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Is a Qui Tam Suit Against a Government Contractor Under the False Claims Act Untimely or Barred by Prior Lawsuits?

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Is a *Qui Tam* Suit Against a Government Contractor Under the False Claims Act Untimely or Barred by Prior Lawsuits?

CASE AT A GLANCE

Respondent Benjamin Carter is suing Kellogg Brown & Root Services, Inc., and other petitioners (collectively KBR) for fraudulently billing the United States under a military contract. Carter's suit rests on the False Claims Act (FCA), which authorizes private, "qui tam" suits on behalf of the federal government. KBR argues that Carter's suit is untimely and barred by prior, similar suits. Those arguments require the Court to interpret the Wartime Suspension of Limitations Act and the FCA's "first-to-file" provision.

Kellogg Brown & Root v. Carter
Docket No. 12-1497

Argument Date: January 13, 2015
From: The Fourth Circuit

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ISSUES

Does the Wartime Suspension of Limitations Act suspend the statute of limitations for a *qui tam* suit under the False Claims Act (FCA)?

Does the FCA's "first-to-file" provision bar a *qui tam* suit that is filed after an earlier-filed, similar suit has ended?

FACTS

Petitioners are Kellogg Brown & Root Services, Inc., Halliburton Company, and related entities (collectively, KBR). KBR provided logistical services to the United States military in Iraq under a government contract. In carrying out the contract, KBR hired respondent Benjamin Carter in December 2004 to operate water purification units at two camps in Iraq.

Carter claims that at both camps KBR was fraudulently billing the government for water purification services that were not actually performed. He alleges that he was instructed during a five-week period "to fill in timecards stating that he worked 12 hour[s] a day, each day, with uniformity," though "he had actually worked zero hours per day" during this period. He alleges that other KBR employees were required to report working 12 hours a day even on days when they did no work at all. Carter says he resigned in April 2005 "out of disgust at the rampant and wanton fraud to which he bore witness." In February 2006, Carter filed the first of four federal court actions against KBR alleging that KBR's timecard fraud violated the False Claims Act (FCA).

The FCA prohibits the submission of false claims to the United States "for payment or approval." People who violate this prohibition are subject to civil actions for civil penalties and treble damages.

The FCA authorizes civil actions to be brought by the federal government or by private plaintiffs suing on behalf of the United States.

When a private plaintiff brings a civil action under the FCA, the plaintiff is called "the relator," the action is called a *"qui tam"* action, and the United States is the plaintiff. The relator files the action under seal and, at the same time, makes a "written disclosure" of all material facts to the federal government. These circumstances enable the government to investigate the allegations confidentially and decide whether to intervene in the action.

If the government intervenes, it takes primary control over the action but the relator remains a party. If the government declines to intervene, the relator may proceed alone. In either event, the relator gets a percentage (generally 15–30 percent) of any amount recovered, which may be considerable because of the FCA's treble damages provision. The idea behind these "bounties" is to encourage corporate whistleblowers to disclose fraud that would otherwise be hard to detect and prove.

While encouraging whistleblowers, the FCA limits *qui tam* actions. One limit—now before the Court—is imposed by the FCA's "first-to-file" provision. That provision says, "When 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." Another limit—which is not before the Court but is discussed in the briefs—is the FCA's "public-disclosure" provision. That provision bars a *qui tam* action that is based on information that has been publicly disclosed in certain ways, unless the action is brought by an "original source" of the information.

A federal district court in Virginia dismissed each of Carter's four *qui tam* actions alleging timecard fraud. In each action, the court determined that, on the date Carter's action was filed, another *qui tam* action was pending against KBR that alleged timecard fraud and that was filed before Carter's. In four separate rulings, the district court held that each of Carter's actions was barred by the first-to-file provision.

To summarize the bases for these rulings: The district court held that Carter's first action was barred by an action in California called *Thorpe,* No. 05-cv-08924 (C.D. Cal. Dec. 23, 2005), which was apparently still under seal when Carter filed his action. The district court held that Carter's second action was barred, oddly enough, by the pendency of Carter's appeal from the dismissal of his first action. The district court held that Carter's third action—which is now before the Court—was barred by a *qui tam* action in Maryland called *Duprey,* No. 07-cv-1487 (D. Md. June 5, 2007). (The district court also found the third action barred by the FCA's statute of limitations.) The district court held that Carter's fourth action was barred by the pendency of KBR's petition for certiorari seeking review of the court of appeals' decision in Carter's third action.

KBR's certiorari petition presents two issues arising from the decision of the U.S. Court of Appeals for the Fourth Circuit, which reversed the dismissal of Carter's third action.

The Fourth Circuit held that Carter's third action, which was filed in June 2011, was not barred by the FCA's 6-year statute of limitations, even though almost all of Carter's claims involved events before June 2005. The court held that the statute of limitations on Carter's action was suspended by the Wartime Suspension of Limitations Act (WSLA). The WSLA suspends, during wartime, the statute of limitations "applicable to any offense" involving fraud against the government. The Fourth Circuit rejected KBR's argument that the WSLA suspends the statute of limitations only for criminal actions—i.e., fraud prosecutions brought by the federal government.

The Fourth Circuit also held that the FCA's first-to-file provision did not bar Carter from pursuing his timecard fraud claims against KBR. The court interpreted the provision to mean that an earlier-filed *qui tam* action bars a later-filed *qui tam* action involving similar facts only as long as the earlier-filed action is pending. The bar lifts, in the court's view, when the earlier-filed action ends. The court observed that the *Thorpe* case in Maryland—as well as another arguably similar case against KBR in Texas—ended after Carter filed his third action. The Fourth Circuit held that those actions *did* bar Carter's third action on the date it was filed because they were pending on that date. But the district court erred, in the Fourth Circuit's view, by dismissing Carter's third action "with prejudice"; the district court should have dismissed the action "without prejudice," so Carter could file a fourth action.

On remand to the district court, Carter filed his fourth action against KBR alleging timecard fraud. In the meantime, KBR petitioned for certiorari. The pendency of the certiorari petition caused the district court to dismiss the fourth action, but the court did so without prejudice. If the U.S. Supreme Court rules in Carter's favor, we can expect him to file a fifth action.

CASE ANALYSIS

The Court will interpret two federal statutes involving fraud against the federal government: the Wartime Suspension of Limitations Act (WSLA) and the False Claims Act (FCA).

As mentioned above, the WSLA suspends the statute of limitations "applicable to any [fraud] offense" against the federal government during wartime. The parties disagree on whether the WSLA applies only to criminal actions or, instead, also applies to civil actions, such as *qui tam* actions under the FCA. Both KBR and Carter rely on the WSLA's text, history, executive-branch interpretations, case law, and purpose.

Focusing on the WSLA's applicability to "any *offense,*" KBR argues that the word "offense" means a crime. KBR also points out that the WSLA is in Title 18 of the U.S. Code, which is entitled "Crimes and Criminal Procedure," and, more specifically, is in a part of Title 18 (entitled "Limitations") that uses "offense" solely in reference to crimes. KBR contends that, if the Court has any doubt about the WSLA's scope, the Court's precedent requires it to construe the WSLA narrowly. Here, that means construing the WSLA to apply only to criminal actions.

Carter argues the WSLA clearly applies to civil actions. He cites dictionaries defining "offense" to include violations of noncriminal laws. He quotes Supreme Court opinions and federal statutes that refer to "criminal offenses," implying an offense can be criminal or civil. He points out that some unlawful conduct can give rise to civil and criminal proceedings, including conduct that violates the FCA.

The WSLA's history includes one main event that each side cites in its support. Before 1944, the WSLA applied to fraud offenses "*now indictable* under any existing statutes." In 1944, Congress removed this "now indictable … " phrase (and made other changes). Carter argues that Congress removed the phrase to expand the WSLA to civil actions (the term "indictable" having plainly restricted the pre-1944 WSLA to criminal actions). KBR replies that if Congress had intended such a drastic expansion of the WSLA, it would have said so, instead of which the legislative history is silent.

Both sides also cite executive-branch interpretations in their support. KBR asserts that, "in the years following the 1944 amendments, the executive branch understood the WSLA to be a criminal provision." For example, KBR quotes a brief that the solicitor general (SG) filed in a 1959 Supreme Court case, *Koller v. United States,* 359 U.S. 309. Then, the SG argued the WSLA applies only to criminal actions. Carter, however, has the support of the current SG, who has filed an amicus brief recanting the *Koller* brief as ill-considered.

Both sides contend case law supports their interpretation of the WSLA. KBR cites cases that, in its view, suggested that after 1944 the WSLA still applied only to criminal actions. Carter, however, cites cases from the 1950s that interpreted the WSLA to apply to civil actions, including FCA actions. KBR dismisses these as "a handful of half-century-old lower-court decisions."

Finally, each side claims that its interpretation furthers the purpose of the WSLA. KBR quotes a Supreme Court opinion stating that the WSLA reflected "fear … that the law-enforcement officers would be

so preoccupied with prosecution of the war effort that the *crimes* of fraud perpetrated against the United States would be forgotten until it was too late" (emphasis added by KBR). KBR contends that this fear justified only a wartime suspension of the statute of limitations for fraud prosecutions. Carter responds that the WSLA recognizes that fraud against the government can be "prosecuted" by civil actions, as well as by criminal actions, and that prosecution of those civil actions can be hindered by the "fog of war" whether the civil actions are brought by the government or by private relators. For example, Carter alleges that his 2006 *qui tam* action was complicated by the location of witnesses in Iraq and Afghanistan.

The parties even dispute which version of the WSLA governs this case: the pre- or post-2008 version. Under both versions, the WSLA suspends the statute of limitations for fraud offenses when the United States is "at war." In 2008, Congress amended the WSLA so it now suspends the statute of limitations for fraud offenses not only when the United States is "at war" but also when Congress has expressly authorized military action. KBR does not appear to dispute that Congress expressly authorized the war in Iraq (in October 2002). KBR argues, however, that the pre-2008 WSLA governs because the events underlying Carter's action predate 2008. Since the Court rarely grants certiorari to interpret obsolete statutes, its grant of certiorari here might imply support for Carter's view that the current version of the WSLA governs.

Whichever version governs, if the Court holds that the WSLA applies only to criminal actions, Carter's FCA claims will be subject to the FCA's 6-year statute of limitations. Those claims all involve events now more than 6 years old. Thus, his claims will be barred unless he has preserved, and can prevail on, two other arguments that he made in the courts below about why his action is timely. He argued below that (1) the FCA's statute of limitations should be "equitably tolled" and (2) his later lawsuits against KBR "relate back" to his first, timely lawsuit in 2006. The Court won't consider these arguments, but it may permit the lower courts to consider them on remand if the Court rejects Carter's argument on the WSLA.

If the Court concludes that the WSLA applies to civil actions, Carter's *qui tam* action will not be barred by the FCA's 6-year statute of limitations. His action might, however, be barred by the FCA's first-to-file provision. That depends on the Court's answer to the second question before it.

As stated above, the first-to-file provision says, "When 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."

KBR interprets this provision to mean that, after an FCA action has been brought (by the filing of a complaint), no one except the government can ever bring (file) an action involving similar facts, even after the first action ends. This interpretation has been described as causing the first-to-file provision to operate "in perpetuity." Under that interpretation, KBR was immune from *qui tam* actions for timecard fraud after the first such action—presumably the *Thorpe* case in California—was filed, even after the relators in *Thorpe* voluntarily dismissed the action.

Carter argues, to the contrary, that the first-to-file provision operates only while the first action is pending. In his view, for example, assuming that the *Duprey* case in Maryland was sufficiently similar to his actions, the *Duprey* case barred his FCA claims only while it was pending. Thus, *Duprey did* bar Carter's third action when he filed it in 2011, because *Duprey* was then pending. But Carter contends that, once *Duprey* was dismissed, it no longer barred him from proceeding with his FCA claims, in a fourth action. This interpretation has been described as causing the first-to-file provision to impose a "one-case-at-a-time" rule: It protects a *qui tam* defendant from simultaneous—but not sequential—actions involving similar facts.

Both sides claim their view is supported by the text and purposes of the first-to-file provision.

KBR argues that the word "pending" in that provision merely clarifies it. KBR asserts that, if you take the word "pending" out of the provision, it's harder to understand. In KBR's view, the word "pending" just means "first-filed" (or "earlier-filed"). It doesn't temporally restrict the operation of the first-to-file provision.

Carter argues that the word "pending" does temporally restrict the first-to-file provision. In his view, when a person brings an action but that action ends, the action is no longer "the pending action;" it therefore can no longer cause the first-to-file provision to bar later-filed actions, even actions filed by the same plaintiff who filed the earlier action.

Each side argues that its interpretation furthers the purposes of the first-to-file provision. The parties agree that one of its purposes is to encourage a *qui tam* relator not to delay in filing an action and making a "written disclosure" of material facts to the government. The parties disagree on what, if any, additional purposes the first-to-file provision serves.

KBR argues that another purpose is to prevent "parasitic" (or "opportunistic") lawsuits by later-filing relators, who, in KBR's view, don't provide valuable information about fraud to the government or serve any other useful purpose. Carter responds that the prevention of parasitic/opportunistic lawsuits is accomplished by a different provision: the FCA's public-disclosure provision, which prevents *qui tam* actions based on information that has been publicly disclosed in earlier-filed *qui tam* actions or other venues. Carter argues that, besides the public-disclosure provision, judicial doctrines also limit repetitive *qui tam* actions. Those doctrines are variously known as claim preclusion, issue preclusion, collateral estoppel, and res judicata.

Carter adds that *qui tam* actions filed after the first one can serve valuable purposes. They can supplement the information disclosed to the government by the first action. Also, when the first *qui tam* action is dismissed on a technicality, such as a poorly drafted complaint, later *qui tam* actions can pursue fraud claims that are worthwhile but that the government does not pursue. The SG bolsters these arguments by noting "[T]he government's limited resources, combined with its lack of inside knowledge, make [later-filed] *qui tam* suits both necessary and important."

SIGNIFICANCE

The Court's decision on both issues before it will affect the exposure of companies that do business with the federal government to civil fraud liability.

That exposure will increase if the Court holds that the WSLA applies to civil actions. Such a holding would suspend the statute of limitations during wartime not only for *qui tam* actions—i.e., actions brought by private relators—but also for civil fraud actions brought by the United States. The United States recovers much more money in civil fraud actions than private relators. In fiscal year 2013, for example, the federal government recovered $3.8 billion under the FCA; private relators recovered about one-tenth as much: $387 million.

Some of the $3.8 billion recovered by the government under the FCA in 2013 was for fraud in military contracts, but most of it was for health care fraud. Although Carter argues that the WSLA can be construed as limited to war-related fraud, no court has accepted that argument and some have rejected it. Moreover, although the FCA is the main federal statute imposing civil liability for fraud against the federal government, other statutes do so and could be subject to WSLA suspension. One such statute is in the Social Security Act and exclusively concerns health care fraud.

The size of any increase in fraud recoveries caused by extending the WSLA to civil actions is speculative. On the one hand, the WSLA could suspend statutes of limitations for fraud actions indefinitely, especially since suspensions might be triggered even by informal military action and can be ended only by a presidential proclamation (with notice to Congress) or a congressional resolution. On the other hand, the FCA's public disclosure provision discourages delay in filing *qui tam* actions by barring those based on publicly disclosed information. So do the judicial doctrines mentioned earlier—e.g., claim and issue preclusion.

The Court's decision on the first-to-file issue could affect civil fraud liability more than the Court's decision on the WSLA issue. If the Court holds that the first-to-file provision operates even after the first-filed *qui tam* action ends, *qui tam* relators generally will have only one shot at a particular defendant for a particular fraud. That one shot goes to the *qui tam* relator who gets to the courthouse first. The *qui tam* relator who takes the first shot, however, doesn't always aim carefully. The first-filed action might rest on incomplete information and hastily drafted pleadings. It might therefore be at greater risk of dismissal than later-filed actions. If the first-filed action is dismissed or otherwise ends without recovery despite having merit, fraud against the government could go unremedied because all later *qui tam* actions will be barred.

KBR and its amici contend, however, that the costs of *qui tam* actions outweigh their benefits. They assert that more than 90 percent of the *qui tam* actions in which the government does not intervene are meritless and cost defendants much time and money to defend. These costs, they contend, ultimately fall on their customers and, when the customer is the federal government, on taxpayers.

Each side disputes the other side's prediction of the results of the Court's decision. Without hard evidence to assess those predictions, the Court's decision might be most important for its symbolic effect. Symbolically, a decision in favor of KBR on both issues will be a big win for business, while a decision in favor of Carter on both issues will be a big win for whistleblowers. The Court could decide one issue in favor of KBR and the other in favor of Carter, in which event history suggests that both sides will claim victory.

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PREVIEW of United States Supreme Court Cases, pages 133–136.

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AMICUS BRIEFS

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