Fourth Circuit Applies the Wartime Suspension of Limitations Act to False Claims Act Relators and Limits the FCA's First-to-File Bar

The U.S. Court of Appeals for the Fourth Circuit, in *United States ex rel. Carter v. Halliburton Co, et. al* (No. 12-1011), recently vitiated two traditional defenses in actions under the False Claims Act ("FCA"). First, the Court held that, under the Wartime Suspension of Limitations Act ("WSLA"), the armed conflict in Iraq suspended the statute of limitations in FCA suits brought by *relators* and not just those brought directly by the United States. Second, the court took a narrow view of the scope of the FCA's first-to-file bar by holding that as long as a first-filed action is no longer an open case when the applicability of the bar is litigated, the bar does not apply, even to an identical later-filed action. In so doing, the court made it easier for relators in the Fourth Circuit to avoid the first-to-file bar by filing a succession of complaints.

In *Carter*, the relator filed a *qui tam* action alleging fraudulent billing practices by a number of government contractors for services provided to military forces serving in Iraq during the first half of 2005. Relator filed his original complaint in February 2006, but the action was ultimately dismissed. He then amended his complaint and re-filed as a separate action in 2009 ("*Carter* 2009"). In March 2010, the parties learned that relator's allegations were similar to those made in a case filed under seal in December 2005 in California. Defendants moved to dismiss *Carter* 2009 under the first-to-file bar, and the district court dismissed the action without prejudice. Relator appealed. After the California complaint was dismissed, relator re-filed his complaint in a separate action ("*Carter* 2010") and moved to dismiss his appeal. The district court, however, dismissed *Carter* 2010 because the *Carter* 2009 appeal was still pending when the complaint was filed. Relator then filed yet another complaint in 2011 ("*Carter* 2011"), which was substantively identical to the complaints in *Carter* 2009 and *Carter* 2010.

By the time *Carter* 2011 was filed, however, two cases involving similar allegations had been filed: *United States ex rel. v. Duprey* in the District of Maryland, and another FCA action in Texas still under seal. Defendants again moved to dismiss, and the district court dismissed with prejudice, determining that *Carter* 2011 was barred by *Duprey*. The district court further held that *Carter* 2011, and any future attempt at re-filing, were barred by the FCA's six-year statute of limitations and that the WSLA did not suspend the limitations period because it did not apply to private relators.

The WSLA and the FCA's six-year statute of limitations

On appeal, the majority first examined whether the WSLA suspended the FCA's statute of limitations in suits brought by whistleblowers. The WSLA generally suspends statutes of limitations in actions involving fraud against the U.S. during wartime. 18 U.S.C. § 3287. Based on the text and spirit of the statute, the court determined that requiring a formal declaration of war would be unduly formalistic given the reality of modern military intervention. The court further held that, for purposes of the WSLA, the United States has been at war in Iraq since the Authorization for the Use of Military Force against Iraq on October 11, 2002 and hostilities had not terminated at the time of the alleged fraud. Finally, the court, over a strong dissent by Judge Agee, held that the WSLA applies to civil FCA claims brought by private relators. In particular, the court explained that not applying the WSLA to relators would violate the statute's plain text and that suspending relator's claims "furthers the WSLA's purpose: to root out fraud against the United States during times of war." Op. at 14.

The First-to-File Rule

The FCA's first-to-file rule bars suits by relators if an earlier filed FCA complaint made substantially similar claims. The *Carter* court joined a growing majority of federal appellate courts to apply the "same material elements" test to evaluate whether claims are sufficiently similar under the first-to-file bar. The Third, Fifth, Sixth, Ninth, Tenth, and D.C. Circuits have all adopted this test, which bars any later-in-time relator's complaint when its allegations are based on the same material elements of fraud as the first-filed suit. Op. at 16. Here, the *Carter* 2011 complaint alleged facts quite similar to those in two previously-filed complaints, and the Fourth Circuit concluded that *Carter* alleged the "same material facts." Furthermore, the court continued, both first-filed cases were active controversies on June 2, 2011. As a result, the court determined, *Carter* 2011 was barred by the first-to-file rule and that the district court properly dismissed the action.

However, the Fourth Circuit rejected *with prejudice* dismissal by the District Court. Though both earlier-filed suits were open when *Carter* 2011 was filed, both complaints had since been dismissed. Following the Seventh Circuit, the court held that the FCA's first-to-file rule bars a suit only while the first-filed complaint is an open case; if those first-filed actions are dismissed, a relator is free to re-file an identical complaint without being barred by the first-to-file rule.[1] Under the FCA's first-to-file bar, "an action that is no longer pending cannot have a preclusive effect for all future claims." Op. at 19. Thus, the court held that relator's suit was erroneously dismissed with prejudice under the FCA.

Implications of the Court's Decision

If *Carter's* reasoning is adopted by other courts, the FCA's limitations period could be extended for a decade or more under the WSLA;[2] this would reward relators who delay providing information to the government about potential fraud. With respect to the FCA's first-to-file provision, the court's decision appears to contemplate that a dismissal based solely on the FCA's first-to-file provision can never be "with prejudice," since all cases—including first-filed ones—eventually conclude, and a new relator is then free to file and litigate a substantially identical complaint. Because both these holdings are inconsistent with the FCA's focus on encouraging whistleblowers *promptly* to provide the government with information on potential fraud, other jurisdictions may be wary of following the Fourth Circuit's reasoning.

If you would like further information, please contact an attorney in Ropes & Gray's False Claims Act practice group or the Ropes & Gray attorney who usually advises you.

[1] The Fourth Circuit noted, however, that while nothing in the FCA prevents relator from re-filing his suit, "the doctrine of claim preclusion may prevent the filing of subsequent cases." Op. at 18.

[2] The district court assumed that hostilities ended on August 31, 2010 with a presidential statement declaring "the end of our combat mission in Iraq," although the dissent queried whether even that was sufficient to satisfy the statute. See Op. at 38 n. 5. Therefore, although the majority did not address this issue, it is conceivable that the FCA's limitations period is even now still being tolled.