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ALERT

U.S. Supreme Court Appears Poised to Eliminate Indefinite False Claims Act Tolling in Wartime and Could Permit Successive *Qui Tam* Actions

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This morning, the Supreme Court of the United States heard oral argument in *Kellogg Brown & Root Services, Inc. v. United States ex rel. Carter*, a case that has major ramifications for the reach of the False Claims Act (FCA). The Court could further extend the FCA by ruling that the Wartime Suspension of Limitations Act (WSLA) has suspended the FCA's statute of limitations indefinitely since 2002 and that FCA defendants can be hit with purely duplicative lawsuits as long as they occur at different times. Wiley Rein previously analyzed the Court's decision to take the case and the issues it presents. Attempting to predict the outcome of a case can be difficult, but based on the arguments this morning the Justices appeared ready to rule that the WSLA does not suspend the civil FCA's statute of limitations but grappled with whether the FCA permits duplicative, non-overlapping lawsuits.

The Court in *Carter* will decide two issues that have wide-reaching implications for companies that do business with the government: whether and in what circumstances the WSLA suspends the FCA's statute of limitations while the country is at war; and the reach of the "first-to-file" rule, which bars a whistleblower's FCA action based on allegations similar to those previously made by a different whistleblower. In *Carter*, the whistleblower alleged that the contractor-defendants submitted false invoices and timesheets to the government for services on military bases in Iraq. The district court originally dismissed the case with prejudice because: (1) the case was stale under the FCA's statute of limitations, which bars FCA

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claims brought "more than 6 years after the date on which the violation . . . is committed," 31 U.S.C. § 3731(b); and (2) two earlier cases based on similar allegations barred the case under the "first-to-file" rule, which prevents any "person [from] . . . bring[ing] a related action based on the facts underlying the pending action," 31 U.S.C. § 3730(b)(5) (emphasis added).

The Fourth Circuit reversed this decision in March 2012, ruling that the case was not time-barred because the WSLA, which tolls the statute of limitations "applicable to any offense . . . involving fraud or attempted fraud against the United States" while the country is at war, 18 U.S.C. § 3287, has suspended the FCA's statute of limitations since Congress's 2002 authorization to use military force in Iraq. The Fourth Circuit also ruled that the case was not barred by the first-to-file rule because although previously-filed cases alleging similar facts were pending when this case began, those cases were dismissed while this case was ongoing, and the court reasoned that "once a case is no longer pending the first-to-file bar does not stop a relator from filing a related case." In so holding, the Fourth Circuit joined the Seventh and Tenth Circuits but diverged from numerous other courts, including the First, Fifth, Ninth and District of Columbia Circuits.

The Supreme Court announced last July that it would take the case and decide these important issues, and the parties have submitted written briefs to the Court in the ensuing months. The contractors argue in their briefs that the Fourth Circuit's decision misapplies the WSLA and nullifies the purpose of the first-to-file rule. They argue that the WSLA should not apply to the civil FCA because it is a criminal provision "applicable to any *offense*," a word that normally connotes criminal liability, and that applying it to the FCA indefinitely revives long-stale claims and suspends the statute of limitations until the wars in Iraq and Afghanistan are officially terminated, a formal step that does not necessarily follow after combat operations end. Concerning the first-to-file rule, the contractors argue that permitting claims based on the same facts of previously-dismissed cases upends the rule's purpose—to encourage whistleblowers to alert the government to fraud *of which it is not already aware*—and permits an infinite series of claims based on the same facts so long as no two cases coincide. The whistleblower, in asking the Court to uphold the Fourth Circuit's decision, argues in his briefs that applying the WSLA to civil FCA claims is consistent with the WSLA's text—including the word "offense," which he contends can be a civil or criminal violation of law—and supported by its legislative history. He concedes that the WSLA should be limited to claims related to war but argues that the Court should not decide this question because it is not at issue here, where the claims do relate to wartime contracting. On the first-to-file question, the whistleblower argues that the words "pending action" mean that a case that has been dismissed cannot bar a related case, and that this interpretation best serves the rule's myriad purposes, including preventing inconsistent judgments, diversion of government resources and dilution of the relator share.

Although oral arguments are an imperfect indicator of how the Court will rule, this morning the Court appeared to side with the contractors on whether the WSLA applies to civil claims under the FCA. Counsel for the contractors noted that the statute was exclusively criminal at its inception—initially referring to offenses "now indictable"—and the legislative history concerning its revision in 1944 contained no indication that the rephrasing to cover "any offense" was intended to expand the statute to civil claims. Counsel for the contractors argued that "offense" does not refer to both civil and criminal violations in any other federal

statutes that are comparable to the WSLA. Additionally, the FCA itself allows for tolling that is keyed to government awareness of a FCA claim, so there is a separate scheme that addresses the underlying policy behind the WSLA. The Court appeared persuaded by these arguments, asking clarifying questions but not doubting the fundamental premise of the contractors' position.

On the "first-to-file" issue, the Justices were much more aggressive in interrogating the contractors' counsel and appeared to side with the whistleblower and the United States. Justice Kennedy said that the contractors' reading of the statute ignores the word "pending," and questioned the appropriateness of prohibiting a successive *qui tam* suit where the first suit was dismissed on something other than the merits. Justice Sotomayor stated that the purpose of *qui tam* suits is not only to alert the government of fraud but also leverage private litigation resources in those cases, a purpose served by permitting successive actions. Justice Breyer noted that a successive suit may be appropriate where a subsequent relator qualifies as an original source of information but the initial relator did not. In supporting the whistleblower's position, the attorney for the government argued other FCA provisions, res judicata, and claim preclusion would bar duplicative litigation. He argued that a ruling on the merits of a *qui tam* action would bar a later action by the government, and that if the government decides not to intervene at the beginning of a *qui tam* case it is bound by any ruling on the merits. He also noted that the public disclosure bar would apply to any successive *qui tam* action, guarding against duplicative litigation.

Overall, it was clear from the questions during oral argument that the Court appreciated the careful structure of the FCA and was determined to interpret both the FCA and the WSLA in a way that retained their essential purposes while honoring the text of the statutes. If the Court rules that the WSLA does not apply to the FCA, it will restore the normal statute of limitations and protect would-be FCA defendants from stale claims that would otherwise be time-barred. If the Court permits successive actions it could cabin the issue in such a way that future courts aggressively apply other protections against duplicative litigation.