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ALERT

Supreme Court Rules the Statute of Limitations of the Civil False Claims Act is Not Tolled During Wartime

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This morning, a unanimous Supreme Court of the United States decision in *Kellogg Brown & Root Services, Inc. v. United States ex rel. Carter* restored the normal operation of the civil False Claims Act's (FCA) statute of limitations provisions but allowed repetitive FCA suits to go forward so long as no two cases coincide. Wiley Rein previously analyzed this case and anticipated this result following oral argument.

In *Carter*, the Court considered whether the Wartime Suspension of Limitations Act (WSLA), which tolls the statute of limitations for "any offense . . . involving fraud or attempted fraud against the United States," 18 U.S.C. § 3287, applied to the civil FCA. Ordinarily, the FCA's statute of limitations provisions require that a *qui tam* action be brought within six years of a violation or within three years of the date by which the United States should have known about a violation. 31 U.S.C. § 3731(b). In no circumstances may a suit be brought more than 10 years after the date of a violation. *Id.* This case came to the Court from the U.S. Court of Appeals for the Fourth Circuit, which had concluded that the WSLA applies to the civil FCA and thus has suspended these statute of limitations provisions since Congress's 2002 authorization to use military force in Iraq. Significantly, the Court took this case despite there being no circuit split on this issue, as the Fourth Circuit was the only federal appellate court to decide it. The Court reversed the Fourth Circuit's decision today, holding that the WSLA applies only to criminal violations because the word "offense" normally connotes criminal liability, the WSLA is located in the criminal code, and the statute's text and history indicate it was meant

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to apply only to criminal offenses.

The Court also held that the FCA's first-to-file bar, which provides that "[w]hen a person brings an action . . . no person other than the Government may intervene or bring a related action based on the facts underlying the pending action," 31 U.S.C. § 3730(b)(5), does not bar subsequent FCA suits based on similar facts as long as the first case has been dismissed. The Court found this to be the only reading of the statute consistent with the plain meaning of the word "pending." While the Court acknowledged that its interpretation of the first-to-file bar may create practical problems for FCA defendants, the Court nevertheless found the language of the statute clear.

The Court's decision does not leave FCA defendants facing duplicative litigation without recourse. As the Court indicated, claim preclusion might protect FCA defendants where the first-filed action is decided on the merits. Additionally, earlier FCA litigation may still trigger other statutory defenses under the FCA, such as the public disclosure bar. This holding also emphasizes the importance of seeking to determine whether there are related *qui tam* actions under seal whenever one suit is revealed. A motion for a limited unsealing of *qui tam* litigation involving the same defendants could allow a defendant to nix a case without reaching the merits.

The Court in *Carter* acknowledged that the FCA *qui tam* provisions "present many interpretive challenges," but at least two issues, the WSLA and successive suits under the first-to-file bar, are now settled. Despite the Court's holding on the first-to-file issue, this decision is good news for companies that do business with the Government. Applying the WSLA to the civil FCA would have suspended the FCA's statute of limitations indefinitely. The Court's unanimous decision restores the proper role of the FCA's statute of limitations and gives greater certainty to contractors that they will not face stale FCA claims.