First Circuit reverses course on its first-to-file rule

Litigation Alert

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By: Andrew J. Hoffman | Courtney Gilligan Saleski | John M. Hillebrecht | Meagan Self

First Circuit law on the first-to-file rule is evolving in a way that could have significant consequences for False Claims Act (FCA) defendants. This week, in *U.S. ex rel. McGuire v. Millennium Laboratories, Inc.*, a three-judge panel reversed First Circuit precedent by holding the first-to-file rule is not jurisdictional, widening an existing circuit split on the issue. No. 17-1106, 2019 WL 1987249, at *1 (1st Cir. May 6, 2019). The decision also suggested that the First Circuit may have a more narrow view of the criteria that make cases sufficiently "related" for the first-to-file rule to apply.

The first-to-file rule

While the FCA's *qui tam* provisions empower private litigants – called "relators" – to bring lawsuits on behalf of the United States, the first-to-file rule is an important limitation on that authority. "The rule is 'part of the larger balancing act of the FCA's *qui tam* provision, which attempts to reconcile two conflicting goals, specifically, preventing opportunistic suits, on the one hand, while encouraging citizens to act as whistleblowers on the other.'" *Id.* at *9 (quoting *United States ex rel. Wilson v. Bristol-Myers Squibb*, Inc., 750 F.3d 111, 117 (1st Cir. 2014)).

Under the first-to-file rule, "[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). To determine whether two actions are "related," the First Circuit considers whether the second-filed complaint "contained 'all the essential facts'" of the fraud alleged in the first-filed complaint. *Id.* at *10 (quoting *United States*

ex rel. Ven-A-Care of the Fla. Keys, Inc. v. Baxter Healthcare Corp., 772 F.3d 932, 938 (1st Cir. 2014)).

The circuit split

Until now, the First Circuit had counted itself among the courts that have held the FCA's first-to-file rule is jurisdictional. (For additional information about this circuit split, visit this page.) Without sitting *en banc*, the three-judge panel in *McGuire* took the unusual step of reversing existing precedent, siding instead with the DC and Second Circuits, which have held the rule is not jurisdictional. The *McGuire* court found compelling the reasoning in *United States ex rel. Heath v. AT & T, Inc.*, 791 F.3d 112, 121 n.4 (D.C. Cir. 2015) and *United States ex rel. Hayes v. Allstate Ins. Co.*, 853 F.3d 80, 85 (2d Cir. 2017), which both relied on the Supreme Court's 2015 decision in *Kellogg Brown & Root Services, Inc. v. United States ex rel. Carter*, 135 S. Ct. 1970 (2015). According to the First Circuit, the *Carter* decision "addressed the operation of the first-to-file bar on decidedly nonjurisdictional terms, raising the issue after it decided a nonjurisdictional statute of limitations issue." *McGuire*, 2019 WL 1987249, at *7.

Following *McGuire*, FCA defendants in the First Circuit will no longer be able to seek a first-to-file dismissal under Federal Rule of Civil Procedure 12(b)(1), which permits jurisdictional issues to be raised at any time using facts outside the pleadings. Instead, defendants must now raise first-to-file challenges under Rule 12(b)(6) using only facts in the pleadings. *Id.* at 2.

The "relatedness" requirement

The *McGuire* decision also suggests that, compared to other circuits, the First Circuit may have a slightly more narrow view of what constitutes "related" actions for first-to-file purposes. The court stressed: "we 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." *Id.* at *11. (quoting *Ven-A-Care*, 772 F.3d at 938) (emphasis in original); *but see U.S. ex rel. Wood v. Allergan, Inc.*, 899 F.3d 163, 169 (2d Cir. 2018) (requiring that "the claims incorporate 'the *same material elements* of fraud.'").

The *McGuire* court held that two cases were not related, where (1) the first-filed complaint alleged that the defendant lab company had a Physician Billing Model that promoted increased point-of-care drug testing, which led to increased and unnecessary confirmatory testing; and (2) the second-filed complaint alleged the lab company "required physicians to execute custom profiles [that] directed [defendant] to automatically conduct a battery of confirmatory tests regardless of individual patient need." *Id.* at *10. The court reasoned that the fraud alleged in the second-filed complaint "had a different mechanism (the custom profiles) and focused on a different stage of testing (the confirmatory stage)" than the fraud described in the first-filed complaint. *Id.* Because "all the essential facts" of the fraud were not the same, the first-to-file rule did not apply. *Id.* at *11.

This decision indicates that, compared to other circuits, the First Circuit may be more willing to parse facts to hold that the first-to-file rule does not apply.

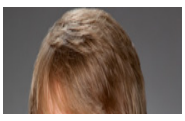
Key takeaways

The *McGuire* decision may make the First Circuit a less appealing venue for FCA defendants with potential first-to-file arguments. While the impact of *McGuire* is yet to be seen, it is possible that defendants will have a more difficult time obtaining early dismissals based on first-to-file grounds.

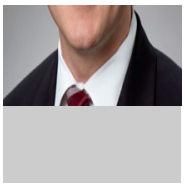
Given the First Circuit's requirement that both complaints contain "all the essential facts of the fraud," it may be easier for relators in that circuit to plead around first-filed complaints, especially now that lower courts may not consider facts outside the pleadings.

Learn more about this development by contacting any of the authors.

AUTHORS



Andrew J. Hoffman
Partner
Los Angeles (Century City) | T: +1 310 595 3000



Courtney Gilligan Saleski
Partner
Philadelphia | T: +1 215 656 3300
Washington, DC | T: +1 202 799 4000

John M. Hillebrecht
Partner
New York | T: +1 212 335 4500

Meagan Self
Associate
Dallas | T: +1 214 743 4500
