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# Argument analysis: Justices dubious of government's broad reading of False Claims Act

The argument Tuesday morning in *Kellogg Brown & Root v. United States ex rel. Carter* took the Justices into the sordid world of government contracts fraud. And specifically into the mechanics of *qui tam* litigation under the False Claims Act: actions brought by what you might call "bounty hunters," individuals claiming to have information about contractors defrauding the government. If the claims turn out to be true, the bounty hunters get to keep a quarter of the proceeds.

The issue in this case is a technical one, about the statute of limitations. The Fourth Circuit held that the lawsuit filed by "relator" (legislative lingo for bounty hunter) Benjamin Carter was timely. The contractor (Kellogg Brown & Root or KBR) appealed.
It didn't bode well for Carter when the Justices let John Elwood (counsel for KBR) go on and on largely uninterrupted through the course of his argument. His first big point was that the Fourth Circuit erred in holding that the statute of limitations under the False Claims Act is tolled by the Wartime Limitations Suspension Act. Because the WLSA applies only to "offenses," and appears in the criminal code, KBR argues that it doesn't apply to the relator's claims.

The Justices seemed to have no problem with that, and after about ten minutes, Justice Sonia Sotomayor broke in to ask whether, "[a]ssuming we agree with you, should we get to the second [issue]?" It must be a joyous moment when a Justice asks you to assume the Court is going your way; I can't say it's ever happened to me! Elwood responded that his client's interests would be completely vindicated by a ruling on the first point, but that it would be the "most efficient thing to do" to decide both questions, because they are presented in other cases coming right behind this one. It bears noting that KBR is a sufficiently large government contractor to have a keen interest in the question.

The second question relates to a provision that prevents multiple relators from suing based on the same alleged misconduct. What happened here is that another suit was filed before Carter's suit, but it was dismissed without a ruling on the merits. The court of appeals agreed with Carter that the statute prevents only simultaneous litigation; therefore, this case can go forward once the first case is over. KBR contends the statute is designed to prevent seriatim litigation: once the contractor wins the first case, the issue can't be raised again. The Justices were much less persuaded by KBR's position on that point.

Justice Anthony Kennedy quickly commented that KBR's reading was a hard one: "You almost write ['pending'] out of the statute." When Elwood suggested that Congress had "to have some sort of" referent, Justice Antonin Scalia suggested that "pending" is "a very strange word to pick" and suggested that "former" would have made a lot more sense. Elwood quickly acknowledged that the statute didn't compel his reading of it. He suggested, though, that the same is true for –Carter: "it could have been written better . . . to embody the reading that we want to give it."

Although their skepticism about KBR's reading of the language was plain, the Justices seemed to save their intellectual engagement for the preclusion question. Several of the Justices pressed Elwood on that point, plainly disturbed at the idea (in the words of Justice Scalia) that a case can be dismissed "[f]or non-merits grounds" and still "nobody else can come in." But despite some close questioning, Elwood stuck clearly to his position, repeatedly emphasizing that the first suit had served its purpose if it provided the relevant information to the government, whether or not the relator prosecuted it to judgment. It wasn't clear that he persuaded anybody, but the Justices gave him every chance to make his point.

The conversation was much more heated for David Stone, counsel for Carter. All the Justices who spoke seemed firmly committed to the idea that "offense" naturally refers to a criminal violation – and thus not the False Claims Act – especially when it appears in Title 18. Stone proffered an example – which he said he took from the government's brief – of a provision in Title 18 that, he claimed, used "offense" to refer to a civil transgression. Justice Scalia joined Justice Kennedy and Justice Stephen Breyer in emphatic disagreement. When Stone stuck to his position, the result was a vehement discussion consuming about half of Stone's time to no apparent benefit. By contrast, when the Court pressed Deputy Solicitor General Malcolm Stewart, arguing on behalf of the federal government, on the government's reading of the same provision, Stewart immediately backed off, agreeing that the provision used "offense" to refer to a criminal transgression, and that every use of the word in Title 18 would bear the same meaning.

The other main topic of interest in Stone's argument involved the legislative history of the revisions of the WSLA during the 1940s. Justices Samuel Alito and Ruth Bader Ginsburg pressed Stone repeatedly — suggesting that the importance of the changes he reads into those revisions should be

matched by a substantial discussion in the legislative history. When Stone pointed to a reference in the legislative history suggesting that the provision would facilitate "litigation," Justice Alito – plainly unmoved – asked: "Is that your best evidence, that there was a reference to litigation?" Predictably enough, Justice Scalia could not sit by idly listening to a discussion of legislative history. At one point, he interjected: "Where did that [reference] appear?" When Mr. Stone answered that it was in a Senate Report, Justice Scalia retorted: "OK. That's all I needed to know." He then sat back in his chair to general laughter.

The remainder of the argument – including Stewart's argument – focused on the preclusion question. Both Stone and Stewart agreed that any decision on the merits in the first case would preclude later litigation by either the government or a later relator. Seemingly surprised that the government took such a moderate view, the Justices apparently accepted that view as resolving their concerns about repeat litigation.

The ultimate outcome here is not easy to see. There seems to be a great deal of interest in reversing the court of appeals on the limitations point, so we can expect the Court's disposition, at a minimum, to reject the idea that the reference to offenses in the WSLA tolls actions under the False Claim Act.

It's a little harder to read what the Justices are thinking about the first-to-file point, largely because it seems unnecessary to a decision if KBR already has prevailed on the limitations point. If the Court does reach it, though, the most likely outcome seems to be a vote that limits the bar to actions that are still pending (taking the language at face value), but coupling that reading with a sufficiently specific discussion of the preclusion problem to put to rest any risk of substantial seriatim litigation. So KBR might technically lose on that point, but the practical impact likely would serve the long-term interests of contractors.

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Posted in *Kellogg Brown & Root Services v. U.S. ex rel. Carter*, Merits Cases

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