WINSTON & STRAWN LLP

CLIENT ALERT

# The Supreme Court Rules on Two Key FCA Issues

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On May 26, 2015, the U.S. Supreme Court issued a much-anticipated decision limiting and clarifying the periods for filing civil suits under the federal False Claims Act ("FCA"), 31 U.S.C. §§ 3729-3733. First, the Court held that the Wartime Suspension of Limitations Act ("WSLA"), which tolls the statute of limitations for "any offense" involving fraud against the government "[w]hen the United States is at war," applies only to criminal offenses and not to claims of civil fraud. Second, the Court held that the FCA's "first-to-file" bar – which prohibits any person "other than the Government" from bringing an action related to a "pending" FCA suit – ceases to apply once the pending action has been dismissed. The Court's new decision provides much-needed clarity on the period during which federal contractors across industries face potential civil liability under the FCA. Prior to the Court's decision, lower federal courts relied on the WSLA to suspend the limitations period for FCA suits against several significant financial institutions, including Wells Fargo and BNP Paribas, based on the United States' involvement in the ongoing conflicts in Iraq and Afghanistan. In 2014 alone, government recoveries on civil FCA claims exceeded $5 billion across industry and contracting sectors.

## Background

In *Kellogg Brown & Root Services, Inc. v. United States ex rel. Carter*, a *qui tam* relator filed a complaint in 2006 ("*Carter I*") alleging that petitioner defense contractors fraudulently billed the government for water purification services performed for the United States during the armed conflict in Iraq. The government declined to intervene and shortly before trial, in 2010, the United States Department of Justice informed the parties of the existence of an earlier filed FCA case based on similar allegations (the "*Thorpe* Case"). The District Court then dismissed respondent's case in *Carter* without prejudice under the first-to-file bar. After this dismissal, respondent appealed and while the appeal was pending, the *Thorpe* Case was dismissed for failure to prosecute. After the *Thorpe* Case was dismissed, respondent re-filed his original complaint ("*Carter II*"), which the District Court dismissed under the first-to-file bar, based on the pendency of *Carter I*, which was still on appeal. Respondent then voluntarily dismissed the appeal of Carter I and filed the complaint at issue ("*Carter III*").

*Carter III*, Relator's third complaint, was filed in June 2011 – more than six years after the alleged fraud – and was dismissed by the District Court with prejudice. The District Court found that *Carter III* was: (i) untimely, because the WSLA applies only to criminal actions and did not suspend relator's time for filing civil claims; and (ii) barred by the

first-to-file rule due to another, related pending action in Maryland. In March 2013, the Fourth Circuit reversed and held that: (i) the WSLA applies to civil claims based on fraud committed during the conflict in Iraq; and (ii) the first-to-file bar ceases to apply once the earlier related action has been dismissed. Since the Maryland action had been dismissed by the time the Court of Appeals was deciding the *Carter III* appeal, the Court granted relator leave to re-file and remanded the case to the District Court with instructions to dismiss without prejudice. It was this decision by the Fourth Circuit with respect to *Carter III* that was the subject of the petition for writ of certiorari.

# The Supreme Court's Decision

**WSLA Does Not Toll Limitations Period for Civil Suits**
In determining whether the WSLA barred the claims at issue, the Supreme Court focused on the WSLA's use of the term "offense," which is commonly used to refer to crimes, and cited definitions of "offense" in Black's Law Dictionary and Webster's Dictionary. The Court noted that the WSLA was codified in Title 18 of the United States Code, titled "Crimes and Criminal Procedure," in which the term "offense" appears hundreds of times, but never to denote a civil violation. While the Court acknowledged that it has cautioned against placing too much significance on the location of a statute in the Code, the Court found placement relevant to a provision's civil or criminal nature. While the Court concluded that the term "offense" in the WSLA applies solely to crimes, the Court noted that even if there were some ambiguity in the use of the term, the ambiguity should be resolved in favor of the narrower definition.

The Court also outlined the WSLA's history and noted that the original 1921 law referred to offenses "now indictable under any existing statutes" – a provision "quite clearly . . . limited to the filing of criminal charges." While the phrase "now indictable under any exiting statutes" was deleted in 1944, the Court disagreed with relator that the amendment had the effect of sweeping in civil claims under the WSLA, explaining 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" and that such "[f]undamental changes in . . . scope" are typically not accomplished with "so subtle a move." The Court concluded that the more plausible explanation was that the change was meant to apply the WSLA prospectively and not to expand the WSLA's reach to civil suits. Accordingly, the Court held that the FCA statute of limitations was not tolled by the WSLA.

**First-to-File Bar Applies Only When Earlier Case Is Pending**
The Court then addressed the first-to-file bar, which provides that "[w]hen a person brings an action . . . no person other than the Government may . . . bring a related action based on the facts underlying the pending action." The Court noted the plain meaning of the term "pending," which is "remaining undecided; awaiting decision," and relied on that plain meaning to conclude that "an earlier suit bars a later suit while the earlier suit remains undecided but ceases to bar the [later] suit once [the earlier suit] is dismissed." The Court noted that if the term "pending" were to be interpreted as "short-hand" for a "first-filed action," as the petitioners had argued, a first-filed suit would bar all subsequent related actions forever, even if the earlier suit had not been dismissed on its merits. The Court rejected such an interpretation and questioned why Congress would want an earlier suit "to bar a later potentially successful suit that might result in a large recovery for the Government. . . ."

# Takeaways

The Supreme Court's decision is noteworthy in a number of respects. A different result on the WSLA issue would have had dramatic implications for defendants in civil cases, resulting in the indefinite tolling of the limitations periods even without a formal declaration of war (as no such declaration is required to trigger the WSLA). Accordingly, the Court's decision should come as a relief for targets of FCA litigation as it holds relators to a tight limitations period. However, the Court's decision that the first-to-file bar acts effectively as a "one-case-at-a-time" rule is more favorable to the government and the relators' *qui tam* bar.

The Court's decision on these two issues will thus have strategic implications for parties on both sides of FCA suits. Based on the Court's decision on the first-to-file issue, relators may decide to stand on the sidelines awaiting a disposition of an earlier-filed case before filing a new *qui tam* action based on similar claims, though they will not be

able to do so indefinitely. Further, defendants must be mindful of the implications of the decision on both the first-to-file bar and the WSLA issues when considering whether and when to settle a matter. Without a decision on the merits, a settling defendant may now be at risk of a subsequent *qui tam* case that is no longer precluded by the first-to-file bar, assuming the statute of limitations does not bar the newly filed case.

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