Bloomberg BNA

Federal Contracts Report™

False Claims Act

Limiting Liability: Unanimous Supreme Court Opinion Defines Boundaries of False Claims Act Limitations Rules




By Sarah Wilson, Susan Cassidy, Brett Reynolds & Jeff Bozman

Although the Supreme Court's decision in *Kellogg Brown & Root Services v. United States ex rel. Carter* was fundamentally about the statutory interpretation of laws that were passed during the Civil War and World War II, the implications for current contractors were very real. In particular, the Supreme Court's decision, issued on May 26th, brings much-needed clarity to questions about limitations under the False Claims Act and the reach of the Wartime Suspension of Limitations Act ("WSLA"). In a substantial win for the business community, a unanimous Court held that the WSLA applies only to crimes—not to civil offenses such as the False Claims Act.

The case turned on the meaning of three key terms: "offense"; "pending"; and "at war." This article examines how those terms interact in the statutory scheme, how the Court analyzed the parties' competing interpretations, and what the decision means for firms who do business with the federal government.

Sarah Wilson is a litigation partner, Susan Cassidy is a partner, and Brett Reynolds and Jeff Bozman are associates at Covington & Burling LLP.

I. The False Claims Act and the WSLA. The False Claims Act dates to the Civil War, when it was enacted to punish war profiteers who defrauded the United States and the Union Army. Today, the False Claims Act applies broadly to all types of government business, and provides for serious penalties for defendants found to have committed violations.[1] The Act levies civil penalties of up to $11,000 per violation, plus treble damages, on "any person who knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval" or "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim."[2]

Private citizens ("relators") may sue in the name of the United States under the *qui tam* provisions of the False Claims Act.[3] Those suits begin under seal. The relator must notify the Department of Justice and give the government 60 days (although courts routinely grant

[1] The government can also prosecute false claims under a criminal statute, 18 U.S.C. § 287. The *Carter* litigation and this article, however, focus on the civil statute.

[2] 31 U.S.C. § 3729(a)(1)(A)-(B).

[3] 31 U.S.C. § 3730(b).

 ISSN 0014-9063

extensions) to determine whether it will exercise its right to intervene in the litigation.

The False Claims Act contains statutes of limitation and repose. Relators must generally file suit within six years of the date of the violation.[4] The government has the benefit of a ''discovery rule,'' under which it may file suit as late as three years after the ''date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed.''[5] The Supreme Court has instructed lower courts to construe these limitations periods strictly, in favor of repose.

Congress has added other limitations to the False Claims Act. The ''first-to-file bar'' prohibits follow-on *qui tam* relators from intervening in the case or filing ''a related action based on the facts underlying the pending action.''[6] The ''public disclosure bar'' prevents most private relators from filing *qui tam* suits ''if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed'' through court filings, public government documents, or the media.[7] A narrow exception to the public disclosure bar permits suits by relators who are ''original sources'' of information about the fraud.

As the United States became a global military power during the first few decades of the twentieth century, the government acted to protect its interests during wartime, when the consequences of fraud would be most severe and the government's ability to promptly investigate and prosecute contractor misconduct would be constrained. Accordingly, Congress enacted the WSLA, initially as a temporary measure, in the early days of U.S. involvement in World War II. Shortly thereafter, Congress amended the statute to make it permanent and codified it in the federal criminal code. When the nation ''is at war or Congress has enacted a specific authorization for the use of the Armed Forces,'' the WSLA tolls the limitations period for ''any offense involving fraud or attempted fraud against the United States . . . until 5 years after the termination of hostilities.''[8] In other words, any statute of limitations that has not run when a war begins is suspended for the duration of the war, plus an additional five years.

The *Carter* litigation raised three central questions about the meaning of the language in these two statutes. First, is the word ''offense'' in the WSLA limited to crimes, such that the WSLA has no application to the civil False Claims Act? Second, what constitutes a ''pending'' case for purposes of blocking related claims under the first-to-file bar? Finally, when is the nation actually ''at war'' within the meaning of the WSLA?

II. History of the Litigation. In 2005, Benjamin Carter was working for KBR under a contract to provide water purification services to U.S. military bases in al Anbar, Iraq. Although his allegations were vigorously denied by the contractor, Carter alleged that KBR directed its employees to record 84 hours of work each week, even if they did not actually perform that work. Carter described these allegations when he filed a *qui tam* suit in federal court in the Central District of California on February 1, 2006. After more than two years of investigation, the government found no merit in Carter's allegations and declined to intervene. The case was unsealed and transferred to the Eastern District of Virginia in October 2008.

In the meantime, three similar cases were percolating in various federal courts: *Thorpe*, also in the Central District of California (filed in December 2005); *Duprey*, in the District of Maryland (filed in June 2007); and an unnamed sealed case in Texas (also filed in 2007). These matters would soon bedevil Carter's case.

The Eastern District of Virginia dismissed Carter's first complaint because it did not describe the allegations of fraud with the required degree of specificity. The court allowed Carter to amend his complaint and re-file, which he did in January 2009. One year later, the Department of Justice contacted the parties and informed them that *Thorpe* was being litigated in California. At KBR's request, the court dismissed Carter's amended complaint, finding that *Thorpe* was a ''related action'' that predated Carter's suit and Carter was, therefore, blocked by the first-to-file bar.

Carter appealed that dismissal to the Fourth Circuit, a decision he would come to regret. *Thorpe* was dismissed in July 2010. With *Thorpe* dismissed, Carter refiled again in the Eastern District of Virginia on August 1, 2010. He also asked the Fourth Circuit to dismiss his appeal of the 2009 case. The Fourth Circuit obliged in February 2011, but the district court—then considering Carter's third complaint—held that Carter was not allowed to file that third complaint before securing dismissal of his appeal on the second complaint. In effect, Carter had constructed his own first-to-file bar, so the district court dismissed the 2010 complaint.

Carter returned to the Eastern District of Virginia on May 24, 2011 with his *fourth* complaint.[9] The court held that this complaint was related to both *Duprey* and the Texas case, and because *Duprey* was still ongoing in California, it triggered the first-to-file bar. Moreover, by May 2011 the False Claims Act's six-year statute of limitations had run on almost all of Carter's claims. The court ruled that the WSLA did not apply in this case, so the statute of limitations prevented Carter from re-filing those claims.

Carter appealed again to the Fourth Circuit. By the time the Fourth Circuit issued its opinion, *Duprey* and the Texas case had both been voluntarily dismissed. All three judges on the panel agreed that neither case remained ''pending,'' so the first-to-file bar was no longer an obstacle. Carter also convinced a majority of the panel that the WSLA applied, and that it extended the False Claims Act's limitations period. Accordingly, the court held that Carter was free to re-file once again.

The defendant contractors petitioned the Supreme Court for review. The Solicitor General opposed the petition—even though the Government had never intervened in any of Carter's cases. Over the Government's objections, the Court granted certiorari and heard oral argument on January 13, 2015.

[4] 31 U.S.C. § 3731(b)(1).
[5] 31 U.S.C. § 3731(b)(2).
[6] 31 U.S.C. § 3730(b)(5).
[7] 31 U.S.C. § 3730(e)(4).
[8] 18 U.S.C. § 3287 (as amended in 2008).

[9] The second, third, and fourth complaints were substantively identical. *United States ex rel. Carter v. Halliburton Co.*, 710 F.3d 171, 176 (4th Cir. 2013).

  FCR ISSN 0014-9063

III. Issues, Arguments & Analysis.

A. "Offense"—Applicability of the WSLA to Civil Claims. A threshold issue for the Supreme Court was whether the word ''offense'' in the WSLA means only crimes, or whether it also applies to civil fraud claims. Although the parties disagreed about whether the term ''offense,'' standing alone, refers to crimes or also encompasses civil offenses, there was little dispute that the WSLA began in 1942 as a statute related only to crimes.[10] As originally enacted, the WSLA suspended the statute of limitations ''applicable to offenses involving the defrauding or attempts to defraud the United States . . . and in any manner, and now indictable under any existing statutes, shall be suspended until June 30, 1945.''[11]

The question was whether Congress ever expanded the WSLA to toll limitations in civil cases. The Fourth Circuit decided that Congress had done so. The majority of that panel held that Congress signaled its intention to expand the WSLA in 1944 by deleting the words ''now indictable'' from the 1942 version of the statute.[12] According to the Fourth Circuit, the amendment extended the WSLA ''to **all actions** involving fraud against the United States,'' not just crimes.[13]

Judge Agee dissented from that part of the opinion.[14] He assumed that the WSLA could apply to the False Claims Act, but only in cases where the government is a party.[15] Judge Agee agreed with the panel majority that the first-to-file bar did not apply, and that a plaintiff generally should be able to re-file a claim after related litigation has been dismissed. With respect to this *particular* plaintiff, however, Judge Agee would have held that his claims were barred by the False Claims Act's statute of limitations, because the WSLA did not extend the limitations period in a non-intervened case. His reasoning paralleled a recent Fourth Circuit case holding that the three-year discovery provision in the False Claims Act's statute of limitations is only available to the government, not private relators.[16] Because the United States had declined to intervene in Carter's case, Judge Agee would have held that the WSLA did not extend the False Claims Act's six-year limitations period, so any claims Carter might re-file would be time-barred.

The United States sided with the Fourth Circuit majority. In a brief to the Supreme Court supporting Carter, the Solicitor General wrote that ''Congress defined the WSLA's coverage not by reference to the criminal or civil character of the underlying violation, but by reference to the substantive nature of the wrongdoing involved. . . . Although Congress could have limited the WSLA to 'crimes,' it has not done so, instead using the term 'offense' to reach a broader class of unlawful conduct directed at government funds, property, or contracts.''[17] KBR criticized the government's position as an about-face from its position in a prior case, where it had argued that the WSLA applied only to crimes.[18] Indeed, the Solicitor General conceded in an earlier brief that the case had ''prompted a further reexamination within the government of the question whether'' the WSLA applies to civil fraud claims.[19]

KBR and its *amici* asked the Court to reject the notion that the WSLA applies at all to civil claims. KBR noted that ''*every* use of the word 'offense' [in Title 18, the criminal section of the U.S. Code] references a crime.''[20] Its counsel pressed this textual point vigorously during oral argument. KBR also explained that Congress's deletion of ''now indictable'' did not have the far-reaching effects that the Fourth Circuit described. During World War II, Congress ''temporarily revived wartime tolling'' that had been in place after World War I, suspending tolling on fraud-related crimes until June 30, 1945.[21] The phrase ''now indictable'' served only to clarify that the unusual, temporary wartime extension of limitations would apply to offenses whose limitations periods had not yet run, and would not ''revive'' old offenses that had already been overtaken by the statute of limitations.[22] When Congress amended the WSLA in 1944 to make it a permanent part of the Code, and one that would operate prospectively, the concerns about retroactivity were moot. The ''now indictable'' language was no longer necessary.[23]

The Court handed KBR a resounding victory on this point, which the Justices telegraphed during oral argument. Although Justice Kagan pressed KBR's counsel on a few minor points of his argument, she reminded Carter's attorney that ''there are plenty of arguments against you.''[24] The Court's opinion methodically traces the text and evolution of the WSLA, noting that its ''history provides what is perhaps the strongest support for the conclusion that it applies only to criminal charges.''[25] In the context of the WSLA, ''offense'' means ''crime.''

B. "Pending"—Application of the First-to-File Bar. The Court was presented with a circuit split on the first-to-file bar issue. The False Claims Act prohibits relators from filing *qui tam* suits while a related action is ''pending.'' The Fourth Circuit resolved the meaning of ''pending'' in Carter's favor, reading it to require some ongoing litigation. This holding aligned the Fourth Circuit with cases from the Seventh and Tenth Circuits.[26]

While *Carter* was pending review by the Supreme Court, a divided panel of the D.C. Circuit reached the

---

[10] *Id.* at 179.

[11] Act of Aug. 24, 1942, Pub. L. No. 77-706, ch. 555, 56 Stat. 747-48.

[12] 710 F.3d at 180.

[13] *Id.* (emphasis added).

[14] *Id.* at 187-88 (Agee, J., dissenting in part).

[15] *Id.* at 188 n.3 & 189.

[16] *Id.* at 190 (discussing *United States ex rel. Sanders v. N. Am. Bus. Indus., Inc.*, 546 F.3d 288 (4th Cir. 2008)).

[17] Brief for United States as Amicus Curiae Supporting Respondent at 12, No. 12-1497 (U.S. Oct. 21, 2014).

[18] Brief of Petitioners at 26-27, No. 12-1497 (U.S. Aug. 29, 2014).

[19] Brief for the United States as Amicus Curiae Opposing Petition for Writ of Certiorari at 16-17, No. 12-1497 (U.S. May 27, 2014).

[20] Brief of Petitioners at 21 (emphasis in original).

[21] *Id.* at 9.

[22] *Id.* at 17. The National Defense Industrial Association, supporting KBR, traced the statutory and legislative history in detail. It criticized the Fourth Circuit's reasoning that ''this wholesale transformation – from a criminal-only provision to one that applies to both criminal and civil conduct – took place by omission.'' Brief for Nat'l Def. Indus. Ass'n as Amicus Curiae Supporting Petitioners at 3, No. 12-1497 (U.S. Sept. 5, 2014).

[23] Brief of Petitioners at 17.

[24] Transcript of Oral Argument at 33.

[25] *Kellogg Brown & Root Servs., Inc., et al. v. United States ex rel. Carter*, No. 12-1497, slip op. at 9 (2015).

[26] 710 F.3d at 183.

opposite conclusion.[27] It dismissed the Seventh and Tenth Circuit opinions as mere dicta and held that the phrase ''pending action'' does not require the related action to be ongoing. Instead, the court defined ''pending'' as a ''referential'' word that simply serves to identify the first-filed action.[28] Under the D.C. Circuit's logic, the first-to-file bar blocks subsequent related suits even if the ''pending action'' has been dismissed, withdrawn, or otherwise removed from active litigation.

Judge Srinivasan dissented. He argued that if ''pending'' does not mean ''ongoing,'' then the majority's rule would prohibit even original sources from bringing subsequent complaints, making the viability of a *qui tam* suit depend on whether the original source also happens to be the first to sue.[29]

The split pitted the Fourth, Seventh, and Tenth Circuits, Carter; the United States, and Judge Srinivasan against the D.C. Circuit, KBR, and various *amici* representing the business community. Relying on the D.C. Circuit's opinion, KBR noted that the Fourth Circuit's reasoning turned the first-to-file bar into a simple ''one-case-at-a-time'' provision that incentivizes delay, ''piecemeal'' litigation, and repetitive, docket-clogging complaints.[30] It explained that the purposes of the bar—rewarding bona fide whistleblowers while blocking parasitic ''me-too'' *qui tam* relators—would be thwarted by a insisting on a ''temporal'' interpretation of ''pending.''[31] Verizon, which had been the prevailing party in the D.C. Circuit decision, filed a brief supporting KBR. It also warned that the Fourth Circuit's reasoning created the very real potential for ''an unlimited number of False Claims Act suits based on the same facts so long as they are filed seriatim.''[32]

The Court disagreed. During oral argument, Justices Scalia and Kennedy criticized the ''referential'' interpretation in favor of what they characterized as the plain meaning of the word ''pending.''[33] Writing for the Court, Justice Alito adopted Justices Scalia and Kennedy's ''plain meaning'' argument. He rejected opposing interpretations of the term, asserting that a referential definition would sweep in an unacceptably large number of cases.[34]

C. "At War"—Duration of Tolling Under the WSLA. The interpretation of the phrase ''at war'' played a central role in the Fourth Circuit's decision, but it drew almost no attention from the Supreme Court. In fact, the Court acknowledged that its holding that the WSLA does not apply to the civil False Claims Act eliminated the need to resolve the questions about the definition of ''war.'' However, the Court did not disturb the WSLA's application to the various criminal charges that often accompany False Claims Act allegations. The Fourth Circuit's analysis of ''at war'' remains a precedent of which contractors should be aware.

The arguments in *Carter* focused largely on the WSLA's structure for defining periods of wartime. The WSLA has three elements: (1) a triggering clause; (2) a suspension period; and (3) a termination clause.[35] In 2008, the Wartime Enforcement of Fraud Act amended the 1944 version of the WSLA by extending the suspension period from three to five years, slightly modifying the termination clause, and adding an authorization for use of military force as a trigger.

The problem for defendants arises from a structural mismatch between the first and third elements: clear procedures in the termination clause; and ambiguous language (''at war'') in the triggering clause. The Fourth Circuit rejected the argument that the triggering clause requires a congressional declaration of war. The text of the WSLA does not expressly refer to *declared* wars, and the Fourth Circuit concluded that a judicial gloss requiring a declaration ''would be an unduly formalistic approach.''[36] On the other hand, a structure that provides an easy trigger but requires termination to follow strict presidential and congressional formalities ''virtually ensures indefinite tolling.''[37]

Fortunately for government contractors, the Supreme Court's decision means that they will not face civil False Claims Act liability for claims arising out of acts dating back to the mid-to-late 1990s, for which the six-year limitations period would not have run when Congress authorized the use of military force in Iraq in October 2002. Unfortunately, though, hostilities in Iraq, Afghanistan and elsewhere have not terminated in accordance with the statutory procedures. Even assuming for the sake of argument, as Judge Agee did, that the ''end of combat operations'' in Iraq in 2010 marked the termination for WSLA purposes, businesses could remain open to suit throughout the remainder of this decade.

Even more worrisome for the contracting community, Judge Wynn's concurring opinion in the Fourth Circuit suggested that indefinite limitations periods might actually be appropriate. He wrote that ''it is within Congress's purview to determine that certain conduct is sufficiently egregious—such as defrauding the government during a time of war—*that an extended or indefinite limitations period is warranted.*''[38]

Carter demurred from addressing those issues at the Supreme Court, and the United States argued that an interpretation of the termination clause was not even properly before the court. Nevertheless, during oral argument, Chief Justice Roberts probed for answers as to the potential breadth of the government's interpretation of ''at war.''[39] Although boundless tolling would be a

[27] *United States ex rel. Shea v. Cellco P'ship*, 748 F.3d 338 (D.C. Cir. 2014). The *Shea* plaintiff petitioned the Court for review. After the Court granted certiorari in *Carter*, however, Verizon urged the Court to hold review in *Shea* pending the outcome of *Carter*. In its brief, Verizon raised the proposition—later taken up by Justice Sotomayor—that resolution of the WSLA issue could obviate the need to address the first-to-file bar. Brief of Respondent in Opposition to Petition for Certiorari, No. 14-238 (U.S. Dec. 9, 2014), 2014 U.S. Briefs 238, at *12.

[28] *Shea*, 748 F.3d at at 343; *see also* Brief of Petitioners at 18, 44, No. 12-1497.

[29] *Id*. at 350.

[30] Brief of Petitioners at 3-4.

[31] *Id*. at 54.

[32] Brief for Verizon at 3, No. 12-1497.

[33] Transcript of Oral Argument at 13.

[34] No. 12-1497, slip op. at 12.

[35] 710 F.3d at 177 (citing *United States v. Pfluger*, 685 F.3d 481 (5th Cir. 2012)).

[36] 710 F.3d at 178. At oral argument, counsel for the United States stated that he believed the statute ''implies that 'at war' does require a declaration of war.'' Transcript of Oral Argument at 54. Counsel for KBR pounced on that statement and argued that the government had thereby ''confessed error'' on that point. *Id*. at 61.

[37] Brief of Petitioners at 42. Judge Agee agreed. *See* 710 F.3d at 194 n.6.

[38] 710 F.3d at 187 (Wynn, J., concurring) (emphasis added).

[39] Transcript of Oral Argument at 54.

  FCR ISSN 0014-9063

boon for the government, the concept does not square with the policy behind the WSLA, particularly in the context of such an apparently open-ended conflict as the ''war on terror.'' The statute was designed to give the government relief from deadlines when its resources are diverted to warfighting. It was originally enacted during World War II, when an extraordinarily significant part of the government's resources and the country's industrial capacity were engaged in the war effort. Smaller wars and more limited military engagements imply less serious diversion of resources, and consequently make a less compelling case for tolling limitations periods.

IV. The Supreme Court's Resolution and Implications for Government Contractors. The Court's primary holding—that the WSLA does not apply to civil offenses—is undoubtedly a win for the contracting community. Part of the government's interest in this case stems from the False Claims Act's ability to generate revenue. The Department of Justice collected nearly $5.7 billion in civil settlements and judgments during the fiscal year that ended on September 30, 2014. Since January 2009, the government has collected almost $23 billion.[40] A substantial portion of this revenue came from False Claims Act cases that had nothing to do with warfighting. Despite the reference to ''wartime'' in the title of the WSLA, the government invoked its suspension provisions in cases involving non-defense procurement, financial services, and health care.[41] Between 1987 and 2013, nearly half of all False Claims Act cases involved health care.[42] The Court's decision, therefore, affects a wide range of businesses that contract with the federal government. The Fourth Circuit's expansive reading of the WSLA, coupled with its permissive interpretation of the first-to-file bar, would have dramatically expanded contractors' financial exposure in False Claims Act suits. Small wonder, then, that the government urged the Court not to hear the case at all, and to leave the Fourth Circuit's opinion intact.

Despite the victory on this first question, the case is not an unalloyed victory for industry. Government contractors should bear in mind a few points of caution that flow from the Court's opinion.

First, by relying on what it characterized as the plain meaning of the word ''pending,'' the Court sided with the majority of appellate courts. Because False Claims Act cases can arise in virtually any jurisdiction, contractors should be aware of this new standard.

Second, as we have indicated, the opinion does not disturb the WSLA's application to criminal statutes. Government contractors analyzing their potential exposure to False Claims Act liability are generally wise to consider their risk under various criminal statutes, including the criminal version of the False Claims Act (18 U.S.C. § 287), the False Statements Act (18 U.S.C. § 1001), and the mail and wire fraud statutes (18 U.S.C. § § 1341 and 1343). Prosecutors can still pursue charges under these criminal laws for actions that occurred more than a decade ago, taking advantage of the WSLA's tolling provisions. Indeed, the inability to proceed under the Civil False Claims Act could tempt Government prosecutors to examine more closely whether there is a potential criminal action.

Finally, the Court did not squarely reject the concept of lengthy or indefinite tolling. Instead, the Court simply concluded that Congress had not provided for expansion of civil limitations periods through its enactment or amendment of the WSLA. The arguments that animate the Court's opinion are those that focus on ''text, structure, and history of the WSLA,'' not on the advisability of wartime tolling as a policy matter.[43] Put another way, the Court left open the possibility that Congress could have made major changes to the civil applicability of the WSLA, but that it had not (yet) chosen to do so.

Even with these caveats, however, the Court's resolution provides welcome relief and certainty to federal contractors. By limiting the applicability of the WSLA, the Court ensured that analysis of False Claims Act liability is properly bounded by the limitations periods built in to the False Claims Act itself. Although the United States has not yet closed the chapter on the combat operations that triggered the most recent invocations of the WSLA, federal contractors can happily cabin their exposure to civil liability based on actions that took place long before those operations began.

---

[40] *See* Press Release, U.S. Dep't of Justice, Justice Department Recovers Nearly $6 Billion from False Claims Act Cases in Fiscal Year 2014 (Nov. 20, 2014), *available at* http://www.justice.gov/opa/pr/justice-department-recovers-nearly-6-billion-false-claims-act-cases-fiscal-year-2014.

[41] Brief for Chamber of Commerce of the U.S. et al. as Amici Curiae Supporting Petitioners at 7-8, Kellogg, Brown & Root Servs., Inc. et al. v. United States ex rel. Carter, No. 12-1497 (U.S. Sept. 5, 2014).

[42] *Id*. at 15.

[43] No. 12-1497, slip op. at 5.