Whistleblower Defense Alert: Supreme Court Holds the WSLA Does Not Apply to the Civil FCA But Limits the Scope of the First-to-File Bar

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By Patrick M. Hagan

Today the Supreme Court issued its decision in *Kellogg Brown & Root Servs., Inc. v. United States ex rel. Carter*. On the first question presented, the Court held that the Wartime Suspension of Limitations Act (WSLA) applies only to criminal offenses and thus does not toll the False Claims Act's (FCA) statute of limitations indefinitely while the United States is in armed conflict. This sensible construction of the WSLA eliminates the uncertainty caused by the prospect of the effective elimination of the FCA's statute of limitations. On the second question presented, the Court held that the FCA's first-to-file bar prohibits subsequent related actions only while the first-filed action is pending. This holding greatly limits the scope of the first-to-file bar and will likely result in future litigation regarding whether, and to what extent, a subsequent action can be barred by the dismissal of the first-filed action.

I. The WSLA Applies Only to Criminal Offenses

The primary issue in *Carter* was the applicability of the WSLA to FCA claims. The WSLA tolls the statute of limitations for "offenses" involving fraud against the United States while the United States is at war (defined broadly to include all conflicts for which Congress has authorized the use of the Armed Forces) until "5 years after the termination of hostilities as proclaimed by a Presidential proclamation, with notice to Congress, or by a concurrent resolution of Congress." The United States and the relator argued that the term "offenses" should be broadly construed to include civil claims under the FCA as well as criminal fraud offenses.

The Court rejected this construction as unsupported by common usage and the statutory text. In his opinion for the unanimous Court, Justice Alito explained, through citation to several dictionaries, that the term "offense" is commonly understood to refer to crimes and specifically cited three contextual points to support this limitation to the applicability of the WSLA. First, Congress chose to place the WSLA in

Title 18, the criminal code. Second, although some regulatory provisions outside Title 18 use "offense" to include civil offenses, every use of the term "offense" in Title 18 is limited to criminal offenses. Third, the parties did not dispute that the term "offense" in prior versions of the WSLA was limited to criminal offenses.

Nevertheless, the United States and the relator argued that the meaning of "offense" within the WSLA was changed when Congress decided to delete a separate clause in the statute during World War II that limited the scope of the WSLA to offenses "now indictable under any existing statutes." The Court noted that deleting other language in the statute would be "an obscure way" to change the meaning of one of the key statutory terms, thereby "substantially expanding the WSLA's reach." "Fundamental changes in the scope of a statute are not typically accomplished with so subtle a move." Instead, the Court concluded that a more plausible explanation for the change is that Congress decided during World War II to apply the WSLA prospectively rather than limiting its application to past fraud. The Court also noted that it had previously expressed a preference for narrowly construing the WSLA "in favor of repose." Consequently, the Court held that the WSLA is limited to criminal offenses.

The practical effect of this decision for government contractors and health care providers is enormous. Under the construction advanced by the United States and adopted by the Fourth Circuit, the WSLA would have tolled the statute of limitations in all FCA cases, including cases in which the United States did not intervene and cases having absolutely no connection to the ongoing armed conflict. The statute of limitations would have been tolled beginning in September 2001 and would have remained tolled until five years after the president or Congress publicly declared an end to the conflict—an event that currently seems unimaginable given the ongoing conflicts in Syria, Iraq and Yemen. Now, FCA defendants can again rely on the FCA's statute of limitations provision as a bright line to eliminate untimely FCA claims.

II. The FCA's First-To-File Bar Applies Only When Another Case Is "Pending"

In the second question presented, the Court limited the scope of the FCA's first-to-file bar. This is a limited victory for the United States and the relator. The FCA's first-to-file bar provides that "[w]hen a person brings an action … no person other than the Government may intervene or bring a related action based on the facts underlying the pending action." 31 U.S.C. § 3730(b)(5). The Court held that the scope of the provision turned on the meaning of the term "pending," which is commonly understood to mean "awaiting decision." Thus, the Court held that § 3730(b)(5) prohibits related actions when a previously filed action "remains undecided" but ceases to bar subsequent actions once any previously filed actions have been dismissed.

The Court acknowledged that its holding could "produce practical problems" but noted "it is beyond our ability in this case to make [the FCA's *qui tam* provisions] operate together smoothly like a finely tuned machine." One major issue that will arise is the extent to which the United States, as the real party in interest in all FCA cases, is bound by the resolution in the first-filed case such that any subsequent relator would also be bound. The United States acknowledged in its merits brief in *Carter* that "the doctrine of claim preclusion may prevent the filing of subsequent cases" when the first case is decided "on the merits." However, achieving dismissal under the doctrine of claim preclusion will be far more difficult for defendants than applying the first-to-file bar, which many courts had previously characterized as "exception free." We expect substantial future litigation over whether, and to what extent, any Rule 12(b)(6)

dismissal in a non-intervened action is a decision “on the merits” that would bar subsequent related lawsuits.