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D.C. Circuit Creates Circuit Split Regarding Jurisdictional Nature of the False Claims Act's First-to-File Rule

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In the recently decided *U.S. ex rel. Heath v. AT&T Inc.*, No. 14-7094 (June 23, 2015), the D.C. Circuit rejected the general consensus of the circuit courts and held that the False Claims Act's ("FCA") first-to-file rule is not jurisdictional. This decisions creates a circuit split between the D.C. Circuit and the First, Fourth, Fifth, Sixth, Ninth and Tenth Circuits, which have all characterized the first-to-file rule as a jurisdictional limitation on the FCA.[1] In doing so, *Heath* calls into question both the nature and the scope of the protection offered by the rule, which bars copycat relators from bringing suits premised upon the same underlying facts of a previously filed FCA suit.

At issue in *Heath* was the question of whether the lower court had properly dismissed relator Todd Heath's *qui tam* suit against AT&T. Heath had alleged that AT&T had engaged in a corporate-wide scheme to violate the Federal Communication Commission's E-Rate program, through which companies provide discounted telecommunication and internet access to eligible schools and libraries. The lower court dismissed this suit on jurisdictional grounds, finding that the FCA's first-to-file rule prohibited the suit because Heath had already filed an FCA suit against Wisconsin Bell, a wholly owned subsidiary of AT&T, alleging that it too had fraudulently charged certain schools higher rates than required by the E-Rate program. According to the lower court, the allegations against AT&T stemmed from the earlier suit against Wisconsin Bell, as the subsidiary's alleged misconduct should have led the Government to investigate the nationwide practices of AT&T that were now at the heart of Heath's claim against the company.

The D.C. Circuit rejected entirely the lower court's decision. The D.C. Circuit found that the lower court had improperly applied the first-to-file rule and that the allegations against Wisconsin Bell and AT&T were based upon separate sets of operative facts. The claim against Wisconsin Bell was based on allegations of individual misconduct by employees of the subsidiary, while the claim against AT&T alleged a corporate-wide scheme to overcharge under the E-Rate program. According to the D.C. Circuit these facts were sufficiently distinct as to prevent application of the first-to-file rule.

More importantly, the D.C. Circuit ruled that the first-to-file bar was not jurisdictional. Though recognizing that numerous courts of appeals had characterized the rule as jurisdictional, the D.C. Circuit noted that 31 U.S.C. § 3730(b)(5),[2] which establishes the first-to-file bar, makes no mention of the jurisdiction of the federal courts or their power to consider a claim. Rather, according to the D.C. Circuit, the statute "speaks only to who may bring a private action and when." Absent any clear

statement as to the jurisdictional nature of the rule, the D.C. Circuit concluded that the first-to-file rule could not be considered jurisdictional, but rather a procedural requirement bearing upon whether a plaintiff has properly stated its claim.

As a pleading standard, rather than a jurisdictional limitation on the FCA, any attempt to invoke this rule and its protections would have be to done at the outset of litigation, potentially before substantive discovery and before the defendant truly understands the basis for the plaintiff's claims. This would represent a stark departure from the protection the first-to-file rule has previously provided defendants, who have invoked this rule as late as the post-judgment phase of a case.[3] Thus, *Heath* could have an important impact on the protection provided by the first-to-file rule and creates an inconsistency among the circuits that the Supreme Court may ultimately have to decide.

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[1] *United States ex rel. Ven-a-Care of the Fla. Keys v. Baxter Healthcare Corp.*, 772 F.3d 932 (1st Cir. 2014); *U.S. ex rel. Carter v. Halliburton Co.*, 710 F.3d 171, 181 (4th Cir. 2013) aff'd in part, rev'd in part and remanded sub nom.*Kellogg Brown & Root Servs., Inc. v. U.S., ex rel. Carter*, 135 S. Ct. 1970 (2015); *U.S. ex rel. Branch Consultants v. Allstate Ins. Co.*, 560 F.3d 371, 376 (5th Cir. 2009); *Walburn v. Lockheed Martin Corp.*, 431 F.3d 966, 970 (6th Cir. 2005); *U.S. ex rel. Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181, 1183 (9th Cir. 2001); *Grynberg v. Koch Gateway Pipeline Co.*, 390 F.3d 1276, 1278 (10th Cir. 2004)

[2] "When a person brings an action under this subsection, 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).

[3] I*n re Pharm. Indus. Average Wholesale Price Litig.*, No. 08-11200-PBS, 2013 WL 2420912, at *4 (D. Mass. May 31, 2013) aff'd sub nom. *U.S. ex rel. Ven-A-Care of the Florida Keys, Inc. v. Baxter Healthcare Corp.*, 772 F.3d 932 (1st Cir. 2014) (finding that the first-to-file rule could be used to prevent the reopening of a prior case).

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