# Fourth Circuit Expands FCA Limitations Period

2013-03-22

In *United States ex rel. Carter v. Halliburton*, a divided panel of the U.S. Court of Appeals for the Fourth Circuit expanded the scope of potential False Claims Act (FCA) liability for government contractors by holding that the Wartime Suspension of Limitations Act (WSLA) suspends the six-year statute of limitations in *qui tam* FCA cases even when the government has not intervened.[1] The WSLA, located in the U.S. Criminal Code, suspends the limitations periods for fraud "offenses" against the United States while the country is engaged in a declared war or armed hostilities and for five years thereafter.[2] Only one other modern court has held that the WSLA suspends the statute of limitations in civil FCA cases,[3] and, as the *Carter* dissent notes, "no case has ever held (other than in dicta) that the WSLA applies to civil cases where the United States is not a plaintiff or intervenor in the *qui tam* action."[4] By suspending the express FCA limitations period in a potentially wide range of cases, the *Carter* decision reflects a substantial expansion of the applicability of the WSLA that appears inconsistent with the intent of Congress expressed in the FCA's *qui tam* provisions.

**History of the WSLA**

Congress enacted the WSLA in 1942 to codify temporary measures that had been put in place to protect the government from increased fraud during World Wars I and II.[5] In 2008, Congress expanded the WSLA by (1) extending the tolling of the limitations period from three to five years after the end of hostilities and (2) broadening its application from declared wars to all authorized military conflicts.[6] As expanded, the WSLA provides:

> "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 (1) involving fraud or attempted fraud against the United States or any agency thereof . . . 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."[7]

In over fifty years, no court had applied the WSLA to toll the limitations period in civil FCA suits. In August 2012, however, in a case brought directly by the United States, a district court in Texas held

that the WSLA applies to civil claims under the FCA, regardless of whether those claims arise from a contract related to the hostilities. See *United States v. BNP Paribas SA*, 884 F. Supp.2d 589 (S.D. Tex. 2012). Indeed, the claim related to the fraudulent procurement of USDA payment guarantees for exports of U.S. commodities—not to the wars in Iraq or Afghanistan.

## The *Carter* Decision

### WSLA

*Carter* arises out of a government contract to build water purification systems in Iraq. The relator filed a *qui tam* action alleging various billing improprieties by the contractor. After his initial complaints were dismissed without prejudice, he filed his ultimate complaint on June 2, 2011, outside the six-year limitations period. The United States declined to intervene. The district court dismissed the case under the FCA's first-to-file bar and as untimely. The district court also held that the WSLA did not toll the running of the limitations period because, if it applied to civil actions at all, it did not apply to *qui tam* cases in which the United States had declined to intervene.[8]

In reversing the district court, the Fourth Circuit's majority opinion reached two significant conclusions with which the dissent disagreed: (1) that Congress's failure to "include any limiting language" in the WSLA meant that Congress wanted the act to "apply to all offenses involving fraud against the United States;"9 and (2) that the WSLA applies to *qui tam* claims even where the government has declined to intervene.[10] In so holding, the majority rejected the contention that the WSLA's concern is the government's increased difficulty in combating fraud during times of war. Rather, the majority cast the WSLA's goal as "root[ing] out fraud against the United States during times of war."[11]

The dissent offers a strong rebuttal to the majority's opinion, focusing primarily on statutory construction and congressional intent. First, the dissent notes that it is "not without doubt" that the WSLA applies to civil actions at all because the WSLA makes no reference to the FCA, and the FCA is silent on whether its statute of limitations is suspended during wartime. The WSLA is codified in the Criminal Code and by its terms applies to "offenses," a term typically used in reference to crimes, as the *Carter* district court explained.[12] Second, the dissent argues that applying the WSLA to actions in which there is no government intervention contradicts the rationale behind the WSLA—both originally and its 2008 extension—of ensuring "the ability of law enforcement to effectively police fraud in times of war."[13] Finally, the dissent notes that applying the WSLA to *qui tam* actions in which the government does not intervene is at cross-purposes with the FCA's *qui tam* provisions because *qui tam* actions are intended "to combat fraud quickly and efficiently by encouraging relators to bring actions that the government cannot or will not" bring.[14]

### First-To-File Bar

The panel unanimously reversed the lower court's holding that the FCA's statutory first-to-file bar (which prevents the filing of *qui tam* suits based on the same facts as a "pending" action) barred

Carter's claims. The court reasoned that because the first-filed cases had been dismissed before Carter filed his complaint, they were no longer "pending" for purposes of the first-to-file bar.

**Implications for Potential FCA Defendants**

Under the broadest reading of the majority's opinion in *Carter*, potential FCA defendants could face what is, for all practical purposes, statutes of limitations that have been tolled since 2001 and will not begin to run until after the end of hostilities in Afghanistan and Iraq.[15] While *Carter*'s facts were limited to alleged false claims squarely connected to the war effort, companies operating outside of the defense industry should take note as well—courts could follow *BNP Paribas* to hold the WSLA applicable to claims not arising out of a war or conflict, though no other court has so far taken such a broad view. Taken together and construed broadly, *BNP Paribas* and *Carter* could be invoked to suspend the limitations period for a wide range of FCA claims brought by relators or directly by the government involving healthcare, prescription drugs, finance and banking, and other areas of government contracting.

---

[1] *United States ex rel. Carter v. Halliburton Co.*, No. 12-1011 (4th Cir. Mar. 18, 2013) ("Carter"). The decision is available here: http://www.ca4.uscourts.gov/Opinions/Published/121011.P.pdf.

[2] 18 U.S.C. § 3287.

[3] *United States v. BNP Paribas SA*, 884 F. Supp.2d 589 (S.D. Tex. 2012).

[4] *Carter* at *30.

[5] *Bridges v. United States*, 346 U.S. 209, 217 (1953).

[6] Pub. L. No. 110-329 (2008).

[7] 18 U.S.C. § 3287.

[8] *United States ex rel. Carter v. Halliburton Co.*, 2011 WL 6178878 (E.D. Va. 2011).

[9] *Carter* at *13.

[10] *Id.* at *14 ("whether the suit is brought by the United States or a relator is irrelevant to his case because the suspension of limitations in the WSLA depends upon whether the country is at war and not who brings the case"). The district court placed significant weight on the distinction between claims with government intervention and those without.

[11] *Id.* at *14.

[12] *United States ex rel. Carter v. Halliburton Co.*, 2011 WL 6178878 (E.D. Va. 2011).

[13] *Carter* at 35-36 (Agee, J. dissenting).

[14] *Id.* at 39 (quoting *United States ex rel. Sanders v. North American Bus. Industries, Inc.*, 546 F.3d 288, 295 (4th Cir. 2008). See also *United States ex rel. Carter v. Halliburton Co.*, 2011 WL 6178878 at *12 (E.D. Va. 2011).

[15] The WSLA's tolling provisions apply only where the alleged fraud occurred during war or hostilities; the statute of limitations does not toll for offenses committed before hostilities began. *Carter* at *8 (citing *United States v. Smith*, 342 U.S. 225, 262 (1952)). Among its other holdings, *Carter* held that hostilities have not terminated in Iraq because the WSLA's requirement of a "presidential proclamation, with notice to Congress" or a "concurrent resolution of Congress" have not been satisfied. *Id.* at *9.

## *Authors*


### David W. Ogden

**PARTNER**

Chair, Government and Regulatory Litigation Practice Group

david.ogden@wilmerhale.com

+1 202 663 6440

### Christopher E. Babbitt

**PARTNER**

Co-Chair, False Claims Act Practice

christopher.babbitt@wilmerhale.com

+1 202 663 6681