First Circuit Upholds False Claims Act's First-to-File Dismissal, Finding Prior Complaint Need Not Meet Rule 9(b)

On May 31, the First Circuit continued the trend of cases holding that an earlier-filed *qui tam* action need not meet Rule 9(b)'s heightened pleading standard in order to bar a later-filed *qui tam* under the Federal False Claims Act's (FCA) first-to-file bar, 31 U.S.C. § 3730(b)(5). In *U.S. ex rel. Heineman-Guta v. Guidant Corp.*, No. 12-1867, 2013 WL 2364172 (1st Cir. May 31, 2013), the First Circuit affirmed the district court's dismissal of the later-filed complaint because an earlier-filed suit was sufficient to put the government on notice of the alleged fraud – that the device manufacturer paid kickbacks to promote the sale and use of its cardiac rhythm management products – regardless of whether it was sufficiently pled to satisfy Rule 9(b).

The First Circuit Decision

In 2008, a former Guidant employee filed an FCA *qui tam* action in the District of Maryland alleging that defendant's Cardiac Rhythm Management division caused the submission of false claims to the federal government by providing kickbacks to physicians to induce them to prescribe defendant's cardiac rhythm management devices. The complaint alleged that defendant's kickbacks included grants to foundations set up by physicians and dinners during which physicians could solicit business, among other things. In 2009, while that complaint was under seal, another former Guidant employee filed a *qui tam* in the District of Massachusetts also alleging that defendant paid kickbacks to doctors to induce use of the same cardiac rhythm management devices. The second relator alleged kickbacks in the form of speaker fees, trips, meals and entertainment; "case reviews," during which physicians reviewed patient cases over expensive meals; "sham" clinical trial programs, in which physicians loyal to defendant were paid to enroll participants; and employment placement to fellows in practices that used defendant's devices.

In 2011, the first relator voluntarily dismissed the original *qui tam* after the government declined to intervene. In 2012, Judge Stearns dismissed the later-filed complaint under the FCA's first-to-file bar, finding that despite its additional detail, the later-filed complaint contained the same essential facts as the earlier-filed complaint. Judge Stearns rejected the second relator's argument that the first complaint did not satisfy Rule 9(b), finding that the first complaint had served the purpose of the first-to-file bar by providing the government with sufficient notice to launch its investigation.

The First Circuit affirmed, holding that "for the purposes of the first-to-file rule, the earlier-filed complaint need not meet the heightened pleading standard of Rule 9(b) to provide sufficient notice to the government of the alleged fraud and bar a later-filed complaint under § 3730(b)(5)." Rather, "earlier-filed complaints must provide only the essential facts to give the government sufficient notice to initiate an investigation into allegedly fraudulent practices." Applying this standard, the First Circuit held that the "additional detail" contained in the later-filed complaint was insufficient to save it from dismissal under the first-to-file bar because the earlier-filed complaint notified the government of the potential fraud, and a resulting investigation would have uncovered the "additional detail."

Conclusion: Prior Complaint Need Not Meet Rule 9(b)

The First Circuit's decision continues the emerging caselaw trend that an earlier complaint need not satisfy Rule 9(b) to have preclusive effect under the FCA's first-to-file bar. *See U.S. ex rel. Batiste v. SLM Corp.*, 659 F.3d 1204, 1210 (D.C. Cir. 2011); *U.S. ex rel. Sandager v. Dell Mktg., L.P.*, No. 08-4805, 2012 WL 1453610, at *7-8 (D. Minn. Apr. 26, 2012) (dismissing relator's complaint as barred by the earlier-filed *qui tam* action dismissed under Rule 9(b) because the "ultimate question is whether the Government had a basis on which to investigate the fraudulent scheme [and] [t]hat standard may be met even if the first-filed complaint is technically deficient"); *see also U.S. ex rel. Wickliffe v. EMC Corp.*, 473 F. App'x 849, 851 (10th Cir. 2012) (affirming dismissal of *qui tam* on other grounds but "admit[ting] to being uneasy with the parties' suggestion that Rule 9(b)'s particularity requirement should be applied to the first-to-file bar"). Notably, the First Circuit — like the DC Circuit in *Batiste* — declined to follow the Sixth Circuit's decision in *Walburn v. Lockheed Martin Corp.*, 431 F.3d 966 (6th Cir. 2005), which held to the contrary, because *Walburn* "did not address in-depth the plain language of § 3730(b)(5), or the different purposes behind Rule 9(b) and § 3730(b)(5)."

Although the earlier-filed complaint at issue in *Heineman-Guta* was voluntarily dismissed by the relator before the Maryland District Court could rule on whether it satisfied Rule 9(b), the First Circuit's holding is not limited to these facts. Rather, even an earlier-filed case that is dismissed on 9(b) grounds can have a preclusive effect under the first-to-file bar where it is sufficient to put the government on notice of the potential fraud. The First Circuit cautioned, however, that an "overly broad and speculative complaint lacking essential facts" that does not provide notice of the alleged fraud to the government may not have preclusive effect under the FCA's first-to-file bar.

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