above, the District Court for the District of Maryland held in *Dugan* that fraudulent-inducement claims accrue at the time of inducement. And as explained above, that is correct.

More recently, the only other court to address the issue, the U.S. District Court for the Northern District of Illinois, in *McGee*, came out the other way. *U.S. ex rel. McGee v. HAL Corp.*, 2017 WL 4467458 (N.D. Ill. Oct. 6). It relied on a copyright decision holding that "[a] claim ordinarily accrues when [a] plaintiff has a complete and present cause of action." Id. at *7 (quoting *Petrella v. MGM, Inc.*, 134 S. Ct. 1962, 1969 (2014)). But that boilerplate begs the question here: As explained above in the discussion of state law, fraudulent-inducement claims outside the FCA context typically accrue at the time of inducement. At that point, the plaintiff has a complete and present cause of action (whether for rescission or any damages), and so *McGee*'s logic fails on its own terms.

*McGee* additionally pointed to the general rule that the FCA's statute of limitations does not run until the defendant submits, or the Government pays, a false or fraudulent claim. Id. at *6–7. But in restating this rule, the court paid insufficient heed to the statutory text, which states that the statute of limitations runs from the time of the challenged "violation." In general, the "violation" does indeed consist of the presentment of a claim for payment, making the court's recitation correct in the ordinary context. Not so in the fraudulent-inducement context, however: As explained above, the "violation" at issue in fraudulent-inducement cases occurs at the moment the contract is entered into.

*McGee* attempted to further support its conclusion by claiming that *Dugan* agreed with it. But its argument in support of that proposition was weak: *McGee* said that *Dugan* cited cases stating the general rule of accrual, and from that concluded that *Dugan must have* applied that rule to the fraudulent-inducement context. That argument ignores *Dugan*'s analysis. Recall that the inducement claim in *Dugan* would have been timely had the statute of limitations started running when the defendant submitted claims under the supposedly fraudulent contract. It was *only* because the statute of limitations began running earlier, at the time of inducement, that the relator's inducement claim was untimely. *McGee* thus misinterpreted *Dugan* to stand for a proposition inconsistent with its holding. See Garner, et al., The Law of Judicial Precedent 89 (2016) ("Courts must … deduce legal rules not only from the language of the opinions, but from their underlying logic as well.").

**Conclusion**—Because the fraudulent-inducement theory finds no basis in the FCA's text, courts should be on the lookout for ways to limit it, "provided that" they do so "in a principled fashion." *Heck v. Humphrey*, 512 U.S. 477, 491 (1994). The limitation proposed here is not just principled, but also follows from the text of the FCA's statute of limitations. And the proposal has a happy consequence: It would make it harder for FCA relators to sue based on spurious yet hard-to-disprove allegations of decades-old fraudulent inducement. This would alleviate some of the leverage that accompanies such allegations, and that causes innocent defendants to settle for millions of dollars rather than trying their luck before a jury.

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***This Feature Comment was written for The Government Contractor by* C. Kevin Marshall, *a partner in Jones Day in its Washington, D.C., office. The views expressed in this essay do not necessarily reflect those of his firm. Thanks to Daniel Benson for assistance on earlier versions and to Connor Suozzo for research assistance.***

 