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False Claims Act

KBR Seeks Knockout In 'Long and Tortured' Iraq Case

Defense contractor Kellogg, Brown & Root will try March 22 to persuade an appellate court in Richmond, Va., to end a decadelong false claims case alleging fraudulent billing for water purification services in Iraq that remains unresolved despite a May 2015 ruling from the Supreme Court (*United States ex rel. Carter v. Halliburton Co.*, No. 16-1262, oral arguments 3/22/17).

KBR has chipped away at the case over the years, but former employee Benjamin Carter still contends that the False Claims Act's first-to-file rule doesn't bar his claims. The first-to-file rule provides that if a lawsuit involving the same subject matter is already pending, no person other than the government may intervene or bring a related action based on the facts underlying the pending action.

Carter argues that the first-to-file rule no longer barred his case once similar and earlier-filed cases filed in district courts in Maryland and Texas were dismissed.

Carter may have hope to keep alive the ''long and tortured'' litigation given the Supreme Court's approach to the first-to-file bar when it ruled on this case 2½ years ago, Jay P. Holland, principal with Greenbelt, Md.-based plaintiffs' law firm Joseph Greenwald & Laake PA, told Bloomberg BNA. Holland does not represent any of the parties in the case.

KBR's district court win ''may well be short-lived, primarily because of the earlier Supreme Court decision,'' Holland said. ''The court used very broad language in holding that a prior filed complaint is not 'pending' for purposes of the rule if it is dismissed and another action is filed.

''Interestingly, the court said a prior complaint 'ceases to bar' another case when the first-filed complaint is no longer pending,'' he added.

Carter has a ''decent policy argument,'' but KBR ''has the better legal argument,'' said Timothy J. Heaphy, chair of Hunton & Williams LLP's white-collar defense and internal investigations practice in Richmond and Washington.

''Carter's argument that the first-to-file rule is excepted when the earlier case is amended, dismissed or resolved is a new argument that is likely precluded by the court's earlier rulings on this exact issue,'' said Heaphy, the former U.S. Attorney for the Western District of Virginia.

Revival Wouldn't Be 'Surprising.' Carter has pursued his claims ''through at least four separate cases, seventeen briefs, eight oral hearings, three appeals, Supreme Court review and a remand'' to the Fourth Circuit, according to KBR.

The case took a major hit following the Supreme Court's May 2015 ruling, which said a majority of claims were untimely under the statute of limitations.

Despite this setback, and another dismissal at the district court in November 2015, Carter believes the Supreme Court clearly said the first-to-file rule doesn't bar his case. Once an earlier-filed case is dismissed without reaching the merits, the bar dissolves and clears the way for a subsequently filed case, he contends.

KBR counters that the Supreme Court didn't upset previous rulings saying that the first-to-file bar is evaluated on the facts as they existed when Carter filed his action.

Because earlier-filed cases were pending when Carter filed, the claim must again be dismissed under the first-to-file bar, KBR said.

A first-to-file defect doesn't evaporate when a first-filed case is dismissed, KBR said.

However, ''it would not at all be surprising'' if the Fourth Circuit sided with Carter, Holland said.

''I think that the Supreme Court's holding is especially pertinent because it involved this very case, and the court was well aware of the Maryland and Texas cases and referred to them in the opinion,'' he said. ''So, while I think the lengthy history of the case may be frustrating to the district court, the case may well end up back in its lap on remand to try the merits of the case.''

Congress Could Clarify. Heaphy countered that KBR ''seems to have a strong argument that the first-to-file analysis is done at the time of filing and can't be undone by subsequent events.''

Carter has a ''decent equitable argument that his claim is the only way to hold KBR liable,'' but the Fourth Circuit ''likely won't overrule or distinguish their prior rulings in this particular matter,'' Heaphy said.

The case could spur Congress to clarify the bar's statutory language — which he said supports KBR's position — by allowing suits to proceed if previously filed actions are amended, dismissed or resolved, Heaphy added.

''This widening of the statute would allow more qui tam filings and further incentivize whistle-blowers,'' he said. ''Congress typically follows litigation involving the

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FCA and other federal statutes, to determine if legislative clarification is needed.''

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