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Keep An Eye On High Court's 2 Potential FCA Cases

Law360, New York (October 18, 2013, 5:54 PM ET) -- The U.S. Supreme Court acted this month on two False Claims Act cases with pending petitions for certiorari, calling for the views of the solicitor general. The court issued an order on Oct. 7 in Kellogg Brown & Root v. United States ex rel. Carter and United States ex rel. Nathan v. Takeda Pharmaceuticals, inviting the solicitor general to file briefs in these cases expressing the views of the United States.

When there is a call for the views of the solicitor general, the court is generally more likely to grant the petition, although the court is also likely to be influenced by the recommendation of the solicitor general as to whether or not it should grant the petition. Depending on the SG's recommendation, it is possible that the court could grant the petitions in either or both of the cases.

In June 2013, defendants petitioned to the Supreme Court following the Fourth Circuit's decision United States ex rel. Carter v. Halliburton Co., 710 F.3d 171 (4th Cir. 2013), in which the panel's majority ruled that the Wartime Suspension of Limitations Act applied to the False Claims Act in the civil as well as criminal context. Located in the federal criminal code, the WSLA, as amended in 2008, suspends or "tolls" the running of any statute of limitations applicable to any "offense" involving fraud against the United States when the country is at war or Congress has authorized the use of the Armed Forces, until five years after the termination of hostilities "as proclaimed by a Presidential proclamation, with notice to Congress, or by a concurrent resolution of Congress."

The majority opinion in Carter decided that the WSLA applies in the civil context, even if the United States was not a party, based on the majority's interpretation of an ambiguous 1944 amendment to the statute. A lengthy dissent argued that the WSLA does not apply to relators and that no court had ever held that the WSLA applied in the civil context when the United States had not intervened. Since the Fourth Circuit decision was issued, at least one decision by a district court outside the Fourth Circuit has followed the minority in Carter, while another by the Southern District of New York has followed the Carter majority, finding that the WSLA applied in the civil context, in a major case involving mortgage loans insured by the Federal Housing Administration.

The Fourth Circuit also held in Carter that "once a case is no longer pending the first-to-file bar does not stop a relator from filing a related case." The FCA's first-to-file bar provides that "[w]hen a person brings an action under [the FCA], no person other than the Government may intervene or bring a related action based on the facts underlying the pending action." Carter had previously filed related actions that were pending when he filed his current case, but that were later dismissed. The district court here dismissed the complaint with prejudice, and the circuit reversed.

If the court grants the Carter petition, that would be good news for potential FCA defendants, because of the opportunity for the court to review and reverse the decision of

the Fourth Circuit. The Fourth Circuit effectively suspended the FCA statute of limitations through application of the WSLA in the civil context and, as explained by the petition, transformed the "first-to-file" rule into a "one case at a time" rule, in a split with other circuits.

Fairness to potential defendants in all industries would support a review by the court of the Carter decision, for the reasons explained well in the amicus briefs submitted by the Chamber of Commerce and the National Defense Industrial Association. Although the Carter holding on the WSLA is unique to the Fourth Circuit, that holding, as well as the "one case at a time" rule, could affect not only government contractors nationwide, but companies in a wide range of industries that are defendants in FCA litigation.

The second pending FCA petition also originates in the Fourth Circuit, where government contractors often face FCA suits. In May 2013, in a case involving allegations of "off-label" promotion of certain stomach acid drugs, an FCA relator petitioned the Supreme Court in United States ex rel. Nathan v. Takeda Pharmaceuticals, after the Fourth Circuit affirmed the dismissal of the complaint by the Eastern District of Virginia for failure to identify a false claim. The district court recognized that some courts outside the Fourth Circuit have accepted a pleading standard that would permit a relator "to proceed without alleging the 'who, what, when, where, and how' as to specific claims submitted to the government in violation of the FCA," as long as the complaint contains "'factual or statistical evidence to strengthen the inference of fraud beyond possibility.'"

The district court rejected that relaxed standard under Fourth Circuit case law, which adheres to a strict application of Rule 9(b) to FCA claims, requiring the relator to identify particular false claims at the pleading stage. The district court noted that in the Fourth Circuit, "both trial and appellate courts have repeatedly emphasized that Rule 9(b)'s particularity requirement must be satisfied in FCA cases." On appeal, the Fourth Circuit acknowledged the decisions of other circuits permitting a more lenient standard, but disagreed, stating it was not persuaded that "allegations of a fraudulent scheme, in the absence of an assertion that a specific false claim was presented to the government for payment, is a sufficient basis on which to plead a claim under the [FCA] in compliance with Rule 9(b)."

If the court grants the Nathan petition, that could be bad news for all potential defendants, because of the possibility that the court could reverse the decision of the Fourth Circuit and its application of Rule 9(b). The Takeda decision was good for defendants because it recognized the standard of strict adherence to Rule 9(b) in the Fourth Circuit, which has established a strong and appropriate gatekeeping mechanism at the pleading stage.

While the solicitor general's office may be generally expected to take pro-plaintiff positions, hopefully it will consider some measure of fairness to defendants when making its recommendations. No matter what the solicitor general recommends, the Supreme Court should give fair and independent consideration to granting the petition for review of the Carter decision because of its drastic implications for defendants in all industries, as described by the amicus briefs.

If the Supreme Court accepts either of the two petitions originating with the Fourth Circuit decisions, the court would affect FCA jurisprudence nationwide. In the meantime, government contractors with pending FCA lawsuits should pay careful attention to the issues subject to these petitions and the state of the law in the circuits where they are defendants, as well as the developments on these subjects in the other circuits and trial courts.

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