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FALSE CLAIMS ACT: District Court Rules That Wartime Suspension of Limitations Act Suspends False Claims Act's Six-Year Statute of Limitations

What if you woke up today and found out that everything you previously understood about the False Claims Act's ("FCA") statute of limitations had been a dream? What if you learned that, for at least the last 10 years and for the foreseeable future, the FCA's express six-year statute of limitations has been suspended? What if you were told that the United States could file an FCA complaint against your client tomorrow and attempt to impose damages and liability for allegedly false claims made well beyond six years ago? Well, according to one district court, this could be the new reality. If that court's decision is adopted more broadly, a little known statute that has not been applied to the civil FCA in more than 50 years could drastically undermine and curtail the statute of limitations defense in FCA cases.

The statute at issue is the Wartime Suspension of Limitations Act, 18 U.S.C. § 3287 (2008) ("WSLA"). The current version of the WSLA provides, in relevant part, as follows:

> When the United States is at war or Congress has enacted a specific authorization for the use of the Armed Forces, as described in section 5(b) of the War Powers Resolution (50 U.S.C. 1544(b)), the running of any statute of limitations applicable to any offense (1) involving fraud or attempted fraud against the United States ... shall be suspended until 5 years after the termination of hostilities as proclaimed by a Presidential proclamation, with notice to Congress, or by a concurrent resolution of Congress.

According to the district court in *United States v. BNP Paribas SA*, No. H-11-3718, 2012 WL 3234233 (S.D. Tex. Aug. 6, 2012), the WSLA applies to FCA claims, and the FCA's six-year statute of limitations has been suspended by the Iraq and Afghanistan conflicts. Moreover, the district court's ruling makes clear that the WSLA's suspension is not limited to FCA cases arising out of wartime contracting or even Defense Department contracting in general, meaning that the FCA's statute of limitations would be rendered ineffective in all sorts of cases, including those involving allegations arising out of the financial and healthcare industries.

This decision runs counter to the plain meaning of the WSLA as well as the clear intent of Congress. It is the first decision of its kind in more than 50 years, and it is wrong. Indeed, the WSLA is applicable only to "offenses" – a term rarely, if ever, used to describe civil FCA counts. And, of course, the WSLA is codified in Title 18 – the U.S. Criminal Code – signaling clearly that its application should be limited to criminal fraud. Nevertheless, one district court held otherwise, and that court's rationale warrants further analysis because, if adopted elsewhere, it would effectively gut the FCA's statute of limitations.

Factual and Procedural Background

The underlying conduct in *BNP* involves commodity guarantees, with the government alleging that the defendants fraudulently procured USDA guarantees for exports of US commodities to ineligible importers in Mexico. There is no apparent connection between the alleged false claims and any defense contracts or wartime operations.

Specifically, the government alleges that the BNP Paribas defendants ("BNPP") used the USDA Commodity Credit Corporation's Supplier Credit Guarantee Program ("SCGP") to access financing and commodity credit guarantees for US exporters and foreign importers that were owned and/or controlled by a Mexican citizen, making them ineligible for SCGP program support. Subsequently, BNPP filed claims under the credit guarantees, with the last claim – the alleged false claim for FCA purposes – filed in September 2005. Following a criminal prosecution of several individuals, the government filed an FCA complaint against BNPP in October 2011, more than six years after the last alleged false claim.

In response to the predictable motion to dismiss by BNPP on statute of limitations (and other) grounds, the United States cited the WSLA as grounds for avoiding the FCA's statute of limitations. In addressing these arguments, the court had to deal not only with whether the WSLA applies at all, but also whether the 2008 amendment to the WSLA applies retroactively to conduct in 2005 and earlier.

The WSLA Should Not Apply To Civil Claims

In applying the WSLA to FCA claims, the *BNP* court rejected arguments that the WSLA – a criminal statute – has no application to civil cases. Nor was the court persuaded by arguments that the term "offense" should be limited to criminal code violations. Instead, the court focused on the deletion in 1944 of the phrase "now indictable" from the 1942 version of the WSLA as support for its conclusion that the reference to "offense" could cover civil actions. *See BNP*, at *13 (citing *Dugan & McNamara v. United States,* 127 F. Supp. 801 (Ct. Cl. 1955)).

However, the *BNP* court's analysis gives far too little credit to the obvious fact that the WSLA is in the criminal code and neither it, nor the FCA, makes any reference to its application to civil FCA cases. Similarly, the district court too readily discarded the seemingly dispositive argument that the WSLA only suspends the limitations period for an "offense," a term with specific meaning in the criminal code that appears nowhere in the FCA. Indeed, the legal definition of the term "offense" is "[a] violation of the law; a crime," and Black's Law Dictionary lists "crime" as a synonym for it. *See United States ex rel. Carter v. Halliburton Co.,* No. 1:11CV602 (JCC/JFA), 2011 WL 6178878, at *9 (E.D. Va. Dec. 12, 2011) (citing Black's Law Dictionary 110 (8th ed. 2004)). Moreover, the phrase following the word "offense" in the WSLA – "involving fraud or attempted fraud" – also demonstrates that provision's inapplicability to the FCA. Aside from the point that there is no FCA liability for an "attempted" false claim, indicating that the WSLA is aimed at the consequences of criminal activity where "attempts" are commonly prosecuted, there is a major distinction between actual fraud and the types of conduct that can constitute false claims under the FCA. Indeed, one of the essential elements of actual fraud is the specific intent to defraud. On the other hand, as the Justice Department frequently points out in FCA matters, liability under the FCA can be established without proof of specific intent to defraud because the statute provides for liability upon a showing of "reckless disregard" or "deliberate ignorance." As a result, even if the WSLA were to apply to FCA cases, its application would be limited to only those instances in

which the United States alleges and proves that the false claims at issue satisfy the specific intent – *i.e*., actual fraud – threshold.

Further, the legislative history to the 2008 amendment to the WSLA emphasizes its criminal enforcement objective: making the WSLA's five-year limitations period (following the end of the conflict) "consistent with the general statute of limitations for criminal offenses" and protecting "American taxpayers from criminal contractor fraud." S. Rep. No. 110-431, at 4, 1-2 (July 25, 2008). Congress certainly was aware of the broad usage of the FCA in 2008 when it amended the WSLA – indeed Congress would amend the FCA twice in subsequent years – and could have made clear that the WSLA applies to civil FCA claims if that had been the legislative intent. Similarly, when Congress amended the FCA in 2009 and 2010, revisions that included imposing a statute of limitations for retaliation claims under Section 3730(h), Congress could have made clear that the six-year statute of limitations in Section 3731 was subject to the WSLA. Notably, at least one other court recently relied on the WSLA's criminal enforcement purposes as a basis for not applying it to an FCA action brought by a *qui tam* relator. *See Carter,* 2011 WL 6178878, at *9. These and other arguments indicate that the *BNP* court simply got it wrong.

The WSLA's 2008 Amendment Should Not Apply Retroactively

Also of concern is the reasoning by which the court arrived at its ruling that the 2008 amendment to the WSLA applied to the defendants' 2005 conduct. That amendment significantly expanded the reach of the statute by making it applicable to conflicts for which "Congress has enacted a specific authorization for the use of the Armed Forces." Nothing in the amendment, however, indicates that this expanded reach applies retroactively to alleged false claims submitted in years prior to the amendment. The *BNP* court never addressed the issue of whether the statute was being applied with impermissible retroactive effect. Instead, rather than resolving the "thorny retroactivity issue" that the Fifth Circuit explicitly avoided in *United States v. Pfluger*, 685 F.3d 481, 483 n.2 (5th Cir. 2012), the *BNP* court stated that applying the amendment to the 2005 conduct turned on "whether the claims at issue expired before the effective date of the newly-enacted statute of limitations." The court's rationale used to bypass the retroactivity question is unpersuasive and surely will be tested in the future.

Under the Pre-2008 Amendment WSLA, No Suspension Should Have Occurred With Respect To Claims Made in 2005

Prior to its amendment in 2008, the WSLA's suspension provision stated:

> When the United States is at war the running of any statute of limitations applicable to any offense (1) involving fraud or attempted fraud against the United States ... shall be suspended until three years after the termination of hostilities as proclaimed by the President or by a concurrent resolution of Congress.

18 U.S.C. § 3287 (2006). In its analysis of the WSLA, the *BNP* court held that the United States was "at war" within the meaning of the statute at the time of the alleged false claims in 2005, meaning that the WSLA's suspension was in effect at that time. In so doing, the court rejected arguments that the WSLA's suspension provision only encompasses wars formally declared by Congress. This ruling, too, is contrary to the plain language of the statute. It also conflicts with other decisions holding that the military actions in Iraq and Afghanistan do not satisfy the WSLA's requirement that the United States is "at war." *See, e.g., United States v. Western Titanium, Inc.,* No. 08-CR-4229-JLS, 2010 WL 2650224

(S.D. Cal. July 1, 2010); *United States v. Anghaie,* No. 1:09-CR-37-SPM/AK, 2011 WL 720044, at *2 (N.D. Fla. Feb. 21, 2011). Moreover, the fact that Congress amended the WSLA in 2008 to include authorizations of military force in addition to the "at war" requirement tends to show that the pre-amendment WSLA did not cover hostilities that were not authorized by formal war declarations.

The WSLA Should Not Suspend the FCA's Ten-Year Statute of Repose

The *BNP* court's limited analysis, focused on the narrow facts of that case, never addresses the WSLA's application to the FCA's ten-year statute of repose. 31 U. S.C. § 3731(b). While the WSLA, by its own terms, suspends the running of a "statute of limitations," the FCA's ten-year statute of repose should not fall within the WSLA's reach. Even the *BNP* court acknowledged that the FCA's statute of repose "*bars* the United States from filing FCA claims over ten years old." *BNP,* at *5 (emphasis added). Indeed, because of the narrow factual scenario in that case, dealing with claims that were made just outside of the six-year limitations period, the *BNP* court did not address (nor do we attempt to do so here) the myriad factual and legal complications that would be encountered during any attempt to apply the WSLA to claims or series of claims reaching back a decade or more.

* * *

The *BNP* court's interpretation and application of the WSLA is only one decision by one district judge in one jurisdiction, but it has the potential, if adopted more widely, to wreak havoc on the statute of limitations in FCA cases and severely prejudice defendants. And, there are other implications to consider, including the difficult (at least for most government agencies) issue of preserving relevant documents. If the government is going to make the argument that the FCA's statute of limitations is essentially limitless, presumably the Justice Department has advised its client agencies that they must preserve all documents during such periods or be subject to legitimate, and potentially dispositive (as well as embarrassment-inducing) arguments by defendants that the agencies have destroyed relevant documents.

By allowing the United States to treat the entire period of the Iraq and Afghanistan conflicts – plus at least five years – as excludable time for limitations purposes, defendants could be subjected to open-ended and massive liability reaching back decades. Consequences of this magnitude should not be imposed lightly and on such a barren analysis.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. If you have any questions about the contents of this memorandum, please call your regular Fried Frank contact or one of the attorneys listed below:

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