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Supreme Court Decision in *Kellogg Brown & Root Services, Inc. v. United States ex rel. Carter*

By Jason Popp and Matt Lawson

Last Tuesday, the U.S. Supreme Court issued its opinion in *Kellogg Brown & Root Services, Inc. (KBR) v. United States ex rel. Carter*, resolving two questions that had previously divided lower courts interpreting the federal False Claims Act (FCA): whether the Wartime Suspension of Limitations Act (WSLA) indefinitely tolls the statute of limitations for FCA actions brought during periods of U.S. military conflict, and whether the FCA's "first-to-file" bar applies to qui tam actions that are based on allegations of a previously filed, but dismissed, complaint. The Supreme Court's opinion presents some good news and some bad news for companies that do business with the government, as the Court answered both questions in the negative. Companies will no longer have to defend against FCA allegations that have expired under the FCA's statute of limitations, but they may be forced to defend against duplicative qui tam lawsuits so long as no previously filed lawsuit remains pending.

Wartime Does Not Suspend the Statute of Limitations in Civil Fraud Claims.

In the decision below, a panel of the Fourth Circuit held that the WSLA—a criminal code provision that tolls the statute of limitations for "any offense" involving fraud against the government during times of war—tolls actions brought under the False Claims Act. The Supreme Court reversed, holding that the WSLA applies only to claims of *criminal* fraud. The Court reached this decision through consideration of dictionary definitions of the word "offense" and the place where the WSLA is coded within the United States Code. Specifically, Congress codified the WSLA in Title 18 of the United States Code, which governs "Crimes and Criminal Procedure."

The Court's decision will operate as a bar against civil fraud claims that are filed after the expiration of applicable statutes of limitation. This means that, regardless of whether the nation is at war, FCA actions must be brought within six years of the alleged violation or within three years of the date by which the United States should have known of the violation (subject to a 10-year cap). This decision represents a significant victory for potential FCA defendants given that Congress had previously amended the WSLA to apply both when war is formally declared and when Congress has only authorized "use of force" by the armed services (as it has in the Iraq and Afghanistan military operations).

First-to-File Rule May Not Bar a Second FCA Complaint

The Supreme Court's decision concerning the first-to-file bar was not as helpful to companies doing business with the federal government. That provision states that "[w]hen a person brings an action under [the FCA], 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). The statutory bar—which was intended to create a "race to the courthouse"—had generated a split among lower courts. The Fourth Circuit had held that qui tam actions are not barred by earlier-filed actions that are no longer pending. In other words, the Fourth Circuit held that a previously filed complaint would not bar subsequent qui tam actions once the initial complaint was dismissed so long as the dismissal of the first action did not constitute an adjudication on the merits. Other courts, including panels of the Fifth Circuit and Ninth Circuit, had concluded that a first-filed FCA action bars subsequent, related qui tam actions even after the first-filed complaint has been dismissed without prejudice or is otherwise no longer pending. The latter decisions comport with the statute's referential use of the word "pending" and with the legislative purpose of the qui tam provisions, which were intended to incentivize prompt disclosure of government fraud and discourage parasitic lawsuits.

The Supreme Court held, however, that "pending" means undecided, and that a lawsuit is not pending under the first-to-file bar once it has been dismissed. The unfortunate result of this decision is that companies will be forced to defend against copycat litigation that the first-to-file bar was designed to prevent. Instead of confronting this issue, the Court simply stated that "*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."

Conclusion

The Supreme Court's decision in *KBR* is a mixed bag for FCA defendants. While companies will no longer have to defend against statutorily expired allegations, they may face the prospect of defending duplicative and identical lawsuits so long as only one action remains pending at a time. *KBR* will significantly impact FCA practice, and potential FCA defendants—which include any company that does business with the government—should consider the opinion's ramifications on current and future claims.

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If you have any questions or would like additional information, please contact your Alston & Bird attorney or any of the following:

Craig Carpenito
Co-Chair
212.210.9582
craig.carpenito@alston.com

Michael L. Brown
Co-Chair
404.881.7589
mike.brown@alston.com

George Abney
404.881.7980
george.abney@alston.com

Randall L. Allen
404.881.7196
randall.allen@alston.com

Jeffrey A. Belkin
404.881.7388
jeff.belkin@alston.com

Donna P. Bergeson
404.881.7278
donna.bergeson@alston.com

Cathy L. Burgess
202.239.3648
cathy.burgess@alston.com

Mark T. Calloway
704.444.1089
mark.calloway@alston.com

Marianne Roach Casserly
202.239.3379
marianne.casserly@alston.com

Steven M. Collins
404.881.7149
steve.collins@alston.com

Thomas E. Crocker
202.239.3318
thomas.crocker@alston.com

Christina Hull Eikhoff
404.881.4496
christy.eikhoff@alston.com

Rodney J. Ganske
404.881.4996
rod.ganske@alston.com

Mary C. Gill
404.881.7276
mary.gill@alston.com

James A. Harvey
404.881.7328
jim.harvey@alston.com

Katherine E. Hertel
213.576.2600
kate.hertel@alston.com

H. Douglas Hinson
404.881.7590
doug.hinson@alston.com

J. Andrew Howard
213.576.1057
andy.howard@alston.com

Brett D. Jaffe
212.210.9547
brett.jaffe@alston.com

William H. Jordan
404.881.7850
bill.jordan@alston.com

Edward T. Kang
202.239.3728
edward.kang@alston.com

Louis A. Karasik
213.576.1148
lou.karasik@alston.com

John L. Latham
404.881.7915
john.latham@alston.com

Dawnmarie R. Matlock
404.881.4253
dawnmarie.matlock@alston.com

Kimyatta E. McClary
404.881.7982
kimyatta.mcclary@alston.com

Wade Pearson Miller
404.881.4971
wade.miller@alston.com

William R. Mitchelson
404.881.7661
mitch.mitchelson@alston.com

Bruce Pasfield
202.239.3585
bruce.pasfield@alston.com

Kimberly K. Peretti
202.239.3720
kimberly.peretti@alston.com

Jason Popp
404.881.4753
jason.popp@alston.com

T.C. Spencer Pryor
404.881.7978
spence.pryor@alston.com

Theodore J. Sawicki
404.881.7639
tod.sawicki@alston.com

Brian Stimson
404.881.4972
brian.stimson@alston.com

Jason M. Waite
202.239.3455
jason.waite@alston.com

Kyle G.A. Wallace
404.881.7808
kyle.wallace@alston.com

Kenneth G. Weigel
202.239.3431
ken.weigel@alston.com

R. Neal Batson
404.881.7267
neal.batson@alston.com

Angela T. Burnette
404.881.7665
angie.burnette@alston.com

Eileen M.G. Scofield
404.881.7375
eileen.scofield@alston.com

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