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High Court Could Rein In Old FCA Claims With KBR Case

By **Dietrich Knauth**

Law360, New York (July 02, 2014, 6:45 PM ET) -- By taking up a False Claims Act case that raises questions about the law's statute of limitations during periods of war, the U.S. Supreme Court has a chance to bring a quick stop to a new body of case law that has dramatically expanded contractors' potential liability for dated fraud claims, government contracts experts say.

Contractors and their attorneys feared that the Fourth Circuit's ruling in U.S. ex rel. Carter v. Halliburton — which held that the Wartime Suspension of Limitations Act applies to whistleblower suits even when they're unrelated to any war contracts and even when the government declines to intervene — could keep contractors on the hook for civil and criminal fraud cases indefinitely.

Because of the scope of the Fourth Circuit's position and the wording in the WSLA, which keeps claims alive until five years after the formal end of U.S. wars, federal contractors and other recipients of federal funds see little downside to the Supreme Court's review.

"For the defense bar, it's Christmas in July," said David Nadler, a partner in Dickstein Shapiro LLP's government contracts group.

The Supreme Court granted certiorari on Tuesday in the Carter case, despite the U.S. Department of Justice's pleas to pass. KBR Inc. asked the high court to reverse the Fourth Circuit on two issues widely applicable in False Claims Act litigation: the application of the WSLA, which tolls deadlines for fraud allegations during periods of war, and the "first-to-file" bar, which bars new FCA suits from being filed while other litigation based on the same claims is pending.

Many attorneys stressed the Carter case's potential to eviscerate statute of limitations defenses, even for claims well past the FCA's six-year statute of limitations or its 10-year statute of repose.

"Under the Carter ruling, the FCA's statute of limitations may never run," said Roderick Thomas of Wiley Rein LLP. "There's no telling when, if ever, Congress or the president will formally end the wars in Iraq and Afghanistan — indeed, the Korean War never formally ended."

As claims age, they become harder to defend, said Robert Huffman of Akin Gump Strauss Hauer & Feld LLP. Memories fade, documents are lost or destroyed and key employees could move on to different jobs or retire.

"Allowing the Wartime Suspension of Limitations Act to apply to nonintervened qui tams, let alone any

civil False Claims Act case, would subject contractors to very stale claims and all the problems that go along with defending against very stale claims," Huffman said.

While the Fourth Circuit's ruling has been the highest-profile decision in an emerging body of WSLA case law, other courts have similarly used the law to breathe new life into otherwise-tardy claims, and it has been cited in situations as far removed from war concerns as Lance Armstrong's U.S. Postal Service sponsorship.

The DOJ's brief urging the justices to let the decision stand didn't address some key questions that could be brought to bear in the case, including the applications of the WSLA to the FCA's statute of repose, which cuts off FCA claims that are 10 years old, and a recent D.C. district court **decision** in the Lance Armstrong case, which went against the recent tide of WSLA cases to say that the law tolls statutes of limitations only in cases that "include fraud as an essential ingredient" — a holding that would not apply to the broader False Claims Act, which allows liability without "proof of specific intent to defraud."

"The [Armstrong] case held that there was prior precedent that the WSLA only applied to statutes where you had to have a finding of fraud in order to establish liability, and because the FCA is broader than that, with its reduced scienter requirement, it didn't fit the bill," said Andy Liu, a partner with Crowell & Moring LLP.

The fact that the Supreme Court took the case without any real split in the appeals courts — only the Fourth Circuit has definitively weighed in on the issue — and despite the DOJ's objections should give contractors hope for a decision in their favor, according to Thomas and his colleague at Wiley Rein, Dylan Hix.

While there isn't a circuit split yet on the statute of limitations issue, there is a more developed legal controversy in the first-to-file bar.

The Fourth Circuit decision chipped away at KBR's defenses under the FCA's first-to-file provision, finding that the suit was not barred by previously filed lawsuits that had been dismissed because the FCA's ban applies only when a previously filed lawsuit is "pending."

The Fourth Circuit took a strict view of the word "pending" and allowed relator Benjamin Carter, a former reverse osmosis water purification unit operator in Iraq, to retain his standing to sue even though he fired off his latest complaint, his third, a little more than a week after his second complaint based on the alleged underlying misconduct was thrown out by a judge in the same district court — a ruling that contractors had criticized as encouraging subsequent relators to come out of the woodwork and file new case after new case, even after dismissals.

"The Carter ruling, and those like it, upend the purpose of the first-to-file rule," Thomas said. "The first-to-file rule works with the qui tam provision to encourage relators to report fraud that might otherwise stay concealed. Permitting duplicative qui tam cases so long as no two coincide nullifies this goal. We hope the court will clarify that relators cannot bring an unending series of identical claims that provide no new information to the government."

With all the complicated pieces — including the torturous legislative history of the WSLA, first enacted in World War II — the Supreme Court has many angles with which to approach the Carter case. But no matter what the justices rule, it would be hard for them to come up with a ruling that would trouble contractors more than the Carter decision, Huffman said.

"This is a great opportunity from the point of view of my clients and the industry to get some certainty and some correction of what I think would be a disastrous precedent," Huffman said. "The Supreme Court could go narrow or it could go very broad, but I think either way it's going to be very beneficial to contractors."

Carter is represented by David S. Stone and Amy Walker Wagner of Stone & Magnanini LLP.

The defendants in the Carter suit are represented by John P. Elwood, Tirzah Lollar, Kathryn Codd, Jeremy C. Marwell and Craig Margolis of Vinson & Elkins LLP.

The case is Kellogg Brown & Root Services Inc. et al. v. U.S. ex rel. Carter, case number 12-1497, in the Supreme Court of the United States.

--Additional reporting by Erica Teichert. Editing by Jeremy Barker and Katherine Rautenberg.
