Is the Supreme Court Poised to Limit the False Claims Act?

Decision Should Provide Clarity in an Area of Law that Affects a Significant Portion of the Health Care Industry

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The U.S. Supreme Court is expected to weigh in once again this term on the False Claims Act, 31 U.S.C. § 3729 et seq. (FCA). The case is *Kellogg Brown & Root Services, Inc. v. United States ex rel. Carter*.[1] At issue are two questions of statutory interpretation that, if resolved, could add a much-needed level of certainty regarding two important defenses to FCA liability.

At least one Court of Appeals has held that a 1942 law suspending the statute of limitations for frauds against the United States during times of war has preserved all civil FCA claims since at least 2002, just after Congress authorized the use of military force in Iraq.[2] As the petitioner points out, however, the appellate court's holding suggests that the United States could be "at war" indefinitely, which in turn would also suspend the statute of limitations on FCA claims indefinitely.[3] In other words, the first issue before the court is whether potential FCA defendants might still be on the hook for actions that occurred as many as 13 years ago, and perhaps far longer.

That same Court of Appeals also held that the FCA's statutory "first-to-file" bar prevents FCA defendants from having to defend multiple claims *at the same time* but does not shield a defendant from successive suits once the initial action is resolved or dismissed. In this sense, the provision operates more to establish a litigation queue than as a substantive limit on prosecution. In light of the significant monetary awards available to successful *qui tam* relators, potential FCA defendants can be assured a supply of willing prosecutors. The second issue before the Court is whether and to what extent this pool of potential relators should be restricted.

The FCA remains a centerpiece of the federal government's health care fraud and compliance enforcement program. According to Department of Justice

figures, the government recovered nearly $5.69 billion from fraud settlements and judgments in 2014.[4] Of that amount, $2.3 billion was related to health care fraud — from pharmaceutical and device manufacturers to hospitals to other health care providers.[5] This marks the fifth consecutive year in which the federal government has recovered more than $2 billion in false claims cases related to federal health care programs such as Medicare and Medicaid.[6] Defending and potentially settling an FCA claim can be a very costly and time-consuming endeavor. Naturally, the results of this case will have particular importance for any member of the health care industry operating under the threat of such a burden.

Case Background

Kellogg Brown & Root Services, Inc. (KBR) obtained a contract with the U.S. military in Iraq to provide logistical services including water purification services, and Benjamin Carter was hired by KBR as a water purification operator. According to Carter, these services were not actually performed by KBR, and KBR also had a policy of requiring employees to submit timesheets indicating 12-hour work days regardless of how much work was actually done.

In 2006, Carter filed his first FCA suit against KBR, alleging fraud in the failure to actually test water for purity and alleging the submission of fraudulently inflated invoices. The government declined to intervene and, before trial, informed the parties of a related FCA action that had been filed in California in 2005. Based upon the first-to-file bar, the district court granted KBR's motion to dismiss Carter's suit without prejudice.

While Carter pursued an appeal, the California case was dismissed. As a result, Carter filed suit with a complaint that was substantially identical to his original one. The district court again granted KBR's motion to dismiss without prejudice, finding that Carter's original action was still pending when he filed the second suit. Carter then voluntarily dismissed his original complaint and refiled the case a third time. Again, the government declined to intervene, and again, the district court found that two related actions filed in 2007 were pending at the time of Carter's latest filing. This time, however, the district court dismissed the case with prejudice, holding Carter's claims were time-barred by the six-year statute of limitations. Carter timely appealed to the Fourth Circuit.

In a divided opinion, the Fourth Circuit reversed the district court and held that the Wartime Suspension of Limitations Act, 18 U.S.C. § 3287 (WSLA), tolled the statute of limitations applicable to Carter's claims. Further, the court held that the WSLA would continue to apply and toll the statute of limitations until the President or Congress formally declared an end to hostilities. The court also held that, although related actions were pending when Carter filed the third suit, those actions had since been resolved and were no longer "pending" as contemplated by 31 U.S.C. § 3730(b)(5). Accordingly, that provision no longer served as an impediment to Carter's still-timely claims, and the district court's dismissal with prejudice was in error.

The Supreme Court granted KBR's petition for a writ of certiorari and heard oral argument on January 13, 2015. The two issues raised are 1) whether the WSLA applies to civil FCA claims by *qui tam* relators; and 2) whether the FCA's first-to-file bar remains in effect once the original related action is no longer pending.

Does the Wartime Suspension of Limitations Act Toll the Statute of Limitations?

The first issue the Court is poised to address is whether the WSLA applies to the facts of this case and permits Carter to bring the action at all. The FCA provides that civil actions must be commenced within six years of the date of the act constituting a

violation.[7] Whether there is some other statutory provision that overrides the limitations period set by the FCA is the question the Supreme Court faces in this case. According to the Fourth Circuit, just such a statute can be found in the WSLA.

Congress first passed the modern WSLA in 1942 in response to concerns over rampant war profiteering. The original 1942 text read: "the running of any existing statute of limitations applicable to offenses involving the defrauding or attempts to defraud the United States … and now indictable under any existing statutes shall be suspended…"[8] In 1944, Congress passed the Contract Settlement Act of 1944, which amended the WSLA text by removing the phrase "now indictable."[9] During its comprehensive recodification of U.S. criminal law in 1948, Congress placed the WSLA in Title 18, the criminal code.[10]

In 2008, the WSLA was amended as part of the Wartime Enforcement of Fraud Act[11] such that the current text of the WSLA reads, in relevant part:

> When the United States is at war or Congress has enacted a specific authorization for the use of the Armed Forces … the running of any statute of limitations applicable to any offense … involving fraud against the United States … shall be suspended until 5 years after the termination of hostilities as proclaimed by a Presidential proclamation, with notice to Congress, or by a concurrent resolution of Congress.
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> 18 U.S.C. § 3287.

The crux of the issue is how to construe the term "offense" as contained in the WSLA. KBR contends that the WSLA does not apply to civil offenses because the WSLA has been, from its inception, exclusively applicable to criminal offenses.[12] Carter answers that the 1944 amendment, which excised the "now indictable" language, evidences a clear Congressional intent to expand the reach of the WSLA to include civil frauds such as those covered by the FCA.[13]

Siding almost entirely with Carter, the Fourth Circuit majority reasoned that the WSLA does not require a formal declaration of war.[14] Further, the military operations in Iraq in 2005, pursuant to an Authorization for the Use of Military Force, were sufficient for a finding that the United States was "at war."[15] From that point, the panel held that the United States remains "at war" because neither the President nor Congress via resolution has formally declared a cessation of hostilities.[16]

The court then grappled with the more fundamental question of whether the WSLA applies to civil actions at all. It found Carter's view more persuasive, noting "had Congress intended for 'offense' to apply only to criminal offenses, it could have done so by not deleting the words 'now indictable' or it could have replaced that phrase with similar wording."[17] Lastly, the court dismissed the notion that the WSLA is inapplicable to actions brought by relators. Such an exception would undermine the overall purpose of the FCA: to root out fraud against the United States.[18]

At oral argument, those justices who spoke appeared uniformly skeptical of the idea that the WSLA applies to civil FCA claims. Accepting that the 1942 statute applied exclusively to criminal offenses, the Court appeared to have serious doubts that the 1944 amendment actually had the effect proffered by Carter. As noted by Justice Alito, one might expect that such a "big change" would produce "a bit of evidence here or there that that's what was intended…"[19] Instead, there is virtually nothing in the legislative history directly suggesting that a change was intended. Moreover, the Court appeared receptive to KBR's argument that the word "offense," as used throughout Title 18, refers to criminal violations without exception. The Court did not appear concerned with whether

the WSLA applied to *qui tam* actions or only those pursued directly by the government.

KBR's briefs argued that the rule established by the Fourth Circuit would lead to an indefinite suspension of the limitations period for FCA claims. For all intents and purposes, KBR argued, the United States has been "at war" under the Fourth Circuit's definition for much of the past 70 years and it is unclear whether a formal cessation will ever occur.[20] Such open-ended suspension would directly contravene a longstanding Congressional policy favoring repose. In response, Carter attempted to focus the Court on the facts, reminding the justices that the acts alleged were committed by a war contractor in a war theatre. In Carter's view, the Court need not decide whether all civil claims under the FCA are tolled by the WSLA, only those that are war-related.[21]

A finding that the WSLA is inapplicable to civil FCA claims[22] should provide all in the health care industry with a measure of relief. Notably, such a holding would mean that the six-year statute of limitations would in most cases be the outer limit for filing a timely action. Even if the Court were to take a more nuanced approach and limit the application of the WSLA to war-related frauds, a significant portion of potential health care-related FCA cases would be excluded from the WSLA's reach. On the other hand, a complete affirmation of the Fourth Circuit's holding would mean that hospitals, device manufacturers, health care providers, and others could be hauled into court for acts over a decade in the past. At a minimum, such a ruling would require additional litigation to determine just how far back liability would reach.

Does the First-to-File Bar Shield Defendants from Successive Suits?

The second statutory question raised by the KBR case involves the so-called first-to-file bar found at 31 U.S.C. § 3730(b)(5). As the procedural history of the case indicates, Carter has now attempted to file this claim four separate times. The government has declined to intervene in each case. In addition, another related case has been pending that has prevented each of Carter's actions from proceeding. All of those related actions, however, have been dismissed without a resolution on the merits. The issue is what effect these facts should have on Carter's ability to continue the pursuit of his claim.

The first-to-file bar was added to the FCA's statutory scheme in 1986 during an update to the entire FCA. The 1986 revisions are largely regarded as pro-relator in that a principal aim was to correct the situation in which a relator's mandatory notification of the government of the facts simultaneously operated to bar the relator's action because the government then possessed knowledge of said facts.[23] Section 3730(b)(5) reads: "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." Where applicable, the bar removes subject matter jurisdiction from the court to hear the relator's claim.[24]

As framed by the parties, the question is whether the first-to-file bar operates as a bar on all future litigation, or more as a "one-case-at-a-time" rule. On this point, the circuits have split. The Courts of Appeals for the Fourth, Seventh, and Tenth Circuits agree that the bar exists only while a related case is pending; those in the First, Fifth, and Ninth Circuits have held that once barred by the provision, an action cannot be revived.[25] Both sides point to the statutory text and purpose as well as legislative history to make their cases.

The Fourth Circuit, again siding with Carter, held that "once a case is no longer pending the first-to-file bar does not stop a relator from filing a related case."[26] To be clear, the panel majority found the first-to-file bar applicable to Carter's claims in that at least one related case was pending *at the time Carter filed* his case. The court reasoned, however, that the statutory bar of section 3730(b)(5) is distinct from the doctrine of claim preclusion and only applies while a related action

is pending. In this sense, Carter's action was properly subject to dismissal *without prejudice*. According to the Fourth Circuit, this interpretation accords "pending" its plain meaning and comports with the overall purpose of the FCA's provisions permitting *qui tam* actions in the first place.[27]

On this point the Supreme Court appeared more receptive to Carter's side. At one point during oral argument, Justice Kennedy noted that KBR is essentially writing the word "pending" out of the statute entirely.[28] Later, Justice Ginsburg registered her concern that a lifetime bar would serve to create a "race to judgment," and leave a relator's recovery subject to great uncertainty.[29] Echoing this point, Justice Breyer confirmed that the *qui tam* provisions serve purposes broader than mere disclosure of fraud to the government and seek also to reward the person who discloses.[30] The Court appeared uncomfortable with the idea that vindication of a fraud claim would depend upon the coincidence of the party happening to file his action first. Whether the original relator did a poor job or settled, or the case was dismissed without reaching the merits, there appeared to be concern that a valid claim be heard.

Nevertheless, KBR argued that a "one-at-a-time" rule would upset the delicate balance struck by Congress between encouraging disclosure of fraud and discouraging opportunistic plaintiffs from filing parasitic suits.[31] Carter answered that this concern is mitigated by operation of the statutory bar prohibiting actions based upon publicly disclosed facts.[32] Instead, the Fourth Circuit's approach preserves otherwise meritorious claims and serves the broader government purpose of prosecuting fraud committed against the United States.

As a threshold matter, the Court may not reach this issue. As KBR conceded at oral argument, it will be made entirely whole by a holding in its favor on the WSLA issue.[33] The Court may nevertheless decide this issue for a number of reasons, including the circuit split or a determination of the WSLA issue that is unfavorable to KBR. Should the Court reach the issue and determine that the first-to-file bar applies only while a related action is pending, potential FCA defendants should be prepared to litigate a claim to its fullest extent and on the merits.

A "one-at-a-time" rule will prevent defendants from avoiding liability for fraud on any of a number of procedural technicalities, such as would be the case when an underfunded relator's first action is ultimately dismissed for lack of prosecution. Instead, potential plaintiffs will, collectively, have the full statutory period to bring a claim. On the other hand, a ruling that section 3730(b)(5) bars all future related actions coupled with a liberal attitude toward finding actions related could be a boon to potential defendants. In such a world, a defendant could avoid the trouble of litigating a whole class of related claims by simply achieving dismissal of the first case.

Conclusion

A decision in the KBR case is expected sometime in June 2015. Although prognosticating Supreme Court decisions is dubious, the Court's questioning at oral argument appeared to demonstrate a perceptible unity of thought on each of the two issues. As to the WSLA, all justices who spoke seemed to evince a skepticism that civil actions are covered by the WSLA. On the other hand, the Court appeared similarly uncomfortable with the idea that a *qui tam* action that is no longer pending should serve as a lifetime bar to future actions. Either way, the Court's ruling should provide clarity in an area of law that affects a significant portion of the health care industry.

Endnotes:

1. No. 12-1497.
2. Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. 107-243, 116 Stat. 1498.
3. Brief for the Petitioners at 41-42, Kellogg Brown & Root Services v. United States ex rel. Carter, No. 12-1497 (Aug. 29, 2014).

4. Kristin Graham Koehler and Monica Groat, *DOJ Announces Nearly $6 Billion in Fraud Recoveries During 2014*, Original Source (Dec. 1, 2014), fcablog.sidley.com/blog.aspx?entry=569.
5. *Id.*
6. *Id*.
7. 31 U.S.C. § 3731(b)(1). Additional time may be provided to the government where it could not reasonably have known of the facts, but in any event, the claim must be brought within 10 years of the date of violation. 31 U.S.C. § 3731(b)(2).
8. Act of Aug. 24, 1942, Pub. L. No. 77-706, 56 Stat. 747.
9. 58 Stat. 667.
10. 62 Stat. 828
11. Wartime Enforcement of Fraud Act, Pub. L. No. 110-417, 122 Stat. 4545.
12. Brief for the Petitioners at 19-29.
13. Brief for Respondent Benjamin Carter at 23-29, Kellogg Brown & Root Services v. United States ex rel. Carter, No. 12-1497 (Oct. 14, 2014).
14. The parties raised arguments related to whether the pre-2008 or post-2008 version of the WSLA should apply, since the actions alleged in Carter's complaint occurred in 2005 or earlier. The Fourth Circuit generally avoided this question by holding that under either version of the statute, a formal congressional declaration of war was not required.
15. *United States ex rel. Carter v. Halliburton Co.*, 710 F.3d 171, 178 (4th Cir. 2013).
16. *Id.* at 179.
17. *Id.* at 180.
18. *Id.* at 180-81.
19. Transcript of Oral Argument at 35, Kellogg Brown & Root Services v. United States ex rel. Carter, No. 12-1497 (Jan. 13, 2015).
20. Brief for the Petitioners at 41-43.
21. Brief for Respondent Benjamin Carter at 40-43.
22. It is worth briefly noting that the U.S. District Court for the District of Columbia recently offered an alternative legal theory as to why the WSLA does not apply to FCA claims. Relying on the Supreme Court's opinion in *United States v. Grainger*, 346 U.S. 235 (1953), the district court noted that the WSLA "applies to offenses 'which include fraud as an essential ingredient,' meaning that a specific intent to defraud the government is an essential element of the offense or cause of action." *United States ex rel. Landis v. Tailwind Sports Corp.*, No. 10-cv-00976, 2014 U.S. Dist. LEXIS 83313, *69 (D.D.C. June 19, 2014) (quoting *Grainger*, 346 U.S. at 242). The court reasoned that the 1986 amendments to the FCA, which defined the terms "knowing" and "knowingly" to eliminate the need for proof of a "specific intent to defraud," rendered civil FCA offenses outside the class of those covered by the WSLA. *Id.* at * 70–71. This theory, however, does not change the analysis to anything other than pure statutory interpretation, and to that end, it does not avoid the thorny issues of divining Congressional intent.
23. See Hughes Aircraft Co. v. United States ex rel. Schumer, 520 U.S. 939, 946 (1997); see also Cook County v. United States ex rel Chandler, 538 U.S. 119, 133 (2003).
24. 710 F.3d at 181.
25. Brief for the Petitioners at 24-25.
26. 710 F.3d at 183.
27. *Id.*
28. Transcript of Oral Argument at 13.
29. *Id.* at 21 – 24.
30. *Id.* at 26.
31. Brief for the Petitioners at 52.
32. Brief for Respondent Benjamin Carter at 53; *see* 31 U.S.C. § 3730(e)(4).
33. Transcript of Oral Argument at 12.