Legal Sidebar

Supreme Court Ruling Affects the Future of Whistleblower Suits Against Government Contractors

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In *Kellogg Brown & Root Services Inc. v. U.S. ex rel. Carter*, the Supreme Court ruled 9-0 on the ability of a former employee of a military contractor to use the Wartime Suspension of Limitations Act (WSLA) to toll the applicable statute of limitations to pursue a time-barred False Claims Act (FCA) suit against his former employer. Benjamin Carter, a reverse-osmosis water purification operator, has alleged that KBR and its former parent company Halliburton fraudulently billed the U.S. Government for work carried out in Iraq that was never actually completed. The Court held that the WSLA only suspends the statute of limitations (i.e., the time period in which a party may bring a lawsuit) on criminal prosecutions and therefore cannot be used for civil claims such as those brought under the FCA. The Court also held that the FCA's first-to-file bar does not apply to bar a second case once a similar first-filed case is dismissed.

The FCA allows third parties to pursue fraud claims against those that are alleged to have defrauded the U.S. government. Known as a *qui tam* action, this type of suit allows for a citizen to sue on behalf of the government and receive a portion of the proceeds (with the remainder going to the government). The third party must first approach the government with the claim; the government can then choose to prosecute the case itself, or allow the third party to proceed while standing in the government's shoes. Third parties that successfully pursue FCA claims are entitled to up to 30 percent of any monetary judgment. Generally, the FCA bars claims brought more than six years after the alleged fraudulent activity occurred. The FCA also includes a first-to-file bar which provides that once a party brings an action, no person other than the government may bring a related action based on the same facts as the "pending" action.

The WSLA suspends the statute of limitations on claims for "any offense" involving fraud against the government during wartime. In its original form, the act suspended the statute of limitations for offenses "now indictable under any statute," but in 1944 that language was removed, leading to the WSLA's current applicability to "any offense."

In this case, the FCA claim was brought by a former employee of KBR who had been sent to Iraq in 2005 to set up water-purification systems on American bases. According to him, his employer was billing for services that were never conducted. He filed an FCA suit against his former employer, but that suit was dismissed in 2010 after a similar case was discovered (due to the first-to-file bar). That dismissal led to the employee filing the claim at issue in this case in 2011, more than six years after the alleged fraud occurred. Because the case was now barred by the six-year statute of limitations (SOL) under the FCA, he sought to toll the SOL by invoking the WSLA. The district court dismissed the claim, because it held both that the WSLA does not apply to civil claims of fraud, and also that the first-to-file bar was triggered by the earlier similar claim even though that claim had been dismissed. The U.S. Court of Appeals for the Fourth Circuit agreed that the WSLA applied only to civil claims, but held that the first-to-file bar ceases to apply once a case has been dismissed.

Writing for a unanimous Court, Justice Alito focused on interpreting the terms "any offense" in the WSLA, and "pending" in the FCA. The third party bringing the FCA claim argued that "any offense" includes both criminal and civil claims of fraud, but KBR argued that Congress never intended to broaden the reach of the WSLA that much. The Court held that the history and plain language of the term "any offense" shows that it only applies to criminal claims. Also critical to the Court's analysis was Congress' intent; the Court reasoned that Congress couldn't have intended to change the operation of the Act in such a major way through such a subtle change in language.

As for the meaning of "pending" in the FCA's first-to-file bar, the Court held that it ceases to apply once the first-filed case has been dismissed. To hold otherwise, that a case could be "pending" even after it is dismissed, would mean that "*Marbury v. Madison* [] is still pending. So is the trial of Socrates."

Although healthcare fraud has accounted for the majority of FCA claims in recent years, the FCA has historically been—and remains—a key legal avenue for obtaining civil remedies from defense contractors that defraud the federal government. The Court's ruling in this case limits the ability of third parties, such as former employees of government contractors, to bring civil FCA claims against those contractors to recover damages incurred during wartime on behalf of the government and taxpayers if the third party files its claim more than six years after the alleged fraudulent conduct occurred. On the other hand, the existence of a previous similar claim that has been dismissed would not prevent a new third party from filing a claim. If that initial claim had been allowed to block all future similar claims, it is possible that government contractors would be motivated to quickly settle such claims in order to protect themselves against future claims. The Court's decision, however, leaves unanswered the question of whether a second FCA claim could be pursued if the first-filed claim was decided on the merits instead of being dismissed on procedural grounds.