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First Circuit Reaffirms False Claims Act's "First-to-File" Bar as a Broad Jurisdictional Limit

Article By:

Matt Turetzky

In early December 2014, the United States Court of Appeals for the First Circuit reaffirmed that circuit's broad interpretation of the False Claims Act's "first-to-file" bar, 31 U.S.C. § 3730(b)(5), in *United States ex rel. Ven-a-Care of the Fla. Keys v. Baxter Healthcare Corp.*, 772 F.3d 932 (1st Cir. 2014). The first-to-file bar, as we have discussed in previous posts, prohibits a second relator from going forward with a False Claims Act ("FCA") case that is similar to an earlier relator's case.[2]

The first relator, Ven-a-Care, was a specialty pharmacy based out of the Florida Keys. In the 1990s, Ven-a-Care filed a FCA suit against dozens of pharmaceutical company defendants, including Baxter. Ven-a-Care alleged that Baxter and other pharmaceutical companies defrauded Medicare and state Medicaid programs by falsely reporting the prices of its drugs to prescription drug compendia. Since Medicare and state Medicaid tied their reimbursement rates to the prices reported in prescription drug compendia, Ven-a-Care alleged that requests for such reimbursements violated the False Claims Act.

The second relators, Linette Sun, a former Baxter employee, and Greg Hamilton, an industry insider, filed their FCA case against Baxter in the early 2000s. Sun and Hamilton raised essentially the same allegations as Ven-a-Care, but did so with regard to Advate, a drug not mentioned in the original Ven-a-Care complaint. Sun and Hamilton also alleged that the fraud identified in their complaint covered a later time period (post-2000) than the Ven-a-Care complaint (1990s to 2002).

In the First Circuit, the first-to-file bar applies whenever a later filed *qui tam*shares the same "essential facts" as the first *qui tam*. *Ven-a-Care*, 772 F.3d at 938. The *Ven-a-Care* court admitted that "[e]xactly how specific a complaint must be to provide the 'essential facts' is not something we have previously described with precision." *Id.* at 939. The court nevertheless found enough guidance in earlier cases to hold that the essential facts test is satisfied if a first filed *qui tam* provides "enough information to [cause the Government] to discover related frauds" alleged by a second *qui tam*. *Id.* at 942. Applying these standards, the court held that Sun and Hamilton's complaint was prohibited by the first-to-file bar. Sun and Hamilton's complaint, according to the First Circuit, "merely provides 'additional facts and details about the same scheme' pled in Ven-a-Care's earlier-filed complaint, which already provided the 'essential facts' about that same scheme." *Id.* at 944 (quoting *United States ex rel. Heineman-Guta v. Guidant Corp.*, 718 F.3d 28, 36 (1st Cir. 2013)).

The case demonstrates that False Claims Act's first-to-file bar remains a potent defense for FCA defendants. The first-to-file bar will preclude a second relator's case, as it did in *Ven-a-Care*, even though slight differences in allegations or time periods might exist. So long as two FCA *qui tam* cases share the same "essential facts," the second case is barred.

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[1] In the interest of full disclosure, Sheppard Mullin attorney Matthew W. Turetzky participated in the representation of Baxter Healthcare Corporation in the Sun and Hamilton *qui tam* before joining the firm.

[2] The first-to-file bar states that "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).

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