First Circuit Affirms Dismissal of FCA Complaint Based on First-to-File Bar

The First Circuit recently affirmed the dismissal of *United States ex rel. Wilson v. Bristol-Myers Squibb, Inc.* under the False Claims Act's ("FCA") "first-to-file" provision, which prohibits any person "other than the Government" from pursuing a "related action based on the facts underlying the pending action." 31 U.S.C. §3730(b)(5). The court applied the now familiar "essential facts" test, articulated in *United States ex rel. Duxbury v. Ortho Biotech Prods., L.P.,* in rejecting relator's attempt to narrow the scope of this important jurisdictional bar.

Background

Relator Michael Wilson, a former Bristol-Myers Squibb ("BMS") sales representative, originally filed suit in September 2006 and subsequently amended his complaint. As part of a 2007 settlement, relator voluntarily dismissed his FCA claims against BMS except for claims relating to off-label promotion, retaliation, and wrongful termination. Two years later, relator filed a Second Amended Complaint, expanding on the remaining claims against BMS and adding Sanofi-Aventis as a defendant. In 2010, relator moved for permission to amend his complaint once again, but this motion was denied and the defendants moved to dismiss.

In granting the motion to dismiss the FCA counts, the District Court focused on whether Wilson's complaint alleged the same "essential facts" as an FCA complaint that had been filed before Wilson's original complaint by another relator in the District Court for the District of Columbia. After comparing the allegations, the court held that Wilson's FCA claims were barred.[1] Relator appealed.

First Circuit's Holding

Like the District Court, the First Circuit applied the "essential facts" or "material elements" test in affirming the first-to-file dismissal of Wilson's complaint.[2] Under this test, a later-filed claim is barred if it "states all the essential facts of a previously-filed claim or the same elements of a fraud described in an earlier suit." The complaints need not be identical for the first-to-file bar to apply; once the government has been advised of the essential facts of a fraudulent scheme by the earlier complaint, it has enough information to discover related frauds.

In holding that the D.C. complaint put the government on notice of the scheme alleged in Wilson's complaint, the court noted that the earlier-filed complaint targeted the same defendants and drugs, asserted a nationwide scheme, and alleged similar mechanisms leading to common patterns of submission of

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[1] Relator's claims for a third drug were dismissed for failure to plead with the specificity required by Rule 9(b). Relator did not appeal this holding.

[2] All circuit courts that have considered Section 3730(b)(5) of the FCA have applied this test to determine whether the jurisdictional bar applies. *See, e.g., U.S. ex rel. Duxbury v. Ortho Biotech Prods., L.P.,* 579 F.3d 13, 32-33 (1st Cir. 2009); *U.S. ex rel. LaCorte v. SmithKline Beecham Clinical Labs., Inc.,* 149 F.3d 227, 232-33 (3d Cir. 1998); *U.S. ex rel. Carter v. Halliburton Co.,* 710 F.3d 171, 181-82 (4th Cir. 2013); *U.S. ex rel. Branch Consultants v. Allstate Ins. Co.*, 560 F.3d 371, 378 (5th Cir. 2009); *Walburn v. Lockheed Martin Corp.,* 431 F.3d 966, 971 (6th Cir. 2005); *U.S. ex rel. Chovanec v. Apria Healthcare Grp., Inc.,* 606 F.3d 361, 363-64 (7th Cir. 2010); *U.S. ex rel. Lujan v. Hughes Aircraft Co.,* 243 F.3d 1181, 1187-88 (9th Cir. 2001); *U.S. ex rel. Grynberg v. Koch Gateway Pipeline Co.*, 390 F.3d 1276, 1279-80 (10th Cir. 2004); *U.S. ex rel. Hampton v. Columbia/HCA Healthcare Corp.*, 318 F.3d 214, 217-18 (D.C. Cir. 2003).

purportedly false claims. The difference between the earlier complaint and the Wilson action concerned the particular diseases and symptoms targeted by the allegedly off-label promotion. However, this was not enough for the court to conclude that the D.C. complaint did not assert related claims. The First Circuit rejected the relator's reading of Section 3730(b)(5), observing that relator's position would transform the "essential facts" test into an "identical facts" test, unduly limiting the first-to-file bar.[3]

Implications of the Court's Decision

The First Circuit's decision importantly reaffirmed that the first-to-file bar does not require that later-filed allegations *match* facts alleged in a previously filed FCA complaint. By barring later-filed claims even when they allege similar but not the same claims, the essential facts standard preserves a balance between incentivizing would-be relators to notify the government quickly of the essential facts of a fraudulent scheme and preventing successive lawsuits from wasting judicial resources. In *Wilson*, the First Circuit declined to shift that balance.

We will continue to monitor the *Wilson* litigation 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.

[3] The First Circuit also affirmed the district court's denial of leave to amend the Second Amended Complaint and relator's motion for reconsideration thereof.