

White Collar Crime - USA

Indefinite tolling: impact of Wartime Suspension of Limitations Act

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Introduction

An archaic World War II statute designed to give the federal government extra time to prosecute crimes during times of war – on the theory that the government is too preoccupied with the "rush of the war activities" – has recently reared its head in the context of False Claims Act *qui tam*(1) actions for the first time in over 50 years. The dramatic and far-reaching consequences of such a tolling of the limitations period for False Claims Act lawsuits have brought renewed attention to this peculiar statute, which seems out of place in an era when the United States fights wars in an entirely different fashion.

This update highlights five key and nuanced issues about which practitioners should be aware when considering potential exposure in civil False Claims Act matters.

Typically, a civil action under the False Claims Act must be brought within "6 years after the date on which the violation of [the statute] is committed" or within "3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States...but in no event more than 10 years after the date on which the violation is committed", whichever is later.(2) However, during times of war, a law codified in the 1940s – the Wartime Suspension of Limitations Act – extends the statute of limitations for prosecution of charges related to fraud offences against the United States(3) As originally drafted, the statute applied to toll the limitations period only for criminal fraud charges that occurred during wartime.(4) As the Supreme Court long ago articulated, the connotation underlying the Wartime Suspension of Limitations Act "is that offences occurring prior to the termination of hostilities shall not be allowed legally to be forgotten in the rush of the war activities".(5) In other words, "[t]he fear was that the law-enforcement officers would be so preoccupied with prosecution of the war effort that the crimes of fraud perpetrated against the United States would be forgotten until it was too late".(6)

This statute has since been amended numerous times and generally now applies to both criminal and civil cases and the tolling period has been extended beyond its original version.(7) As the Fifth Circuit has outlined, the act has three components:

- a triggering clause;
- a suspension period; and
- a termination clause.(8)

Moreover, the Supreme Court has held that the act applies only to offences committed after the triggering clause and before the termination of hostilities. The limitation period then begins to run when hostilities are terminated.(9) Although the act had been dormant for nearly 50 years, a recent flurry of cases has brought it back to the forefront and raised a number of questions and concerns for those facing a False Claims Act lawsuit. Most notably, the Fourth Circuit – the first and only federal appellate court to consider the issue to date – effectively eviscerated the act's statute of limitations in finding that it was tolled by the Wartime Suspension of Limitations Act during the relevant time period in which the allegedly fraudulent conduct occurred, mostly in 2005.(10) Practitioners should pay close attention to this case as it continues: the defendants have asked the Supreme Court to take up the case.(11) Although the Supreme Court

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has yet to make a decision, it asked the solicitor general for input on October 7 2013.

(12)

Act not limited to fraud related to wartime transactions and services

Although the Wartime Suspension of Limitations Act remained unsolicited in False Claims Act claims for over 50 years, the act has become an increasingly popular tool for plaintiffs in civil fraud actions. Since 2012, the proliferation of False Claims Act plaintiffs exploiting the Wartime Suspension of Limitations Act has led to the extension of defendants' fraud liability in numerous jurisdictions. While it may seem intuitive to challenge the tolling of limitations in cases that are unrelated to wartime transactions or wartime activity, courts continue to find that the Wartime Suspension of Limitations Act applies in a myriad of cases unrelated to war. In fact, since 2012, only one case applying the act has involved wartime activity.(13)

Instead, most of the recent cases using the Wartime Suspension of Limitations Act as justified by the United States' wars in Iraq and Afghanistan have involved claims of fraud unrelated to those conflicts. The first case of its kind, *United States v BNP Paribas SA*, employed the Wartime Suspension of Limitations Act to extend the statute of limitations in a False Claims Act case related to eligibility for a US Department of Agriculture programme.(14) Others have included claims under the False Claims Act from the healthcare(15) and mortgage insurance industries.(16)

In the only case to discuss directly whether the Wartime Suspension of Limitations Act applies to fraud unrelated to wartime activity, the court ruled that no such limitation exists. In *United States v Wells Fargo Bank, NA*, Wells Fargo argued that the act "should not apply to matters involving domestic mortgage loan practices, having nothing to do with wartime contracting".(17) Wells Fargo further suggested that the "actual text of the [Wartime Suspension of Limitations Act] might limit the statute to offenses related to the war".(18) In rejecting Wells Fargo's argument, the court explained that the act applies to three kinds of offences, including, but not limited to:

"offenses 'committed in connection with ... any contract, subcontract, or purchase order which is connected with or related to the prosecution of the war or directly connected with or related to the authorized use of the Armed Forces, or with any disposition of termination inventory by any war contractor or Government Agency."(19)

The court noted that Wells Fargo's interpretation (limiting the Wartime Suspension of Limitations Act) would "violate the grammatical rule of the last antecedent ... pursuant to which a limiting clause or phrase ... should ordinarily be read as modifying only the noun or phrase that it immediately follows".(20) As such, the limiting phrase does not apply to other categories listed by the act, including the broad category of "fraud against the United States".(21) In short, the court concluded that because offences related to wartime activity were only one of three types of offence covered by the act, it did not make sense to limit application to only that type of case. The court also relied on previous cases that "applied the [act] to fraud having nothing to do directly with the prosecution of war or the military".(22)

Ultimately, the cases applying the Wartime Suspension of Limitations Act to False Claims Act claims fit no mould, are far reaching and affect defendants in a variety of industries.

Consistent extension of Wartime Suspension of Limitations Act to civil cases

As originally enacted, the Wartime Suspension of Limitations Act applied to "offenses involving the defrauding or attempts to defraud the United States * * * and *now indictable* under any existing statutes".(23) In 1944 the act was amended and, critically, the phrase "now indictable" was deleted.(24) In *Dugan & McNamara*, the US Court of Claims held that this edit signified that the act applies not only to criminal charges of fraud against the United States, but also to civil lawsuits involving fraud against the United States.(25) This decision brought *qui tam* actions under the False Claims Act within the ambit of the tolling statute.

Defendants have also pointed to language in the Wartime Suspension of Limitations Act to suggest that by its plain terms it applies only to criminal charges, focusing on the meaning of the word 'offence'. Numerous courts have considered the meaning of 'offence' as used in the act and the critical piece of evidence in each is the 1944 amendment to the act removing the words "now indictable".(26) Based on the plain text of the Wartime Suspension of Limitations Act, the 1994 amendments and the legislative history, the Fourth Circuit in *Carter* found that the act applies to civil claims.(27)

Indeed, all but one court to have considered whether the act applies to civil claims have found that it does.(28) While this conclusion seems mostly settled – and though there appear to be additional challenges to lodge against this conclusion(29) – each case to consider the argument in the past decade has engaged in extensive reflection on this point.

Wartime Suspension of Limitations Act applies to non-intervened False Claims Act suits

Given the indefinite length of tolling supplied by the Wartime Suspension of Limitations Act, it is perhaps most disturbing that the act will affect the statute of limitations in cases in which the US government has not intervened. In an unprecedented move, the Fourth Circuit held that the act does in fact apply to relators' suits.⁽³⁰⁾ Reversing the lower court, the Fourth Circuit majority found that the act's application "depends upon whether the country is at war and not who brings the case".⁽³¹⁾ As such, "whether the suit is brought by the United States or a relator is irrelevant" to the inquiry of whether the act applies.⁽³²⁾ Although the district court had extended reasoning from other False Claims Act cases concluding that "31 U.S.C. § 3731(b)(2), a special statutory extension of the [False Claims Act's] statute of limitations, was available only to the government," the Fourth Circuit majority rejected this reasoning, concluding it was "misguided".⁽³³⁾ The District Court for the Western District of Missouri appears to follow this aspect of the *Carter* decision without affirmatively addressing the issue.⁽³⁴⁾

However, this issue is by no means settled. Other courts – although no federal appellate courts – have disagreed with the Fourth Circuit's holding and instead relied upon *Carter's* dissent.⁽³⁵⁾ In reasoning that the Wartime Suspension of Limitations Act could not apply to relators bringing non-intervened *qui tam* actions, the *Carter* dissent⁽³⁶⁾ relied upon *United States ex rel Sanders v North American Bus Industries, Inc.*⁽³⁷⁾ a decision considering the statute of limitations imposed by the False Claims Act statute itself. That case addressed whether the following passage within the False Claims Act statute of limitations could apply to a private relator:⁽³⁸⁾

"A civil action under [the False Claims Act] may not be brought ... more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with the responsibility to act in the circumstances."

As the *Carter* dissent explained, the *Sanders* court held that it could not: "[Section] 3731 (b)(2) c[an] only be logically applied when referring to an action brought by the United States."⁽³⁹⁾ Following the same logic as *Sanders*, the *Carter* dissent reasoned, "a civil action should not be read to encompass all [False Claims Act] actions, but rather, should be read in context to include only those actions brought by the United States".⁽⁴⁰⁾ Holding otherwise would be "inconsistent with the nuanced approach that courts have employed when reading the 'civil action' language in § 3731(b)".⁽⁴¹⁾

Likewise, and addressing the language of the Wartime Suspension of Limitations Act specifically, the dissent in *Carter* explained that:

"[t]he triggering and terminating provisions of the [Wartime Suspension of Limitations Act] are both related to and solely controlled actions of the United States government: declaration of war or congressional authorization for use of military force (to trigger) and congressional resolution or Presidential proclamation (to terminate). In either circumstance, Congress and the President possess the unique power to invoke the [Wartime Suspension of Limitations Act] to toll the limitations period for fraud offenses: a period when the same government is thus released from a looming time bar to bring an [False Claims Act] claim. The private qui tam plaintiff has no connection with these decisions and it seems odd to conclude that such a private plaintiff, absent a clear statutory direction, should be entitled to the same limitations period as the necessary actor, the government. There is no such clear statutory direction."⁽⁴²⁾

In other words, the dissent found it unreasonable for a provision meant to accommodate government-specific concerns to apply to non-government actors.

In addition to its statutory interpretation, *Carter's* dissent pointed to Supreme Court case law discussing the legislative intent underlying the enactment of the Wartime Suspension of Limitations Act:

"The fear was that the law-enforcement officers would be so preoccupied with prosecution of the war effort that the crimes of fraud perpetrated against the United States would be forgotten until it was too late. The implicit premise of the legislation is that the frenzied activities, existing at the time the Act became law, would continue until hostilities terminated and that until then the public interest should not be disadvantaged."⁽⁴³⁾

The legislative history is clear that the motivation for enacting the Wartime Suspension of Limitations Act was the inability of the government both to effectively prosecute fraud and to manage wartime efforts.⁽⁴⁴⁾ Relators have no such competing interests.

The *Carter* dissent also noted that the *Sanders* court made special mention of "the practical effect of allowing a private relator to claim the benefit of a statutory limitations period intended for the benefit of the government".⁽⁴⁵⁾ Specifically, the dissent highlighted that allowing a relator to profit from an extended statute of limitations would

only encourage that relator to allow claims to build up over time rather than litigating them immediately, undermining the original purpose of the False Claims Act statute: "to combat fraud quickly and efficiently."⁽⁴⁶⁾ Additionally, the court raised concern over the indefinite nature of the tolling period, pointing out that:

"[i]n this case, for example ... application of the [Wartime Suspension of Limitations Act] would extend the limitations period for [relators'] actions well into the next decade at least, depending on the date hostilities in Iraq are deemed terminated."⁽⁴⁷⁾

While such a tolling period might be necessary for the government at war,⁽⁴⁸⁾ it is a windfall for relators.

Considering the above statutory, legislative and policy-based arguments, three courts have since considered the dissent in *Carter* and agreed with its logic, holding that the Wartime Suspension of Limitations Act does not apply to False Claims Act actions brought only by relators.⁽⁴⁹⁾

Absence of formal declaration of war

In 2008, the Wartime Suspension of Limitations Act was amended again by the Wartime Enforcement of Fraud Act to expand its operation to any time "[w]hen the United States is at war or Congress has enacted 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))."⁽⁵⁰⁾ Additionally, the suspension period was extended 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".⁽⁵¹⁾

The United States has not declared war formally since World War II. In the recent outbreak of cases, defendants have raised this as a challenge to the application of the Wartime Suspension of Limitations Act, arguing that the conflicts in Iraq and Afghanistan are insufficient to trigger the act's 'at war' status. However, after the 2008 amendments, courts have repeatedly rejected this argument.⁽⁵²⁾ The Fourth Circuit in *Carter* concluded that it was "unnecessary to decide which version of the [Wartime Suspension of Limitations Act] applies because [it found] that the Act does not require a formal declaration of war", presumably concluding that even the pre-2008 version of the act contemplated being at war following the authorisation for use of military force.⁽⁵³⁾ In other words, the court found that the pre-2008 version of the Wartime Suspension of Limitations Act could apply to conflicts without a formal declaration of war. In *Carter* – the only federal appellate court to address the applicability of the Wartime Suspension of Limitations Act to the False Claims Act – the Fourth Circuit recognised that:

"requiring a declared war would be an unduly formalistic approach that ignores the realities of today, where the United States engages in massive military campaigns resulting in enormous expense and widespread bloodshed without declaring a formal war."⁽⁵⁴⁾

The Fourth Circuit in *Carter* found that Congress's 2001 authorisation for use of military force (AUMF)⁽⁵⁵⁾ and 2002 authorisation for the use of military force against Iraq (AUMFAI)⁽⁵⁶⁾ compelled the conclusion that the United States was at war in Iraq within the meaning of the act.⁽⁵⁷⁾ While the pre-2008 version of the Wartime Suspension of Limitations Act stated that it applied simply "[w]hen the United States is at war",⁽⁵⁸⁾ the 2008 amendment explicitly expanded its operation to "[w]hen the United States is at war or Congress has enacted 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))."⁽⁵⁹⁾ The Fourth Circuit found that there was no distinction in how the act should be applied, regardless of which version controlled.⁽⁶⁰⁾

Even assuming that these authorisations propelled the United States into war within the meaning of the Wartime Suspension of Limitations Act, some defendants have argued that the hostilities nonetheless have terminated and the tolling should cease. The Fifth Circuit's decision in *United States v Pfluger*⁽⁶¹⁾ has proven instructive in this regard. In *Pfluger*, the Fifth Circuit determined that "the plain and unambiguous language of the [Wartime Suspension of Limitations Act] mandates formal requirements for the termination clause to be met".⁽⁶²⁾ In *Grainger*, the Supreme Court explained:

"[r]ather than catalog the many presidential and congressional announcements, tributes, and statements about World War II ending with the Japanese surrender, or analyze the status of the troops' return to civilian life, the Court instead looked at the precise language of the [Wartime Suspension of Limitations Act] itself and the specific formal requirements mandated by its text."⁽⁶³⁾

This operates in present-day terms, as the Fourth Circuit explained, as follows:

"In the pre-[2008]-amendment [Wartime Suspension of Limitations Act], termination occurs when 'proclaimed by the President or by a concurrent

resolution by Congress.' 18 U.S.C. § 3287 (2006). In the post-amendment WSLA, termination happens when 'proclaimed by a Presidential proclamation, with notice to Congress, or by a concurrent resolution of Congress.'"(64)

Thus, until one of these formal statutory requirements is met, the Wartime Suspension of Limitations Act will continue to toll the statute of limitations on False Claims Act claims, potentially resulting in indefinite exposure.(65) On December 14, 2011 in Fort Bragg, President Barack Obama announced the end of the war and withdrawal of troops. No court has yet passed upon whether this proclamation will be sufficient to terminate the war within the meaning of the Wartime Suspension of Limitations Act;(66) but even if it did, the conflict in Afghanistan continues. Although some expect a similar proclamation in December 2014 ending the hostilities in Afghanistan,(67) the question remains as to whether it will suffice under the case law.

Comment

The Wartime Suspension of Limitations Act will continue to present challenges to defendants facing False Claims Act suits. Specifically, defendants are exposed to indefinite tolling periods and, depending on the jurisdiction, may even find that these extensions apply to private relators in non-intervened cases. In this fast-developing landscape, particularly considering the potentially catastrophic liability, defendants must remain apprised of new developments and should take heed of others' successes and failures as this legal phenomenon continues to evolve.

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Endnotes

(1) The full phrase is '*qui tam pro domino rege quam pro se ipso in hac parte sequitur*', which is Latin for "who as well for the king as for himself sues in this matter". See *Black's Law Dictionary* (9th ed 2009).

(2) False Claims Act, 31 USCA Section 3731(b) (False Claims Act).

(3) 18 USCA Section 3287 (1942). The Wartime Suspension of Limitations Act, 18 USC Section 3287, was originally enacted during World War I, but was repealed in 1927. *United States v BNP Paribas SA*, 884 F Supp 2d 589, 600 (SD Texas 2012), motion to certify appeal denied, Civ A No H-11-3718, 2012 WL 4754731 (SD Texas Oct 4, 2012). It was re-enacted temporarily in 1942 for World War II, and finally in 1948 it was codified "as permanent legislation to be applicable whenever the country is at war". *Id* at 601 (quoting *Dugan & McNamara, Inc v United States*, 127 F Supp 801, 802 (Ct Cl 1955)).

(4) *US ex rel Carter v Halliburton Co*, 710 F3d 171, 177 (4th Cir 2013).

(5) *United States v Smith*, 342 US 225, 228 (1952) (concluding that "the Suspension Act is inapplicable to crimes committed after the date of termination of hostilities").

(6) *Id* at 228-29.

(7) The current version of the Wartime Suspension of Limitations Act provides:

"When the United States is at war or 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)), the running of any statute of limitations applicable to any offense (1) involving fraud or attempted fraud against the United States or any agency thereof in any manner, whether by conspiracy or not, or (2) committed in connection with the acquisition, care, handling, custody, control or disposition of any real or personal property of the United States, or (3) committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, cancelation, or other termination or settlement, of any contract, subcontract, or purchase order which is connected with or related to the prosecution of the war or directly connected with or related to the authorized use of the Armed Forces, or with any disposition of termination inventory by any war contractor or Government agency, 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."

18 USCA Section 3287 (2014).

(8) *United States v Pfluger*, 685 F3d 481, 483 (5th Cir 2012) (quoting 18 USC Section 3287).

(9) *Smith*, 342 US at 229-30.

(10) *Carter*, 710 F3d 17. On remand for consideration of the public disclosure bar, the

Eastern District of Virginia held that the public disclosure bar did not prohibit the relator from bringing the suit, and therefore denied Halliburton's motion to dismiss. *US ex rel Carter v Halliburton Co*, No 1:11cv602 (JCC/JFA), 2013 WL 5306645 (ED Va Sept 19 2013).

(11) Petition for writ of certiorari, *Kellogg Brown & Root Servs, Inc v US ex rel Carter* (No 12-1497).

(12) *Kellogg Brown & Root Servs, Inc v US ex rel Carter*, 134 S Ct 375 (Oct 7 2013).

(13) See *Carter*, 710 F3d 171 (involving fraud related to defence contractor services in Iraq).

(14) 884 F Supp 2d 589 (SD Texas 2012), motion to certify appeal denied, Civ A No H-11-3718, 2012 WL 4754731 (SD Texas Oct 4 2012).

(15) See *US ex rel Emanuele v Medicor Associates*, CA No 10-245 Erie, 2013 WL 3893323 (WD Pa July 26 2013); *US ex rel Bergman v Abbot Labs*, Civ Act No 09-4264, 2014 WL 348583 (ED Pa Jan 30 2014).

(16) See *United States v Wells Fargo Bank, NA*, No 12 Civ 7527 (JMF), 2013 WL 5312564 (SDNY Sept 24, 2013).

(17) 2013 WL 5312564 at *13.

(18) *Id.*

(19) *Id.*

(20) *Id.* (internal citations and quotation marks omitted).

(21) *Id.*

(22) *Id.* at *14 (collecting cases).

(23) *Dugan & McNamara, Inc v U S*, 127 F Supp 801, 802 (Ct Cl 1955) (quoting 18 USCA Section 3287 (1942)) (emphasis added).

(24) *Id.*

(25) *Id.* at 804 (finding that the 1944 amendments rendered the Wartime Suspension of Limitations Act "applicable to all actions involving fraud against the United States whether the Government should seek redress by criminal or civil means").

(26) See Contract Settlement Act of 1944, 58 Stat 649, 667, 41 USC Section 101 *et seq.*

(27) 710 F3d at 180 ("Had Congress intended for 'offense' to apply only to criminal offenses, it could have done so by not deleting the words 'now indictable' or it could have replaced that phrase with similar wording").

(28) *Carter*, 710 F3d at 180 (citation omitted) (collecting cases); but see *United States v Weaver*, 107 F Supp 963, 966 (ND Ala 1952), (finding that "Congress intended only to toll the running of existing statutes of limitations as a bar to criminal prosecutions") *rev'd* on other grounds, 207 F2d 796 (5th Cir 1953).

See also *United States v Witherspoon*, 211 F2d 858 (6th Cir 1954); *United States ex rel McCans v Armour & Co*, 146 F Supp 546 (DDC 1956); *United States v BNP Paribas*, 884 F Supp 2d 589 (SD Tex 2012); *Wells Fargo Bank*, 2013 WL 5312564 at *13 (rejecting defendant's argument that the Wartime Suspension of Limitations Act applies only to criminal offenses); *US ex rel Paulos v Stryker Corp*, Civ No 11-0041-CV-W-ODS, 2013 WL 2666346, at *15 (WD Mo June 12, 2013) (holding that the Wartime Suspension of Limitations Act applies in a False Claims Act *qui tam* case regarding the marketing of pain pumps and tolling the limitations period for offences that occurred since the September 2001 AUMF).

(29) One argument that has not gained significant traction may lend credibility to the proposition that the Wartime Suspension of Limitations Act was never intended to apply to civil actions, even after the amendment removing the words "now indictable". Suppose the words 'indictable offense' in the originally drafted Wartime Suspension of Limitations Act did not refer to criminal offences but rather was a distinction relevant to the right to a jury trial. At common law, a 'summary offence' was one that could be tried summarily only to a judge, whereas an 'indictable offence' could be tried to a judge or jury. *Carrasca v Pomeroy*, 313 F3d 828, 835 (3d Cir 2002) (referring to a summary offence as a "non-indictable" criminal offence). See also Dr Richard C Alexander, "'Cost Savings' As Proceeds of Crime: A Comparative Study of the United States and the United Kingdom, 45 *Int'l Law* 749, 800 (2011) (noting that in English law, 'indictable offences' are "the more serious crimes" and that a 'summary offence' is "approximately equivalent to a misdemeanour in the U.S. system"). By removing the word 'indictable', Congress may have been trying to remove a limitation on the Wartime Suspension of Limitations Act. Assuming that the word 'indictable' in the original act meant to signify

that the act applied only to felonies – for which there is a jury trial right under the Sixth Amendment – that would mean that the Wartime Suspension of Limitations Act originally did not apply to misdemeanours, for which there is no jury trial right if the punishment is six months or less. Congress, in removing 'now indictable' from the statute, may have been seeking to remove that limitation on the Wartime Suspension of Limitations Act and expand its reach to misdemeanours. This argument ought to receive further play as this issue works its way through the courts.

(30) *Carter*, 710 F3d at 189 (Agee, CJ, concurring in part and dissenting in part) (the dissent noting that "no other case has ever held (other than in dicta) that the [Wartime Suspension of Limitations Act] applies to civil cases where the United States is not a plaintiff or an intervenor in the *qui tam* action").

(31) *Id* at 180.

(32) *Id*.

(33) *Id* (citing *United States ex rel Sanders v North American Bus Industries, Inc*, 546 F3d 288 (4th Cir 2008)).

(34) *US ex rel Paulos v Stryker Corp*, Civ No 11-0041-CV-W-ODS, 2013 WL 2666346, at *15 (WD Mo June 12, 2013). Though the *Stryker* court cites *Carter*, 710 F3d at 179-80, to address the defendants' arguments with respect to the act's application to both criminal and civil fraud cases, the court does not explicitly discuss application of the Wartime Suspension of Limitations Act to an action in which the government has declined to intervene. In other words, though this case was not intervened by the government, and though the court held that the Wartime Suspension of Limitations Act applied, it did not affirmatively discuss its reasoning.

(35) See *Hericks v Lincare Inc*, Civ A No 07-387, 2014 WL 1225660, at *14 n16 (ED Pa Mar 25, 2014) (holding that the Wartime Suspension of Limitations Act is not applicable to non-intervened relators' suits); *US ex rel Bergman v Abbot Labs*, Civ Act No 09-4264, 2014 WL 348583, at *16 (ED Pa Jan 30, 2014) (same); *US ex rel Emanuele v Medicor Associates*, CA No 10-245 Erie, 2013 WL 3893323, at *7 (WD Pa July 26, 2013) (same).

(36) 710 F3d at 185.

(37) 546 F3d 288 (4th Cir 2008).

(38) 31 USC Section 3731(b)(2).

(39) 710 F3d at 190 (Agee, CJ, concurring in part and dissenting in part).

(40) *Id* at 191.

(41) *Id*.

(42) *Id* at 191.

(43) *Id* at 192 (quoting *United States v Smith*, 342 US 225, 228-29 (1952)).

(44) *Id*.

(45) *Id* at 190.

(46) *Id* (internal quotations omitted).

(47) *Id* at 193.

(48) Arguably, the structure of the federal government – drastically changed since World War II – might suggest that the concerns leading to the enactment of the Wartime Suspension of Limitations Act are no longer legitimate. However, this remains a legislative issue, not a judicial consideration.

(49) *Hericks*, 2014 WL 1225660, at *14 n16; *Bergman*, 2014 WL 348583, at *15-16; *Emanuele*, 2013 WL 3893323, at *5-6. But see *US ex rel Paulos*, 2013 WL 2666346, at *15 (holding that the Wartime Suspension of Limitations Act applies to relators' case without further discussion).

(50) See Wartime Enforcement of Fraud Act, PubL No 110-417 Section 855, codified at 18 USC Section 3287.

(51) *Id*. With respect to whether these amendments apply retroactively, courts remain in conflict. *United States v BNP Paribas SA*, 884 F Supp 2d 589, 601-02 (SD Tex 2012). For example, in *United States v Anghaie*, the court applied the post-amendment Wartime Suspension of Limitations Act to counts for which the limitations period would have expired after the amendment. No 1:09-CR-37, 2011 WL 720044, at *2 (ND Fla Feb 21, 2011). However, in *United States v Pearson*, No 2:09cr43, 2010 WL 3120038, at *1 (SD Miss August 4, 2010), the court applied the pre-amendment Wartime Suspension of Limitations Act to offences that occurred prior to the amendment.

(52) Prior to the 2008 amendments to the Wartime Suspension of Limitations Act, two courts addressed the question of what 'at war' means and reached opposite conclusions in the context of criminal fraud charges. Compare *United States v Shelton*, 816 F Supp 1132, 1135 (WD Tex 1993) (finding that the United States was not at war within the meaning of the Wartime Suspension of Limitations Act during the 1991 conflict in Iraq because Congress did not formally recognise that conflict as a war) with *United States v Proseri*, 573 F Supp 2d 436, 450 (D Mass 2008) (finding that the United States was at war within the meaning of the Wartime Suspension of Limitations Act based on the September 18 2001 authorisation for use of military force, Pub L No 107-40, 115 Stat 224; and (2) the October 11 2002 authorisation for the use of military force against Iraq 2002, Pub L No 107-243 116 Stat 1498). See also *BNP Paribas SA*, 884 F Supp 2d at 607 (discussing the *Shelton* and *Proseri* cases).

(53) 710 F3d at 178-79.

(54) *Id* at 178 (citing *Hamdi v Rumsfeld*, 542 US 507, 58 (2004) for the proposition that the laws of war apply to non-declared wars such as the war in Afghanistan).

(55) Pub L No 107-40, 115 Stat 224 (2001).

(56) Pub L No 107-243, 116 Stat 114 (2002).

(57) 710 F3d at 179.

(58) 18 USC Section 3287 (2006).

(59) *Carter*, 710 F3d at 177 (citing Wartime Enforcement of Fraud Act, PubL No 110-417 Section 855, codified at 18 USC Section 3287).

(60) The Fourth Circuit also reasoned that "had Congress intended the phrase 'at war' to encompass only declared wars, it could have written the limitation of 'declared war' into the Act as it has in numerous statutes". *Carter*, 710 F3d at 178 (citing 28 USC Section 2416(d) (tolling provision for civil claims by the United States seeking money damages applies only when "the United States is in a state of war declared pursuant to article I, section 8, of the Constitution of the United States"), and 50 USC Section 1829 ("Notwithstanding any other provision of law, the President, through the Attorney General, may authorize physical searches without a court order . . . to acquire foreign intelligence information for a period not to exceed 15 calendar days following a declaration of war by the Congress"))).

(61) 685 F3d 481 (5th Cir 2012), cert denied, 133 S Ct 1279 (2013).

(62) *Id* at 485 (relying on the Supreme Court's 1953 decision in *United States v Grainger*, 346 US 235, 246 (1953)). See also *BNP Paribas*, 884 F Supp 2d at 607 (relying on *Pfluger* to "conclude[] that the United States was 'at war' for purposes of the WSLA in 2005 when the acts alleged in this action occurred").

(63) *Pfluger*, 685 F3d at 485 (citing *Grainger*, 346 US at 246).

(64) 18 USC Section 3287 (2011). *Carter*, 710 F3d at 179.

(65) Some defendants have challenged such indefinite tolling. See, for example, *Carter*, 710 F3d at 178 (arguing that the "post-amendment [Wartime Suspension of Limitations Act] implicates its constitutional due process rights in that the Act may allow a statute of limitations to run indefinitely").

(66) It is unlikely that this announcement at a press conference will suffice to terminate the Iraq War within the meaning of the Wartime Suspension of Limitations Act. Although no court has been confronted with whether Obama's announcement counts, other courts to have passed on similar questions have required explicit compliance with the specific terms of the Wartime Suspension of Limitations Act. See, for example, *Grainger*, 346 US at 246; *Pfluger*, 685 F3d at 485. In other words, only "a Presidential proclamation, with notice to Congress, or [a] concurrent resolution of Congress," 18 USC Section 3287 (2011), can end the Iraq War, but to date this has not occurred.

(67) Editorial "Frustration with Afghanistan", *NY Times*, March 4, 2014, available at 2014 WL 5863242 (explaining that the United States and NATO have threatened to pull all troops out of Afghanistan by the end of 2014).

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