Kellogg Brown & Root Services, Inc., et al. v. United States ex rel. Carter, No. 12-1497 (previously described in the July 1, 2014, Docket Report)

Government contractors and health-care companies have become increasingly concerned about the application of the Wartime Suspension of Limitations Act ("WSLA"), 18 U.S.C. § 3287, and the Department of Justice's and False Claims Act ("FCA") relators' arguments that the statute extends indefinitely the limitation period applicable to civil FCA cases, *see* 31 U.S.C. §§ 3729-3733. Today, the Supreme Court unanimously rejected the extension of the WSLA and limited the reach of that statute (and suspension of limitations periods) to the context of criminal law.

The decision in *Kellogg Brown & Root Services, Inc. v. U.S. ex rel. Carter*, No. 12-1497 ("*KBR*"), is an important victory for government contractors, health-care companies, and other recipients of federal funding. It provides protection against stale claims, which should be barred by the statute of limitations. It is particularly noteworthy because it removes the risk of stale FCA claims that would otherwise be time-barred and have no connection to wartime activities, such as health-care claims, or are related to civilian-agency programs, like the Department of Agriculture program discussed in *United States v. BNP Paribas S.A.*, 884 F. Supp. 2d 589 (S.D. Tex. 2012).

The WSLA was enacted shortly after World War I and reenacted during World War II. Until 2008, it permitted the period of limitations to be suspended during wartime and for three years after the end of hostilities. Prior to 2008, it was not clear whether the WSLA was triggered by the military operations in Iraq and Afghanistan, as there had been no declaration of war. Congress expanded the WSLA in 2008 to apply when Congress enacts a "specific authorization for the use of the Armed Forces" and increased the suspension period to five years after the termination of hostilities. 18 U.S.C. § 3287. Given the ongoing conflicts in which the U.S. has been involved during the past decade, questions have arisen about whether the suspension of the limitations period has become indefinite and is being used for matters that have no connection to wartime. In *KBR*, the Supreme Court reversed the Fourth Circuit and held that the WSLA does not toll the statute of limitations in civil fraud cases.

In the case before the Court, a former employee who had worked for a contractor in Iraq brought a civil FCA action as a relator, claiming that the contractor had billed the government for work that was never performed. The government did not intervene in the case. Before the Supreme Court, Carter and the government (as *amicus curiae*) argued that, even though the WSLA is part of Title 18, it applies to civil fraud. The government noted that, until 1944, the WSLA applied to offenses that were "now indictable under existing law"—and that the "now indictable" language was removed in 1944. (The district court's decision in *BNP Paribas* provides a detailed history of the WSLA.) The government's *amicus* brief also defended application of the WSLA to civil cases based on policy considerations, including that its time and resources are overtaxed during wartime and that fraud often requires a substantial amount of time to uncover and pursue.

After discussing the history of the WSLA, the Supreme Court explained why the statute applies only to criminal charges, not civil claims. The Court's analysis focused on the WSLA's text, *i.e.*, "the running of any statute of limitations applicable to any offense . . . involving fraud or attempted fraud against the United States or any agency thereof." 18 U.S.C. § 3287. Although "the term 'offense' is sometimes used more broadly" by legal dictionaries, the Court explained that several dictionary definitions supported a narrower reading—as did the government's inability to find any part of Title 18 in which the term is "employed to denote a civil violation" and the fact that "Congress chose to place the WSLA in Title 18." Slip op. 7-8.

The Court rejected the government's argument that the removal of the phrase "now indictable under any statute" from the WSLA in 1944 expanded the WSLA's reach to civil claims. The Court explained that "[s]imply deleting the phrase 'now indictable under the statute,' while leaving the operative term 'offense' unchanged would have been an obscure way of substantially expanding the WSLA's reach. Fundamental changes in the scope of a statute are not typically accomplished with so subtle a move." Slip op. 9.

In addition to this WSLA issue, the petition for certiorari in *KBR* raised an important issue concerning the first-to-file bar under Section 3730(b)(5) of the civil FCA. That section provides that, "[w]hen a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action." The effect of this provision is to bar subsequent actions alleging false-claims violations that have previously been alleged by a relator or the government in another case. The purpose of the first-to-file bar is to encourage relators to come forward with information previously unknown to the government to aid in uncovering fraud. A subsequent action (or "me-too" suit) involving the same material elements does not further that goal.

A division had developed among the courts of appeals as to what it means for an action to be "pending" under the first-to-file bar. The First and D.C. Circuits had held that a previously dismissed action bars later actions. The Fourth, Seventh, and Tenth Circuits had held that, once an action is dismissed without prejudice, it is no longer considered "pending."

Carter's case had a tortured history of procedural dismissals and amended complaints—which the Court described as "a remarkable sequence of dismissals and filings." Slip op. 3. The contractor explained that the repeated actions it faced had unfairly extended the period in which the claims could be brought and exposed it to repeated costs and risk. It argued that the

word “pending” in the first-to-file bar should be read expansively to preclude successive claims, *i.e.*, that “the first-filed action remains ‘pending’ even after it has been dismissed” and “forever bars any subsequent related action.” Slip op. 11.

The Court rejected KBR’s argument, explaining: “This interpretation does not comport with any known usage of the term ‘pending.’ Under this interpretation, *Marbury v. Madison*, 1 Cranch 137 (1803), is still ‘pending.’ So is the trial of Socrates.” Slip op. 12.

The Court also noted that, in addition to “push[ing] the term ‘pending’ far beyond the breaking point,” KBR’s argument “would lead to strange results that Congress is unlikely to have wanted.” *Id.* These would include barring “all subsequent related suits even if th[e] earlier suit was dismissed for a reason having nothing to do with the merits.” *Id.*

The Court was not swayed by the “practical problems” government contractors face from successive lawsuits by relators making similar (if not identical) allegations. The Court noted that the relator and the government had argued that the contractor’s concerns were overblown and could be addressed by “the doctrine of claim preclusion,” slip op. 12-13, but this concern was not raised directly by the issue before the Court.

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