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Life, Liberty and the Pursuit of Fraud: Using Wartime Powers to Extinguish Statutes of Limitations

Sun Tzu declared in *The Art of War* that “there is no instance of a nation benefitting from prolonged warfare.” Sun Tzu, however, did not consider the vast power that springs from US Congressional actions made during times of crisis. The US Department of Justice has lately taken an expansive view of a World War II-era law tolling the statute of limitations to pursue civil fraud cases that would long have been extinguished but for the United States’ “prolonged warfare” against terror. Given today’s reality, companies must consider the possibility that the government has license to investigate and prosecute claims of fraud—potentially including claims brought under 19 U.S.C. § 1592, the civil penalty statute enforced by US Customs and Border Protection—that were committed many years ago, and that its ability to do so may be practically unlimited.

The Wartime Suspension of Limitations Act (WSLA) under 18 U.S.C. § 3287 tolls the statute of limitations applicable to any offense involving, among others, “fraud or attempted fraud against the United States or any agency thereof in any manner, whether by conspiracy or not.” The tolling begins when the United States is at war or Congress has enacted a specific authorization for the use of military force, and it ends five years after the termination of hostilities “as proclaimed by a Presidential proclamation, with notice to Congress, or by a concurrent resolution of Congress.”

The WSLA had been mostly dormant since the late 1950s. However, with Congress’ authorizations on September 16, 2001, for the use of force “against those responsible for” the September 11, 2001 terrorist attacks on the United States and on October 16, 2002, for the use of force in Iraq, the Department of Justice has resurrected the WSLA and put it to use in a new series of cases. These cases have involved both civil and criminal violations.

Most recently, on September 24, 2013, in *United States v. Wells Fargo Bank*, the US District Court for the Southern District of New York allowed prosecution of claims under the False Claims Act (FCA) dating back to 2001—eleven years before the suit was commenced. Although the government included other arguments in addition to the WSLA in response to a statute of limitations defense raised by Wells Fargo, the court agreed that the provisions of the WSLA had tolled all of the government’s FCA claims.

The recent trend of civil cases successfully invoking the WSLA to toll the statute of limitations is potentially troubling for several reasons. First, the WSLA is being used to negate statute of limitations defenses in civil fraud cases that have nothing to do with war or military activities. So far, the primary civil statute involved has been the False Claims Act, which has increasingly been invoked for customs-related activities. It is not difficult, however, to foresee the government applying this statute to other violations involving underpayments of duties and fees or other customs violations under 19 U.S.C. § 1592 where fraud is an essential element.

For more detailed information on the government’s increased reliance on the WSLA to extend its ability to pursue fraud claims, please contact any of the following attorneys or trade professionals.

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More importantly, the conditions for ending the tolling provisions in the WSLA require a presidential proclamation or concurrent resolution of Congress ceasing hostilities. The problem, however, lies in the open-ended way in which the current authorizations for the use of military force are drafted. The September 16, 2001 Congressional authorization, for example, allows for military force to be used against “those nations, organizations, or persons [the president] determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.”

In today’s political climate, one can imagine the difficulty any member of Congress or the president would face supporting termination of this authorization as long as Al Qaeda—or any group or individual affiliated or derived from that organization—maintains any sort of threat. As such, the real uncertainty raised by the government’s current reliance on the WSLA is not how broadly it applies or when it begins, but rather, when it could foreseeably end.

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