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False Claims Act: Fourth Circuit Opens The Door To Stale Relator Actions

The False Claims Act ("FCA") allows whistleblowers, called relators, to file civil fraud actions on behalf of the federal government and retain a portion of any recovered damages. The FCA's statute of limitations is six to ten years, depending on when the material facts are discovered. In *United States ex rel. Carter v. Halliburton Co.*, No. 12-2011 (4th Cir. Mar. 18, 2013), however, the Fourth Circuit held that the Wartime Suspension of Limitations Act, 18 U.S.C. § 3287, indefinitely tolls the FCA's statute of limitations for so long as the United States is "at war." The district court had dismissed the action because, among other grounds, the matter was a civil action brought by a relator after the limitations period had expired. The district court noted that the Department of Justice had declined to intervene, and held that the WSLA did not apply to civil actions where the United States was not a party. The Fourth Circuit disagreed, holding that the suspension of limitations "depends on whether the country is at war and not who brings the case." Because the United States remained "at war" with Iraq for purposes of the WSLA, the WSLA tolled the statute of limitations.

Carter is the first appellate holding to apply the WSLA to civil relator actions since the FCA was amended in 1986 to no longer require a showing of specific intent to defraud. Because the WSLA tolls the statute of limitations for five years after the United States is "at war," the Fourth Circuit's holding opens the door to otherwise time-barred FCA actions.

Class Actions: Plaintiffs' Attorneys Say Sky's Not Falling After CAFA Ruling

Plaintiffs' attorneys say that they are not worried about the state of class action litigation in the wake of the U.S. Supreme Court's holding that plaintiffs who bring class actions cannot cap damages to avoid federal jurisdiction. The Court's ruling in *Standard Fire Insurance Co. v. Greg Knowles*, No. 11-1450 (March 19, 2013), foreclosed attempts by plaintiffs to cap their damages to avoid the $5 million jurisdictional threshold set by the Class Action Fairness Act ("CAFA"), which permits the removal of state cases when the amount in controversy exceeds $5 million. While some legal experts have suggested that the ruling represents a victory for defendants trying to keep class actions out of state courts, a number of plaintiffs' attorneys described the holding as a non-event. In particular, they cited the small number of class actions in which the amount in controversy is less than $5 million to begin with. Despite their ostensible ambivalence, plaintiffs' attorneys are still litigating in a more challenging environment post-CAFA, as the statute is intended to make class actions more easily removable to federal courts.

Ninth Circuit Reaffirms That Amount In Controversy Must Be Apparent From The Four Corners Of The Complaint To Start 30-Day Removal Clock

When a complaint only alleges the value of the class representative's claim, a class-action defendant need not consult its business records and devise a representative valuation of class members' claims in order to determine whether the amount in controversy exceeds the Class Action Fairness Act's $5 million threshold for

removal. *Kuxhausen v. BMW Financial Services*, No. 12-57330, slip op. at *8-11 (9th Cir. Feb. 25, 2013). Nor must the defendant make a "plausible-enough guess" as to the value of the other claims. *Id*. While "multiplying figures clearly stated in a complaint" is clearly required of a defendant, "mak[ing] extrapolations or engag[ing] in guesswork" is not. *Id*. (quotations omitted). This rule ensures that the costs associated with indeterminate pleadings are borne by their authors. *Id*. at *10.

Fourth Amendment: Ninth Circuit Requires "Reasonable Suspicion" Prior To Border Search Of Electronic Devices

Companies concerned about employees travelling abroad with sensitive business information stored on their electronic devices can take some comfort in the Ninth Circuit's *en banc* ruling in *U.S. v. Cotterman*, No. 09-10139 (9th Cir. March 8, 2013). Inspections at border crossings have long been held to be an exception to the Fourth Amendment's prohibition against warrantless searches without probable cause, allowing authorities broad latitude in searching travelers' electronic devices. In *Cotterman*, the Ninth Circuit slightly narrowed that exception by requiring law enforcement to have reasonable suspicion of criminal activity prior to conducting a forensic examination of electronic devices.

The impact of the decision is not clear because the Ninth Circuit further held that authorities had the requisite reasonable suspicion based on the facts of the case *sub judice*, specifically, defendant's prior child-related conviction, frequent travels, crossing from a country known for sex tourism, and variety of electronic equipment (two laptops, three digital cameras), plus the parameters of the Operation Angel Watch program aimed at combating child sex tourism. Thus, the child pornography found after a forensic examination of defendant's laptops—conducted upon his return from Mexico—was admissible. The court rejected, however, the notion that password protection of computer files alone supports reasonable suspicion, requiring that other indicia of criminal activity also be present.

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