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Attys React To Supreme Court's Wartime Limits To FCA Ruling

Law360, New York (May 26, 2015, 7:51 PM ET) -- On Tuesday, the Supreme Court overturned a Fourth Circuit decision and held that the Wartime Suspension of Limitations Act applies only to criminal fraud claims and not civil fraud cases, including False Claims Act suits. Here, attorneys tell Law360 why the decision in Kellogg Brown & Root Services Inc. et al. v. U.S. ex rel. Carter is significant.

Wilson G. Barmeyer, Sutherland Asbill & Brennan LLP

"In light of the ever-shifting and evolving nature of modern military conflicts, the Supreme Court's ruling will restore some certainty to the statute of limitations for civil fraud actions, such as FCA claims. It removes a potentially open-ended tolling that would end only when the president or Congress formally proclaims the termination of hostilities. The statute contemplates formal declarations of war and ending of hostilities, similar to the wars fought in the early part of the 20th century, and the statute is less suited to modern conflict."

Douglas W. Baruch, Fried Frank Harris Shriver & Jacobson LLP

"The court's unanimous decision today is welcome news for those who seek to restore a modicum of rationality to False Claims Act enforcement. In the few years since the Justice Department 're-discovered' the WSLA, companies have been forced to settle False Claims Act cases rather than face the prospect of extensive damages unbounded by any limitations period. On its face, and given its history and purpose, the WSLA never should have been applied in the False Claims Act arena in the first instance."

Steve Cash, Day Pitney LLP

"Justice [Samuel] Alito's decision is clear and reasonable, [and] addresses the anomalous result of our current state of apparently endless war — that the statute of limitations is always tolled, forever. By making clear that civil matters are not subject to the WSLA, the court allows the critical function of statutes of limitations — allowing parties to know when over is really over, and when they can look forward."

Steven Cottreau, Clifford Chance LLP

"Today's wartime tolling ruling continues a pattern of rejecting expansive government interpretations of statutes of limitations that ignore the value of repose. Two years ago, the Supreme Court in Gabelli rejected the SEC's similarly expansive view of the statute of limitations governing civil penalty actions. In light of today's ruling rejecting wartime tolling in civil cases, the government may feel pressure to

pursue stale fraud claims in criminal actions where wartime tolling may operate to extend the statute of limitations."

Rachel Geman, Lieff Cabraser Heimann & Bernstein LLP

"Pending means pending and fair is fair. Carter supports that defendants cannot stamp out meritorious claims of fraud from the get-go just because, once upon a time, there had been a related lawsuit that was dismissed for any number of reasons."

Larry A. Golston, Beasley Allen Crow Methvin Portis & Miles PC

"The Supreme Court's decision concerning the WSLA was foreseeable. The decision highlights the need for relators and relator's counsel to file viable claims promptly to avoid any unnecessary delays."

David J. Leviss, O'Melveny & Myers LLP

"Today's decision has something for everyone to like and for everyone to complain about. It is not surprising, given the tone of the oral arguments, that the Supreme Court ruled against relator on the WSLA argument. To hold otherwise, in the current era of nearly perpetual global conflict, would have created a limitless statute of limitations under the FCA. But it is surprising that the court went out of its way to reach the first-to-file question. In doing so, they injected unnecessary uncertainty into the settlement process. It will be more difficult now for defendants to be confident that they are achieving final resolution when they settle a qui tam. Defendants will need to factor this uncertainty into their assessment of the settlement value as well as the risk of future litigation."

Daniel N. Marx, Foley Hoag LLP

"Although the scope of liability under the FCA grows more expansive all the time, the unanimous decision by the Supreme Court in KBR is a welcome respite from that trend. Focused narrowly on the language, structure and history of the WSLA, the court was not persuaded to adopt a more whistleblower-friendly approach based on the underlying statutory purpose of the FCA. In fact, Justice Alito's opinion did not even mention the Solicitor General's argument that applying the WSLA tolling provision to civil FCA actions would further the government's critical interest in policing wartime fraud."

Jackson Moore, Smith Anderson Blount Dorsett Mitchell & Jernigan LLP

"The Supreme Court clarified that the first-to-file bar does not prevent later FCA actions if the earlier-filed actions are dismissed on non-merits grounds. In other words, a second-filed FCA suit can survive if another relator's first-filed suit is dismissed. When that happens, the first-filed suit is no longer 'pending,' as that word appears in the statute, and the second action can proceed."

Lathrop Nelson, Montgomery McCracken Walker & Rhoads LLP

"The court in KBR provided some finality for civil FCA cases by limiting the WSLA to criminal proceedings, thus precluding plaintiffs from relying upon the WSLA to extend the statute of limitations in civil matters in times of war. Yet, notably, the court declined to address the scope and applicability of the WSLA in criminal matters, including whether the 2008 amendments were retroactive and the scope and extent of the term 'at war' in the statute. Given that the president did not announce the end of the combat mission in Afghanistan until December 2014, the government may well attempt to rely upon the WSLA in criminal matters, including offenses that occurred prior to the 2008 amendments, and open questions remain as to when the statute of limitations begins and how long it tolls in criminal matters."

Mark Olinsky, Sills Cummis & Gross PC

“The unanimous decision in KBR provides clarity on two issues of importance to healthcare companies and others that are often the subject of qui tam actions. First, the holding that the WSLA applies only to criminal offenses means that the six-year limitations period (with 10-year maximum) will be the outer limit for filing a timely FCA claim. Second, the holding that an FCA claim ceases to be ‘pending’ once dismissed means that FCA defendants must be prepared to litigate claims fully because the first-to-file bar will not preclude a new lawsuit after settlement or dismissal of a similar claim.”

Robert Rhoad, Crowell & Moring LLP

“The court’s finding that the WSLA does not apply to civil fraud cases was a predicted and well-reasoned result. The unanimity of the court is consistent with other FCA cases it has decided recently. Although there was only limited need for the court to delve into the second issue of whether a dismissed case remains ‘pending’ to preclude a follow-on case involving similar allegations, the court’s determination that it does not was really an academic exercise as claim preclusion through the public disclosure defense and res judicata remain defenses to many follow-on lawsuits.”

Daniel S. Ruzumna, Patterson Belknap Webb & Tyler LLP

“The Fourth Circuit’s holding would have had the practical effect of tolling FCA actions indefinitely, eviscerating the relevant statute of limitations.The Supreme Court’s decision that the WSLA does not apply to civil actions leaves intact jurisprudence dismissing untimely FCA claims. Equally significant is the court’s holding that a dismissed action is not ‘pending’ and therefore does not bar a subsequent FCA suit under the ‘first-to-file’ bar. In so holding, the court was clearly concerned that adopting this absolute rule could foreclose meritorious FCA suits, where a prior action was ‘dismissed for a reason having nothing to do with the merits,’ as was the case in Carter.”

Andrew Schilling, BuckleySandler LLP

“The Justice Department has been aggressively using the FCA to target banks and mortgage companies for actions leading up to the mortgage crisis. Its novel interpretation of the WSLA had given the government a hook to look back earlier in time for cases than it otherwise could have under the FCA. Today’s decision is significant because it restores the traditional time limits of the FCA, and more of the government’s claims in these crisis-era cases will be time-barred by the application of the Act’s 6-year statute of limitations and 10-year statute of repose.”

Scott Simmer, Simmer Law Group PLLC

"In its 'first-to-file' decision, the Supreme Court has concluded that the statute means exactly what it says and will allow meritorious FCA cases to proceed as long as no prior claim is pending. This common-sense ruling is a victory for relators and taxpayers alike.”

--Editing by Emily Kokoll.
