

## The False Claims Act During Times of War: Is There Any Time Limit For Bringing Suit?

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A federal appellate court recently ruled that, at least for the moment, claims under the False Claims Act ("FCA") are not subject to any statute of limitations. The United States Circuit Court for the Fourth Circuit, in *U.S. ex rel. Carter v. Halliburton Co.*, 710 F.3d 171 (4th Cir. 2013), relied on an obscure federal statute, the Wartime Suspension of Limitations Act ("WSLA"), to hold that the FCA's general six-year statute of limitations, 31 U.S.C. §3287, was tolled due to the ongoing conflict in Iraq. The Fourth Circuit's decision is ground-breaking, as it is the first federal appellate court to weigh in on this issue and takes a broad view of the tolling question, effectively removing any limitations bar to FCA violations committed during times of war

The WSLA, originally enacted in 1942 and amended as recently as 2008, generally suspends statutes of limitations in actions related to fraud against the United States until 5 years after the termination of a war. 18 U.S.C. §3287. In *Carter*, the qui tam whistleblower alleged that his employer, well-known government contractor Kellogg Brown Root Services, Inc. ("KBR"), was defrauding the government by inflating its employees' work hours on a water purification contract as well as misrepresenting to the United States that it was actually purifying water for servicemen and servicewomen deployed in Iraq. The trial court dismissed Carter's complaint on the grounds that, among other things, Carter's case was not tolled by the WSLA because the government did not intervene in the action. *Carter*, 710 F.3d at 176. The Fourth Circuit reversed, holding that the armed conflict in Iraq suspended the statute of limitations in Carter's case, regardless of whether the case was being prosecuted by Carter, as the FCA relator, or by the United States. According to the court, "whether the suit is brought by the United States or a relator is irrelevant . . . because the suspension of limitations in the WSLA depends on whether the country is at war and not who brings the case." *Id.* at 180.

In addition to explicitly extending the scope of the WSLA to non-intervened cases, the Fourth Circuit made two other important WSLA-related holdings. First, the court ruled that the phrase "at war" in the WSLA is not limited to formally declared wars but, instead, applies to modern military engagements such as the United States' involvement in Vietnam, Korea, Afghanistan and Iraq. *Id.* at 179. Although none of these conflicts were formally declared wars, they occupied much of the government's attention and resources such that the purpose of the WSLA-allowing the government more time to act during the fog of war-would not be served if an unnecessarily formalistic approach were required.

Second, the Fourth Circuit-consistent with several district courts before it-ruled that the WSLA applies to both criminal and civil cases. *Id.* at 179-180. The question of WSLA's application to civil matters arose out of the use of the word "offense" in the statute. The original version of the WSLA applied to "offenses involving the defrauding or attempts to defraud the United States . . . and now indictable under any existing statutes." In 1944, however, the Act was amended, deleting the "now indictable" language. With that change, the court concluded, the "WSLA was then applicable to all actions involving fraud against the United States," including civil actions. *Id.*

In light of the Fourth Circuit's decision in *Carter*, the limitations period for FCA actions may be indefinitely extended. Indeed, in *Carter*, the court indicated that it is not clear that the war in Iraq is over for purposes of the WSLA. Tolling under the WSLA ends 5 years after the termination of hostilities "as proclaimed by a Presidential proclamation, with notice to Congress, or by a concurrent resolution of Congress." Wartime Enforcement of Fraud Act, Pub. L. No. 110-417 §855, codified at 18 U.S.C. §3287. According to the Fourth Circuit, because "it is not clear" that President Obama has proclaimed the war in Iraq as over and provided notice of the same to Congress, as required by the WSLA, the limitations period may still be tolled.

Some commentators have argued that the FCA statute of repose, which sets the outside deadline for bringing claims at either "3 years after the date when facts material to the right of action are known or reasonably should have been known" by the government, "but in no event more than 10 years after the date on which the violation is committed, whichever occurs last." This mandates that the statute of limitations for FCA cases cannot be tolled for more than 10 years. Although *Carter* did not reach that specific issue, it seems unlikely-based on the Fourth Circuit's language and analysis-that it would endorse such a position. Indeed, the Fourth Circuit noted, in a footnote, that "tolling will indeed extend indefinitely" absent a formal Presidential proclamation with notice to Congress. *Carter*, 710 F.3d at n.5.

If the Fourth Circuit's analysis is adopted by its sister circuits, there will be profound benefits for whistleblowers seeking to expose fraud against the Government. For instance, defendants may be discouraged from proffering hyper-technical, confused or convoluted statute of limitations defenses in order to avoid responsibility for their fraud. It would also open up the possibility of bringing *qui tam* claims under the FCA for conduct dating farther back in the past.

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