FCA CASES JUST GOT HARDER TO SETTLE

On May 26, 2015, the United States Supreme Court issued its decision in *Kellog Brown & Root Service, Inv. et al. v. United States ex rel. Carter*, 575 U.S. ___ (2015), Case No. 12-1497. Most of the commentary on the case centers around the Court's decision on the Wartime Suspension of Limitations Act, but the Court also issued a crucial decision on the False Claims Act's "first-to-file bar," one that will reverberate through FCA settlement discussions for years to come.

The Case

The FCA's first-to-file bar states:

When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action. [1]

At issue in *Kellog Brown & Root* was the meaning of "pending action." The government and the *qui tam* relator argued that it applied only to cases pending at the time a new complaint was filed, and that, after dismissal, a new complaint would not be barred. The defendant argued that the filing of a *qui tam* case barred all future cases related to the same set of facts. The Court, applying the plain language of the word "pending," ruled for the government and the relator. It did note, however, that its ruling could chill settlement prospects:

If the first-to-file bar is lifted once the first-filed action ends, defendants may be reluctant to settle such actions for the full amount that they would accept if there were no prospect of subsequent suits asserting the same claims. [2]

This issue arose during oral argument. At that time, the government argued that a case resolved on its merits would be barred, as a second *qui tam* relator would be acting on behalf of the government, which already had its claims resolved. However, a case settled and dismissed without prejudice "would not be barred by the first-to-file provision." (Transcript, p. 57, ll. 8-9). Justice Alito, writing the opinion for the Court, agreed that the decision could cause problems in future FCA cases, particularly settlement discussions but stated:

That issue is not before us in this case. The False Claims Act's *qui tam* provisions present many interpretive challenges, and it is beyond our ability in this case to make them operate together smoothly like a finely tuned machine. [3]

Practical Takeaway

The United States often refuses to dismiss FCA whistleblower cases with prejudice as part of a settlement. This refusal is a precautionary measure by the government, which is obligated to protect its ability to take further civil or even criminal action should additional improper acts come to light. The ruling in *Kellogg Brown & Root* will, as predicted, make it very difficult for a defendant to accept such a settlement, as another *qui tam* relator could file the day after a case is dismissed, and the defendant would have to litigate, and perhaps even settle and pay for, the same actions a second time. The defendant might even have to settle a third and fourth time if there is still life in the FCA's six-year statute of limitations. The FCA's separate public disclosure limitation might offer some protection to defendants, but that was significantly watered down in the 2010 amendments to the FCA. Prior to 2010, the bar stated:

"[n]o court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information. [4]

As amended, the statute reads:

(A) The court shall dismiss an action or claim under this section, unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed— (i) in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party; (ii) in a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation; or (iii) from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information. [5]

Under the amended statute, public disclosures are limited to federal hearings, and the government can conclusively contest dismissal. Under the earlier version, a public disclosure deprived the Court of jurisdiction without consideration of the government's position. A defendant attempting to settle an FCA case in which the government refuses to dismiss with prejudice must now consider the effect of the *Kellog Brown & Root* decision in light of the 2010 amendments to the Act and take into consideration the risks a second whistleblower might be waiting in the wings. Defendants' only choices in such a situation will be to wait out settlement until the statute of limitations would bar a new lawsuit or to accept whatever additional conditions the government might demand in exchange for dismissal with prejudice. Such conditions can include higher settlement amounts and imposition of onerous and expensive corporate integrity agreements.

Should you have any questions regarding the False Claims Act or defense against whistleblower actions, please contact:

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- Your regular Hall Render attorney.

[1] 31 U.S.C. 3730(b)(4)

[2] *Kellog Brown & Root Service, Inv. et al. v. United States ex rel. Carter*, p. 12

[3] *Id.*, p. 13

[4] PUBLIC LAW 99-562—OCT. 27, 1986

[5] 31 U.S.C. 3730(e)(4)(A)