No. 12-1011

IN THE

United States Court of Appeals for the Fourth Circuit

UNITED STATES EX REL. BENJAMIN CARTER,

Plaintiff-Appellant,

v.

HALLIBURTON CO., KELLOGG BROWN & ROOT SERVICES, INC., SERVICE EMPLOYEES INTERNATIONAL, INC., AND KBR, INC.,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Virginia,
No. 1:11-cv-00602-JCC-JFA
James C. Cacheris, Senior District Judge

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITION FOR REHEARING EN BANC

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April 1, 2013

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 12-1011 Caption: United States ex rel. Benjamin Carter v. Halliburton Co., et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Chamber of Commerce of the United States of America
(name of party/amicus)

who is amicus curiae, makes the following disclosure:
(appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☐ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s Jonathan S. Franklin Date: April 1, 2013

Counsel for: Chamber of Commerce of the U.S.A.

CERTIFICATE OF SERVICE

****

I certify that on April 1, 2013 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s Jonathan S. Franklin (signature) April 1, 2013 (date)

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INTEREST OF AMICUS CURIAE

Amicus curiae the Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation.[1] It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry, from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. The Chamber thus regularly files amicus curiae briefs in cases raising issues of vital concern to the Nation's business community.

The Chamber has a strong interest in apprising the en banc Court of the significant adverse consequences for the Nation's businesses if the panel decision in this case is allowed to stand. The panel opinion combined two far-reaching decisions that would greatly expand the reach of the False Claims Act ("FCA"). First, its interpretation of the Wartime Suspension of Limitations Act ("WSLA"), 18 U.S.C. § 3287, has the potential, when wielded by the relators' bar, to toll indefinitely all statutes of limitations for all claims involving alleged fraud against the United States, whether civil or criminal. Second, the panel's interpretation of the so-called "first to file" provision of the FCA, 31 U.S.C. § 3730(b)(5), would allow

[1] No party's counsel authored the brief in whole or in part, and no party or party's counsel or any person, other than the amicus curiae, its members, or its counsel, contributed money intended to fund preparing or submitting the brief. A motion for leave accompanies this brief.

relators to file duplicative actions so long as they are not pending at the same time.

The combined effect of these rulings will be to empower relators to argue for the tolling of statutes of limitations for all claims involving alleged fraud against the government for a potentially unlimited time, and to allow FCA relators to take advantage of this near-permanent tolling by filing duplicative claims one after another. This misinterpretation of the governing statutes, if allowed to stand, will impose an unprecedented burden on businesses, which could potentially be faced with an onslaught of otherwise time-barred, stale claims, and which could be subjected to duplicative FCA actions involving the same claims.

REASONS FOR GRANTING REHEARING

I. THE PANEL DECISION WILL UNLEASH RELATORS TO SEEK LIMITLESS TOLLING FOR A VAST NUMBER OF CLAIMS.

The panel's WSLA interpretation, if not overturned, will open the floodgates for relators seeking to revive stale claims against the Nation's businesses, many of which are subject to suit in this Circuit. According to the panel, the WSLA (1) applies to both civil and criminal claims, even though it covers only "offenses"; (2) applies when the U.S. is engaged in "armed hostilities," regardless of whether there was a specified formal act, Panel Op. 11; (3) applies to claims by private parties; and (4) tolls limitations under all statutes involving government fraud until after such time—if ever—that the President issues a proclamation or Congress passes a concurrent resolution terminating hostilities.

The breadth of that holding is striking. This panel held that the WSLA applies to qui tam FCA actions, but the FCA is not limited to war-related claims. It covers allegations of fraud brought by self-deputized "relators" in such disparate areas as health care, energy, grants, procurement, and loan programs, to name just a few. And the number of FCA claims, particularly qui tam actions, is skyrocketing, with 647 qui tam claims filed in fiscal year 2012 as compared to just 30 in 1987. *See* U.S. Dep't of Justice, *Fraud Statistics—Overview* (Oct. 1, 1987-Sept. 30 2012) (www.justice.gov/civil/docs_forms/C-FRAUDS_FCA_Statistics.pdf). Moreover, because the WSLA covers any "offense"—which the panel interpreted to include private civil claims—"involving fraud or attempted fraud against the United States," 18 U.S.C. § 3287(1), the plaintiffs' bar and the government will no doubt ultimately argue that the panel's holding covers claims brought under a wide array of anti-fraud statutes, not just the FCA.[2]

The tolling authorized by the panel is also potentially limitless. *See* Dietrich Knauth, *Fourth Circuit Shows Expired FCA Claims Can Haunt Contractors*, Law360.com (Mar. 27, 2013) (www.law360.com/articles/427588/4th-circ-shows-expired-fca-claims-can-haunt-contractors) ("given that the U.S. has rarely exper-

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[2] *See, e.g.*, 42 U.S.C. § 1320a-7a (health care fraud); 18 U.S.C. §§ 1001 (false statements), 1341 (mail fraud), 1343 (wire fraud). *See also* 18 U.S.C. § 3287(2) (WSLA also applies to any "offense . . . committed in connection with the acquisition, care, handling, custody, control or disposition of any real or personal property of the United States").

ienced complete peace for more than five years, the Fourth Circuit's reading of the law would expand the statute of limitations nearly indefinitely for any government contract . . . ."). The panel held that the WSLA was triggered by the undeclared hostilities in Iraq—without itself attempting to tie the conduct to the formalities required to trigger either version of the WSLA.[3] This broad understanding of the WSLA triggering events, which future relators will undoubtedly attempt to expand further, sets the stage for a dramatic expansion of the WSLA's applicability when combined with the panel's stripping of its other meaningful limitations. Properly interpreted, both versions of the WSLA require specific formalities to begin the tolling just as they require formalities to end it. But at a minimum, as explained in the petition for rehearing, the statute applies only to "offenses" involving government fraud and the panel erred in holding that this term includes not just criminal claims but also civil claims brought by private plaintiffs.

Because of the combined effect of the panel decision's errors, WSLA tolling may never end. Under the current version of the statute, tolling applies "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."

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[3] Prior to 2008, the statute was triggered only when the United States is "at war," which when correctly interpreted should require an actual declaration of war. In 2008, the statute was amended to also apply when "Congress has enacted a specific authorization for the use of the Armed Forces, as described in section 5(b) of the War Powers Resolution (50 U.S.C. 1544(b))." 18 U.S.C. § 3287.

18 U.S.C. § 3287(3). Modern military confrontations, however, are likely to continue indefinitely and may never be terminated in such a formal manner. Indeed, the United States is continually engaged in undeclared "armed hostilities" abroad, Panel Op. 11, very few of which have been terminated through the formalities set forth in the WSLA. *See* Richard F. Grimmett, Congressional Research Service, *Instances of Use of United States Armed Forces Abroad,* 1798-2012 (Sep. 19, 2012) (www.fas.org/sgp/crs/natsec/R42738.pdf) (listing more than 330 U.S. foreign military operations in 215 years).

Accordingly, the panel's decision could cause opportunistic relators and other plaintiffs to seek to revive stale claims against companies, under the FCA and other laws, going back decades. The result will be what statutes of limitations are intended to prevent: intolerable burdens on defendants forced to defend old claims for which exculpatory evidence may have long ago been lost. Moreover, as Judge Agee noted, plaintiffs will have incentives to delay claims. *See* Panel Op. 39 (Agee, J., dissenting). When the statute is properly limited to criminal cases and requires formalities to be invoked, prosecutorial discretion may help prevent overreaching in bringing stale claims. Private plaintiffs have no such constraints.

II. THE FIRST-TO-FILE BAR DOES NOT ALLOW RELATORS TO FILE MULTIPLE, DUPLICATIVE CLAIMS.

The panel then compounded its error by holding that the FCA's "first-to-file" bar allows multiple, duplicative cases so long as they are brought successively

rather than concurrently. Under this ruling, not only are FCA claims tolled indefinitely, but businesses can be subjected, over and over, to the same claims. This result conflicts with the statute's language and thwarts its purposes.

"When a person brings [a qui tam FCA] 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). This "first-to-file" bar is absolute—"no person other than the Government may . . . bring a related action"—and it takes effect immediately upon the filing of the first case. Contrary to the panel's decision, the statute provides no end point for the bar on filing related cases. If Congress wanted to say that the bar applies only "while the earlier-filed action is pending," Congress would have said that. The statutory words "pending action" impose no time limit, but rather are just a reference to the first-filed action. As one court has explained, the word "'pending' is used as a short-hand for the first-filed action, and 'pending' was used instead of some other term so that the courts would compare the first-filed action's most recent allegations with the second-filed action's complaint." *U.S. ex rel. Powell v. Amer. Intercontinental Univ., Inc.,* No. 1:08–CV–2277–RWS, *2012* WL 2885356 at *4 (N.D. Ga. July 12, 2012). The bar on related cases takes effect as soon as the first action is pending, but nothing in the statute terminates that bar when that action is concluded.

The panel's interpretation "create[s] perverse incentives and 'reappearing'

jurisdiction." *Id*. at *5. "The first-filed claim provides the government notice of the essential facts of an alleged fraud, while the first-to-file bar stops repetitive claims." *U.S. ex. rel. Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181, 1187 (9th Cir. 2001). The statute creates a "race to the courthouse" under the policy that "once the government knows the essential facts of a fraudulent scheme, it has enough information to discover related frauds." *U.S. ex. rel. Branch Consultants v. Allstate Ins. Co.*, 560 F.3d 371, 377, 378 (5th Cir. 2001) (quotation omitted). If the bar ends when the first action is dismissed, "a race to the courthouse would not occur as subsequent relators would wait hoping that the first-filed action would be dismissed, and fraud would continue to occur in the interim. Moreover, a relator would be able to file, dismiss, and re-file identical qui tam actions, thus encouraging forum shopping and wasting government resources that would be required to review the claims in each action." *Powell*, 2012 WL 2885356 at *5.

"A whistleblower sounds the alarm; he does not echo it." *U.S. ex rel. Green v. Northrop Corp*., 59 F.3d 953, 966 n.11 (9th Cir.1995) (citation omitted). Thus, "once the Government has notice of potential fraud, the purposes of the FCA are vindicated" and "the policies behind the statute do not support successive suits simply because the first suits were dismissed." *Powell*, 2012 WL 2885356 at *5. "Once the government is put on notice of its potential fraud claim"—which happens when the first action is filed—"the purpose behind allowing qui tam

litigation is satisfied." *Grynberg v. Koch Gateway Pipeline Co.*, 390 F.3d 1276, 1279 (10th Cir. 2004). *See also Lujan*, 243 F.3d at 1188 ("Dismissed or not, [the first-filed] action promptly alerted the government to the essential facts of a fraudulent scheme-thereby fulfilling a goal behind the first-to-file rule.").

This case demonstrates the adverse consequences of the panel's rule for the Nation's businesses. The relator has already filed three complaints containing the same allegations, which were also the subject of three other prior qui tam actions. And yet the panel has now authorized him to file a fourth case with the same allegations, more than eight years after the underlying events. The first-to-file rule was intended to prevent such burdensome litigation once the government is already alerted to an alleged fraud. The panel's ruling, by contrast, affirmatively fosters it.

CONCLUSION

For the foregoing reasons, rehearing en banc should be granted.

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I hereby certify that on this 1st day of April, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit using the appellate CM/ECF system, which will send notice of such filing to the following registered CM/ECF users:

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