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4th Circ. Shows Expired FCA Claims Can Haunt Contractors

By **Dietrich Knauth**

Law360, New York (March 27, 2013, 9:43 PM ET) -- The Fourth Circuit recently became the first federal appeals court to hold that a little-used World War II-era law suspends the False Claims Act's statute of limitations during wartime, a ruling that effectively eviscerates the time limits for civil fraud cases against government contractors.

In U.S. ex rel. Carter v. Halliburton, the Fourth Circuit reversed a lower court's dismissal of a suit alleging Halliburton Co. and KBR Inc. billed the government for water purification work they never did at U.S. bases in Al Asad and Ar Ramadi, Iraq. The decision, dated March 18, held that the Wartime Suspension of Limitations Act tolls the statute of limitations for fraud claims during a time of war, regardless of whether the claims were civil or criminal and regardless of whether the government or a private relator was bringing the claims.

The ruling took some defense attorneys by surprise, and its upending of the FCA's normal six-year statute of limitations has such a potentially broad impact that it will almost certainly see intense litigation until the case reaches the Supreme Court or Congress intervenes, attorneys said.

The WSLA extends the statute of limitations until five years after the formal end of any conflict, and given that the U.S. has rarely experienced complete peace for more than five years, the Fourth Circuit's reading of the law would expand the statute of limitations nearly indefinitely for any government contract, even for claims as far removed from wartime concerns as allegations that Lance Armstrong defrauded the U.S. Postal Service by using steroids in breach of his promotional contract.

“The [FCA] itself isn't narrowly tied to the war effort,” said Robert Huffman, head of Akin Gump Strauss Hauer & Feld LLP's government contracts group. “Even cases involving [U.S. Department of Transportation]-funded transportation projects in Seattle, or health care contracts performed entirely in the Unites States, or even the Lance Armstrong case — why wouldn't it suspend the statute of limitations there, in all those cases?”

The U.S. Department of Justice embraced the WSLA argument in a Texas case decided last year, U.S. v. BNP Paribas, in which a federal judge ruled that the WSLA tolled the statute of limitations for claims brought by the government. But before the BNP Paribas and Halliburton cases, the WSLA was not even on defense attorneys' radar.

“The whole issue came out of the blue last year,” said Peter B. Hutt II, also a partner at Akin Gump. “Until the BNP Paribas decision last year, no one litigating under the False Claims Act had considered whether the statute of limitations is tolled by this rather obscure federal law passed during WWII.”

Attorneys in both cases argued that the WSLA didn't apply to civil fraud claims, noting that the law was written to give the government the freedom to pursue criminal fraud committed in wartime without having to divert its attention away from the war effort. But both the Fourth Circuit and the Southern District of Texas ruled that a 1944 amendment to the law removed the word “indictable” from its description of the types of fraud it covered, making civil fraud fair game.

That argument was explicitly endorsed by the DOJ in the BNP Paribas case, making it likely that the government will make use of the WSLA in other FCA enforcements, experts say.

The Fourth Circuit's decision is even more troubling for contractors than the BNP Paribas case — not only because it is an appeals court decision, applying to all lower courts in the Fourth Circuit, but also because it extends the statute of limitations for cases in which the U.S. has declined to intervene. That drew a partial dissent from Circuit Judge G. Steven Agee, who said that part of the decision was an “altogether novel” expansion of the WSLA.

That finding is also likely to be aggressively challenged by other defendants facings similar claims that could be tolled by the WSLA, Huffman said.

“Other courts may well disagree with that, because the entire purpose of the WSLA is to allow the government to devote its attention to the war effort, not prosecuting fraud actions,” Huffman said. “There's absolutely no reason to apply the WSLA to cases brought by qui tam plaintiffs.”

The Fourth Circuit also chips away at another FCA defense, the first-to-file rule, which prevents relators from bringing a suit if there is already a pending suit based on substantially the same claims. The Fourth Circuit took a strict view of the word “pending,” and allowed the 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 underlying misconduct was thrown out by a judge in the same district court.

The Fourth Circuit decision could allow subsequent relators to come out of the woodwork and file new case after new case, even after dismissals, according to Robert Rhoad, a partner with Crowell & Moring LLP.

“It's going to be like Whac-A-Mole, where they're going to have to face serial lawsuits for the same misconduct,” Rhoad said.

Weakening the statute of limitations could also allow damages for ongoing misconduct to pile up indefinitely, and the decision may create a perverse incentive for whistleblowers to sit on their claims and let the damages grow before they file a suit, said Elizabeth Ferrell, a partner at McKenna Long & Aldridge LLP.

Contractors and their attorneys will likely fight several aspects of the decision, and it is likely that the WSLA issue will end up before the Supreme Court, which hasn't been shy about tinkering with FCA case law.

Rhoad pointed out one 2009 case, U.S. ex rel. Eisenstein v. City of New York, in which the Supreme Court stepped in to resolve a circuit split and clarify that relators have just 30 days to appeal judgments in FCA suits if the government has declined to participate, rather than the 60 days given to the government.

Congress, which has also amended the FCA several times over the past few years, may also step in, Huffman said. In the meantime, the issues will be argued fiercely in lower courts.

“It's one of those decisions and one of those issues that comes out of nowhere and unsettles the whole landscape,” Huffman said.

--Additional reporting by Brian Mahoney. Editing by Elizabeth Bowen and Andrew Park.

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