NEWS

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From Health Law Reporter

By Jeffrey D. Koelemay

May 26 — Health-care providers and other government contractors will benefit from a unanimous May 26 U.S. Supreme Court decision that said a strict six-year limitations period applies to civil actions brought by whistle-blowers under the False Claims Act, attorneys told Bloomberg BNA.

But the decision wasn't all good news for providers. Whistle-blowers will benefit from a plaintiff-friendly interpretation of the FCA's "first-to-file" rule, which bars claims based on the facts underlying another "pending" action, the attorneys added.

Still, the holding that the Wartime Suspension of Limitations Act does not apply to civil offenses "will be a tremendous relief to health care providers and others facing allegations under the civil False Claims Act," Linda A. Baumann, with Arent Fox LLP in Washington, told Bloomberg BNA.

The high court, in a decision by Justice Samuel A. Alito Jr., said the WSLA doesn't toll the FCA's six-year statute of limitations applicable to civil claims because the act, 18 U.S.C. §3287, only applies to criminal offenses.

The court also held, however, that the FCA's "first-to-file" bar only keeps new claims out of court while related claims are actively "pending," not in perpetuity based on a single filing. A qui tam suit under the FCA "ceases to be 'pending' once it is dismissed," the court said.

Qui tam suits allow whistle-blowers to bring fraud claims on behalf of the government in exchange for a share of any funds the government recovers in the case. The court's decision addressed Benjamin Carter's allegations that Kellogg, Brown & Root Services Inc. overbilled the federal government for water purification services in Iraq that weren't being performed.

`Good News' for Hospitals

Commenting on the decision, Jennifer C. Schleman, the senior associate director for media relations at the American Hospital Association, told Bloomberg BNA that the Supreme Court's "rejection of the attempt by the government and private individuals to create an open-ended period for filing cases under the False Claims Act is good news for

hospitals and for the fair administration of the law."

"The alternative would have resulted in efforts to revive decades-old stale civil claims, the vast majority of which would prove meritless, and impose significant unwarranted costs on health care providers," she said.

Baumann noted that the FCA "is broadly drafted," has been expanded even further in recent years and carries "potentially onerous penalties and already has an expansive statute of limitations, allowing the government to reach as far back as 10 years in many cases."

To have allowed the WSLA to have applied "in these civil cases was a frightening prospect to many providers since most of these cases are settled, rather than litigated, and numerous settlements already run into the hundreds of millions of dollars. An expanded statute of limitations likely would have led to even larger damage awards," Baumann said.

On the other hand, she said the holding relating to the first-to-file bar and pending cases "increases the risk that defendants in FCA cases will face potential exposure from multiple parties over extended periods of time," Baumann said.

She added that health-care providers "are unlikely to take much comfort from the Court's statement that the FCA'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.' " However, Baumann said it's possible to read this statement "as an indication that the Court realizes some of the issues inherent in the FCA and might be willing to address more of them if an appropriate case is before them."

'Split the Baby.'

"We still have a chance to go forward with the case, so from that perspective I'm pleased with the ruling," Carter's counsel, David S. Stone of Stone & Magnanini LLP, Short Hills, N.J., told Bloomberg BNA.

"The most important thing for us and the whistle-blower community is that they struck a death blow to this argument that 'pending' doesn't mean 'pending,' " Stone said.

Other than that, "I think it went pretty much just as the oral argument went," Stone said.

"Today the Supreme Court 'split the baby,' " Stephen M. Kohn of Kohn, Kohn & Colapinto LLP, Washington, told Bloomberg BNA May 26. Kohn filed an amicus curiae brief in support of KBR.

On remand, KBR will ask the appellate court to dismiss the case with prejudice, "given that it is abundantly clear that any refiled complaint would be time-barred," counsel for KBR John P. Elwood of Vinson & Elkins LLP, Washington, told Bloomberg BNA May 26.

"There is no live claim available to Carter," Elwood said.

Socrates' Trial: Not Pending

The court looked to dictionaries to determine the "ordinary meaning" of the word "pending" in the FCA.

It then rejected KBR's "very peculiar" argument that a first-filed action "remains 'pending' even after it has been dismissed, and it forever bars any subsequent related action."

"Under this interpretation," *Marbury v. Madison*, a case over 200 years old, "is still 'pending.' So is the trial of Socrates," the court said.

This argument pushes the term “far beyond the breaking point,” and “would lead to strange results that Congress is unlikely to have wanted,” it said.

“Why would Congress want the abandonment of an earlier suit to bar a later potentially successful suit that might result in a large recovery for the Government?” the court said.

The court's interpretation is a “common sense reading” of the statute, Joseph E.B. “Jeb” White, of Nolan Auerbach & White PL, Philadelphia, told Bloomberg BNA May 26. White filed an amicus curiae brief supporting Carter.

‘Certainty' for Whistle-Blowers

The opinion will have a significant impact on existing qui tam actions and on cases going forward, White said.

“What happens in the real world is, people come to us with a potential claim, and the first thing we try to do is find out if there's another case that's currently pending,” White said.

Having to go back and also look for “some dusty case” that was dismissed “for whatever reason” years ago “really does undercut our ability to prosecute fraud cases,” he said.

“If it had gone the other way,” it would discourage “a lot of cases from ever being filed,” White said.

One “simply can't take the risk of encouraging people to step forward and potentially be blackballed in an industry” without “a level of comfort and certainty” that the case won't be immediately thrown out, he said.

Here, the court “laid out a very clear bright line rule for relators and relators' counsel to understand, so they can go forward with some level of certainty,” White said.

Court's Decision

The WLSA suspends the statute of limitations for “any offense” involving fraud against the federal government when the U.S. is at war, or when Congress has enacted a specific authorization for the use of force, the court said.

The court looked to the text, structure and history of the WSLA to conclude the term “offenses” applies only to criminal conduct, and not the civil claims at issue in this case.

The 1921 and 1942 versions of the act, passed in response to World War I and World War II, contained the phrase “now indictable,” but that was removed in 1944, according to Benjamin G. Robbins of the New England Legal Foundation, Boston, who filed an amicus curiae brief supporting KBR.

Prior to the court's decision here, lower courts had incorrectly focused on the removal of the word “indictable” to mean the WSLA can apply to civil claims, Robbins said.

“That was just a time restriction. The key word was not *indictable*, the key word was *now*,” Robbins said.

The high court agreed, adopting much of Robbins's historical analysis in its opinion.

The amendment reflects “Congress' decision to make the WSLA applicable, not just to offenses committed in the past during or in the aftermath of particular wars, but also to future offenses committed during future wars,” the court said.

“If Congress really wanted to effect such a broad change they would have done more than just drop language,” Robbins said.

“Fundamental changes in the scope of a statute are not typically accomplished with so subtle a move,” the court said.

The court also looked to dictionaries to determine the term “offense” is “most commonly used to refer to crimes,” and noted that the WSLA is codified in Title 18 of the United States Code, titled “Crimes and Criminal Procedure.”

Congress “never intended in any way to change the meaning or scope of the word ‘offense,' ” Robbins said.

David S. Stone of Stone & Magnanini LLP, Short Hills, N.J., argued for Carter. John P. Elwood of Vinson & Elkins LLP, Washington, argued for KBR. Deputy Solicitor General Malcolm L. Stewart of the Department of Justice, Washington, argued as a friend of the court in support of Carter.

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The court's decision is at http://www.bloomberglaw.com/public/document/Kellogg_Brown__Root_Services_Inc_v_United_States_ex_rel_Carter_No.