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Fourth Circuit Applies the Wartime Suspension of Limitations Act to the Civil False Claims Act

The False Claims Act's ("FCA") six-year statute of limitations took a body blow on March 18, 2013 when a split panel of the Fourth Circuit Court of Appeals ruled that the Wartime Suspension of Limitations Act, 18 U.S.C. § 3287 ("WSLA") applies to certain FCA claims. With its opinion in *United States ex rel. Carter v. Halliburton Co.,* No. 12-1011, 2013 WL 1092732 (4th Cir. Mar. 18, 2013), the Fourth Circuit is the first appellate court in more than fifty years to apply the WSLA to civil FCA causes of action and the first appellate court ever to apply it since the FCA's 1986 amendments. In our view, the *Halliburton* decision rests on a flawed interpretation of the WSLA text and its legislative history, and it also fails to address numerous other arguments demonstrating that Congress never intended the WSLA to extend to civil FCA actions.

We advanced similar views in response to the 2012 district court decision in *United States v. BNP Paribas SA*, 884 F. Supp. 2d 589 (S.D. Tex. 2012), which, at that time, was the first *district* court ruling in more than fifty years applying the WSLA to a civil FCA action in order to resurrect otherwise time-barred claims. *See* FraudMail Alert No. 12-08-16. The Fourth Circuit's ruling in *Halliburton* further diminishes the viability of a statute of limitations defense in certain types of FCA cases, even those brought by *qui tam* relators.

Of course, pending any reversal on rehearing, the *Halliburton* decision applies only in the Fourth Circuit and, in any event, leaves open a number of questions concerning the application of the WSLA to civil FCA claims. Because the action was remanded to the district court for further proceedings, the decision is unlikely to reach the Supreme Court anytime soon. In the meantime, the result (right or wrong) will present significant challenges to defendants seeking to avoid having to defend against stale FCA allegations.

Halliburton Case Background

Halliburton is a *qui tam* action under the FCA. The Justice Department declined to intervene and, as far as the docket reflects, the Justice Department did not file any brief with the Fourth Circuit expressing its view on the WSLA issue.

The relator in *Halliburton* alleged that the government contractor defendant violated the FCA by falsely billing the United States under a Defense Department contract to provide logistical services to U.S. military forces in Iraq. The specific FCA violations allegedly occurred in 2005. Judge Cacheris of the Eastern District of Virginia dismissed the complaint on two grounds: (1) the suit was barred by the FCA's "first-to-file" rule (31 U.S.C. § 3730(b)(5)), and (2) the suit was time barred under the six-year FCA statute

of limitations (31 U.S.C. § 3731(b)(1)). With respect to the statute of limitations decision, Judge Cacheris specifically rejected the relator's argument that the WSLA saved his claims, ruling instead that the WSLA did not apply to FCA claims brought by relators.

On appeal, a divided panel reversed the dismissal. The majority held that the WSLA does apply to *qui tam* claims and remanded the action to the district court to address an unresolved jurisdictional issue dealing with the "public disclosure" bar. Much of the *Halliburton* decision focuses on jurisdictional questions that do not have any bearing on the WSLA, which is the topic of this Alert.

The WSLA

As amended in 2008, the WSLA, 18 U.S.C. § 3287, provides 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 or any agency thereof in any manner, whether by conspiracy or not, or (2) committed in connection with the acquisition, care, handling, custody, control or disposition of any real or personal property of the United States, or (3) committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, cancelation, or other termination or settlement, of any contract, subcontract, or purchase order which is connected with or related to the prosecution of the war or directly connected with or related to the authorized use of the Armed Forces, or with any disposition of termination inventory by any war contractor or Government agency, 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.
>
> Definitions of terms in section 103 of title 41 shall apply to similar terms used in this section. For purposes of applying such definitions in this section, the term "war" includes 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 Fourth Circuit's Reasoning is Questionable

The factual allegations in *Halliburton* led to a narrow ruling by the Fourth Circuit as it pertains to the WSLA, leaving a number of open questions. We address some of these open questions in more detail below.

In addition to extending the WSLA to *qui tam* claims brought by relators, the Fourth Circuit also tackled one of the key questions arising out of the WSLA, namely whether the term "offense" is limited to criminal offenses, or whether it can also apply to civil fraud against the government. As we expressed in our earlier FraudMail Alert addressing the *BNP Paribas* decision in 2012, we believe that the better reasoning leads to the conclusion that the WSLA – by its express terms and legislative intent – is limited to criminal code offenses. But, after acknowledging that the WSLA has its roots in a 1942 statute that clearly applied solely to criminal code offenses, the Fourth Circuit was persuaded by Congress's deletion of the words "now indictable" from the description of "offense" in the 1944 version of the statute and the fact that some courts in the 1950s applied the WSLA to civil FCA cases.

This reasoning is suspect. The Fourth Circuit decision points to no legislative history recounting that the deletion of the words "now indictable" was intended to expand the reach of the WSLA to civil actions involving fraud against the United States and, surely, if that had been the intent, Congress could have and would have used much clearer terms to effect such a radical change in the scope of the statute, and then it would not have chosen to codify the statute in Title 18 – the Criminal Code. Similarly, in reciting 1950s-era decisions that applied the WSLA to the civil FCA, the Fourth Circuit apparently did not consider the fact that the civil FCA in the 1950s (and up until the 1986 amendments) was dramatically different than it is today in at least one critical respect. Indeed, the Fourth Circuit overlooked the Supreme Court's holding in *United States v. Grainger* that the WSLA only applies to offenses that "include fraud as an essential ingredient." 346 U.S. 235, 242 (1953). When *Grainger* was decided in 1953, the FCA mandated proof of specific intent – a hallmark of common law fraud – for both criminal and civil liability. However, the 1986 amendments to the FCA reduced the level of scienter required to prove a civil FCA violation to "reckless disregard" or "deliberate ignorance." Hence, under the Supreme Court's dictate in *Grainger*, the WSLA should not apply to the civil FCA because fraud indisputably is *not* an "essential ingredient" of the statute or the "offense."

The Fourth Circuit's Ruling Was Limited and Did Not Address Other Key WSLA Issues

Due to its narrow focus and the factual circumstances presented, the Fourth Circuit did not address several other arguments that counsel against broad application of the WSLA. We highlight *some* of those other factors briefly below:

Retroactivity. The 2008 WSLA amendments made clear that the United States did not have to be at war in order for the WSLA to apply and that Congressional authorization for the use of the Armed Forces could suffice. That amendment raises the constitutional question of whether it should apply to pre-2008 conduct. The Fourth Circuit avoided that constitutional question by holding that the amendment really made no difference, since the United States was "at war" in Iraq in 2005 even though there was no formal declaration of war. But the legislative history of the 2008 amendments makes clear that Congress amended the WSLA precisely because it was concerned that the WSLA did not apply to conduct in connection with an undeclared war. *See* S. Rep. No. 110-431, at 4 (2008).

War-time Contracting. Since the allegations in *Halliburton* arose out of a military contract to support war-time operations in Iraq and the alleged conduct occurred during the "war" (*i.e.*, prior to termination of hostilities in Iraq), the Fourth Circuit did not need to confront the thorny issue of whether the WSLA would apply to a civil FCA action that did not have anything to do with a war-time contract, nor did it have to address whether the contract had to pertain to the "war" in question. Those issues have yet to be squarely addressed by any appellate court. Even so, the Fourth Circuit acknowledged that the WSLA only applies to an "offense" that occurred after the war declaration or Congressional authorization and prior to the termination of hostilities.

The FCA's Ten-Year Rule of Repose. Because the allegations in *Halliburton* pertained to conduct for which the WSLA would extend the limitations period by a few years, at most, the Fourth Circuit did not address what would happen if the WSLA purported to extend the statute of limitations to beyond a decade. That scenario is foreseeable given that the Iraq conflict has been ongoing for ten years, the Afghanistan military campaign is entering its eleventh year, and it is unclear how the termination of hostilities in those conflicts will be determined within the meaning of the WSLA. This uncertainty is at odds with the Supreme Court's recent reaffirmation of "the basic policies of all limitations provisions: repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a

defendant's potential liabilities" in refusing to judicially impose a discovery rule in civil penalty actions that would lack "an absolute provision for repose." *Gabelli v. SEC,* 133 S. Ct. 1216, 1224 (2013). In discussing statutes with an "absolute provision for repose," the Supreme Court referenced the FCA, which requires an action to be brought "in no event more than 10 years after the date on which the violation is committed." 31 U.S.C. § 3731(b)(2). This "absolute" ten-year repose for FCA claims, using the language "in no event," indicates that even if the WSLA applies to civil FCA actions, it would not override the absolute ten-year limit in § 3731(b)(2).

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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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