Published on *The National Law Review* https://natlawreview.com

The FCA's First-to-File Bar and The Enduring Importance of Textualism

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Two years ago, in *Kellogg Brown & Root Services, Inc. v. United States ex rel. Carter*, the Supreme Court interpreted the "first-to-file" bar of the False Claims Act ("FCA") in a manner that seemingly authorizes relators to pursue *qui tam* suits based upon the same allegations made in previously dismissed FCA actions. On remand from the Supreme Court, the Fourth Circuit recently issued an opinion in *Carter* in which it took a similarly text-based approach, but reached a different conclusion, holding that the FCA's first-to-file bar should be interpreted in a manner that promotes finality and prevents copycat lawsuits. These opinions demonstrate the importance of carefully assessing the FCA's statutory text in litigation.

The FCA's first-to-file rule states that "[w]hen a person brings an action . . . no person other than the Government may intervene or bring a related action based on the facts underlying the pending action." 31 U.S.C. § 3730(b)(5). As discussed on this blog, the Supreme Court's decision in *Carter* declined to examine Congress's statutory intent and instead looked to the dictionary definition of the term "pending" to hold that a later action is only barred as long as the first action remains undecided or is awaiting a decision. Under this interpretation, once the first action ends, a second relator theoretically can bring a suit based on the same facts—provided, of course, that the subsequent suit is filed within the statute of limitations.

The Supreme Court remanded *Carter* for further proceedings consistent with its decision, but the district court quickly realized that the case presented additional questions involving the first-to-file rule. The relator in *Carter* had not waited until the first action had ended to file his case: he instead brought the action while *two other FCA actions* were pending. And if the court dismissed the relator's current lawsuit and the relator filed a new lawsuit, the new lawsuit would be barred by the statute of limitations. Recognizing the dilemma, the relator contended that he should be able to amend his complaint without having to re-file.

The district court rejected the relator's contention, and the Fourth Circuit recently affirmed in *United States ex rel. Carter v. Halliburton Co.* As the Fourth Circuit explained, the FCA "imposes a restriction on the 'bring[ing]' of an 'action.'" Just as the Supreme Court had focused on the word "pending," the Fourth Circuit focused on the word "bring." The Court explained that it "must look at

the facts as they existed when the claim was brought to determine whether an action is barred by the first-to-file bar." At that time the relator in *Carter* filed his case, two actions were pending. And although those actions were subsequently dismissed, the Fourth Circuit made clear that "[f]acts that may arise after the commencement of a relator's action, such as the dismissals of earlier-filed, related actions pending at the time the relator brought his or her action, do not factor into this analysis." Therefore, the district court did not err when it dismissed the case.

In reaching this conclusion, the Fourth Circuit addressed the First Circuit's decision in *United States ex rel. Gadbois v. Pharmerica Corp.* There, the Court held that a relator could amend its complaint without re-filing, if the first action ceases to be pending while the second action is ongoing. The Fourth Circuit held that *Gadbois* was factually distinguishable, as the *Gadbois* relator had actually referenced the earlier actions in its amended complaint. Significantly, the Fourth Circuit also cited several district court cases which suggested that *Gadbois* was wrongly decided on the merits.

The law within the Fourth Circuit is clear: a relator cannot file a *qui tam* action while a previously-filed action based upon the same allegations is still pending. Moreover, it is becoming increasingly clear that a relator cannot avoid the statute of limitations by amending a complaint that was originally barred by the first-to-file rule. We note that the D.C. Circuit reached a similar conclusion in *United States ex rel. Shea v. Cellco Partnership*, and suspect that other appellate courts will likely follow suit.

National Law Review, Volume VII, Number 254