D.C. Circuit Creates Split in Authority on Applicability of False Claims Act "First-to-File" Bar

The U.S. Court of Appeals for the D.C. Circuit recently affirmed the dismissal of a False Claims Act ("FCA") complaint in *United States ex rel. Shea v. Cellco Partnership*, 2014 WL 1394687 (D.C. Cir. Apr. 11, 2014) for failure to meet the statute's "first-to-file" rule, which provides that "[w]hen a person brings an action under [the FCA], 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 its holding, which turned on the meaning of the term "pending," the D.C. Circuit became the first circuit court to determine that the first-to-file rule bars subsequently filed, related FCA complaints even when the first-filed action has been dismissed.

The relator in *Shea* was a former telecommunications consultant for Verizon. In 2007, the relator filed an FCA complaint alleging that Verizon submitted prohibited surcharges to the government for reimbursement under a telecommunications contract. Op. at *1. The government intervened in the action and settled with Verizon in February 2011. Prior to the settlement of the first action, the same relator filed a second FCA complaint in June 2009 that alleged a similar scheme by Verizon to defraud the government under additional contracts with government agencies. Op. at *1-2.

After amending his second complaint in 2012, the district court granted Verizon's motion to dismiss with prejudice under the FCA's first-to-file rule, citing the second complaint's similarity to the allegations in the original 2007 complaint. Op. at *1-2. On appeal, the relator argued that he should be allowed to refile his action because the 2007 complaint had been dismissed under the 2011 settlement and thus was no longer "pending" for the purposes of the first-to-file rule. *Id.*

After determining that the two complaints were sufficiently related to trigger the first-to-file rule, the D.C. Circuit in a 2-1 opinion held that the first-to-file rule bars related complaints even when the prior action is no longer active. The D.C. Circuit reasoned that the term "pending" in the statute did not refer to the status of the first-filed complaint, but rather was meant to distinguish the earlier-filed action from the later-filed action. Op. at *4-5. The court further held that the term "pending" did not signal a temporal limit on the applicability of the first-to-file bar. *Id.* The court reasoned that if the first-to-file rule ceased to apply once the earlier related action was dismissed, relators would be able to file duplicative FCA complaints on the same issues even though the government was already on notice of related frauds through the first-filed complaint. Op. at *5. The D.C. Circuit acknowledged that its interpretation of the statute departed from other circuit court opinions, but it noted that such cases either raised the issue in dicta or did not directly compare the competing definitions of the term "pending." Op. at *5-6.

Implications of the Court's Decision

The Shea opinion creates a split in circuit court authority on the applicability of the FCA's first-to-file bar, an issue that is the subject of a pending petition for review before the Supreme Court. *Kellogg Brown & Root Servs., Inc. v. United States ex rel. Carter* (Sup. Ct. No. 12-1497). In October 2013, the Supreme Court asked the Solicitor General to file a brief expressing the government's views on the case. The *Carter* petition may now be a stronger candidate for Supreme Court review given the D.C. Circuit's explicit disagreement with its sister circuits on an important threshold for FCA claims.

We will continue to monitor the *Carter* petition and how it may affect FCA jurisprudence. If you would like further information, please contact one of the attorneys in our FCA practice or the Ropes & Gray attorney who usually advises you.

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