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COMMENTARY

Once the Whistle Has Sounded: Courts Should Aggressively Enforce the False Claims Act's First-to-File Bar

The False Claims Act's ("FCA") first-to-file bar—31 U.S.C. 3730(b)(5)—encourages a race to the courthouse to reward a *qui tam* relator who promptly discloses fraud against the government. The rule creates an incentive for relators to promptly alert the government to the essential facts of a fraudulent scheme, by allowing only the first to report the scheme to share in any reward recovered. The rule establishes a jurisdictional bar by discouraging additional lawsuits based on the same facts because the follow-on suits do not enhance the government's ability to investigate and prosecute fraud. Further, allowing multiple suits would drain the government's already limited resources without creating potential for additional recovery.

Numerous courts, however, have perverted the purpose of the rule, instead allowing an infinite number of duplicative claims, as long as no prior claim is pending at the time of filing. The United States Supreme Court recently granted certiorari in *United States ex rel. Carter v. Halliburton Co.* and is set to decide whether the first-to-file bar prohibits repetitive claims or functions merely as a "one-case-at-a-time" rule.

Recent False Claims Act Statistics

New FCA cases have exploded. According to U.S. Department of Justice ("DOJ") statistics, 752 new cases were filed in 2013 alone. This all-time high followed year over year growth since 2008: 379 cases were filed in 2008, 433 in 2009, 575 in 2010, 638 in 2011, and 647 in 2012.

The reasons are not surprising. Congress has repeatedly acted to make it easier to file FCA suits. The financial incentive to initiate false claims and whistleblower cases is staggering. FCA relators receive 15 to 30 percent of a judgment or settlement. With the government having recovered nearly $3.8 billion in federal false claims cases in fiscal year ("FY") 2013, $5 billion in FY 2012, and more than $37 billion since 1986, relators are reaping substantial rewards. In 2013, whistleblowers were paid more than $300 million. Their lawyers receive statutory attorneys' fees paid by the defendant and also typcally have a substantial contingent interest in the relator's recovery.

In the face of these incentives, "'[t]he primary function of a *qui tam* complaint is to notify the *investigating* agency, i.e. the Department of Justice,' and a *qui tam* complaint 'serves first and foremost as notice to the Attorney General that he should investigate the allegations.'" *U.S. ex rel. Folliard v. Synnex Corp.*, 798 F. Supp. 2d 66, 71 (D.D.C. 2011) (emphasis in original) (quoting *U.S. ex rel. Folliard v. CDW*, 722 F. Supp. 2d 37, 42 (D.D.C. 2010)). Thus, the FCA contains an "exception-free" jurisdictional bar that states, "[w]hen a person brings an action under this subsection, 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); *see U.S. ex rel. Ortega v. Columbia Healthcare, Inc.*, 240 F. Supp. 2d 8, 12 (D.D.C. 2003) ("Section 3730(b)(5) sets up an exception-free, first-to-file bar."). The first-to-file bar is intended to bar secondary suits that do nothing more than remind the government of the facts it learned from the first lawsuit. *U.S. ex rel. Shea v. Verizon Business Network Serv. Inc.*, No. 1:09-cv-1050, 2012 U.S. Dist. LEXIS 163525, at *9 (D.D.C. Nov. 15, 2012) (discussing *U.S. ex rel. Chovanec v. Apria Healthcare Group Inc.*, 606 F.3d 361, 364 (7th Cir. 2010)).

The Majority of Recent Case Law Prohibits Repetitive Claims

"[S]o long as a subsequent complaint raises the same or a related claim based in significant measure on the core fact or general conduct relied upon in the first *qui tam* action, the § 3730(b)(5)'s first-to-file bar applies." *U.S. ex rel. Grynberg v. Koch Gateway Pipeline Co.*, 390 F.3d 1276, 1279 (10th Cir. 2004). Most courts examining the first-to-file rule have interpreted the meaning of "related action based on the facts underlying the pending action" quite broadly, holding that the facts of the later-filed *qui tam* need not be identical for the suit to be barred by the rule. Instead, most courts have interpreted the rule to apply when a later-filed *qui tam* complaint is based on either (i) the same "type of fraud," (ii) the same "essential elements," or (iii) the same "material elements" of fraud. *See*, e.g., *U.S. ex rel. Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181, 1189 (9th Cir. 2001). Thus, the ultimate question is "whether the [later-filed] complaint alleges a fraudulent scheme the government already would be equipped to investigate based on the [earlier-filed] complaint." *U.S. ex rel. Batiste v. SLM Corp.*, 659 F.3d 1204, 1209 (D.C. Cir. 2011). What the vast majority of case law demonstrates is that courts will not allow a relator to get around the first-to-file bar simply by alleging a new place, time, or item by which the same fraudulent scheme is being carried out. There is no one specific list of similar characteristics to consider when looking at a first-to-file issue. Rather, the court will look at the purpose behind the FCA provision. If there is enough evidence to put the government on notice that the fraud was being committed, the second lawsuit should be barred.

In a recent case that could have broad implications for pharmaceutical companies facing FCA allegations, the First Circuit held that the first-to-file bar applied where the later-filed complaint alleged a scheme to promote different off-label uses for the same prescription drugs. *U.S. ex rel. Wilson v. Bristol-Myers Squibb, Inc.*, 750 F.3d 111 (1st Cir. 2014). The court held that the "essential facts test" had been satisfied where the two complaints involved the same defendants, the same drugs, the assertion of nationwide schemes, and common mechanisms of promotion that lead to common patterns of submission of false claims, even though the drugs were marketed for different diseases and symptoms. *Id.* at 119. In reaching this conclusion, the court also noted that "[w]hether the first complaint results in there being an actual government investigation and whether any such investigation extends to off-label uses to treat different diseases is not the point." *Id.*

Courts have also applied the first-to-file bar in cases where different products were at issue. For example, in *U.S. ex rel. LaCorte v. SmithKline Beecham Clinical Laboratories, Inc.*, a number of *qui tam* actions were brought in connection with the allegedly fraudulent ordering and billing of certain blood tests. 149 F.3d 227 (3d Cir. 1998). Although the later-filed complaint identified a few different tests from the earlier-filed action, the court still held that the first-to-file bar applied, stating that the original complaint "clearly did not intend to provide an exhaustive list of tests improperly included in the . . . orders." *LaCorte*, 149 F.3d at 236. Accordingly, the original complaint was broad enough to bar the claims in the subsequent complaint.

Similarly, in *Synnex*, the relator asserted that the defendants had misrepresented the country of origin for various computer products, mostly Cisco products. 798 F. Supp. 2d at 73. An earlier case had alleged the same scheme of falsifying countries of origin, but with regard to some different products,

mostly HP goods. *Id.* The court held that this difference was not sufficient to allow the relator to get around the first-to-file bar. *Id*. Rather, the court explained that "the first-to-file bar applies unless the complaint alleges a different *type* of wrongdoing, based on different material facts." *Id.* (emphasis in original) (internal quotations omitted). Further, the fact that the relator alleged that the defendants made "false claims to different agencies under different contracts [did] not mean that the complaints incorporate different material elements." *Id.*; *Shea*, 2012 U.S. Dist. LEXIS 163525 at *9.

Other courts have applied the first-to-file bar in cases involving different geographic regions and time periods. For example, in cases alleging a nationwide scheme, courts will apply the first-to-file bar to a subsequently filed lawsuit that identifies fraudulent acts in a state not specifically named in the earlier-action. *See U.S. ex rel. Hampton v. Columbia/HCA Healthcare Corp*., 318 F.3d 214, 218 (D.C. Cir. 2003) (noting that the original complaint had alleged a nationwide scheme and had only used those states as "examples or samplings of a huge number of illegal payments from Medicare … received … in 3 states."). Likewise, a difference in the time period also will not prevent the application of the first-to-file bar. *See Chovanec*, 606 F.3d at 365 (applying the first-to-file bar to a later-filed action alleging a fraudulent scheme occurring after the time period covered in the earlier-filed complaint and settlements, but granting dismissal without prejudice so that the relator could refile its claims since the earlier actions were no longer pending).

Several Courts Have Perverted the Purpose of the First-to-File Bar

Contrary to the overwhelming majority of cases that broadly interpret the first-to-file rule to prohibit related claims, several circuits have perverted the purpose of the rule and limited its application. In *Chovanec*, the Seventh Circuit held that once the initial complaint was no longer pending, the bar of § 3750(b)(5) was inapplicable and allowed the relator to file a new *qui tam* action. 606 F.3d at 362-65. The court noted that if the later-filed case were brought while the original case was pending, it would have to be dismissed "rather than left on ice." *Id*. at 362. In reaching this conclusion, the court reasoned that while the doctrine of claim preclusion may prevent filing of subsequent cases, the first-to-file bar should not, especially where the original case was dismissed on reasons other than the merits or dismissed without prejudice. *Id*. at 362–65.

Likewise, in *Carter*, now before the Supreme Court, the Fourth Circuit held that the first-to-file bar did not stop the relator from refiling a related case once the original actions had been dismissed. 710 F.3d at 183. In reversing the district court, the Fourth Circuit found that the relator's claim, which was filed while related actions were pending, should have been dismissed without prejudice based on the first-to-file rule.

In its brief in opposition to certiorari, the respondent relator argues that a dismissal for lack of jurisdiction categorically cannot be with prejudice and that precluding copycat actions creates immunity from suit. However, as pointed out by the petitioner defendant, the relator's position conflicts with the purpose of the rule and other precedent. The purpose of the first-to-file rule is to notify the government that it should investigate a potentially fraudulent scheme. That purpose is not furthered by permitting a relator to file duplicative actions concerning the same allegedly fraudulent scheme. Further, the concern raised by the petitioner in *Carter* that dismissal with prejudice based on the first-to-file bar will create immunity is simply untrue. The first-to-file bar prevents only an action by a private person, while the government remains free to prosecute FCA claims. However, as noted by the petitioner defendant in *Carter*, the Ninth Circuit's rationale in *U.S. ex rel. Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181 (9th Cir. 2001) requires dismissal of a related complaint even where the earlier-filed complaint has already been dismissed. Further, the D.C. Circuit's recent decision in *United States ex rel. Shea v. Cellco Partnership*, 748 F.3d 338 (D.C. Cir. 2014), likewise confirms that the FCA's first-to-file rule bars subsequent related suits even if the prior action is no longer pending. In reaching this conclusion, the D.C. Circuit expressly disagreed with the Fourth Circuit's holding in *Carter* and with precedent in several other circuits, indicating a clear circuit conflict.

Conclusion

By effectively treating a first-to-file dismissal as curable, the Fourth and Seventh Circuits have ignored the purpose of the first-to-file bar—i.e., to notify the government that it should investigate a potentially fraudulent scheme. Allowing

successive complaints would encourage copycat relators to file suit at the detriment of the government, which would have to further stretch its limited resources by requiring investigation of duplicative claims. The Supreme Court now has the opportunity to restore the purpose of the first-to-file bar by reversing the Fourth Circuit and clearly settling the circuit conflict.

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