
US Supreme Court Agrees To Address Two Important False Claims Act Issues

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Yesterday, the Supreme Court granted certiorari in *Kellogg Brown & Root v. United States ex rel. Carter*, No. 12-1497, a case presenting two important issues under the False Claims Act (FCA). The first is whether the Wartime Suspension of Limitations Act—which tolls the limitations period during wartime for any “offense” against the United States—applies to a civil FCA claim brought by a qui tam relator. The second is whether the FCA’s “first-to-file bar”—which provides that once a relator brings an FCA action, “no person other than the government may intervene or bring a related action based on the facts underlying the pending action”—precludes a later action only so long as the earlier action is still pending.¹

Background

Petitioner Kellogg Brown & Root (KBR) provided logistical services to the U.S. military during the Iraqi war. In 2006, Respondent Carter, a former KBR employee, filed an FCA action against KBR, alleging that KBR had fraudulently billed the government. After a lengthy procedural history, the district court (Cacheris, J.) dismissed the latest complaint with prejudice. The court first held that the first-to-file bar, 31 U.S.C. § 3730(b)(5), precluded Carter’s action because another FCA case alleging similar facts had already pending in another federal district court when Carter filed his operative complaint. Although that other case had since been dismissed, the district court here held that the first-to-file bar depended on the state of affairs at the time of the filing of the complaint. The court also held that most of Carter’s claims were time-barred, rejecting his argument that the Wartime Suspension of Limitations Act (WSLA), 18 U.S.C. § 3287, tolled the limitations period. The court ruled that the WSLA does not apply to a civil fraud claim brought by a qui tam relator.

The Fourth Circuit reversed. The court held that although the complaint was properly dismissed under the first-to-file bar, because the earlier-filed case had still been pending at the time Carter filed his latest complaint, the dismissal should have been without prejudice because the subsequent dismissal of that case meant that the first-to-file bar no longer applied, leaving Carter free to re-file. The court of appeals also held that Carter’s claims were not time-barred because the WSLA applies to civil FCA suits, even those in which the government has declined to intervene. One

judge dissented from this portion of the court's ruling, arguing that the WSLA does not apply to qui tam suits in which the government has declined to intervene.

In its certiorari petition, KBR argues that the Fourth Circuit's first-to-file rule would improperly allow relators to bring case after related case based on very similar facts, so long as they were brought seriatim. On the WSLA question, KBR contends that the term "offense" is limited to crimes, that the Fourth Circuit's approach is contrary to the WSLA's purpose, and that the Fourth Circuit's decision would lead to enormously long periods of tolling given the nature of the military conflicts in which the United States is engaged.

Next Steps

The case will likely be argued in December 2014 or January 2015. KBR's opening brief is due August 15, 2014 and Carter's opposition brief is due September 15, 2014, though those deadlines may well be extended.

¹ The certiorari stage briefing is available here: <http://www.scotusblog.com/case-files/cases/kellogg-brown-root-services-inc-v-united-states-ex-rel-carter>.

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