Division Among Courts Intensifies Regarding False Claims Act's First-to-File Requirement

Last week, the United States District Court for the District of Massachusetts found that a relator's complaint was barred by the False Claims Act's ("FCA's") first-to-file requirement and dismissed relator's complaint. *United States ex rel. Heineman-Guta v. Guidant Corp., et al.* (No. 09-CV-11927-RGS). In holding that a previously-filed complaint does not need to satisfy Federal Rule of Civil Procedure 9(b) in order to bar a later-filed FCA claim, the court intensified a developing divide among courts about the breadth of the FCA's first-to-file rule.

Two Approaches to First-to-File

The FCA's first-to-file requirement—designed to prevent repetitive lawsuits and incentivize relators to alert the government promptly of alleged fraudulent activity—acts as a jurisdictional bar to later-filed complaints that allege the same essential elements as another "pending action." In the last decade, two federal Courts of Appeal have refused to apply the first-to-file bar when the first-filed complaint was "either jurisdictionally precluded or legally incapable of serving as a complaint" on the theory that a deficient complaint would "not properly qualify as a pending action" under the FCA. *United States 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 (6th Cir. 2005); *Campbell v. Redding Med. Ctr.*, 421 F.3d 817, 825 (9th Cir. 2005).

But in 2011, the D.C. Circuit departed from the Sixth and Ninth Circuits' approach and reached the opposite conclusion. The D.C. Circuit declined to follow the Sixth Circuit, explaining that Rule 9(b) is not incorporated anywhere in the language of the FCA's first-to-file provision, which requires only an earlier-filed, pending action. *United States ex rel. Batiste v. SLM Corp.*, 659 F.3d 1204, 1210 (D.C.Cir.2011). *Batiste* distinguished the purpose of Rule 9(b)'s pleading requirement (to protect defendants from frivolous suits and to facilitate their appropriate responses) from the purpose of the FCA's first-to-file rule (to bar "copycat actions" that offer the government no new and material information about fraudulent schemes). The *Batiste* Court further worried that using Rule 9(b) to limit 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.

Trial Courts Weigh In on the Circuit Split

This relatively new circuit split, with the Sixth and Ninth Circuits on one side and the D.C. Circuit on the other, divides the first-to-file landscape with respect to whether a first-filed complaint must satisfy Rule 9(b)'s pleading standard. Other courts have recently weighed in on this divide and more will do so in the near future. In recent months, the District of Massachusetts issued two opinions aligned with the D.C. Circuit, and the issue is now fully briefed before the Fourth Circuit.

Most recently, Judge Stearns endorsed the D.C. Circuit's approach in *Heineman-Guta*, holding that the FCA's first-to-file rule precludes jurisdiction for later-filed complaints *even if* the first-filed complaint did not plead facts with sufficient particularity under Rule 9(b). The relator did not deny that an earlier-filed complaint alleged virtually the same scheme of fraud about the same devices, but argued that the first-filed complaint failed to satisfy Rule 9(b) and therefore could not bar his complaint. Relying heavily on the D.C. Circuit's reasoning, Judge Stearns rejected such a "caveat" to the first-to-file bar. Shortly before *Heineman-Guta*, Judge Zobel also declined to adopt an exception to the first-to-file rule under such circumstances. *See United States ex rel. Banignan et al. v. Organon USA Inc., et al.*, 2012 WL 1997874, at *5, n.17 (D.Mass., June 1, 2012). Both cases commented on the United States Court of Appeals for the First Circuit's silence on this issue. Another

District of Massachusetts case noted the issue in 2009, but the court did not reach the first-to-file question. *See United States ex rel. Poteet v. Lenke*, 604 F.Supp.2d 313, 323 (D.Mass. 2009).

The contours of the first-to-file bar may also be addressed soon by the Fourth Circuit in *United States ex rel. Carter v. Halliburton, et al.* (No. 12-1011). Though the district court dismissed the case on other grounds, the parties' briefs dispute whether a first-filed complaint must bear scrutiny under Rule 9(b) before it is given preclusive effect. The relator-appellant argued that the court should not give preclusive effect to prior complaints because, among other deficiencies, the previously-filed complaints did not satisfy Rule 9(b). The defendant-appellee disputed such an interpretation of the first-to-file bar, stating "the law has continued to trend away from [the relator's] position" and citing the D.C. Circuit's opinion in support. Due to the procedural posture of the case, it is unclear whether the Fourth Circuit will take up the issue.

We will continue to monitor developments relating to this issue and assess its potential impact on our clients. If you would like further information, please contact the Ropes & Gray attorney who usually advises you.