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High Court Should Reverse 4th Circ.'s Flawed FCA Ruling

Law360, New York (February 26, 2014, 2:39 PM ET) -- The U.S. Supreme Court is currently deciding whether to review the Fourth Circuit's decision in United States ex rel. Carter v. Halliburton Co., 710 F.3d 171 (4th Cir. 2013), holding that the Wartime Suspension of Limitations Act suspended the statute of limitations for civil False Claims Act cases.

In Carter, a former employee filed a whistleblower action under the qui tam provisions of the FCA, alleging that, in early 2005, the defendants submitted false claims to the United States military for water purification services provided during the Iraq War. The United States declined to intervene and the former employee has litigated the action on behalf of the government, as the qui tam provisions permit.

The district court dismissed these claims as barred by the FCA's six-year statute of limitations. The Fourth Circuit reversed. It held that the October 2002 Congressional authorization for the use of armed force in Iraq triggered the WSLA, and that the WSLA suspended the FCA's statute of limitations and will continue to do so until five years after the president or Congress declares a termination of hostilities. Id. at 179.

In addition to Carter, two district courts have held that the WSLA has suspended the FCA statute of limitations. See United States v. Wells Fargo Bank NA, Civ. No. 12-7527, 2013 U.S. Dist. LEXIS 136539 (S.D.N.Y. Sept. 24, 2013) (WSLA triggered by both the war in Afghanistan and the war in Iraq); United States v. BNP Paribas, 884 F. Supp. 2d 589 (S.D. Tex. 2012) (same).

The courts in Carter, Wells Fargo and BNP Paribas erred in ruling that the WSLA applies to noncriminal matters, such as claims asserted under the FCA. In Carter, the defendants have petitioned for a writ of certiorari, and on Oct. 7, 2013, the Supreme Court invited the solicitor general to share the views of the United States. The Solicitor General's Office has not yet responded.

Carter, Wells Fargo and BNP Paribas effectively eliminate the statute of limitations in FCA cases and put businesses in numerous industries, including health care, defense and financial services, at risk of having to defend stale claims seeking potentially ruinous damages under the False Claims Act.

Under these rulings, for an entity that has done business with the government or that has been a Medicare or Medicaid provider within the past 10 years, the statute of limitations has not yet begun to run for False Claims Act claims and will not begin to run for at least five years after the United States' involvement in the armed conflicts in Iraq and Afghanistan end.

Congress originally enacted the WSLA in 1942, during World War II, recognizing that the massive defense procurement effort would invariably present "unscrupulous persons" with opportunities to

defraud the Government. United States v. Smith, 342 U.S. 225, 228-29 n.2 (1952).

Congress was concerned that "'[t]hese frauds may be difficult to discover as is often true of this type of offense and many of them may not come to light for some time to come,'" especially because "'[t]he law-enforcement branch of the Government is also busily engaged in its many duties, including the enforcement of the espionage, sabotage, and other laws.'" Id. (quoting S. Rep. No. 1544, 77th Cong., 2d Sess., pp. 1-2).

The 1942 statute provided in part that "the running of any existing statute of limitations applicable to offenses involving the defrauding or attempts to defraud the United States or any agency thereof, whether by conspiracy or not, … and now indictable under any existing statutes, shall be suspended until June 30, 1945." Wartime Suspension of Limitations Act of 1942, ch. 555, 56 Stat. 747-48 (1942).

In 1944, Congress amended the WSLA, deleting the phrase "now indictable under any existing statutes," removing the June 30, 1945 time restriction, and suspending statutes of limitations until three years after whenever the president or Congress proclaimed an end to the hostilities of World War II. See Contract Settlement Act, ch. 358, 58 Stat. 649, 667 (1944). In 1948, Congress amended the WSLA again so that it would apply in the event of future wars. See Act of June 25, 1948, ch. 645, 62 Stat. 683, 828 (1948).

In its current form, the WSLA suspends statutes of limitations for, among other things, "any offense" involving fraud against the United States during time of war, with the suspension lasting until five years after the president or Congress has declared a termination of hostilities:

When the United States is at war or Congress has enacted a specific authorization for the use of the Armed Forces ... the running of any statute of limitations applicable to any offense (1) involving fraud or attempted fraud against the United States or any agency thereof in any manner, whether by conspiracy or not ... shall be suspended until 5 years after the termination of hostilities as proclaimed by a Presidential proclamation, with notice to Congress, or by a concurrent resolution of Congress.

18 U.S.C. § 3287.

Because the WSLA applies in the case of an "offense" involving fraud against the United States, it suspends statutes of limitations only for criminal prosecutions, and not for civil lawsuits brought by the United States. The term "offense" means a crime, and not a civil action. See Black's Law Dictionary 1110 (8th ed. 2004) ("offense" means "[a] violation of the law; a crime" and is synonymous with "criminal offense"); see also Milwaukee County v. M.E. White Co., 296 U.S. 268 (1935) (as used in a federal jurisdictional statute, "offense" refers to criminal offenses and not civil lawsuits).

In Carter, however, the Fourth Circuit held that "offense" as used in the WSLA means both criminal and civil actions. The court noted that the 1942 version of the statute referred only to criminal cases, but concluded that when Congress deleted the phrase "now indictable" from the WSLA in 1944, the term "offense" thereby expanded in meaning to cover civil fraud claims as well. Carter, 710 F.3d at 180.

According to Fourth Circuit, "[h]ad Congress intended for 'offense' to apply only to criminal offenses, it could have done so by not deleting the words 'now indictable' or it could have replaced that phrase with similar wording." Id. The district courts in Wells Fargo and BNA Paribas also relied upon the 1944 deletion of the words "now indictable" to rule that "offense" in the WSLA encompasses civil FCA claims. Wells Fargo, 2013 U.S. Dist. LEXIS 136539, at *43; BNA Paribas, 884 F. Supp. 2d at 603-04.

The Fourth Circuit's reasoning is flawed. In 1944, Congress did not merely delete the words "now indictable." It deleted a longer phrase — "now indictable under existing laws." As enacted in 1942, the WSLA applied only to offenses "now indictable under existing laws," i.e., the WSLA suspended statutes of limitations only for conduct that occurred as of the time of the WSLA's enactment ("now indictable") and only as to criminal laws already enacted by that time ("under existing laws"). In 1944, by deleting "now indictable under existing laws," Congress clarified that WSLA applied to criminal activity that might occur, and statues that might be enacted, after 1942.

This understanding is confirmed by the fact that at the same time Congress deleted "now indictable under existing laws," Congress amended the WSLA so that it would be in effect for an indefinite period of time. The 1944 amendment eliminated the June 30, 1945, time restriction and extended the WSLA until the government proclaimed that the World War II hostilities were over. See 58 Stat. at 667; United States v. Grainger, 346 U.S. 23 (1953) (noting that President Truman proclaimed an end to the hostilities of World War II on Dec. 31, 1946). The courts in Carter, Wells Fargo and BNA Paribas apparently did not appreciate the full scope and import of the 1944 amendments, erroneously viewing the amendment as merely deleting the words "now indictable."

Subsequent congressional action confirms that the WSLA applies only to criminal prosecutions. In 1948, Congress passed a statute that reorganized and codified criminal laws within Title 18 of the United States Code, including codifying the WSLA at 18 U.S.C. § 3287. See 62 Stat. 683 (1948). A Senate sponsor of the 1948 codification explained that the criminal statutes were being reorganized within Title 18 to "mak[e] it easy to find the criminal statutes." 94 Cong. Rec. 8721 (daily ed. June 18, 1948).

The 1948 codification was intended "[to] bring[] the Federal criminal statutes into one place, so as to avoid the necessity of going from one volume to another in order to ascertain what the criminal law of the Nation is." Id. As the Supreme Court has stated, Title 18 of the United States Code "codifies the federal criminal laws." Pennsylvania v. Nelson, 350 U.S. 497, 519 (1956); see also Kansas v. Hendricks, 521 U.S. 346, 361 (1997) (stating that legislatures demonstrate whether a statute is criminal or civil based on whether the legislature codifies the statute in a criminal or noncriminal code).

Furthermore, the WSLA was codified within a broader set of provisions addressing limitations periods within the criminal code, 18 U.S.C. §§ 3281-3301. These provisions uniformly use "offense" to describe only crimes.

In Carter, the U.S. Department of Justice did not express a position as to whether the WSLA applies to civil claims, such as claims under the False Claims Act. The United States declined to intervene in Carter and the matter was being litigated by the qui tam relator on the government's behalf. In Wells Fargo and BNA Pariabas, however, the Department of Justice did argue that the WSLA applies to FCA cases. The solicitor general should respond to the Supreme Court's invitation in Carter by recognizing that the government's position in Wells Fargo and BNA Pariabas was erroneous. In addition, the Supreme Court should grant cert in Carter and reverse the Fourth Circuit.

Allowing the Carter ruling to stand will result in tremendous unfairness to government contractors and Medicare and Medicaid providers. Conduct occurring in 1995 would not be barred by the FCA statute of limitations until at least five years after either the president or Congress declares that hostilities in both Iraq and Afghanistan have terminated, whenever that may be. If such proclamations occur in 2016, President Obama's last year in office, the statute of limitations for conduct occurring in 1995 would not expire until 2021.

With ever-increasing numbers of qui tam actions filed each year (647 filed in 2012), government contractors and health care providers face the risk of stale and meritless lawsuits that are expensive to defend and that pose the potential for ruinous liability.

—By Jesse A. Witten and Lee Roach, Drinker Biddle & Reath LLP

Jesse Witten is a partner in Drinker Biddle's Washington, D.C., office and a former deputy associate attorney general in the U.S. Department of Justice. Lee Roach is an associate in the firm's Washington office. They represent defendants in False Claims Act litigation.