Client Alert

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Welcome Back *Carter*: Why Defendants Come Out Ahead in the Supreme Court's False Claims Act Ruling

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On May 26, 2015, the U.S. Supreme Court issued a unanimous decision in *Kellogg Brown & Root Services, Inc. v. United States ex rel. Carter*, No. 12-1497, resolving two hotly debated aspects of False Claims Act (FCA) litigation.

By rejecting a potentially open-ended tolling argument, which would have suspended the FCA's statute of limitations under the Wartime Suspension of Limitations Act (WSLA), the Court effectively dismissed a number of claims in KBR's favor. The Court also resolved a circuit split regarding the FCA's "first-to-file" bar in the relator's favor. In what is likely to be the more far-reaching ruling in the case, the Court held that a *qui tam* plaintiff is not precluded by the first-to-file bar from bringing a claim that has already been the subject of litigation if the first-filed action has been abandoned or voluntarily dismissed.

Individual plaintiffs will likely treat the Court's ruling on the first-to-file bar as an invitation to file new suits based on the same facts consecutively. However, nothing in the *Carter* decision guarantees the survival of such suits. Instead, the many unique features of FCA litigation will continue to provide defendants with a wide array of defenses against follow-up FCA suits that arise after first-filed suits are dismissed.

THE LIMITATIONS ON FALSE CLAIMS ACT LITIGATION

The FCA imposes civil liability when false or fraudulent "claims for payment" are presented to the government. The act authorizes both the Attorney General and, with certain restrictions, private *qui tam* relators to bring civil actions to recover treble damages and impose civil penalties. When a relator brings a *qui tam* action, he or she must first disclose the claims to the government, and the government may opt to intervene, dismiss the suit, or allow the relator to prosecute the action.

The FCA includes various restrictions to limit litigation, including a built-in statute of limitations.[1] It also has multiple unique bars that are designed to ferret out opportunistic *qui tam* suits, such as the "first-to-file" bar, which states that "[w]hen a person brings an action under" the FCA's *qui tam* provisions, "no person other than the Government may intervene or bring a related action based on the facts underlying the pending action."[2] Similarly, the "public disclosure" bar directs courts to dismiss any *qui tam* action "if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed," including "in a Federal …civil…hearing in which the Government or its agent is a party," unless the relator can show that he qualifies as an "original source."[3]

FCA litigation often turns on the scope of these specialized restrictions. Not surprisingly, how these restrictions are applied is necessarily driven by the specific facts at issue, which has resulted in courts frequently arriving at contrary results when interpreting and applying the restrictions.

[1] 31 U.S.C. § 3731(b).

[2] 31 U.S.C. § 3730(b)(5).

[3] 31 U.S.C. § 3730(e)(4).

THE TWO ISSUES PRESENTED BY *CARTER*

Carter was a *qui tam* action in which the government declined to intervene. Carter alleged that his former employer, a defense contractor, fraudulently billed the government for water purification services during the armed conflict in Iraq in early 2005. He first filed his FCA suit in 2006. Because another relator had filed suit based on the same alleged facts in late 2005, the district court dismissed Carter's claims under the first-to-file bar. In 2011—after the first-filed suit had been dismissed for failure to prosecute, but after two new related suits had been filed by other relators—Carter filed his claims again. This time, the district court dismissed Carter's claims with prejudice, holding that all but one of his claims were barred by the six-year statute of limitations, and all of his claims were barred by the first-to-file bar.

A panel for the Fourth Circuit reversed the district court on both issues.[4] Over a vigorous dissent, the panel ruled that the FCA's statute of limitations did not bar the relator's claims because the statute was tolled by the WSLA.[5] The WSLA tolls the limitations period for "any offense" involving fraud against the government "[w]hen the United States is at war." Following a 2008 amendment, the WSLA also applies whenever Congress authorizes the use of military force. The panel concluded that the WSLA was not limited to criminal offenses, and therefore encompassed FCA violations. This ruling left a host of unanswered questions that threatened to undermine the predictability of the FCA's statute of limitations, including whether the WSLA can toll claims that are unrelated to combat or military operations.

Second, the panel found that the first-to-file bar did not apply. By the time the panel considered the appeal, all of the earlier-filed suits had either been abandoned or voluntarily dismissed. Because the earlier-filed cases were no longer "pending," the panel ruled that the first-to-file bar no longer prohibited Carter's claims. This decision quickly came under fire: The following year, the D.C. Circuit adopted a contrary reading of the first-to-file bar.[6]

The Fourth Circuit remanded the suit to the district court, with instructions to determine whether Carter's claims were precluded by the FCA's separate public disclosure bar.

THE SUPREME COURT PROVIDES A NARROW RULING ON THE FIRST-TO-FILE BAR

After considering the text of the first-to-file bar, the Supreme Court agreed with the Fourth Circuit, and ruled that the bar only applies while a first-filed suit is "pending." Turning to dictionaries to determine "ordinary meaning," the Court found that "pending" means "remaining undecided" or "awaiting decision." The Court rejected out of hand the appellants' alternative reading, that the word "pending" was used as convenient shorthand for the first-filed suit: "Under this interpretation, *Marbury v. Madison* is still 'pending.' So is the trial of Socrates." Considering the specific facts in *Carter*, where the initial cases had been abandoned and voluntarily dismissed, the Court seemed to apply a pragmatic view towards the first-to-file bar, asking, "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?"

At oral argument and in their brief, the appellants warned that a narrowing of the first-to-file bar could invite "an unending or infinite series of related lawsuits." However, in construing the first-to-file bar, the Court acknowledged

[4] *United States ex rel. Carter v. Halliburton Co.*, 710 F.3d 171 (4th Cir. 2013).

[5] 18 U.S.C. § 3287.

[6] *United States ex rel. Shea v. Cellco P'ship*, 748 F.3d 338 (D.C. Cir. 2014).

that its ruling did not touch other FCA doctrines. As the Court stated, "The False Claims Act'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." The Court's reservation is implicitly a nod to the numerous defenses that remain available to FCA defendants.

Among the specialized defenses still available against follow-up FCA suits are the following:

- **First-Filed Actions May Have Res Judicata Effects:** As the Court recounted in its opinion, the government took a clear position in *Carter* "that the doctrine of claim preclusion may protect defendants if the first-filed action is decided on the merits." The Court's reference to this argument is potentially far reaching, as courts typically treat dismissals for failure to state a claim, as well as dismissals for failure to plead fraud with particularity, as decisions on the merits for res judicata purposes.[7] This means that a defendant that successfully dismisses a first-filed suit on these grounds should have strong res judicata defenses to subsequent suits by follow-up relators.

- **The First-Filed Action May Still Provide a "Public Disclosure":** During oral argument, the government promoted another defense against follow-up suits: "[O]ften the effect of the first suit may be to bar second relators from suing under the public disclosure bar unless they qualify as original sources." Several justices brought up the public disclosure bar during arguments, hinting that it provides a more appropriate tool than the first-to-file bar for dismissing copycat complaints. This position has also been suggested by several lower courts.[8] At the end of the day, defendants who lose an opportunity to invoke the first-to-file bar because a first-filed suit is no longer "pending" may end up with the same result under the public disclosure bar.

- **The First Case May Remain "Pending" After Dismissal:** While the Court made it clear that the trial of Socrates is no longer "pending," it left it to the lower courts to determine where to draw the line in other litigation. FCA suits often involve amendments and appeals after complaints are initially dismissed, and this process can last for years. The relator in *Carter* has already provided an illustrative example: While the Fourth Circuit's decision in *Carter* was awaiting certiorari, the same relator filed yet another action against the same defendants. The district court dismissed the action, holding that "a relator's pending appeal operates to bar any successive related claims until the appeal is decided."[9] A first-filed case of long duration may also have the effect of delaying the filing of follow-up suits until after the passage of the six year statute of limitations—especially in light of the government's position at oral argument that the statute of limitations "probably" continues to run while the first suit is pending, and "time wouldn't be tolled."

THE SUPREME COURT READS THE WARTIME SUSPENSION OF LIMITATIONS ACT TO EXCLUDE CIVIL FCA ACTIONS, LEAVING THE FCA'S STATUTE OF LIMITATIONS INTACT

The Supreme Court also preserved the FCA's statute of limitations, making short work of the Fourth Circuit's WSLA tolling ruling. The Court held that the WSLA applies only to statutes of limitations for criminal offenses, not civil FCA claims. The Court's reasoning was twofold:

[7] *See*, *e.g.*, 18 Moore's Federal Practice § 131.30[3][a].

[8] *See*, *e.g.*, *United States ex rel. Chovanec v. Apria HealthCare Group, Inc.*, 606 F.3d 361, 365 (7th Cir. 2010).

[9] *United States ex rel. Carter v. Halliburton Co.*, 19 F. Supp. 3d 655, 662-63 (May 2, 2014).

- First, the text of the WSLA states that the limitations period for "any *offense*…involving fraud or attempted fraud" shall be tolled. Invoking several dictionaries, the Court noted that "[t]he term 'offense' is most commonly used to refer to crimes." This interpretation was bolstered by the fact that the WSLA appears in Title 18 of the U.S. Code, which pertains to criminal offenses, and which does not otherwise use the word "offense" to refer to civil violations.
- Second, the Court examined the history of the WSLA, focusing on the fact that, when the statute was first passed during World War I, it explicitly applied only to criminal "offenses" that were "now indictable." Even though the phrase "now indictable" had fallen out of the WSLA during subsequent amendments, the Court found that if Congress had meant this change to apply the WSLA to civil claims, "we would expect it to have used language that made this important modification clear to litigants and courts."

As a result of the Court's ruling on the WSLA, only one of Carter's claims may survive the statute of limitations—and to prevail on that claim, Carter will have to overcome the public disclosure bar on remand.

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