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KBR Ruling Likely To Encourage More FCA Litigation

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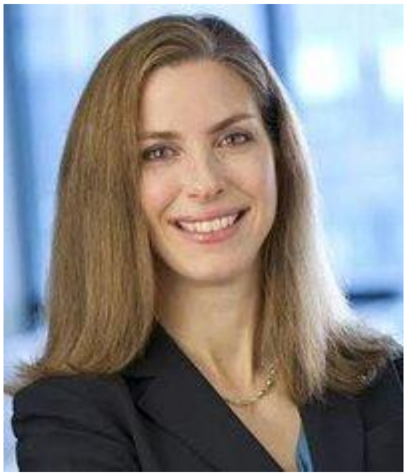

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The U.S. Supreme Court's unanimous decision this week in *Kellogg Brown & Root Services Inc. v United States ex rel. Carter* has something for everyone. It gives defendants an important victory on a statute of limitations question that threatened exposure to civil fraud litigation with no foreseeable expiration date. At the same time, it resolves a circuit split on the scope of the False Claims Act's first-to-file rule in favor of relators, allowing repetitive qui tam actions to go forward once an earlier-filed qui tam lawsuit has been dismissed. While the court's first holding puts to rest a vigorously contested issue, its second holding creates uncertainty and may make it more difficult to settle qui tam disputes.

Stopping the Clock on Civil Fraud Litigation

In a major victory for defendants, the court held that the Wartime Suspension of Limitations Act applies only to criminal offenses.[1] For "any offense" involving fraud against the federal government, the WSLA suspends the statute of limitations while the country is at war until five years after "the termination of hostilities as proclaimed by [the president], with notice to Congress, or by a concurrent resolution of Congress."[2] Relying on "[t]he text, structure, and history of the WSLA," the court rejected the argument that the WSLA tolls civil claims alleging fraud against the government.[3]

The court "beg[an] with the WSLA's text," focusing on the statute's use of the term "offense," which "is most commonly used to refer to crimes."[4] The court acknowledged that the term "offense" is "sometimes" used more broadly.[5] However, the court pointed out, the term is never used to denote a civil violation in any of the "hundreds" of times it appears in Title 18 of the United States Code, where the WSLA is codified.[6]

The court found "perhaps the strongest support" for its conclusion in the legislative history of the WSLA.[7] As originally enacted in 1921 and amended in 1942, the WSLA applied to "offenses ... now indictable under any existing statutes." The parties did not dispute that the 1921 and 1942 versions of the statute applied only to crimes, and the court found that the "retention of the same term" — "offense" — in later versions of the statute "suggests that no fundamental alteration was intended."[8] Although later versions of the statute deleted the language "now indictable under any existing statutes," that did not suggest an intent to apply the statute to civil offenses. The more plausible explanation, the court reasoned, was that the amendments were intended to change the WSLA from "a retroactive measure designed to deal exclusively with past fraud into a measure applicable to future fraud as well."[9] Therefore, Congress removed the "now indictable" language that limited the statute's application to past crimes, but did not intend to broaden the statute's application to civil offenses.

Notably, although the case before the court in *Carter* was a qui tam action under the civil False Claims Act, the court's holding is not limited to that context. The court very clearly held that the WSLA "applies only to criminal offenses."[10] Thus, the WSLA has no effect on the statute of limitations for any civil claim, whether asserted under the FCA or some other authority, or whether asserted by a qui tam relator or by the government itself.

Given the armed conflicts in which the country has been involved since Sept. 11, 2001, and the lack of clarity around whether and when such conflicts have begun and ended,[11] the court's ruling provides putative defendants with much-needed certainty regarding their potential exposure to civil fraud litigation.

First-to-File Ruling Creates Uncertainty

The court, however, created substantial uncertainty with its second holding relating to the FCA's first-to-file rule.

The qui tam provisions of the FCA deputize private individuals, called "relators," to pursue FCA claims on behalf of the government. Depending on the nature and extent of his or her contribution to the case, a relator gets a bounty of between 15 to 30 percent of any recovery to the government. The FCA places certain limitations on qui tam lawsuits, however. One such limitation is the first-to-file rule, which provides that, "when a person brings an action" under the qui tam provisions of the FCA, no one other than the government may bring "a related action based on the facts underlying the pending action."[12]

Lower courts had split over whether this rule bars a qui tam action filed after an earlier related qui tam action has been dismissed.[13] Relying on the "ordinary meaning" of the word "pending," the Supreme Court held that the rule bars related qui tam actions "while the earlier suit remains undecided" but not "once it is dismissed."[14] The court was unconvinced that the term "pending action" was intended to refer back, as shorthand, to the "action" mentioned in the first clause of the rule. That task, the court reasoned, could have been accomplished in "equally economical ways" — for example, by replacing "pending" with "earlier" or "prior."[15]

Additionally, the court found that an interpretation barring repetitive qui tam lawsuits in perpetuity "would lead to strange results that Congress is unlikely to have intended."[16] The court offered the example of a case dismissed for failure to prosecute and asked, rhetorically, "Why would Congress want the abandonment of an earlier suit to bar a later potentially successful suit that might result in a large recovery for the Government?"[17]

The answer to that question actually can be found in the FCA's legislative history, which reflects that the first-to-file rule was enacted "to clarify in the statute that private enforcement under the civil False Claims Act is not meant to produce ... multiple separate suits based on identical facts and circumstances."[18] Additionally, the government and taxpayers benefit when fraud is reported promptly, a purpose furthered by a rule that creates a "race to the courthouse."[19] The design of the statute also answers the question. While Congress barred relators from pursuing related qui tam actions, it plainly did not prevent the government from doing so. Under any interpretation of the first-to-file rule, the abandonment of an earlier qui tam lawsuit would not preclude the government from pursuing a meritorious claim on its own.

The court, however, did not analyze the FCA's legislative history or the overall statutory design — a peculiar aspect of the decision given the emphasis the court placed on these factors in the first part of its opinion interpreting the WSLA. Indeed, the court seemed to shy away from such an analysis in the FCA context, saying that "[t]he False Claims Act's qui tam provisions present many interpretive challenges, and it is beyond our ability in this case to make them operate together smoothly like a finely tuned machine."[20]

Whatever the merits of the court's analysis of the first-to-file rule, there is little doubt that its ruling on that issue creates substantial uncertainty for defendants. The court itself acknowledged that there "is some merit" to the argument that its interpretation will "produce practical problems."[21] Defendants now face the prospect of serial copycat qui tam lawsuits. As the court noted, settling a qui tam action will be challenging when a new qui tam action making the same allegations can be filed as soon as the ink dries on the settlement with the first relator.

Tide of Qui Tam Litigation Unlikely to Recede

Defendants, of course, are not without other defenses to serial qui tam lawsuits, but those defenses will have to play out in the lower courts.

The court left open the possibility that "the doctrine of claim preclusion may protect defendants if the first-filed action is decided on the merits."[22] However, it expressly declined to decide that issue, which was not before it.

The FCA's public disclosure rule may also provide some protection to defendants, but that rule has its own limitations. It requires the dismissal of a qui tam lawsuit making allegations "substantially similar" to ones that have been publicly disclosed — as would happen when an earlier-filed, related qui tam complaint is unsealed[23] — but only if the relator fails to qualify as an "original source."[24] The "original source" standard was redefined through statutory amendments in 2010 and has been the subject of substantial litigation. Further litigation of that issue can be expected, particularly in light of the court's decision in *Carter*.

The statute of limitations, unhindered by the WSLA, may provide an additional defense. At a minimum, it places an outer time limit on the ability of relators to pursue repetitive qui tam claims. One consequence of the court's decision in *Carter* is that it makes it more likely that a defendant will be able to foreclose repetitive litigation the longer a first-filed case remains pending.

If one thing is clear after *Carter*, it is that the burgeoning tide of qui tam litigation will not abate any time soon. The FCA's bounty provision, and the massive amounts typically at stake in FCA litigation, provide great incentives for relators to pursue qui tam actions. Each year, the government recovers billions of dollars under the FCA, and relators take home huge amounts as their share of those recoveries. In 2014 alone, relators collectively garnered over $430 million as their share of amounts recovered by the government.[25] It is hardly surprising that today, nearly 90 percent of new civil FCA matters are initiated by relators rather than by the government.[26] While *Carter* clarifies that there is a time limit on when relators may pursue their lawsuits, the court's interpretation of the first-to-file rule is likely to encourage more qui tam litigation.

—By Blanca F. Young, Munger Tolles & Olson LLP

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[1] Kellogg Brown & Root Services, Inc., et al. v. United States ex rel. Carter, 2015 WL 2456621 at *5, 8, __ S.Ct.___ (May 26, 2015) ("Carter")

[2] 18 U.S.C. § 3287

[3] Carter, 2015 WL 2456621 at *5.

[4] Id. at *6.

[5] Id.

[6] Id.

[7] Id. at *7.

[8] Id.

[9] Id. at *7-8.

[10] Id. at *5.

[11] These questions remain unresolved. See, e.g., id. at *8, n. 4 ("this holding obviates any need to determine … whether 'war' in the 1948 Act applies only when Congress has formally declared war").

[12] 31 U.S.C. § 3730(b)(5)

[13] Contrast, e.g., United States ex rel. Carter v. Halliburton Co., 710 F.3d 171 (4th Cir. 2013), aff'd sub nom Kellogg Brown & Root Services, Inc., et al. v. United States ex rel. Carter, 2015 WL 2456621, __ S.Ct.___ (May 26, 2015) with United States ex rel. Shae v. Cellco Partnership, 748 F.3d 338 (D.C. Cir. 2014).

[14] Carter, 2015 WL 2456621 at *8-9.

[15] Id.

[16] Id. at *9.

[17] Id.

[18] S. Rep. No. 99-345, at 25 (1986)

[19] See United States ex rel. LaCorte v. SmithKline Beecham Clinical Labs., Inc., 149 F.3d 227 (3d Cir. 1998), United States ex rel. Branch v. Allstate Ins. Co., 560 F.3d 371, 377 (5th Cir. 2009)

[20] Carter, 2015 WL 2456621 at *9.

[21] Id.

[22] Id.

[23] See. e.g., United States ex rel. Boothe v. Sun Healthcare Group, Inc., 496 F.3d 1169, 1173-1174 (10th Cir. 2007); United States v. Hughes Aircraft Co., 162 F.3d 1027, at 1032-33 (9th Cir. 2001).

[24] 31 U.S.C. §3730(e)(4)

[25] Fraud Statics, October 1, 1987-September 30, 2014, Civil Division, U.S. Dep't of Justice (Nov. 20, 2014), available at http://www.justice.gov/civil/pages/attachments/2014/11/21/fcastats.pdf

[26] Id.
