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Providers Benefit from False Claims Act's First-to-File Rule

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Health care providers sued under the False Claims Act (FCA) are often subjected to multiple “copy cat” lawsuits filed by different persons, but all based on the same allegations raised in an earlier-filed lawsuit. The FCA contains a “first-to-file” rule prohibiting that tactic. The rule states that when an individual files a “qui tam” claim 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).

A recent federal court decision highlights the potential for defendants to invoke the first-to-file rule to fight back against copy cat FCA lawsuits. Although the case did not involve a federal health care program, the decision nonetheless is instructive and useful for health care providers who may become involved in FCA litigation.

In *U.S. ex rel. Batiste v. SLM Corp.*, __ F.3d __, 2011 WL 5299637 (D.C. Cir. Nov. 4, 2011), the D.C. Circuit considered a lawsuit filed by Sheldon Batiste, a former employee of Sallie Mae — the entity well known for its administration of student loans. Batiste filed a lawsuit in the District of Columbia, alleging that the defendant submitted false claims in connection with a federal student loan program. However, another individual — Michael Zahara — previously filed a lawsuit in California containing similar allegations.

The *Batiste* court noted that the FCA’s first-to-file rule does not require the later-filed lawsuit to be “identical” to the earlier-filed case. The rule applies when the two suits allege the “same material elements of fraud.” In *Batiste*, the court paid particular attention to “whether the Batiste Complaint alleges a fraudulent scheme the government already would be equipped to investigate based on the Zahara Complaint.” The court ultimately concluded that Zahara’s earlier-filed complaint contained the same essential allegations later asserted by Batiste, and Zahara’s

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lawsuit provided the government with all the information it needed to investigate the alleged fraud. Thus, “Batiste’s additional details would not give rise to a different investigation or recovery.” For those reasons, the court dismissed Batiste’s suit under the first-to-file rule.

In the course of applying the first-to-file rule, the *Batiste* court considered another principle that often comes into play in FCA litigation. Persons alleging violations of the FCA must specify the nature of the alleged fraud, including the “who, what, when, where and how” of the fraud. In an attempt to get around the first-to-file rule, Batiste argued that Zahara’s earlier-filed complaint lacked the required details and, therefore, should not bar Batiste’s lawsuit. However, the *Batiste* court rejected that argument, concluding that even a complaint that lacked the required details still would bar a later-filed lawsuit that is based on the same allegations.

Health care providers, especially larger providers conducting business in multiple states, are vulnerable to being sued by different whistleblowers in different jurisdictions. In large organizations, several employees — either coincidentally or acting together — may simultaneously form an opinion that their employer is engaged in defrauding the government. That may set off a “race to the court house,” where employees compete with one another to be the first to file an FCA lawsuit and avoid having their suit thrown out of court based on the FCA’s first-to-file rule. Occasionally, in the haste to be the first to file an FCA lawsuit, the person filing the case fails to allege the required details regarding the alleged fraud. Nonetheless, that defective lawsuit may serve to bar later-filed lawsuits based on the same basic allegations. As noted by the *Batiste* court, the earlier-filed case does not need to be identical to the later-filed case. In the context of health care, multiple FCA cases may involve different patients, facilities, procedures, billing codes or other minor variations, yet conceivably still involve the same basic fraud allegation.

When a provider is sued under the FCA, it is essential that legal counsel be consulted to evaluate whether the first-to-file rule may be used to stop the litigation.

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