APRIL 11, 2022

FALSE CLAIMS ACT – ONLY THE FIRST CAN BE FIRST TO FILE

The Eleventh Circuit Court of Appeals recently affirmed that a *qui tam* relator's original complaint, rather than any amended complaints subsequently filed in the action, is the "proper point of reference" for analysis under the False Claims Act's ("FCA's") first-to-file rule. *Cho on behalf of States v. Surgery Partners, Inc.*, No. 20-14109 WL 982126 (11th Cir. 2022).

BACKGROUND

Relators filed their original complaint in April of 2017, alleging that the defendants routinely pressured medical providers to order laboratory tests that were not medically necessary. Additionally, the relators alleged that the defendants also ran excessive test panels that were not medically necessary. These relators filed an amended complaint in January of 2019. However, a separate group of relators had already filed a *qui tam* action in August of 2016, eight months prior to this suit, alleging the same fraud scheme. This original lawsuit reached settlement in August of 2020. After that settlement, the *Cho* relators filed a Second Amended Complaint, which was dismissed by the trial court under the first-to-file rule.

THE ORIGINAL COMPLAINT IS THE PROPER POINT OF REFERENCE

The defendant moved to dismiss the relator's suit on several grounds, one of which argued that the relator's suit was barred by the FCA's first-to-file rule. The first-to-file rule states that "[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." This rule serves two purposes - first to "eliminate parasitic plaintiffs who piggyback off the claims of a prior relator" and second "to encourage legitimate relators to file quickly by protecting the spoils of the first to bring a claim." The relators argued that, because their amended complaint was filed at the time that the other lawsuit was not pending, this rule does not bar their claim even though the other action was pending when their original complaint was filed.

The district court disagreed and granted the defendant's motion to dismiss. The Eleventh Circuit affirmed the dismissal of the suit and reasoned that the FCA's first-to-file bar turns on when relators "*initiated* legal proceedings—not on the moment the Relators amended their complaint." Additionally, the Court noted that other circuits have recognized that while an amended complaint may change the facts plead in the action, it does not change the fact that the suit was initially brought at a time when another action was pending.

The Eleventh Circuit Court's ruling preserves the purpose behind the first-to-file rule, avoiding parasitic lawsuit. Had it allowed an amended complaint to resuscitate a lawsuit otherwise barred by the rule, any second-place or subsequent relator could simply wait for the first lawsuit to get settled, then renew their claim to seek damages for actions already settled by the government.

PRACTICAL TAKEAWAYS

The FCA offers very few protections for health care providers. The first-to-file rule is one of them, barring additional whistleblowers from "piling on" providers already dealing with an original FCA action. In the incredibly complex, and often mutually inconsistent, world of government-payer health care, any statutory, regulatory or guideline-related violation can expose a provider to onerous FCA litigation. When in doubt about any action, or when employees or others raise questions of medical necessity, it is crucial to evaluate the allegations, and it best to do so through counsel and with the benefit of the attorney-client privilege.

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