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New Qui Tam Ruling: Chalk One Up for the Defense

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Under the Federal False Claims Act ("FCA"), the number of potential Relators is generally limited by the "first-to-file" rule (31 U.S.C. § 3730(b)(5)) which bars a second Relator from filing a qui tam complaint that is similar to a first Relator's complaint, even in different jurisdictions. Unfortunately, this bar had been lowered by the 6th Circuit's opinion in *Walburn v. Lockheed Martin Corp.*, 431 F.3d 966, 972 (6th Cir. 2005), where it was held that the first-filed "complaint's failure to comply with Rule 9(b) rendered it legally infirm from its inception, and therefore it cannot preempt [the later-filed] action under the first-to-file bar."

Fortunately, the D.C. Circuit has recently disagreed with the 6th Circuit and raised the bar back to a rational place. In *United States, ex rel. Batiste v. SLM Corporation* (D.C. Cir., Nov. 4, 2011, No. 10-7140), the D.C. Circuit struck a blow to Relators by affirming the district court's dismissal of a *qui tam* complaint on the ground that an earlier-filed complaint barred consideration of the later-filed complaint regardless of whether the earlier-filed complaint met the heightened pleading standard of Fed.R.Civ.P. 9(b):

> We hold that first-filed complaints need not meet the heightened standard of Rule 9(b) to bar later complaints; they must provide only sufficient notice for the government to initiate an investigation into the allegedly fraudulent practices, should it choose to do so.

(Opinion at 10.)

In *Batiste,* the Relator and the United States, as *amicus curiae,* had relied on *Walburn* to argue that requiring the first-filed complaint to meet Rule 9(b) "would ensure the complaint provides the government sufficient information to pursue an investigation, as well as prevent an overly-broad complaint from barring a more detailed, later-filed complaint." (Opinion at 11.) The D.C. Circuit was "unconvinced" for a number reasons:

(1) The "statutory text" does not incorporate the particularity requirement of Rule 9(b), but only requires a first-filed complaint to be "pending."

(2) The two rules have different purposes. "Rule 9(b) is designed to protect defendants in fraud cases from frivolous accusations and allow them to prepare an appropriate response," whereas "Section 3730(b) is designed to allow recovery when a *qui tam* relator puts the government on notice of potential fraud being worked against the government, but to bar copycat actions that provide no additional material information." In other words, "a complaint may provide the government sufficient information to launch an investigation of a fraudulent scheme even if the complaint does not meet the particularity standards of Rule 9(b)."

(3) A "strange judicial dynamic" would be created by requiring satisfaction of Rule 9(b), "potentially requiring one district court to determine the sufficiency of a complaint filed in another district court, and possibly creating a situation in which the two district courts disagree on a complaint's sufficiency." Indeed, this could happen under the Sixth Circuit's reasoning in *Walburn*.

(4) The argument that unless Rule 9(b) applies, "would-be *qui tam* relators [would be encouraged] to file non-specific suits to block other potential relators from sharing in their bounty," does "not make sense." "Even without grafting a Rule 9(b) requirement onto the first-to-file rule, the first plaintiff's complaint is still subject to the Rule 9(b) pleading requirements in order for a court to hear the

case," and "[i]f the first relator did not plead fraud with particularity, his complaint would be dismissed and he would lose his own shot at monetary reward"; therefore "[t]he threat of a second application of Rule 9(b) is unnecessary."

(Opinion at 11-12.)

Under F.R.A.P. 40(a)(1), the Relator in *Batiste* has until November 18, 2011 to seek a panel rehearing. If the D.C. Circuit's decision remains unchanged, the stage may be set for the Supreme Court to resolve the split between the Sixth Circuit and D.C. Circuit. Stay tuned.

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