THOMSON REUTERS ACCELUS™

Little-known statute may breathe new life into False Claims Act cases against financial institutions

Apr 18 2013 Andrew W. Schilling, Ross E. Morrison and Michelle L. Rogers

The False Claims Act (FCA) is a powerful tool that allows both the government and whistleblowers to seek damages for claims of civil fraud on the United States. In the past two years, the government has aggressively used the FCA to target financial institutions for claims of reckless lending and improper servicing. However, as the events leading to the financial crisis have approached, and in some cases exceeded, the FCA's statute of limitations, financial institutions have increasingly responded to such claims by arguing that the government did not assert them in a timely manner.

A recent Fourth Circuit decision interpreting an obscure act, first enacted during World War II, threatens to make it significantly more difficult for financial institutions to assert a statute of limitations defense to FCA claims. The case, United States ex rel. Carter v. Halliburton, came before the Fourth Circuit after a lower court dismissed an FCA lawsuit brought against Halliburton and related entities (collectively "KBR") as barred by the FCA's six-year statute of limitations. In a critical decision, the Fourth Circuit reversed the dismissal on the grounds that the FCA's statute of limitations was "tolled," or put on suspension, by the Wartime Suspension of Limitations Act (WSLA).

The holding is significant because the Fourth Circuit held that the WSLA applies regardless of whether the government or a private plaintiff prosecutes the case or the case involves the defense industry. Thus, the case has the potential to reach any FCA defendant in any civil case — from financial institutions to health care providers.

Brought by a former KBR employee, the suit alleged that KBR fraudulently billed the United States for water purification services in Iraq that were never actually performed. The employee said he was instructed to submit time sheets for work he did not perform, and said the practice was consistent with a scheme to routinely bill the government for set hours, regardless of actual hours worked.

Although the government declined to intervene, the plaintiff, Benjamin Carter, continued to prosecute the action under the FCA's "qui tam" provisions, which allow a private party, legally known as a "relator," to sue in place of the government and share in any recovered proceeds. After the district court dismissed his complaint, in part because it had been filed after the FCA's statute of limitations had expired, Carter appealed, arguing that under the WSLA, the conflict in Iraq allowed the FCA's statute of limitations to be suspended.

The WSLA was enacted in 1942 to extend the time to bring charges related to "indictable" fraud against the United States when "at war". An amendment two years later, in 1944, deleted the term "indictable." In 2008, the Wartime

Enforcement of Fraud Act (PDF) further amended the WSLA to allow it to apply whenever "Congress has enacted specific authorization for the use of the armed forces," and suspend the statute of limitations until "five years after the termination of hostilities".

In a novel interpretation, the Fourth Circuit held that the WSLA applies to claims of both civil and criminal fraud against the United States, regardless of whether the United States has intervened, and even without a formal declaration of war. The Fourth Circuit first held that a formal declaration of war is not required under the WSLA, and that the United States was "at war" in Iraq from the date that Congress authorized the use of military force in 2002.

The court also held that the United States was still "at war," for the purposes of the WSLA, when the alleged fraud occurred, because neither Congress nor the President had met the formal requirements of the act for ending the FCA statute of limitations suspension period. The Fourth Circuit then held that the WSLA applies to both criminal and civil cases, because the 1944 amendments removed the word "indictable". Finally, the Fourth Circuit held that whether an FCA claim is brought by the United States or a private plaintiff is "irrelevant," because the WSLA's suspension of statutes of limitation hinges not on who brings the claim, but when the claim is brought (i.e. when the United States is "at war"). Accordingly, the Fourth Circuit held that the FCA claims against KBR were not time-barred.

While the Fourth Circuit's decision is remarkable, the theory advanced by the former KBR employee is gaining traction, including in cases outside of the defense industry. In mid-2012, for example, the Department of Justice successfully made the same arguments in United States v. BNP Paribas SA, when it brought civil claims against it under the FCA, alleging that the defendants had defrauded the United States in connection with commodity payment guarantees provided by the Department of Agriculture.

More recently, the Justice Department has raised this argument in its multi-million dollar case against a major financial institution. In October 2012, the U.S. Attorney's Office for the Southern District of New York (SDNY) filed suit against Wells Fargo Bank, N.A., claiming violations of the FCA and the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA) for alleged underwriting and quality control defects related to loans insured by the U.S. Department of Housing and Urban Development and the Federal Housing Administration through its Direct Endorsement Lender program.

Wells Fargo has challenged the suit, in part, by arguing that at least some of the FCA claims are untimely. The Southern District of New York has argued that under the WSLA, the statute of limitations was suspended because the United States was "at war" during the time of the alleged false statements, based on the 2001 Authorized Use of Military Force (AUMF) Against Terrorists (related to the use of force in Afghanistan) and the 2002 Authorized Use of Military Force in Iraq.

The government also has argued that, as late as June 2007, there had been no termination of hostilities sufficient to end the WSLA's tolling provision. Wells Fargo has contended in response that the WSLA should be limited to criminal cases and, even if the WSLA applies to civil cases, it should not be interpreted to apply to (1) domestic mortgage

lending practices unconnected to war-related contracting, and (2) conduct characterized as "reckless" rather than "fraud" within the meaning of the WSLA. The court has not yet ruled on the issue.

While the Fourth Circuit's decision may inform the district court's decision in the Wells Fargo case, it is also possible that the district court will proceed differently, potentially paving the way for another appellate court determination and perhaps even a circuit split.

There are also several avenues that may leave the Fourth Circuit's decision subject to scrutiny. First, the decision creates a paradox, since it does not require a formal declaration of war to suspend the FCA's statute of limitations, but requires a formal termination of hostilities to end it. The Fifth Circuit has previously noted the potential of such an "absurd result" but failed to address a resolution. Additionally, while the issue in the Halliburton case was the FCA's six-year statute of limitations, the Fourth Circuit's opinion may also impact the application of the FCA's ten-year repose provision. Indeed, the decision has the potential to effectively eliminate the FCA's statute of limitations entirely, given the realities associated with the ongoing conflicts. The Authorization of Use of Military Force Against Terrorists was issued in 2001, for example.

In short, the Halliburton decision is certain to spur increased litigation as the government, relators (private plaintiffs), and defendants alike join the fast-growing debate about the WSLA's proper application.

Andrew Schilling is a partner with BuckleySandler LLP and leads the New York office's government enforcement practice. Prior to joining BuckleySandler, Schilling served as chief of the Civil Division at the U.S. Attorney's Office for the Southern District of New York. Ross Morrison is a counsel in the firm's New York office and Michelle Rogers is a counsel in the firm's Washington D.C. office. The authors represent entities and individuals facing government enforcement actions and in complex civil litigation, including matters involving the False Claims Act.

THOMSON REUTERS GRC | © 2011 THOMSON REUTERS. ALL RIGHTS RESERVED