First Circuit Oral Argument Considers the Proper Standard Governing the False Claims Act's "First-to-File" Rule

The United States Court of Appeals for the First Circuit recently heard oral arguments in *United States ex rel. Heineman-Guta v. Guidant Corp., et al.* (12-1867). During oral argument, the panel considered, among other issues, the standard for evaluating whether a complaint was barred under the False Claims Act's ("FCA") "first-to-file" rule, and in particular, whether a first-filed complaint must satisfy Fed. R. Civ. P. 9(b) in order to trigger the rule. This same issue is the basis for a recent circuit split among certain federal Courts of Appeals, with the Sixth and Ninth Circuits on one side, and the D.C. Circuit on the other. The decision in *Heineman-Guta* could ultimately align the First Circuit with one of those stances, or potentially carve out a new, third position altogether.

Circuit Split Surrounding the First-To-File Rule

Under the first-to-file rule, when an individual files an action, no person other than the government may bring a related action based on the facts underlying the pending case. *See* 31 U.S.C. § 3730(b)(5). In the last decade, both the Sixth and Ninth Circuits have refused to apply the first-to-file bar when the first-filed complaint failed to satisfy Rule 9(b)'s heightened particularity requirement, reasoning that a deficient complaint could "not properly qualify as a 'pending action'" under the FCA. *United States v. ex rel. Poteet v. Medtronic, Inc.,* 552 F.3d 503, 516 (6th Cir. 2009) (internal citations omitted); *see also Walburn v. Lockheed Martin Corp.*, 431 F.3d 966, 972 (6th Cir. 2006); *Campbell v. Redding Med. Ctr.*, 421 F.3d 817, 825 (9th Cir. 2005).

However, in 2011, the D.C. Circuit departed from this approach and expressly declined to follow the Sixth Circuit, explaining that the language of the FCA's first-to-file provision does not incorporate Rule 9(b) and requires only an earlier-filed, pending action. *United States ex rel. Batiste v. SLM Corp.*, 659 F.3d 1204, 1210 (D.C. Cir. 2011). The Court in *Batiste* distinguished the purpose of Rule 9(b)'s pleading requirement, to protect defendants from baseless suits, from the purpose of the FCA's first-to-file rule, to bar similar actions that offer the government little new material information about fraudulent conduct. The Court also worried that using Rule 9(b) as a trigger for the first-to-file bar would require two separate courts to determine whether the first-filed complaint satisfies Rule 9(b), giving rise to potential problems, particularly if the two courts' analyses reached opposite conclusions.[1]

District Court's Decision in Heineman-Guta

In *Heineman-Guta*, relator brought a complaint alleging Defendants Guidant Corporation and Boston Scientific Corporation (collectively, "BSC") had violated the FCA through a scheme of fraudulent kickbacks. However, a prior-filed complaint—the *Bennett* complaint—had already alleged a similar scheme against the same Defendants. *United States ex rel. Bennett v. Boston Scientific Corp., et al.*, No. 08-cv-2733-CCP (D. Md., filed Oct. 16, 2008). The district court dismissed relator's complaint as barred by the first-to-file rule after determining that the *Bennett* complaint provided the essential facts of BSC's allegedly fraudulent kickback scheme. In his opinion, Judge Stearns endorsed the D.C. Circuit's approach in holding that the first-to-file rule barred relator's complaint even if the *Bennett* complaint failed to satisfy Rule 9(b)'s pleading standard. *United States ex rel. Heineman-Guta v. Guidant Corp., et al.*, 874 F. Supp. 2d 35, 39-41 (D. Mass. 2012). Judge

[1] The Tenth Circuit has acknowledged "being uneasy with the . . . suggestion that Rule 9(b)'s particularity requirement should be applied to the first-to-file bar"; however, the Court has yet to directly address the issue. *United States ex rel. Wickliffe v. EMC Corp.*, 473 Fed. App'x 849, 852 (10th Cir. 2012). The Eighth Circuit also recently held Rule 9(b)'s pleading requirement need not be satisfied in determining whether a relator is entitled to her share of the settlement proceeds in a *qui tam* action in which the government decides to intervene. *United States ex rel. Roberts v. Accenture, LLP, et al.*, No. 11-2054, 2013 WL 764734, at *6-7. (8th Cir. Mar. 1, 2013).

Stearns is the second judge within the District of Massachusetts to adopt the D.C. Circuit's approach. *See also United States ex rel. Banignan et al. v. Organon USA Inc., et al.*, 883 F. Supp. 2d 277, 287 n.17 (D. Mass. 2012) (Zobel, J.).

Oral Argument before the First Circuit

At oral argument, both parties agreed that the central issue in the case is controlled by the First Circuit's holding in *United States ex rel. Duxbury v. Ortho Biotech Products, L.P.*, 579 F.3d 13 (1st Cir. 2009). In *Duxbury*, the Court held that the first-to-file rule bars subsequent complaints when the first complaint puts the government on notice of the "essential facts" of the allegedly fraudulent conduct. *Id.* at 32-33. Relator argued that the *Bennett* complaint failed to provide the essential facts sufficient to provide the government with notice of the fraudulent scheme in question, because it merely contained sweeping, conclusory statements. The panel, however, challenged this assertion and noted the various allegations in the first complaint to which the district court referred in its decision.

In the briefing prior to oral argument in *Heineman-Guta*, the parties also vehemently contested whether the *Bennett* complaint had to satisfy Rule 9(b) to trigger the first-to-file rule, a question the district court answered in the negative. At oral argument, relator urged the panel to adopt the Sixth Circuit's holding that Rule 9(b) must be satisfied. Relying on *Walburn*, relator argued that imposing a heightened requirement would advance the first-to-file rule's objectives by encouraging only relators with quality information to come forward. In response, BSC adopted the *Batiste* rationale, arguing that nothing in the statutory text of Section 3730(b)(5) evinces an intent to require that the first-filed complaint satisfy Rule 9(b). BSC also noted that Rule 9(b)'s heightened pleading standard is unique, as it was implemented to protect defendants against unsubstantiated allegations of fraud.

The panel questioned relator's attempt to rely on Rule 9(b), and noted the first-to-file rule's goal of ensuring that the government has sufficient notice with which to conduct an investigation. In doing so, the panel asked how a heightened pleading standard would aid in placing the government on notice and allowing relators to come forward; and it noted that even conclusory allegations can give notice to the government. Like the court in *Batiste*, the panel further raised the possibility of inter-court conflicts if multiple relators were allowed to attack the validity of the others' complaints as insufficient under Rule 9(b), a theme counsel for the Defendants emphasized as well. And in response to relator's concern that failing to require the first-filed complaint to satisfy Rule 9(b) would permit relators with relatively little knowledge to preclude suits by those closer to the alleged fraud, the panel questioned whether the court was free to ignore the statutory language merely because it resulted in a potentially illogical outcome. The panel's questioning of the defendant's counsel, by contrast, was relatively sparse.

Heineman-Guta provides the First Circuit with an opportunity to weigh in on an increasingly divisive issue and provide much needed guidance to the district courts within its jurisdiction, particularly the District of Massachusetts. And while it is unclear how the panel will ultimately rule, its questioning at oral argument appropriately touched upon the flaws in relator's attempt to convert Rule 9(b)—a conceptually distinct pleading rule designed to protect defendants— into a means by which relators can evade the first-to-file rule.

We will continue to monitor this case. If you would like further information, please contact one of the attorneys in our False Claims Act practice or the Ropes & Gray attorney who usually advises you.