Whistleblower Defense Alert: The Supreme Court Will Review Fourth Circuit Decision that Weakened the False Claims Act's Statute of Limitations and First-to-File Bar

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CLIENT ALERT | 7.1.2014

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Today, the Supreme Court granted the petition for *certiorari* in *Kellogg Brown & Root Servs., Inc. v. United States ex rel. Carter*. The petition presented two questions: (1) whether the Wartime Suspension of Limitations Act (WSLA) applies to claims of civil fraud brought by *qui tam* relators, and (2) whether the False Claims Act's (FCA) first-to-file rule is an absolute bar or whether it permits subsequent actions so long as the first-filed action had been dismissed on non-merits grounds prior to filing of the subsequent action. The Fourth Circuit's decision was unfavorable to potential FCA defendants on both issues. The Supreme Court's decision to grant *certiorari* is important news for all companies that do business with the government, as both issues significantly impact potential FCA exposure.

On the first question, the Fourth Circuit held that the WSLA applies to civil as well as criminal cases, and applies to FCA actions in which the government has declined to intervene. The practical effect of that ruling is that the statute of limitations in ***all*** FCA cases is tolled 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." 18 U.S.C. § 3287. District courts have begun to issue contrary rulings, with courts in both the Eastern and Western District of Pennsylvania holding that the WSLA does not apply to non-intervened FCA cases.[1] Most recently, in the well-known "Lance Armstrong case," the District of D.C. held that the WSLA does not apply to ***any*** civil FCA cases because the FCA does not require "proof of specific intent to defraud."[2]

On the second question, the Fourth Circuit joined the Seventh and Tenth Circuits in holding that the FCA's first-to-file rule does not prohibit duplicative actions so long as the earlier-filed actions are not pending at the time the duplicative case was filed. That conflicts with

the approach taken by the First, Fifth and Ninth Circuits, which have held that allowing duplicative actions to proceed, regardless of whether the previously filed action was "pending" at the time, "cannot be reconciled with [the FCA's] goal of preventing parasitic [suits]."[3]

If the Supreme Court upholds the Fourth Circuit's ruling on both of these issues, the consequences for FCA defendants could be disastrous. The application of the WSLA to all civil FCA cases, including non-intervened cases, essentially eliminates the statute of limitations for FCA cases indefinitely. Indeed, the president recently ordered additional troops to Iraq to address the recent instability there, which suggests that the "termination of hostilities" in Iraq is not imminent. The weakening of the first-to-file rule compounds the harm caused by the tolling of the statute of limitations by decreasing incentives for relators to report fraud promptly. The practical effect of the Fourth Circuit's "one-two punch" to defendants is to encourage relators to delay filing claims to maximize the potential damages. These incentives directly conflict with the purpose of the FCA.

When read in its entirety, the dual purposes of the FCA are to provide financial incentives to encourage private citizens to promptly report fraud while limiting the ability of those whistleblowers to profit based on publicly disclosed, previously alleged or stale information. Three pillars of the FCA provide the limitations on relators. The public disclosure bar prevents relators from profiting from suits based upon information that was already publicly available. The first-to-file rule serves a similar purpose – once the government has been alerted to potential fraud by the first-filed *qui tam* action, there is no reason to incentivize additional lawsuits. Finally, the vast majority of courts have correctly held that relators cannot benefit from the tolling provision in the FCA's statute of limitations and thus, that the limitations period for non-intervened cases is six years (as opposed to up to 10 years for the government). All three of these provisions of the FCA provide incentives for relators to make prompt allegations of fraud.

Unfortunately, the 2010 amendments to the FCA have already weakened the public disclosure bar by leaving its application to the government's discretion (see our January 2014 and May 2012 alerts for more on the weakening of the public disclosure bar). The Fourth Circuit's holding in *Carter* undermines both the statute of limitations and the first-to-file rule. If the Fourth Circuit's reasoning is upheld, companies doing business with the government could face lawsuits for alleged FCA violations that occurred many years earlier. Defending old claims is often difficult. Paper documents are often destroyed in accordance with document management policies or are stored in less accessible locations. The relevant electronic files may be stored on a sunset email or document management system. Witnesses may have moved away or forgotten relevant facts. Some may even be dead. And, if the relator alleges a continuing violation, the potential damages and penalties that have accumulated over a long period of time may be astronomical.

Amicus curiae briefing on the petition for *certiorari* in *Carter* illustrates that this case is set for a showdown. In his *amicus* brief, the solicitor general indicated that the government would support the Fourth Circuit's application of the WSLA to all civil FCA cases and its interpretation that the first-to-file rule does not bar subsequent actions when the first-filed action is no longer pending. The Chamber of Commerce filed an *amicus* brief in support of the defendant to alert the Court that "the sum effect of [*Carter*] will be to increase the number of aged and duplicative cases that serve only to inflict substantial litigation costs on businesses." All companies that in some way do business with the government – including health care, government procurement and banking and finance – should closely watch this case during the Supreme Court's October term.

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[1] *U.S. ex rel. Emanuele v. Medicor Associates*, No. 10-245, 2013 U.S. Dist. LEXIS 104650, at *20 (W.D. Pa. July 26, 2013); *U.S. ex rel. Bergman v. Abbott Laboratories*, No. 09-4262, 2014 U.S. Dist. LEXIS 12333, at *56-57 (E.D. Pa. Jan. 30, 2014).

[2] *U.S. ex rel. Landis v. Tailwind Sports Corp.*, No. 10-cv-00976, 2014 U.S. Dist. LEXIS 83313 (D.D.C. June 19, 2014).

[3] *See, e.g.*, *U.S. ex rel. Branch Consultants v. Allstate Ins. Co.*, 560 F.3d 371, 378 (5th Cir. 2009).