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ALERT

Supreme Court Announces that it Will Review Two Major Issues under the False Claims Act

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This morning, the Supreme Court of the United States announced that it will review an important and controversial decision from the Fourth Circuit under the False Claims Act (FCA), *United States ex rel. Carter v. Halliburton Co*. The Court will decide two hot-button issues that have major implications for companies that do business with the Government: whether and to what extent the Wartime Suspension of Limitations Act (WSLA) suspends the FCA's statute of limitations while the country is at war; and the reach of the "first-to-file" rule, which bars a whistleblower's FCA action based on allegations similar to those previously made by a different whistleblower. The Court's decision to grant review is good news, as it gives hope that the Court will curtail a troubling recent trend in which courts have applied the WSLA to toll the FCA's statute of limitations almost indefinitely, and that it might clarify the law around the first-to-file rule and reverse decisions that have upended the rule's central purpose.

In *Carter*, the whistleblower alleged that the contractor-defendant submitted false invoices and timesheets to the Government for services on military bases in Iraq. The whistleblower filed his initial complaint in 2006; that case was dismissed, as were multiple subsequent complaints before he filed again in 2011. After the United States declined to intervene, the district court dismissed the 2011 complaint with prejudice because: (1) the case was stale under the FCA's statute of limitations, which bars FCA claims brought "more than 6 years after the date on which the violation . . . is committed," 31 U.S.C. § 3731(b); and (2) two separate cases based on similar allegations barred the case under the first-to-file rule, which prevents any "person [from] . . . bring[ing] a related action based on the facts underlying the pending action," 31 U.S.C. § 3730(b)(5).

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The Fourth Circuit reversed this ruling in March of last year. The court held that the WSLA, which tolls the statute of limitations "applicable to any offense . . . involving fraud or attempted fraud against the United States" while the country is at war, 18 U.S.C. § 3287, applies to the FCA, even absent a formal declaration of war. The court thus held that the FCA's statute of limitations has been tolled since Congress's 2002 authorization to use military force in Iraq, and would be tolled until the President or Congress formally terminates hostilities. The court rejected the argument that the WSLA, a criminal code provision that applies to "any offense. . . involving fraud," might apply to criminal FCA *offenses* but not civil *claims*. The court also rejected the argument that the WSLA, which was enacted during World War II to preserve the Government's ability to police fraud while its resources are diverted to war efforts, applies only when the Government is a party (which it was not in this case).

The Fourth Circuit also held that the case was not barred by the first-to-file rule. Though the first-filed cases alleging similar facts were pending when the whistleblower filed his most recent complaint, they had been dismissed while his case was pending. On this basis, the court concluded that the first-to-file bar did not apply, reasoning that "once a case is no longer pending the first-to-file bar does not stop a relator from filing a related case."

In granting review, the Supreme Court has the opportunity to stem a troubling recent trend and restore proper limits to the FCA's reach. Since the Fourth Circuit decided *Carter* in March 2013, courts that have considered the WSLA's application to the FCA have almost uniformly held that the WSLA suspends the statute of limitations for *all* FCA claims whenever Congress has authorized military actions. These decisions have profound implications for the FCA's reach, reviving claims dating back to 2002 that would otherwise be long stale and suspending the statute of limitations almost indefinitely while the country wages two wars. A decision last month interrupted this trend. On June 19, the District Court for the District of Columbia, in deciding a motion to dismiss a high-profile FCA case against Lance Armstrong and other defendants related to blood doping and performance-enhancing drug use on the United States cycling team, held that the WSLA does not apply to the FCA because fraud is not an "essential ingredient" of the FCA, which requires "no proof of specific intent to defraud." 31 U.S.C. § 3729(b)(1)(B). This ruling coupled with the Court's decision to review *Carter* may mark a turning point in this important and rapidly developing area of law.

The Court also has the opportunity to clarify the law around the first-to-file rule and reverse decisions that have unreasonably limited the rule's reach. In holding that the rule does not bar a whistleblower case based on facts similar to a separate case if the prior case has already been dismissed, the Fourth Circuit joined the Seventh and Tenth Circuits but diverged from numerous other courts, including the First, Fifth and Ninth Circuits. As the contractors argued vigorously in their petition for the Court's review, permitting claims based on the same facts of previously-dismissed cases nullifies the purpose of first-to-file rule—to encourage whistleblowers to alert the Government to fraud *of which it is not already aware*—and permits an infinite series of claims based on the same facts so long as no two cases coincide.

Companies facing FCA claims or evaluating potential claims that implicate the FCA's statute of limitations should consider all possible arguments that the WSLA does not apply to the FCA. Potential arguments include: that the WSLA does not apply to civil FCA claims; that, consistent with the statute's purpose, it only applies to

cases in which the United States is a party, and only to claims involving wartime contracting; and that the FCA's statute of repose still bars claims brought more than ten years after the alleged violation. Though some courts have rejected these arguments, as these recent developments demonstrate, the WSLA's application to the FCA is a new and evolving issue, and courts are apt to decide it differently.

By the same token, companies facing whistleblower FCA claims should conduct a thorough search for previously-filed claims based on similar facts. The first-to-file rule can bar a case even with differences in the parties, jurisdictions, or allegations, as long as the two cases involve the same essential facts. Vigilance and creativity are critical in preparing this defense. In addition to scouring media reports and public dockets, an FCA defendant can pursue limited unsealing of complaints involving the same defendants, contracts, or other material facts through filing a motion with the court, negotiating with the U.S. Department of Justice, or some combination thereof. These proactive measures can permit an FCA defendant to nix a whistleblower case without reaching the merits. In the meantime, companies that do business with the Government should keep a close eye on the Court's review of the *Carter* decision.

** Wiley Rein summer associate W. Andrew Lanius contributed to this alert.*