# First Circuit Deepens Circuit Split On Question Concerning the False Claims Act's First-to-File Bar

On May 31, 2013, the First Circuit weighed in on a question concerning application of the False Claims Act's first-to-file bar that has split the circuits. In *United States ex rel. Heineman Guta v. Guidant Corp., et al.*, (12-1867), the First Circuit held that the first-filed complaint need not satisfy Fed. R. Civ. P. 9(b)'s heightened pleading standard in order to bar a later-filed complaint. In doing so, the court expressly rejected the Sixth Circuit's approach. The First Circuit's opinion reaffirms that the first-to-file bar's focus is on whether the government has received adequate notice of potential fraud.

## Disagreement Regarding the First-To-File Rule

Under the first-to-file provision of the FCA, when an individual files an action, "no person other than the government may intervene or bring a related action based on the facts underlying the pending action." 31 U.S.C. § 3730(b)(5). In several cases over the past few years, the Sixth Circuit has 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).

In 2011, however, the D.C. Circuit departed from this approach, explaining that the language of the FCA's first-to-file provision does not incorporate Rule 9(b). *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.

Other courts, while not directly ruling on this precise issue, have also discussed the intersection of Rule 9(b) and the FCA's threshold defenses. 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." *United States ex rel. Wickliffe v. EMC Corp.*, 473 Fed. App'x 849, 852 (10th Cir. 2012). And the Eighth Circuit 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). In *Campbell v. Redding Med. Ctr.*, 421 F.3d 817, 825 (9th Cir. 2005), the Ninth Circuit held that, in public disclosure cases, later-filed complaints are only barred by an earlier-filed complaint that satisfies the requirements of the FCA's public disclosure rule. 421 F.3d at 425; *see also* 31 U.S.C. 3730(e)(4) (requiring dismissal of a claim if substantially the same allegations alleged were publicly disclosed, unless relator is an original source of an earlier-filed complaint that satisfies the requirements of the FCA's public disclosure rule).

## 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). Soon thereafter, a second judge within the District of Massachusetts adopted the D.C. Circuit's approach as well. *See 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.).

## First Circuit Decision

At the outset of its opinion, the First Circuit explained that the first-to-file rule is intended to incentivize relators to come forward in an effort to alert the government to the essential facts of allegedly fraudulent conduct. To further this purpose, the First Circuit has held that the first-to-file rule bars a later-filed complaint if the subsequent complaint "states all the essential facts of a previously filed complaint or the same elements of a fraud described in an earlier suit." *United States ex rel. Duxbury v. Ortho Biotech Prods.*, 579 F.3d 13, 32 (1st Cir. 2009) (internal citations omitted).

As such, the court rejected relator's argument that the appropriate standard to assess whether a first-filed complaint should be given preclusive effect is not the essential facts tests, but rather Rule 9(b)'s heightened pleading standard. The court reasoned that nothing in the statutory language of the FCA's first-to-file rule references Rule 9(b)'s particularity requirement. *See* 31 U.S.C. § 3730(b)(5). Characterizing the text as "plain and simple," the court observed that Congress has explicitly referenced the Federal Rules of Civil Procedure in other provisions of the FCA, and when Congress does not do so, as is the case here, the court will not incorporate extrinsic language into a provision. The court also noted that Rule 9(b)'s goal is to shield defendants from unsubstantiated lawsuits, not to alert the government to potentially fraudulent conduct.

At oral argument, relator urged the panel to adopt the Sixth Circuit's position, arguing that failing to impose a heightened pleading requirement would encourage relators to file vague and speculative complaints to prevent subsequent relators from filing complaints once armed with more-detailed information. In its decision, the court rejected this line of argument and explicitly disagreed with the Sixth Circuit in favor of the D.C. Circuit, reasoning that a first-filed complaint containing merely vague and speculative allegations would likely lack the essential facts necessary to place the government on notice of fraudulent conduct, and thus would fail to bar a subsequent, overlapping complaint.

Applying the essential facts test to the instant case, the court explained that there was no question that the first-filed complaint – the *Bennett* complaint – provided the essential facts of BSC's allegedly fraudulent kickback scheme. Like relator's complaint, the *Bennett* complaint centered on BSC's alleged use of kickbacks to induce hospitals and physicians to submit false claims to the government, specifically Medicare. As a result, the first-filed complaint had sufficiently placed the government on notice and therefore barred relator's later-filed complaint.

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The First Circuit's decision in *Heineman-Guta* appropriately recognizes the distinct function served by the first-to-file bar. As the court properly observed, whereas Rule 9(b) looks to protect defendants facing accusations of fraud, the first-to-file bar prevents suits that do not aid the government in investigating false claims, thereby encouraging would-be relators to come forward with allegations of fraud promptly. Whereas the rules of pleading may require specific allegations as to the details of a fraudulent scheme, such details are not necessarily required to initiate a government investigation and therefore should not be required for the first-to-file rule to apply.

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