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GOVERNMENT SUPPORTS INDEFINITE TOLLING OF CIVIL FRAUD CASES UNDER WARTIME SUSPENSION OF LIMITATIONS ACT

The Solicitor General has asked the Supreme Court of the United States not to review a recent decision of the U.S. Court of Appeals for the Fourth Circuit applying the Wartime Suspension of Limitations Act ("WSLA") to toll a False Claims Act ("FCA") case brought by a private relator against a wartime contractor. According to the government, the WSLA tolls the statute of limitations for "all frauds" against the United States—including civil FCA claims brought by *qui tam* plaintiffs —for a potentially indefinite period of time, unless and until there is a formal Presidential proclamation that the conflicts in Iraq and Afghanistan have ended. The position asserted by the government, which has already been adopted in the Fourth Circuit and in several district courts in other circuits, could have sweeping consequences for potential FCA defendants in a wide range of industries, who may face years of indefinite tolling, even for conduct unrelated to wartime efforts and even in cases where the government chose not to intervene in a *qui tam* action.

THE FALSE CLAIMS ACT AND THE WARTIME SUSPENSION OF LIMITATIONS ACT

The FCA was enacted in 1863 to combat fraud against the Union by defense contractors. However, the "Lincoln Law," as it was commonly known, was not limited to any particular type of fraud. Today, the FCA provides for, among other things, the imposition of treble damages and statutory penalties against any person who knowingly presents, or causes to be presented, a false or fraudulent claim to the government for payment or approval.

The FCA contains its own statute of limitations, providing that claims must be brought within six years of a violation, or within three years of the date on which the United States knew or reasonably should have known about the violation but in no event more than 10 years after the violation was committed.[1] The government's brief does not address Petitioner's argument that the second portion of this statute is an "absolute provision for repose," that bars the government from ever bringing any action 10 years after a violation, regardless of the WSLA. Petitioners argued that applying the WSLA to toll the claim against them was inconsistent with the Supreme Court's recent decision in *Gabelli v. SEC*, which rejected a claim for indefinite tolling.[2]

Courts have applied the WSLA to prosecute construction contractors charged with fraud during the time period in which the United States has been involved in the Afghanistan and Iraq conflicts. The WSLA was signed into law in 1942, and applied to a wide range of allegedly fraudulent acts in the immediate post-World War II era. But it lay dormant for decades, until in 2006 the government relied on the statute in pursuing criminal charges against contractors involved in the federally-financed Central Artery/Tunnel Project, better known as Boston's "Big Dig." In that case, the District of Massachusetts held that it "makes no difference that the fraud [at issue] involved a construction project unrelated to the Iraqi or Afghani conflicts," and found that the WSLA applied.[3] Since then, a

[1] 31 U.S.C. §3731(b).
[2] *See Gabelli v. SEC*, 133 S.Ct. 1216, 1224 (2013).
[3] *See United States v. Propseri*, 573 F. Supp. 2d 436, 442 (D. Mass. 2008).

number of courts have applied the WSLA to toll civil claims that would otherwise be time-barred, and have found the WSLA continues to toll claims of fraud against the United States because the conflicts in Iraq and Afghanistan have not been formally terminated.[4]

THE PENDING *KBR* LITIGATION

The pending petition for writ of certiorari seeks review of *United States ex rel. Carter v. KBR*, 710 F.3d 171 (4th Cir. 2013), which involves logistical services that KBR provided to the U.S. military in Iraq. In a series of complaints, the *qui tam* relator alleged that KBR had fraudulently billed the United States for services related to water purification. The operative complaint was filed in June 2011, slightly more than six years after the fraudulent billing alleged in the complaint. The government opted not to intervene in the case, and KBR moved to dismiss on the grounds that (1) the WSLA did not apply to toll Carter's claims, and (2) an already-pending FCA suit filed by a different relator was sufficiently "related" to Carter's claims that Carter's suit could not survive the FCA's "first to file" provision.

The district court granted KBR's motion to dismiss, reasoning that the WSLA did not apply to claims under the FCA brought by relators. On appeal, a divided Fourth Circuit panel reversed. The majority held that the WSLA applies to all civil actions, including FCA claims brought by relators, and that the WSLA does not require a formal declaration of war to trigger its tolling provisions. The court therefore determined that the United States was "at war" beginning with Congress's passage of the Authorization for the Use of Military Force against Iraq on October 11, 2002.

The court then turned to the question of when tolling ends under the WSLA, which requires that termination of a conflict for WSLA purposes be "proclaimed by a Presidential proclamation, with notice to Congress, or by a Concurrent resolution of Congress." The Fourth Circuit did not analyze the question extensively, concluding simply that the "[n]either Congress nor the President had met the formal requirements" of the WSLA for terminating the period of suspension.

Finally, the court held that the WSLA's tolling provision was available to relators even in cases where the government did not intervene. Reasoning that it could deviate from the "literal language" of the statute only where the statute would lead to "absurd results" or "defeat the intent of Congress," the court determined that to give relators' civil claims the benefit of the WSLA would still further the Congressional purpose of rooting out fraud during times of war.

Judge G. Steven Agee dissented with respect to the majority's application of the WSLA. His dissent primarily concerned the appropriateness of relators' ability to make use of the WSLA. Reasoning that the triggering and terminating provisions of the WSLA are "both related to and solely controlled actions of the United States government" rather than of relators, he concluded that "it seems odd" to conclude that a private plaintiff should be entitled to the same tolling provisions.

KBR'S PETITION FOR CERTIORARI

Following the Fourth Circuit's application of the WSLA to the relator's FCA claims, KBR petitioned the Supreme Court for a writ of certiorari. Even though the government elected not to intervene in the FCA suit, the Supreme Court invited the views of the Solicitor General, whose recent brief opposes a grant of certiorari.

[4] *See, e.g., United States v. Pfluger*, 685 F.3d 481, 485 (5th Cir. 2012); *United States v. Wells Fargo Bank, N.A.*, 972 F. Supp. 2d 593, 610 (S.D.N.Y. 2013); *United States v. BNP Paribas SA*, 884 F. Supp. 2d 589 (S.D. Tex. 2012).

In its petition, KBR argues that the Fourth Circuit's approach to the WSLA is out of step with Supreme Court precedent requiring a narrow construction of the WSLA. The petition also references the Supreme Court's recent decision in *Gabelli v. SEC*, which held that to "extend [a] limitations period to many decades" would "thwart the basic objective of repose underlying the very notion of a limitations period."[5] In this context, KBR emphasizes the repose provision to the FCA's discovery rule, which provides that while the United States may bring an action "3 years after the date" that material facts are discovered, but "in no event" more than 10 years after the violation. To allow the WSLA to apply without limit, according to KBR, risks "indefinite tolling" that the Supreme Court has rejected in *Gabelli*. In KBR's view this presents "grave implications" for defendants who might have to "defend against stale fraud claims years or even decades later, as memories fade and helpful evidence is lost."

THE GOVERNMENT'S POSITION ON THE APPLICATION OF THE WSLA TO QUI TAM FCA CASES

In opposing certiorari, the government argues that the WSLA's application does not turn on the nature of the plaintiff, but on the "nature of the offense alleged." This, in the government's view, means that there is no distinction between FCA suits filed by relators and suits in which the government elects to intervene or brings of its own right: the WSLA can apply to toll both. The government's argument is rooted in well-established case law that the WSLA applies to both civil and criminal fraud claims. As the government notes, application of the WSLA to both types of claims has been uniformly adopted by all of the appeals courts that have considered the question. Notably, though, the government's brief explains that the Court's invitation "prompted further reexamination within the government on the question." Such "reexamination" is unusual given the near-uniformity of lower courts on the question.

Even though the question whether the WSLA can apply to both criminal and civil fraud claims is largely settled, less clear is whether that holding can be easily extended to allow the WSLA to apply to both cases brought by the government and those brought by relators. With respect to the argument that the WSLA should be primarily concerned with government resource constraints during times of natural exigency, the government's brief even concedes that it is "natural" that a statute concerning fraud against the government Congress might "focus[] on the practical exigencies confronting federal officers." The text of the WSLA, however, simply provides no basis in the government's view for distinguishing between FCA cases brought by the government and those brought by relators.

POTENTIAL IMPACT OF SUPREME COURT DECISION

The application of the WSLA to the FCA presents important questions of risk and liability for companies that might face allegations of fraud or false claims. Under the Fourth Circuit's interpretation, even an FCA case brought by a private relator can be tolled until five years after a formal proclamation ending a war or other military conflict. In the context of lengthy and ill-defined conflicts such as the war on terror and the United States' operations in Iraq and Afghanistan, the WSLA can therefore expose companies to potential liability well beyond the period of time that would typically be expected in FCA cases. For instance, if a suit alleged fraud against the United States in late 2002, the typical FCA statute of limitations would bar suits not filed before 2008, or, using the discovery rule, within 3 years of learning of the underlying facts, but in no event later than 2012. Under the WSLA, by contrast, even if the President formally proclaimed to Congress today that the wars in Afghanistan and Iraq were over, relators and the government would still have until 2019 to file suit.

[5] *See Gabelli v. SEC*, 133 S.Ct. 1216, 1223 (2013).

This result is even more striking outside of the war fraud context. While one might expect contracts related to armed conflicts and war efforts to have tolling periods linked to the war itself, nothing in the FCA or WSLA imposes such a limit. Thus, it is possible that the WSLA could be used to enlarge the statute of limitations for FCA or fraud cases in the healthcare industry, government contracting unrelated to defense (such as the "Big Dig" FCA case mentioned above), and various other contexts where fraud against the United States might be alleged. Moreover, because the WSLA purports to toll causes of action until there is a formal proclamation of the termination of hostilities or a resolution of Congress, a statute of limitations could be extended virtually indefinitely if those formalities never occur. Even if the Supreme Court *does* take up the KBR case, which may resolve whether *qui tam* relators can force companies to defend for years or decades any alleged fraud, many of these broader questions are likely to remain unsettled.

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