wiley

ARTICLE

Case Study: *US V. SLM*

Law360
November 17, 2011

On Nov. 4, 2011, the United States Court of Appeals for the District of Columbia Circuit held that under the False Claims Act's "first-to-file" rule, 31 U.S.C. § 3730(b)(5), a *qui tam* complaint need not meet the heightened pleading standard of Federal Rule of Civil Procedure 9(b) to potentially bar a later-filed qui tam complaint. Under Section 3730 (b)(5), when a whistleblower brings an action on behalf of the government, no other whistleblower may bring a subsequent action based on the same underlying facts.

The D.C. Circuit, in *United States ex rel. Batiste v. SLM Corp.*, No. 10-7140 (D.C. Cir. Nov. 4, 2011), recently explained that an initial complaint can trigger the first-to-file bar even if not pled with particularity as long as it is sufficient to "give the Government grounds to investigate."

The D.C. Circuit thus affirmed the district court's dismissal of whistleblower Batiste's *qui tam* complaint for lack of subject matter jurisdiction because an earlier filed complaint had alleged the same material elements of a fraudulent scheme and put the government on notice of the material facts necessary to instigate an investigation.

Lower Court Rulings

In November of 2005, an initial whistleblower filed a *qui tam* complaint against SLM Corporation. The complaint alleged that SLM encouraged its employees to falsify forbearance records because the company received allowances from the U.S. Department of Education when borrowers' loans were in forbearance but not when they were in default. The whistleblower's complaint was dismissed without prejudice on March 12, 2009, for failure to obtain counsel.

Authors

Roderick L. Thomas
Partner
202.719.7035
rthomas@wiley.law

Practice Areas

Government Contracts

Issues and Appeals

White Collar Defense & Government Investigations

On June 13, 2008, Batiste filed a second *qui tam* complaint against SLM. Batiste alleged that SLM unlawfully placed student loans into forbearance in violation of the Higher Education Act's regulations. Furthermore, Batiste alleged that SLM systemically encouraged employees to violate these regulations by incentivizing loan officers to grant as many forbearances as possible.

The district court dismissed Batiste's complaint with prejudice for lack of subject matter jurisdiction, holding that his complaint was barred by the FCA's first-to-file rule because both complaints, even though they had some differing allegations, included the "same material elements" of fraud. The district court rejected the argument that the initial complaint's failure to state with particularity the circumstances constituting fraud or mistake allowed Batiste to circumvent the first-to-file bar.

The D.C. Circuit Decision

On appeal, along with arguing that his complaint was inappropriately dismissed with prejudice, Batiste argued that (1) the FCA's first-to-file bar was not applicable to his complaint as he alleged different fraudulent schemes and (2) the FCA requires the first complaint to meet the requirements of 9(b) for the first-to-file bar to apply.

The court of appeals rejected Batiste's arguments. The court first acknowledged that the first-to-file rule of Section 3730(b)(5) does not require identical facts to bar a subsequent complaint, if the second complaint alleges "a fraudulent scheme the government already would be equipped to investigate based on the [first complaint]." Slip op. at 8. The court concluded that despite differing specific allegations, both complaints gave the government sufficient information to investigate SLM's nationwide forbearance practices. Id. at 9.

The court also held that nothing in the language of the FCA's first-to-file bar incorporates the particularity requirement of Rule 9(b) – which itself discourages imposing a reading of its requirements into a statute – and thus the only requirement of the first complaint is to provide the government with sufficient information to launch an investigation. Id. at 11.

In support, the court noted that Rule 9(b) is designed to protect defendants from frivolous accusations, while Section 3730(b)(5) allows recovery when the government is put on notice but "bar[s] copycat actions that provide no additional material information." Id. Thus, the court decided, a complaint may provide the necessary information to put the government on notice without meeting the particularity standards of Rule 9 (b).

The D.C. Circuit's decision has clarified its stance that the FCA's first-to-file rule only requires the initial whistleblower to allege facts sufficient to allow the government to start an investigation to bar any subsequent citizen from filing suit on the same material facts.

If this theory gains additional traction, it may provide some relief for government contractors and other entities that routinely find themselves subject to FCA lawsuits by discouraging prospective whistleblowers from engaging in wide-ranging "fishing expeditions" based upon prior whistleblowers' allegations. Contractors should be mindful, however, that other courts have taken a narrower view, and the limits of the first-to-file bar

are still poorly defined.

Regardless, in the wake of the D.C. Circuit's decision, it is now more important than ever for defense attorneys to identify prior suits against their FCA clients. Previous allegations may provide the underpinning for dismissal under the theory laid out by the D.C. Circuit.