

U.S. Supreme Court Holds Wartime Tolling Does Not Apply in Civil False Claims Act Cases

The U.S. Supreme Court held today in *Kellogg Brown & Root Services, Inc. v. United States ex rel. KBR* (Case No. 12-1497) that the Wartime Suspension of Limitations Act ("WSLA") does not toll the statute of limitations in civil False Claims Act ("FCA") actions during times when the United States is at war. The United States and *qui tam* relators (private parties who pursue FCA suits on the government's behalf) have increasingly been relying on the WSLA to save civil FCA claims that would otherwise be barred under the FCA's 6-year statute of limitations. The Supreme Court's decision limits wartime tolling to criminal cases and overrules numerous lower courts that held that wartime tolling applies to civil FCA claims.

The WSLA provides that "[w]hen the United States is at war ... the running of any statute of limitations applicable to any offense ... involving fraud or attempted fraud against the United States ... shall be suspended until 5 years after the termination of hostilities." 18 U.S.C. § 3287. The FCA provides for the recovery of treble damages against any person who, among other things, knowingly presents a false or fraudulent claim to the United States government for payment or approval. 31 U.S.C. § 3729(a)(1)(A). The *KBR* case threatened to establish indefinite tolling of the FCA limitations period as a result of United States military engagement, including in Afghanistan and Iraq.

Case History

In *KBR*, Kellogg Brown & Root Services, Inc. and other entities (collectively "KBR") provided services to the United States military under a multi-year government contract. Relator Benjamin Carter worked for KBR on water-purification projects, and in 2006 filed an FCA *qui tam* complaint (amended in 2008), alleging that KBR instructed him to submit falsified time sheets so that KBR could overbill the federal government. The government declined to intervene after Carter filed his complaint.

The district court granted KBR's motion to dismiss for two reasons. First, the court held that Carter's claims were time-barred because the statute of limitations for FCA civil claims had run, finding that the WSLA did not apply to a civil FCA case brought by a relator. *United States ex rel. KBR v. Halliburton Co.*, No. 1:11 cv602, 2011 WL 6178878, at *11-12 (E.D. Va. Dec. 12, 2011). Second, the court held that Carter's suit was barred under the FCA's "first-to-file" bar, which provides that "no person other than the Government may intervene or bring a related action based on the facts underlying the pending action." *Id.* at *5 (quoting 31 U.S.C. § 3730(b)(5)).

On appeal, a divided panel of the Fourth Circuit reversed, holding that the WSLA suspended the statute of limitations for Carter's FCA civil claims because the United States has been "at war" in Iraq since October 2002's Congressional authorization for the use of military force against Iraq. *United States ex rel. KBR v. Halliburton Co.*, 710 F.3d 171, 179 (4th Cir. 2013). In addition, the Fourth Circuit concluded that the FCA's "first-to-file" provision did not forever bar respondent's claims, because earlier cases based on the same facts were dismissed. *Id.* at 183.

KBR filed a petition for certiorari in June 2013. The Supreme Court granted certiorari in July 2014.

WSLA's Application to FCA Civil Cases

In the Supreme Court, KBR argued that the Fourth Circuit mistakenly construed the WSLA to apply to civil fraud claims. Specifically, KBR explained that the plain meaning of "offense" means a criminal violation and every use of the term "offense" in Title 18 of the U.S. Code is consistent with that plain meaning. As a result, the use of the word "offense" in the WSLA limits wartime tolling to criminal matters.

In response, Carter and the United States as amicus curiae argued that the WSLA by its terms applies to "any offense," expansive language that encompasses both criminal and civil cases. The United States explained that the Supreme Court itself held in *United States v. Hutto*, 256 U.S. 524 (1921), that the term "offense" included both criminal and civil violations of law. Carter noted that a slew of district court opinions in the wake of World War II held that the WSLA applied to civil cases, thereby confirming its ordinary meaning. Finally, Carter and the United States also explained that Congress expanded the scope of wartime tolling to civil cases in 1944 as part of the Contract Settlement Act, which was a statute with a predominantly civil focus.

The Court's Ruling

The Supreme Court unanimously reversed the Fourth Circuit's holding that wartime tolling under the WSLA applied to civil FCA cases. First, "the text, structure, and history of the WSLA show that the Act applies only to criminal offenses." *Kellogg Brown & Root Servs., Inc. v. United States ex rel. KBR*, 575 U.S. ___, No. 12-1497, slip op. at 5 (U.S. 2015). The Court focused on the plain meaning of the term "offense," and its usage and definition in Title 18 of the U.S. Code, to hold that "[t]he term 'offense' is most commonly used to refer to crimes." *Id.* at 7. The Court also looked to the history of wartime tolling, which prior to 1944 had applied solely to criminal cases.

The Court rejected the arguments of respondent and the United States that Congress expanded in 1944 the scope of wartime tolling when it deleted the phrase "now indictable under the statute" after the word "offense." The Supreme Court instead held that the deletion of the phrase was meant only to permit the statute to have prospective application to offenses committed after the date of enactment, not to expand wartime tolling to civil cases. The Supreme Court reasoned that if Congress had intended to apply the FCA to civil offenses at the time of that amendment, the Court "would expect it to have used language that made this important modification clear to litigants and courts." *Id.* at 10. Finding that the WLSA does not apply to civil claims under the FCA, the Court did not consider "whether the term 'war' in the 1948 Act applies only when Congress has formally declared war." *Id.* at 11 n.4.

In addition, the Court similarly looked to the plain language of the FCA to decide whether the FCA's "first-to-file" bar prohibits the prosecution of an action even after the previous civil FCA claim has been dismissed. Considering that the language used in the statute applies to "pending" actions, the Court concluded that "an earlier suit bars a later suit while the earlier suit remains undecided but ceases to bar that suit once it is dismissed." *Id.* at 11. Simply, "a *qui tam* suit under the FCA ceases to be 'pending' once it is dismissed." *Id.* at 13.

Implications

Today's wartime tolling ruling continues a pattern of rejecting expansive government interpretations of statutes of limitations that are inconsistent with the plain language and inconsistent with the principle that ambiguous statutes of limitations should be "narrowly construed" in "favor of repose." *Id.* at 10 (quotation marks omitted). Importantly, the Supreme Court gave no weight to a lengthy string of lower court decisions over the past 60 years that held that WSLA tolling applied to civil cases. Those cases largely did not examine the plain meaning of "offense" or its usage in other provisions of Title 18 of the U.S. Code, and failed to emphasize the value of repose. Repose was also a key factor when the Supreme Court, two Terms ago, unanimously rejected the Securities and Exchange Commission's assertion that government agencies could bring enforcement actions under the so-called "discovery rule" seeking to extend the applicable 5-year limitations period. *Gabelli v. SEC*, 568 U.S. ___, 133 S. Ct. 1216, 1223 (2013) (rejecting government's interpretation where "[r]epose would hinge on speculation about what the Government knew, when it knew it, and when it should have known it").

In addition, although civil FCA claims are now subject only to the FCA's 6-year limitations period and tolling applicable when the government should not have known of facts material to its cause of action, wartime tolling under the WSLA can still apply in criminal cases. In light of the Court's decision in *KBR*, the government may elect to pursue criminal fraud investigations where the civil FCA statute of limitations has run.

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