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First Circuit Resolves Dispute Between Relators Under First-to-File Bar

By Michael A. Rogoff and David Russell*

The U.S. Court of Appeals for the First Circuit recently held that a relator asserting the first-to-file bar must show not only that his or her complaint was earlier-filed but also "contained 'all of the essential facts'"—including the "actual mechanism"—of the alleged fraud. The First Circuit has turned the "essential facts" test into something more akin to an "identical facts" test, which numerous courts, including the First Circuit, had previously rejected. The authors of this article discuss the decision and its practical impact.

One court giveth and another court taketh away. In the case of two competing relators, the U.S. Court of Appeals for the First Circuit held that a relator asserting the first-to-file bar must show not only that his or her complaint was earlier-filed but also "contained 'all of the essential facts'"—including the "actual mechanism"—of the alleged fraud. In so holding, the First Circuit has turned the "essential facts" test into something more akin to an "identical facts" test, which numerous courts, including the First Circuit, had previously rejected.

MCGUIRE

United States ex rel. McGuire v. Millennium Laboratories, Inc., arose out of the government's successful intervention in several *qui tam* suits against Millennium Laboratories.[1] Specifically, the government alleged that Millennium engaged in two connecting schemes: "(1) Millennium's submission of claims for excessive and unnecessary urine drug testing ordered by physicians through standing orders without an individualized assessment of patient need; and (2) urine drug testing referred by physicians who receive free point-of-care testing supplies."[2]

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[1] *See* No. 17-1106 (1st Cir. 2019).

[2] *Id.*

Ultimately, Millennium agreed to settle for $227 million plus interest.[3] And this is where the fight began between two relators—Robert Cunningham and Mark McGuire—with each asserting that he alone was entitled to the relator share of the settlement. McGuire filed a crossclaim for declaratory relief that his was the first-filed complaint to allege the essential facts in the government complaint and, as a result, he was entitled to the relator's share.[4] In response, Cunningham asserted that *he* was in fact entitled to the relator's share because his complaint was first and McGuire's claim was jurisdictionally barred under the first-to-file rule.[5] The government took no position on the issue.

The district court held for Cunningham, following First Circuit precedent that the first-to-file bar was jurisdictional. As a result, the district court looked outside the four corners of each complaint and concluded that Cunningham had alleged the essential facts of the fraud, thereby entitling Cunningham to be considered the first-filing relator.[6] McGuire then appealed to the First Circuit, arguing that (1) the first-to-file bar was nonjurisdictional and (2) that he was the first-filing relator because his complaint, although later in time, alleged all of the "essential facts underlying the government's complaint in intervention."[7]

The First Circuit held for McGuire on both grounds. On the jurisdictional point, the court looked to intervening case law and statutory text to depart from its prior holdings and held, like most other circuits, that the first-to-file bar was not jurisdictional.[8] Because the first-to-file rule is not jurisdictional, the court held that it and the district court had subject matter jurisdiction over McGuire's claims.[9]

On the more important substantive point—namely, which relator was truly the first to file—the First Circuit held that courts "must ask not merely whether the first-filed complaint provides some evidence from which an astute government official could arguably have been put on notice, but also whether the first complaint contained *all the essential facts* of the fraud it alleges."[10] In so doing, the First Circuit found that although Cunningham's complaint did allege a claim for "excessive and unnecessary drug testing" against Millennium, this was

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[3] *See id.*

[4] *See id.*

[5] *See id.*

[6] *See id.*

[7] *Id.*

[8] *Id.*

[9] *See id.*

[10] *Id.* (emphasis in original).

"too general an argument" because a first-to-file analysis requires the court to "look to the actual mechanism (the 'essential facts') of the fraud" alleged.[11] The First Circuit concluded that the fraud that McGuire alleged involved a "different mechanism" and a "different stage of testing" than the fraud alleged initially by Cunningham.[12] As a result, the "first relator to file a claim including the essential elements of Millennium's custom profile fraud" was McGuire, and he was entitled to the relator share.[13] Important to the court's conclusion was the fact that "the fraud the government pursued was that alleged by McGuire."[14]

THE PRACTICAL IMPACT OF THIS DECISION

The practical impact of this decision could be significant, especially because the First Circuit did not limit its holding to the unique posture of the *McGuire* case, an intervened case where the court could determine which relator's allegations line up most closely with the government's case. In the typical case involving multiple relators, however, there is no government complaint. In those cases, if each successive whistleblower could avoid the first-to-file bar by specifying a different "mechanism" or "stage" by which a fraud was accomplished, then the first-to-file bar ceases to fulfill its purpose of "avoiding piecemeal and duplicative litigation that does not advance the government's investigation of the alleged fraud."[15] The First Circuit's interpretation of the "essential facts" test fails to appreciate, as many courts have stated, that once the government has information about a fraud, it is well-equipped to investigate related mechanisms and stages of the same fraud.[16] In addition, by limiting application of the first-to-file bar to those subsequent complaints that articulate the same mechanism and stage as the fraud alleged in the earlier complaint, *McGuire* serves to turn the "essential facts" test into what more closely resembles the widely rejected "identical facts" test.[17]

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[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *United States ex rel. Kelly v. Novartis Pharm. Corp.*, 827 F.3d 5, 11 (1st Cir. 2016).

[16] *See United States ex rel. Wood v. Allergan, Inc.*, 899 F.3d 163, 169 (2d Cir. 2018) ("If the first-filed complaint ensures that the Government 'would be equipped to investigate' the fraud alleged in the later-filed complaint, then the two cases are related" for the first-to-file bar) (citation omitted).

[17] *See United States ex rel. Ven-A-Care of the Fla. Keys, Inc. v. Baxter Healthcare Corp.*, 772 F.3d 932, 938, 940–42 (1st Cir. 2014) (stating that "there need not be identity between the two complaints to trigger the first-to-file rule").

CONCLUSION

In *McGuire*, the First Circuit had the benefit of hindsight, namely, that the government had *actually* intervened in McGuire's complaint. It remains to be seen how courts in the First Circuit will apply the "essential facts" test where there is no intervened government complaint on which to compare the multiple relators' complaints. One can see courts in the First Circuit grappling with how to apply the standard articulated in *McGuire* without leaving the first-to-file bar toothless as a defense to serial *qui tam* complaints.