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COURT'S RULING ON "FIRST-TO-FILE" BAR CREATES CIRCUIT SPLIT ON KEY FALSE CLAIMS ACT ISSUE

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The False Claims Act's (FCA) "first-to-file" jurisdictional bar serves important gatekeeping, efficiency, and fairness purposes by preventing multiple, related *qui tam* lawsuits from proceeding based on the same underlying conduct. In recent years, *qui tam* relators have eroded this bar in some federal circuits, successfully arguing against its application in various circumstances, including where the first-filed action has been dismissed or where there is not an exact overlap in the conduct alleged in each action.

With its decision on April 11, 2014 in *United States ex rel. Shea v. Cellco P'ship* (*d/b/a Verizon Wireless*), No. 12-7133, 2014 WL 1394687 (D.C. Cir. Apr. 11, 2014) ("*Verizon II*"), the U.S. Court of Appeals for the D.C. Circuit reinvigorated the bar and, in so doing, created a clear circuit court split. *Verizon II*'s rejection of the relator's definition of "pending" in the relevant statutory language is directly at odds with a prior Fourth Circuit opinion.

The same relator filed the two *qui tam* actions at issue in *Verizon II*. The first action alleged that Verizon applied improper surcharges under several General Services Administration contracts. The second action alleged that Verizon improperly applied surcharges to different federal agencies under different government contracts. Verizon moved to dismiss the second suit under the first-to-file bar, which provides: "When a person brings an [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). The district court agreed with Verizon's first-to-file argument and dismissed the second *qui tam* complaint.

On appeal to the D.C. Circuit, the relator argued that: (1) his two actions were not "related" because they involved different contracts and different government agencies; (2) the first-to-file bar does not apply to the same relator; and (3) the first-to-file rule does not apply because the first suit was no longer "pending" when the second suit was dismissed. The court of appeals rejected all three arguments. Most notably, with respect to relator's third argument, the D.C. Circuit concluded that the term "pending action" is merely shorthand for "first-filed action," and noted that its interpretation is consistent with the policy considerations underlying the statute:

> The resolution of the first-filed action does not somehow put the government off notice of its contents. On the other hand, reading the bar temporally would allow related *qui tam* suits indefinitely—no matter to what extent the government could have already pursued those claims based on earlier actions. Such duplicative suits would contribute nothing to the government's knowledge of fraud.

2014 WL 1394687, at *5.

Verizon II conflicts directly with *United States ex rel. Carter v. Halliburton Co.*, 710 F.3d 171 (4th Cir. 2013), *petition for cert. filed*, 82 USLW 3010 (U.S. June 24, 2013) (No. 12-1497). The resulting circuit split primes the "pending action" question for resolution by the Supreme Court and may even affect the current *certiorari* petition in the *Carter* case. Notably, in a recently filed *amicus curiae* brief in *Carter*, the Solicitor General agreed with the relator's definition of "pending" and discouraged Supreme Court intervention by characterizing the circuit split as a narrow one that may soon resolve itself. Brief for the United States as *Amicus Curiae* at 22, *Kellogg Brown & Root Servs., Inc. v. United States ex rel. Carter*, No. 12-1497 (May 27, 2014). However, the Solicitor General's argument regarding the nature of the circuit split, which relies on speculation about future events (*i.e.*, anticipating both the grant of an *en banc* review in *Verizon II and* an *en banc* decision supporting relator's definition), is tenuous and should not dissuade the Supreme Court from resolving an issue that is arising in more and more *qui tam* cases.

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