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1st Circ. Set To Weigh In On FCA First-To-File Rule

Law360, New York (December 04, 2012, 12:42 PM ET) -- Early next year, the United States Court of Appeals for the First Circuit will likely issue a significant False Claims Act ruling in United States ex rel. Heineman-Guta v. Guidant Corp. The Guidant court will become the latest federal appeals court to determine whether a previously filed, but legally insufficient, FCA complaint satisfies the "first-to-file rule." Regardless of how the Guidant court rules, but especially if it reverses the district court, its decision will only deepen an existing circuit split, and will increase the odds of the U.S. Supreme Court ultimately resolving this issue.

The First-To-File Rule, Guidant and the Existing Circuit Split

Pursuant to the FCA, "no other person other than the Government may intervene or bring a related action based on the facts underlying the pending action."[1] Known as the first-to-file rule, this provision of the FCA is intended to prevent duplicative FCA awards covering the same behavior. The rule completely bars a later filed FCA allegation if it states all the essential facts of a previously filed claim or the same elements of a fraud described in an earlier suit.

In United States ex rel. Heineman-Guta v. Guidant Corp., 09-11927 (D.Mass. July 5, 2012), the plaintiff alleged that Guidant, later Boston Scientific Corporation, violated the anti-kickback statute (42 U.S.C. § 1320a-7b) by offering kickbacks to physicians to influence them to implant cardiac rhythm management devices and refer patients for implantation of the devices.

The Massachusetts district court, however, dismissed the complaint finding that that a previously filed complaint in the District of Maryland (the "Maryland complaint") concerning the same alleged scheme was the first filed, even though the plaintiff and government voluntarily dismissed the Maryland complaint because it failed to satisfy the heightened pleading requirement required under Federal Rule of Civil Procedure 9(b).

In dismissing the complaint, the Massachusetts district court adopted the D.C. Circuit's ruling in Batiste, which held that the first-filed complaint need not meet the specificity requirements of Fed. R. Civ. P. 9(b) to bar a second-filed complaint.[2] In contrast, the Sixth and Ninth Circuits have held that to qualify as a first-filed complaint, the first complaint must be jurisdictionally sound and not otherwise barred by the Federal Rules of Civil Procedure, including Fed. R. Civ. P. 9(b).[3] The plaintiff appealed to the First Circuit.

In her Nov. 6 appellate brief, the plaintiff argued that the Massachusetts district court erred in holding that the Maryland complaint was the first filed because it was "legally incapable of serving as a complaint because it did not meet the particularity requirements of Rule 9(b) of the Federal Rules of Civil Procedure."[4] The plaintiff argued, in part, that the first-to file bar should only apply to FCA complaints that satisfy Rule 9(b)'s particularity requirements to support the FCA's policy goal of preventing relators from filing "conclusory complaints in the hopes that a government investigation will turn something up, without any intent of ever litigating those claims." Guidant's brief to the First Circuit is due on Dec. 10, 2012, and oral argument is expected to occur in 2013.

The Department of Justice's Position

Although the U.S. Department of Justice filed court submissions in both the D.C. Circuit's Batiste case and the First Circuit's Guidant case, it has not presented a consistent opinion on whether a complaint that fails to satisfy Fed. R. Civ. P. 9(b) will satisfy the first-to-file rule. In Batiste, the DOJ filed an amicus brief in which the DOJ explained that "[b]ecause a qui tam complaint that does not satisfy 9(b) may not provide the Government with the necessary information to investigate or pursue the alleged fraud, a subsequent qui tam complaint, which might provide that information, should not be barred."

The DOJ argued that "[i]f the first-filed complaint cannot proceed because of Rule 9(b), then the subsequent complaint may provide valuable information to the Government of potential fraud, consistent with the FCA's policy of encouraging whistleblowers. Allowing such a later-filed complaint in no way undermines the FCA's policy of discouraging parasitic or repetitive suits."[5]

Despite taking this position in Batiste, in Guidant the plaintiff's appellate brief noted that the DOJ filed a submission where it declined to take a position on whether the suit should be barred because of the first-to-file rule.[6]

The First Circuit's Decision in Guidant Will Be Significant

The First Circuit's decision in Guidant will be significant in both the short term and the long term. As a practical matter, many FCA claims involving the life sciences industry are filed in the First Circuit, and therefore this decision will have a particular impact on new cases filed against companies in that industry. And in the long term, given the high stakes generally implicated in FCA matters and the importance of clarity surrounding the first-to-file rule for plaintiffs, defendants and the government, the Guidant decision and the potentially deepening circuit split increases the likelihood that the Supreme Court ultimately will resolve this issue in the coming years.

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[1] 31 U.S.C. § 3730(b)(5).

[2] United States ex rel. Batiste v. SLM Corp., 659 F.3d 1204, 1210 (D.C. Cir. 2011).

[3] United States ex rel. Poteet v. Medtronic Inc., 552 F.3d 503, 516-17 (6th Cir. 2009); Campbell v. Redding Med. Ctr., 421 F.3d 817, 825 (9th Cir. 2005).

[4] http://www.cadwalader.com/docs/Brief_in_Support_of_Appeal.pdf

[5] DOJ's amicus brief in Batiste can be found here:
http://www.cadwalader.com/docs/USA_v._SLM_DoJ_amicus_brief.pdf

[6] http://www.cadwalader.com/docs/Brief_in_Support_of_Appeal.pdf