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Litigation Alert

First Circuit Explains "Essential Facts" Test Under the False Claims Act's First-to-File Bar

Relators bringing *qui tam* suits in the First Circuit alleging the same "essential facts" as earlier-filed *qui tam* complaints are likely to have a difficult time surmounting the federal False Claims Act's (FCA) so called first-to-file jurisdictional bar (31 U.S.C. § 3730(b)(5)), which blocks *qui tam* suits filed while similar ones are pending. In *U.S. ex rel. Ven-A-Care of the Florida Keys, Inc. v. Baxter Healthcare Corp.*, No. 13-1732, 2014 WL 6737102 (1st Cir. Dec. 1, 2014), the First Circuit affirmed the dismissal of a later-filed *qui tam* complaint because an earlier-filed complaint had already disclosed the "essential facts" of the alleged fraud, even though the later suit supplied "far more detail." In its analysis, the First Circuit observed that it had not "previously described with precision" how specific a complaint must be to provide the "essential elements" of the alleged fraud, and provided guidance on this issue.

Background

In 1995, relator pharmacy Ven-A-Care brought an FCA *qui tam* suit against a number of pharmaceutical companies, including Baxter Healthcare Corporation (Baxter), alleging that defendants had fraudulently inflated the prices of their drugs and thereby caused Medicare and Medicaid to pay higher-than-appropriate reimbursements for use of those drugs. In 2002, Ven-A-Care filed its final amended complaint in the action and, in 2011, the district court dismissed the suit when Ven-A-Care settled with Baxter. In 2005, while the Ven-A-Care complaint was pending, Linnette Sun (a former Baxter research director) and Greg Hamilton (an employee of a pharmacy that purchased Baxter's products) (collectively, Relators) filed an FCA *qui tam* suit against Baxter that also alleged a price inflation scheme.

Judge Saris granted summary judgment in favor of Baxter, finding that the 2011 Ven-A-Care/Baxter settlement released Sun's and Hamilton's claims against Baxter. Sun and Hamilton, who had not been parties to the earlier Ven-A-Care action, moved under FRCP 60(b) to re-open the 2011 judgment and seek a fairness hearing under the FCA. Defendant Baxter then argued that, separate and apart from the settlement agreement, the FCA's first-to-file rule (31 U.S.C. § 3730(b)(5)) jurisdictionally barred Relators' *qui tam* suit because Relators had filed their complaint while the related Ven-A-Care complaint was pending. The district court agreed and dismissed Relators' complaint.

First Circuit's Decision and Analysis

The First Circuit affirmed, finding that the earlier-filed Ven-A-Care suit was a "related" action under the FCA's first-to-file bar because it had given the government sufficient notice of the "essential facts" to cause it to initiate an investigation of the alleged fraud. The First Circuit observed that it had not "previously described with precision" how specific a complaint must be to provide the "essential facts" of the purported fraud. It acknowledged that "precision may be too much to ask, given the context-specific nature of the inquiry," but nonetheless provided guidance.

First, referencing its decision in *U.S. ex rel. Heineman-Guta v. Guidant Corp.*, 718 F.3d 28, 36-37 (1st Cir. 2013), the First Circuit found that an earlier-filed complaint need not satisfy Federal Rule of Civil Procedure 9(b) to trigger the first-to-file bar. The First Circuit explained that an earlier-filed complaint can be preclusive even if it does not contain a "play-by-play narration of how the scheme led to the submission of false claims." Applying this guidance, the First Circuit found that the Ven-A-Care complaint was not so "bereft of facts specific to Baxter's allegedly fraudulent conduct" as to render it insufficient to bar Relators' suit. It found that the earlier complaint had preclusive effect despite the fact that Relators Sun and Hamilton had drawn on their "inside knowledge" and offered "far more detail" than the earlier complaint "about particular actors within Baxter and the role those actors played" in the alleged fraud.

Second, the First Circuit found that the Ven-A-Care complaint contained "the key highlights about how Baxter conducted the supposed fraud"—namely, the pricing mechanism Baxter allegedly used to carry out the fraud, the drugs and time period at issue and corroborating evidence of the fraud by Baxter in the form of a price/cost chart. Following its previous decision in *U.S. ex rel. Wilson v. Bristol-Myers Squibb, Inc.*, 750 F.3d 111, 117 (1st Cir. 2014), the First Circuit rejected Relators' contention that additional details they had supplied were sufficient to evade the FCA's first-to-file bar. The First Circuit explained that "the use of comparatively greater detail in describing the same underlying fraud is not what matters for the first-to-file rule. Otherwise, the 'essential facts' test would be reduced to an 'identical facts' test."

Finally, the First Circuit found that, despite certain differences in the time periods of the alleged fraudulent schemes, Relators had alleged the same fraud as the one alleged by Ven-A-Care. Relators had argued that because their complaint alleged a post-2000 fraud involving "list sales price" as opposed to the Ven-A-Care complaint's allegations of a pre-2000 fraud involving

"average wholesale price," their complaint should survive dismissal. Relators attempted to analogize *U.S. ex rel. Duxbury v. Ortho Biotech Products, L.P.*, 579 F.3d 13, 32 (1st Cir. 2009), in which the First Circuit had found that the later complaint's allegations of an off label marketing scheme that was "nowhere refer[enced]" in the earlier complaint made the later complaint meaningfully different, thereby saving it from the first-to-file bar. The First Circuit rejected Relators' analogy, finding instead that "any meaningful differences" between the frauds alleged in the complaints "were ones about which Ven-A-Care's complaint provided the 'essential facts.'" The First Circuit concluded: "Simply put, once the government gets sufficiently valuable information from a *qui tam* complaint about the same fraud alleged by a follow-on complaint, the purposes of the first-to-file rule have been fully served."

Conclusion

Outlining in more detail the contours of the "essential facts" test, the *Ven-A-Care* decision builds on and synthesizes the First Circuit's recent line of decisions, including *Heineman-Guta, Duxbury* and *Wilson,* rejecting later-filed relator actions under the FCA's first-to-file bar. In affirming the dismissal of Relators' complaint, the First Circuit in *Ven-A-Care* observed that "there is . . . no reason to read [the first-to-file provision of the FCA] to let later-filing relators sue merely because they offer additional information that might also help the government carry out its investigation." Going forward, relators bringing *qui tam* suits in the First Circuit alleging the same "essential facts" as earlier-filed *qui tam* complaints are likely to have difficulty surmounting the first-to-file bar.

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