Will 2015 Bring Expanded Liability for Contractors Under the False Claims Act?

In January 2015, the U.S. Supreme Court heard arguments in a False Claims Act (FCA) *qui tam* case that addresses the application of the WSLA to the FCA and the current circuit split regarding the proper interpretation of the FCA's "first-to-file" rule. This article discusses the case's history and some of the practical effects that the upcoming decision may have.

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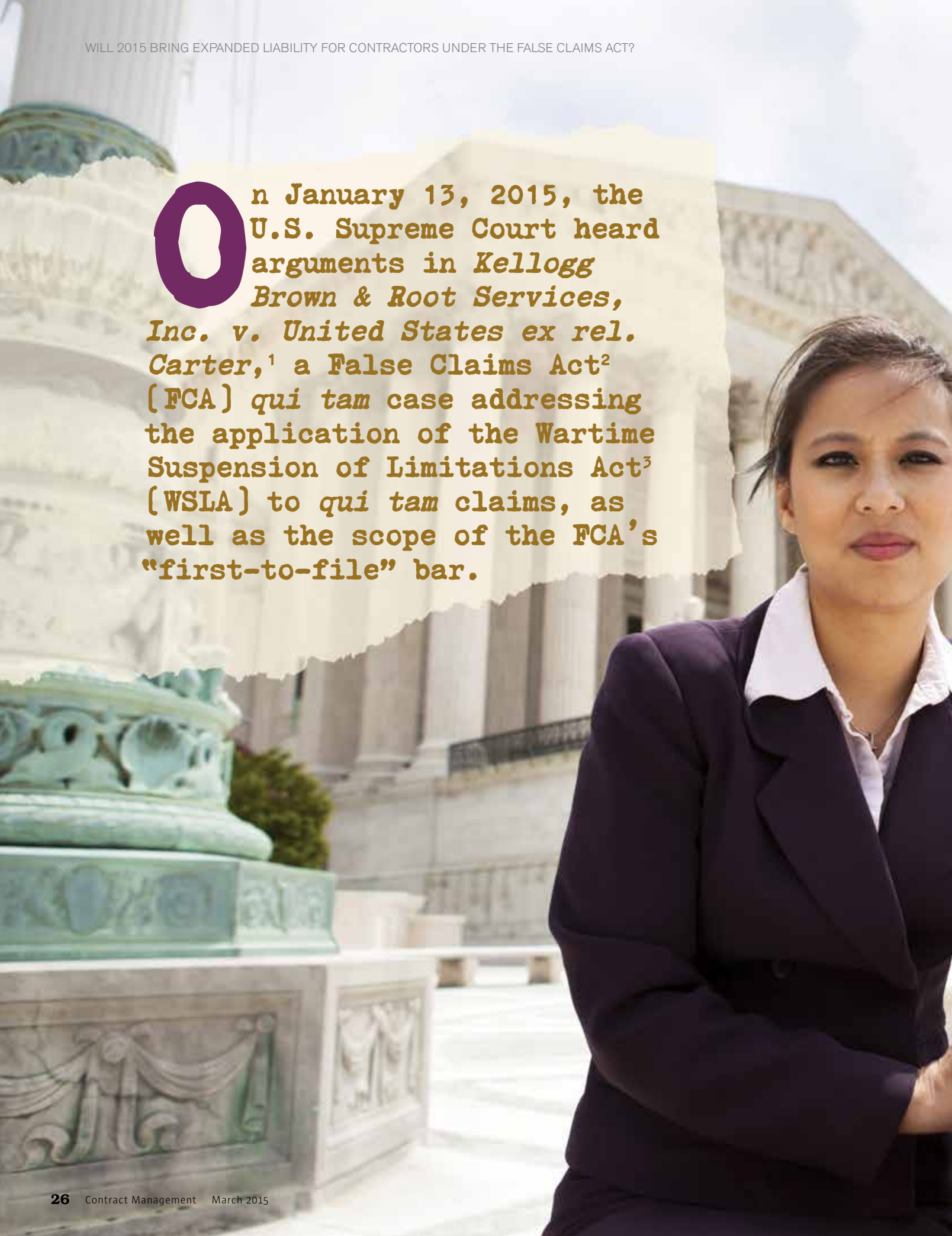

On January 13, 2015, the U.S. Supreme Court heard arguments in *Kellogg Brown & Root Services, Inc. v. United States ex rel. Carter*,[1] a False Claims Act[2] (FCA) *qui tam* case addressing the application of the Wartime Suspension of Limitations Act[3] (WSLA) to *qui tam* claims, as well as the scope of the FCA's "first-to-file" bar.

Petitioner Kellog Brown & Root (KBR) was seeking to overturn a decision by the Fourth Circuit applying the WLSA to the FCA in a manner that could expand the FCA's statute of limitations well beyond its current six-year term. KBR was also arguing for a conservative interpretation of the "first-to-file" bar, which the Fourth Circuit and others interpret to allow plaintiffs to file multiple actions so long as no similar matters are pending or have been decided on their merits.

According to petitioner KBR's reply brief filed on November 13:

> The Fourth Circuit panel read two laws in a way that effectively repeals the statute of limitations for claims of civil fraud against the government in the post-9/11 world, and gives private relators leave to refile duplicative claims indefinitely.[4]

The FCA

The FCA imposes civil liability on any person, including a corporation, who knowingly uses a "false record or statement to get a false or fraudulent claim paid or approved by the government," and any person who "conspires to defraud the government by getting a false or fraudulent claim allowed or paid."[5]

The FCA's *qui tam* provision[6] allows a private person—known as a "relator" or "*qui tam* relator"—to bring an action for a violation of the FCA for themselves and the U.S. government. When a private person brings an action under the FCA's *qui tam* provision, the government may elect to proceed with the action (called "intervening"), or it may decline to take over the action, in which case the person bringing the action shall have the right to conduct the action.

Qui tam cases are filed under seal and remain secret while the government conducts its investigation.

Violators of the FCA face treble damages and a civil penalty of $5,500 to $11,000 per occurrence. A successful relator may receive a reward of up to 30 percent of the proceeds plus reimbursement for attorneys' fees, costs, and expenses.

Qui tam relators and the government have successfully brought FCA actions against a wide variety of defendants. Examples of common targets under the FCA include defense contractors, General Services Administration suppliers, and healthcare providers.

The statute of limitations under the FCA is the latter of six years, or:

> [Three] years after the date when facts material to the right of action

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> 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.[7]

The FCA also contains a so-called "first-to-file" bar,[8] which states:

> When a person brings an action under this subsection, no person other than the government may intervene or bring a related action based on the facts underlying the pending action.

United States ex rel. Carter v. KBR

The facts of the *Carter* case are not complex, though the procedural history is lengthy. Plaintiff-relator Carter alleged that while working for KBR as a water purification operator in Iraq in 2005, he was instructed to submit timesheets for time that he did not work, and that the defendants routinely overbilled the government. In February 2006, Carter filed a *qui tam* action ("*Carter I*"[9]), unaware that another relator beat him to the punch on December 23, 2005 (the "*California Case*").[10]

In January 2009, the U.S. District Court for the Eastern District of Virginia dismissed *Carter I* and granted Carter leave to amend his claims. On January 28, 2009, Carter filed an amended complaint, and in July 2009, the Eastern District of Virginia partially dismissed *Carter I* again, setting the remaining portion of the case for trial in April 2010. On March 23, 2010, the week before the case was set for trial, the government revealed the existence of the *California Case*, which was still under seal. On May 10, 2010, the Eastern District of Virginia dismissed *Carter I* without prejudice, holding that the FCA's first-to-file bar prohibited Carter's claims while the *California Case* was still pending.

Carter appealed to U.S. Court of Appeals for the Fourth Circuit. About two weeks later, the Central District of California court dismissed the *California Case* after the attorneys for the relators in that case withdrew and the relators failed to find new representation. On August 4, 2010, Carter filed a second *qui tam* lawsuit ("*Carter II*"[11]) in the Eastern District of Virginia. The Eastern District of Virginia dismissed *Carter II* in May 2011, holding that *Carter I*, still pending before the Fourth Circuit, was indisputably

related and prohibited *Carter II* under the FCA's first-to-file bar.

Carter withdrew his appeal to the Fourth Circuit and filed a third action ("*Carter III*"[12]) in June 2011. The Eastern District of Virginia dismissed Carter's third attempt with prejudice, holding that it was barred by yet another related action,[13] and because nearly all of Carter's claims were barred by the FCA's six-year statute of limitations.[14] Carter again appealed to the Fourth Circuit, arguing that the WSLA tolled the statute of limitations and that the first-to-file bar did not preclude him from bringing a new action once the original actions were dismissed. The Fourth Circuit agreed with Carter and reversed and remanded the case, leaving KBR to appeal to the U.S. Supreme Court.

On July 1, 2014, the Supreme Court granted KBR's petition for a writ of *certiorari* to determine two issues:

- Whether the WSLA—a criminal code provision that tolls the statute of limitations for "any offense" involving fraud against the government "[w]hen the United States is at war,"[15] and which this court had instructed must be "narrowly construed" in favor of repose—applies to claims of civil fraud brought by private relators, and is triggered without a formal declaration of war, in a manner that leads to indefinite tolling; and
- Whether, contrary to the conclusion of numerous courts, the FCA's so-called "first-to-file" bar[16]—which creates a race to the courthouse to reward relators who promptly disclose fraud against the government, while prohibiting repetitive, parasitic claims—functions as a "one-case-at-a-time" rule allowing an infinite series of duplicative claims so long as no prior claim is pending at the time of filing.

The WSLA

The WSLA, enacted in 1942 and amended as recently as 2008, provides in pertinent part:

> When the United States is at war or Congress has enacted a specific authorization for the use of the Armed Forces... the running of any statute of limitations applicable to any offense...involving fraud or attempted fraud against the United States or any agency thereof in any manner, whether by conspiracy or not...shall be suspended until 5 years after the termination of hostilities as proclaimed by a presidential proclamation, with notice to Congress, or by a concurrent resolution of Congress.

According to the accompanying 1942 Senate Report:

> The purpose of the proposed legislation is to suspend any existing statutes of limitations applicable to offenses involving the defrauding or attempts to defraud the United States or any agency thereof, for the period of the present war...and to insure that the limitations statute will not operate, under stress of the present-day events, for the protection of those who would defraud or attempt to defraud the United States.[17]

KBR argued that the WLSA was a criminal statute and should not be applied to civil claims brought by private relators. In particular, KBR argued that the ordinary meaning of the term *offense* denotes a "criminal offense," and it cited to how the word is used throughout Title 18 of the U.S. Code, which deals with crimes and criminal procedure. KBR's petition before the Supreme Court described the worst-case practical implication of the application to the WSLA to the FCA:

> For any entity that has done business with the government in any industry over the past ten years [the Fourth Circuit's holding] means that the statute of limitations has *not even begun to run* on any of the possible fraud claims that the government or a self-interested relator might eventually choose to bring. And it will not expire until years after the president or congress has formally terminated the conflicts in Iraq and Afghanistan—which has not happened yet and, as a practical and political matter, may never happen.[18]

However, the statutory history of the WSLA and several court decisions over the last 60 years appear to disagree with KBR's position. The WSLA as enacted in 1942 applied to "offenses involving the defrauding or attempts to defraud the United States...and now indictable under any existing statutes."[19] In 1944, Congress passed the Contract Settle-

ment Act, which amended the WSLA to remove the words "now indictable" from the statute, suggesting that Congress intended to broaden the scope of the WSLA to include offenses other than "indictable" criminal offenses.[20] Congress also added the word "any" in front of "offense." Accordingly, as early as 1955, courts found that the WSLA applied to lengthen the statute of limitations for civil claims under the FCA.[21]

More recent cases appear to support the same conclusion. For example, in 2013, in *United States v. Wells Fargo Bank, N.A.*,[22] the U.S. District Court for the Southern District of New York held that the WSLA applied to FCA claims brought by the government. And, as recently as May 2014, the U.S. District Court for the Southern District of Texas held that the WSLA applied to *qui tam* actions in *United States ex rel. Carroll v. Planned Parenthood Gulf Coast*,[23] though other courts have frequently rejected the WSLA's application to healthcare cases.[24]

The First-to-File Bar

Section 3730(b)(5) of the FCA states:

> When a person brings an action under this subsection, no person other than the government may intervene or bring a related action based on the facts underlying the pending action.

As previously mentioned, this provision is commonly referred to as the "first-to-file" bar. The Fourth Circuit, along with the Seventh and Tenth Circuits, hold that section 3730(b)(5) functions as a "bar" only when the prior claim is still pending.[25] Under the Fourth Circuit's interpretation, Carter was free to proceed with his second (and third) *qui tam* lawsuits once the pending prior cases were dismissed, though his claims were still subject to the requirements of the FCA's public disclosure bar and original source rule, and the doctrines of claim and issue preclusion.[26]

However, other circuits have held that a prior *qui tam* action functions as a complete bar regardless of whether it was decided on its merits. For example, in *United States ex rel. Branch Consultants v. Allstate Ins. Co.*,[27] the Fifth Circuit Court of Appeals held that:

> [A] relator cannot avoid [section] 3730(b)(5)'s first-to-file rule by simply adding factual details or geographic locations to the essential or material elements of a fraud claim against the same defendant described in a prior complaint.[28]

The Fifth Circuit reasoned that:

> Any construction of [section] 3730(b)(5) that focused on the details of the later-filed action would allow an infinite number of copycat *qui tam* actions to proceed so long as the relator in each case alleged one additional instance of the previously exposed fraud. This result cannot be reconciled with [section] 3730(b)(5)'s goal of preventing parasitic *qui tam* lawsuits.[29]

The First and Ninth Circuits ruled similarly in *United States ex rel. Duxbury v. Ortho Biotech Prods., L.P.*,[30] and *U.S. ex rel. Lujan*

v. Hughes Aircraft Co.,[31] respectively. In these circuits, district courts may allow a "second-to-file" relator to join forces with a first-to-file relator where the relators agree that the second-to-file relator has useful information.

KBR argued that the Fourth Circuit's interpretation allowed "serial re-filing," which "defeats the first-to-file bar."[32] Similarly, the Chamber of Commerce and other business interests asserted that:

> Such a rule will inflict substantial costs on businesses defending duplicative suits without any appreciable gains in ferreting out actual fraud, and further burden the U.S. court system. Every suit filed drains resources from all involved, and repetitive suits by private relators simply clog the courts.[33]

Oral Argument

Discussion of the WSLA dominated oral argument. The Supreme Court justices appeared unaccepting of the proposition that the WSLA operates to suspend the statute of limitations for the FCA.

Justice Elena Kagan at first seemed open to Carter's argument. She noted that "The taking out of the indictment language, the putting in the word 'any,' and the passage in conjunction with the Contract Settlement Act," would be arguments against KBR's interpretation of the WSLA.

However, all of the justices and the parties conceded that the WLSA began as a criminal statute and Justice Antonin Scalia told Carter: "The burden is on you to show that it's been changed from the criminal to the civil." The justices challenged Carter on the point: "Wouldn't Congress have said, now we're going to make it—we want it to be civil, so we're going to make it clear that it's civil?" Similarly, Justice Scalia told U.S. Deputy Solicitor General Malcom Stewart that the "'now indictable language'…could have been eliminated for a very different reason; and that is, to show that it…operates prospectively."

The justices appeared open to the Fourth Circuit's interpretation of the first-to-file rule and discussed how KBR's interpretation would require courts to disregard the word "pending." Justice Anthony Kennedy remarked to KBR: "The problem you have with this argument…[is that] you give no significance of the word 'pending.' You almost write that out of the statute." The justices also appeared unconvinced that the Fourth Circuit's interpretation would result in a never-ending line of *qui tam* plaintiffs seeking to re-litigate the same claims in light of the original source rule contained at 31 U.S.C. 3730(e)(4)(a) and the doctrine of claim preclusion.

Practical Implications If the Supreme Court Upholds the Fourth Circuit's Ruling

While KBR and its supporters argue that the Fourth Circuit's decision has the potential to effectively eliminate the FCA's six-year statute of limitations and to allow a line of never-ending, overlapping *qui tam* claims, the practical implications appear far less dire. The WSLA does serve to extend the FCA's temporal reach, but the FCA's first-to-file rule, the public disclosure bar, and the doctrines of claim and issue preclusion still operate to encourage relators to come forward as soon as possible. Additionally, there appears to be little support to allow the WSLA to extend to cases wholly unrelated to defense contractors, such as those brought against stateside healthcare providers.

Secondly, the first-to-file rule, as interpreted by the Fourth, Seventh, and Tenth Circuits, still prohibits duplicative litigation when a prior claim has been decided on its merits. In this case, the prior *California Case* was dismissed only because the relators were unable to secure counsel. KBR never actually faced the duplicative litigation or double jeopardy that it complained of. The Fourth, Seventh, and Tenth Circuits' interpretation still allows only one full, merit-based bite at the apple. Relators bringing subsequent claims must prove that they are an original source of the information and that their actions are not barred by the doctrines of claim and issue preclusion. Accordingly, *qui tam* relators and their counsel are still encouraged to race to the courthouse and to file their claims as early as possible, protecting contractors from belated, repetitive attacks and parasitic claims. **CM**

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ENDNOTES

1. 710 F.3d 171 (4th Cir. 2013), cert. granted, 134 S. Ct. 2899 (U.S. 2014) (No. 12-1497).
2. 31 U.S.C. 3729–3733.
3. 18 U.S.C. 3287.
4. *Reply Brief for Petitioner, KBR v. United States ex rel. Carter*, No. 12-1497, 2014 WL 5906565 (U.S., November 13, 2014). On October 11, 2002, Congress passed the military action in Iraq through the Authorization for the Use of Military Force in Iraq (*Pub. L.* 107-243, 116 Stat. 113). In a worst-case scenario for contractors, the statute of limitations could reach all the way back to 2002 in certain circumstances, and potentially "indefinitely" so long as hostilities continue.
5. *Allison Engine Co. v. United States ex rel.* Sanders, 553 U.S. 662, 665 (2008).
6. Section 3730(b).
7. 31 U.S.C. 3731(b).
8. Contained at 31 U.S.C. 3730(b)(5).
9. *United States ex rel. Carter v. Halliburton Co.*, No. 1:08-cv-01162 JCC/JFA (E.D. Va.) (originally filed in C.D.Cal., case no. 2:06-cv-00616, and transferred on 11/7/2008).
10. *See United States ex rel. Thorpe v. Halliburton Co.*, No. 05-cv-08924 (CD. Cal.).
11. *United States ex rel. Carter v. Halliburton Co.*, No. 1:10-cv-00864 JCC/TCB (E.D. Va.).
12. *United States ex rel. Carter v. Halliburton Co.*, No. 1:11-cv-00602 JCC/JFA (E.D. Va.).
13. *United States ex rel. Duprey v. Halliburton, Inc.*, No. 8:07-cv-1487 (D. Md.).
14. *U.S. ex rel. Carter v. Halliburton Co.*, 1:11-cv-00602 JCC/JFA, 2011 WL 6178878 (E.D. Va., December 12, 2011) *rev'd and remanded*, 710 F.3d 171 (4th Cir. 2013).
15. 18 U.S.C. 3287.
16. *See* note 8.
17. S. Rep. 1544, 77th Cong., 2d Sess., 1–2.
18. Petition for Cert. at *3–4 (emphasis in the original).
19. *United States ex rel. Carter v. Halliburton Co.*, 710 F.3d 171, 177 (4th Cir. 2013) (alteration in original) (*quoting Dugan & McNamara, Inc. v. United States*, 127 F.Supp. 801, 802 (Ct. Cl.1955)); *see also* The Contract Settlement Act of 1944 (*Pub. L.* 395, 58 Stat. 649, 667).
20. *See* The Contract Settlement Act of 1944, *ibid.*
21. *See, e.g., Dugan & McNamara*, 127 F. Supp. at 803–804 (1955); *and United States ex rel. McCans v. Armour & Co.*, 146 F. Supp. 546, 551 (D.D.C. 1956) ("[I]n 1944 Congress in the Contract Settlement Act, 18 U.S.C. § 3287, 58 Stat. 649, 667, enacted July 1, 1944, amended the language of the Suspension of Limitations Act by deleting the term 'now indictable.' This brought the False Claims Act within its purview.").
22. *United States v. Wells Fargo Bank*, N.A., 972 F. Supp. 2d 593, 613–614 (S.D.N.Y. 2013).
23. *United States v. Planned Parenthood Gulf Coast, Inc.*, No. H-12-3505, 2014 WL 1933554, __ F. Supp. 2d __ (S.D. Tex., May 14, 2014).
24. *See Brief for Chamber of Commerce, et al. as Amici Curiae Supporting Petitioners* at n.2, *KBR v. United States ex rel. Carter*, No. 12-1497, 2014 WL 4417780 (U.S., September 5, 2014) (citing several cases finding that the WSLA did not toll the statute of limitations in healthcare cases).
25. *See e.g., U.S. ex rel. Carter v. Halliburton Co.*, 710 F.3d at 183; *United States ex rel. Chovanec v. Apria Healthcare Group, Inc.*, 606 F.3d 361, 365 (7th Cir. 2010); *and In re Natural Gas Royalties Qui Tam Litig.*, 566 F.3d 956, 963–964 (10th Cir. 2009).
26. The public disclosure bar, contained at 31 U.S.C. 3730 (e)(4)(A), requires dismissal of claims, "unless opposed by the government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed—(i) in a federal criminal, civil, or administrative hearing in which the government or its agent is a party; (ii) in a congressional, Government Accountability Office, or other federal report, hearing, audit, or investigation; or (iii) from the news media, unless the action is brought by the attorney general or the person bringing the action is an original source of the information." Issue and claim preclusion would prevent Carter from bringing and litigating his claims if the same claims were already decided on their merits.
27. *U.S. ex rel. Branch Consultants v. Allstate Ins. Co.*, 560 F.3d 371, 378 (5th Cir. 2009).
28. *Ibid.*
29. *Ibid.*
30. *United States ex rel. Duxbury v. Ortho Biotech Prods., L.P.*, 579 F.3d 13, 33 (1st Cir. 2009) ("The 'first-to-file' rule is 'exception-free.'")
31. *U.S. ex rel. Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181, 1183 (9th Cir. 2001) ("[Section] 3730(b)(5) establishes an exception-free, first-to-file bar.").
32. *Brief for Amici Curiae the Chamber of Commerce, et al.*, at 23–24, No. 12-1497, 2014 WL 4417780 (U.S., September 5, 2014).
33. *Ibid.*