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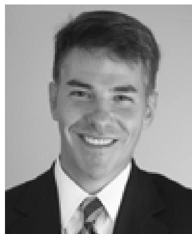
*False Claims Act*

# Supreme Court to Take Up Major False Claims Act Case Involving Wartime Suspension of Limitations Act and First-to-File Bar.



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On July 1, the U.S. Supreme Court granted *certiorari* to hear the appeal in *United States ex rel. Carter v. Kellogg Brown & Root, Inc.*, 710 F.3d 171, 181(4th Cir. 2013). The case presents two significant issues under the federal False Claims Act, 31 U.S.C. § 3729 *et seq.* (2012) (''FCA''). First, does the Wartime Suspension of Limitations Act (''WSLA'') apply to the FCA? If so, then does the relatively low threshold for triggering the WSLA effectively emasculate any statute of limitations on FCA claims? Second, what did Congress mean by ''pending action'' in the FCA's first-to-file bar? Does it apply only so long as the first-filed action remains ongoing, or does the bar continue to have preclusive effect even after the earlier action has been dismissed?

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**The Wartime Suspension of Limitations Act (''WSLA'').** The WSLA was enacted in 1942. *Carter*, 710 F.3d at 177. Once triggered, it suspends the statute of limitations for all applicable offenses until five years after the ''termination of hostilities.'' 18 U.S.C. § 3287 (2012). The applicable offenses include ''fraud or attempted fraud against the United States.'' *Id.* The qualification ''now indictable'' was removed in 1944, such that the fraud in question need not be presently indictable for its period of limitations to be tolled. *Carter*, 710 F.3d at 177 (citing *Dugan & McNamara, Inc. v. United States*, 127 F. Supp. 801, 802 (Ct. Cl. 1955)).

The WSLA's triggering clause was substantially amended in 2008. *See* Pub. L. 110-417, Title VIII, § 855, 122 Stat. 4545. Instead of requiring that the United States be ''at war,'' the WSLA now *also* applies when ''Congress has enacted specific authorization for the use of the Armed Forces.'' 18 U.S.C. § 3287. Thus, for any conduct occurring after October 14, 2008, the question of whether the United States is ''at war'' is irrelevant so long as Congress has authorized the use of force.

In *Carter*, the Fourth Circuit refused to apply the FCA's six-year statute of limitations to bar the relator's claims because, it held, the limitations period was tolled by the WSLA. 710 F.3d at 178-79. The court held that Congress' authorization of military force in Iraq in 2002

placed the United States ''at war'' for the purposes of the WSLA. Hesitant to adopt an ''unduly formalistic approach that ignores the realities of today,'' the court found that ''the Act does not require a formal declaration of war.'' *Id.* at 178. Congress has elsewhere required a ''declared war,'' the court reasoned, and could have done so here. While not requiring a formal declaration of war to trigger application of the WSLA, the Fourth Circuit found that such formalities *are* required to terminate the tolling. *See id.* at 179 (''Neither Congress nor the President had met the formal requirements of the Act for terminating the period of suspension when the claims at issue were presented for payment.''). And because the President and Congress *still* have not formally declared a cessation of the Iraq hostilities (and may never do so), the WSLA continues to toll the FCA's statute of limitations indefinitely. In so holding, the court rejected arguments that the WSLA applied only to criminal fraud, or that it should only apply in *qui tam* suits when the government does not intervene.

**The First-to-File Bar.** The FCA's first-to-file bar is codified at 31 U.S.C.A. § 3730(b)(5). It provides that ''[w]hen 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.'' *Id.*

The procedural history of the *Carter* case is long and complicated, but for first-to-file purposes is relatively simple. The first-filed complaint was ''related'' to the second complaint, and was operative at the time that the second complaint was filed. But by the time the district court was considering a motion to dismiss the second complaint on first-to-file grounds, the first complaint had been dismissed. The question presented was whether the first complaint, having been dismissed, was nonetheless a ''pending action'' within the meaning of the first-to-file bar. If so, then dismissal with prejudice would be in order. If not, then relator would have a chance to re-file the second complaint.

The Fourth Circuit interpreted ''pending action'' to mean that the first-to-file bar is temporally limited, i.e., the first-filed action only has preclusive effect while it remains an active matter on a court's docket. *Carter*, 710 F.3d at 182-83. Once it has been dismissed, the bar is lifted and another relator—or the same relator, for that matter—may file a similar if not exactly the same lawsuit.

The *Carter* majority pointed out that *res judicata* (or ''claim preclusion'') may serve as a check when the first-filed action is resolved on the merits. 710 F.3d at 183. But the scope of *res judicata* is far narrower than the reach of the first-to-file bar, which applies to actions that are merely ''related.'' 31 U.S.C. § 3730(b)(5). While the Fourth Circuit acknowledged as much by endorsing a broad reading of ''related,'' 710 F.3d at 183, it failed to resolve the inconsistency in its reasoning. Nor did it explain how its interpretation squares with the FCA's policy goals of incentivizing relators to expose fraud while spurning those who bring parasitic suits, especially once the government has been put on notice by an earlier suit and is equipped to investigate related frauds. *See United States ex rel. Batiste v. SLM Corp.*, 659 F.3d 1204, 1208 (D.C. Cir. 2011) (observing the ''twin goals of rejecting suits which the government is capable of pursuing itself, while promoting those which the government is not equipped to bring on its own.'').

**The Solicitor General's Plea.** Invited to express the government's views, the Solicitor General on May 27 urged the Supreme Court *not* to take the case. *See* Brief for the United States as Amicus Curiae, *Kellogg Brown & Root, Inc. v. United States ex rel. Carter*, __ U.S. __ (No. 12-1497). The government's view is, not surprisingly, that the WSLA tolls the statutes of limitation for criminal and civil claims alike. Perhaps less expected, however, was the government's argument that the WSLA applies even when the government does not intervene. This does not necessarily follow; the government could rationally argue that the WSLA applies to civil FCA claims, but only when the United States intervenes and takes over the litigation of the case. After all, the purpose of the WSLA—even as the Fourth Circuit describes it—is ''to combat fraud at times when *the United States* may not be able to act quickly because it is engaged in 'war.' '' *Carter*, 710 F.3d at 179 (emphasis added). There is no indication that Congress in 1942 was concerned about the effect of war on would-be *qui tam* relators.

The Solicitor General also downplayed the circuit split over the word ''pending'' in the first-to-file bar. One year after *Carter*, the D.C. Circuit interpreted ''pending'' quite differently than the Fourth Circuit. *See United States ex rel. Shea v. Cellco P'Ship*, 748 F.3d 338 (D.C. Cir. 2014). Examining the plain language of the bar, the D.C. Circuit found that ''[t]he simplest reading of 'pending' is the referential one; it serves to identify which action bars the other.'' *Id.* at 343. Thus, the D.C. Circuit held ''that the first-to-file bar applies even if the initial action is no longer pending.'' *Id.* In so doing, the Court expressly rejected the reasoning of the Fourth, Seventh, and Tenth Circuits. *Id.* at 344. Notwithstanding this clear division, and relying in part on the prospect of *Shea* being reviewed *en banc*, the Solicitor General surmised that ''[t]he disagreement in the circuits is a narrow one that may resolve itself without this Court's intervention.'' Brief at 21-22.

**Supreme Court Review and Implications for Government Contractors.** The Supreme Court was evidently unconvinced by the Solicitor General's arguments. It granted *certiorari* and will hear the case next term. While there is no telling how the Supreme Court will rule, the fact that it has decided to hear the case can only be viewed as a positive sign for FCA defendants in the wake of the Fourth Circuit's opinion in *Carter*. Either way, the high court's resolution of these issues will undoubtedly have a significant impact on exposure to FCA liability.

On the WSLA issue, the two principal arguments for reversal will be (1) that the WSLA only applies to criminal fraud; and (2) that the WSLA does not apply to non-intervened FCA cases. These arguments have some force. The WSLA is codified in the Criminal Code, at 18 U.S.C.A. § 3287 (2012). It speaks in terms of ''offenses,'' which the petitioner (KBR) will argue connotes criminal malfeasance. It originally contained the qualifier ''now indictable,'' which clearly implies that the offenses are criminal and not civil. While the respondents will argue that the removal of ''now indictable'' indicated an expansion to civil offenses too, it is equally plausible that the statute as modified still speaks to *criminal* offenses—those ''now indictable'' and those indictable in the future. If any of these arguments succeeds, then

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potential FCA defendants will regain the predictability, stability, and finality that a statute of limitations is meant to provide. The alternative is for companies and individuals to face the everlasting threat of suit under the FCA, a threat that will increase costs (direct and indirect) for both them and, by extension, the taxpayer.

If the WSLA holding stands, the FCA's statute of limitation could become effectively meaningless. Although the Fourth Circuit found the purpose of the WSLA was ''to combat fraud at times when the United States may not be able to act as quickly because it is engaged in 'war,' '' *id.* at 179, the import of its ruling is such that the WSLA seemingly tolls the statute of limitations for claims regarding *any* fraud actionable under the FCA—war-related or not. It would extend to not only alleged FCA violations by defense contracts, but also other entities, such as health care providers and others who transact business with the government wholly unrelated to war efforts. Under the logical extension of the *Carter* ruling, an authorization for the use of force in Saudi Arabia would toll the statute of limitations on an off-label marketing scheme in Kansas. Nor does the DOJ have to demonstrate any particularized drain on its resources; a congressional authorization for 100 troops to deploy as peace keepers in Sri Lanka would toll the statute of limitations for *all fraud everywhere*, even if no DOJ or U.S. Attorney personnel—to say nothing of the private plaintiff's bar—are involved in any way. In short, the import of the Supreme Court's ruling on this issue can hardly be overstated.

Also important is the Court's anticipated ruling on the first-to-file bar. If the *Carter* holding stands, then there is virtually no obstacle to the *seriatim* filing of repetitious *qui tam* suits under the FCA. The competing arguments are perhaps best illustrated by the majority and dissenting opinions in *Shea*, 748 F.3d 338. The dissent's conclusion—that the first-to-file bar has no preclusive effect once the first-filed action is dismissed—relies almost exclusively on the primary purpose of the first-to-file being ''protecting the spoils of the first to bring a claim.'' *Id.* at 348-49 (Srinivasan, J., dissenting) (quoting *United States ex rel. Chovanec v. Apria Healthcare Group, Inc.*, 606 F.3d 361(7th Cir. 2010)). But that purpose cannot be viewed in a vacuum; it is likely subservient to the *ultimate* purpose of the ''race to the courthouse'' incentivized by the first-to-file bar: providing notice of potential fraud to the government as soon as possible. *Cf. Grynberg v. Koch Gateway Pipeline Co.*, 390 F.3d 1276, 1279 (10th Cir. 2004) (''Once the government is put on notice of its potential fraud claim, the purpose behind allowing qui tam litigation is satisfied.''). If that view prevails, then the purpose of the first-to-file bar is served as soon as the *first* complaint is filed under seal with the Justice Department. If that complaint is later dismissed, the government does not somehow cease to be on notice of the potential fraud. Rather, the first-filed action puts the government on notice sufficient for it ''to discover related fraud,'' *Carter*, 710 F.3d at 182, which eliminates the utility to the government of a later-in-time, ''related'' whistleblower suit being brought. And of course, the government may intervene or file its own complaint; the first-to-file bar never precludes the United States from filing suit. 31 U.S.C. § 3720(b)(5). In sum, there are ample reasons why the *Carter* holding on the first-to-file bar might be (and should be) reversed.

Of course, it is by no means certain that the Court will reach both issues; a reversal on either would make the other moot. For example, if the Supreme Court reverses on WSLA grounds, then Mr. Carter's claims would be time-barred; there would be no need to consider the first-to-file bar. And vice versa. How the Supreme Court will choose to decide the case, however, remains to be seen.