The Insufficient Complaint - Consequences

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When amending the False Claims Act ("FCA") in 1986, Congress enacted several new provisions that created a "race to the courthouse" between different relators, as well as between relators and the government itself.[1] These provisions "were designed to inspire whistle-blowers to come forward promptly with information concerning fraud so that the government can stop it and recover ill-gotten gains" as soon as possible.[2]

Without question, early filing of a *qui tam* suit, when done properly, has its advantages for both the relator and the government. Not only does the early filing of a sufficient complaint commence the suit for statute of limitations purposes, it also reduces the risk that the relator's action will be precluded by one of the FCA's jurisdictional bars – *e.g.*, the "first-to-file" bar, the "pending government action" bar and the "public disclosure" bar.[3]

As highlighted by several recent cases, however, the filing of an **insufficient** complaint (not to be confused with a meritless complaint) can have deleterious consequences that can lead to, *inter alia*, first-filing relators being supplanted by second-filing relators and the dismissal of otherwise legitimate claims as time-barred.

I. OVERVIEW OF THE FCA AND THE 1986 AMENDMENTS

The FCA was originally enacted in 1863, during the Civil War, to combat Union contractor fraud. The original Act imposed civil and criminal penalties on persons who submitted a false claim for payment to the government. The original Act also provided for federal jurisdiction over civil *qui tam* actions.

Such private enforcement was necessitated by the government's inability to combat contractor fraud while its resources were tied up with the Civil War. Harsh sanctions were provided for in the original Act: double damages and a $2,000 penalty for each false claim by a government contractor. Individuals who brought successful *qui tam* suits were entitled to one half of the forfeitures and damages collected. This provided individuals with a strong incentive to bring *qui tam* suits. However, in order to discourage frivolous lawsuits, the Act required the relator to bear the cost of pursuing the suit and also allowed the government to intervene and take over the suit at its sole discretion.

Despite the potential for huge windfalls, the end of the Civil War and the requirement that the relator bear the cost of pursuing the suit resulted in few actions under the *qui tam* provision until the 1930's. Several factors led to an increase in the number of *qui tam* suits brought in the 1930's and early 1940's. First, the military build-up prior to World War II and the enactment of the New Deal in the 1930's and early 1940's expanded opportunities for government contractors to increase profits through fraud. Second, although the Act attempted to

discourage frivolous lawsuits by requiring relators to bear the costs of bringing the suit, the Act did not limit recovery to *qui tam* plaintiffs with direct knowledge of previously unknown fraud. As a result, the Act allowed for "parasitic" actions in which individuals used information in criminal fraud indictments to bring civil *qui tam* actions and obtain a fifty percent share in any recovery.

For example, in 1941, an opportunistic relator allegedly instituted a civil action under the FCA which incorporated allegations copied from a criminal indictment under the FCA. Although the relator brought no new information to the government's attention, the Supreme Court held that the relator was entitled to half of any money judgment resulting from the civil action under the FCA.[4]

The Court's opinion in *Hess* led to a significant revision of the Act in 1943 which narrowed a *qui tam* relator's ability to bring suit and reduced the potential bounty the relator could receive. The 1943 amendments included a jurisdictional bar against *qui tam* suits "whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought."[5] This government knowledge defense effectively prohibited government employees from bringing suit under the FCA.

The courts expansively construed the jurisdictional bar under the 1943 Act. For example, in *Dean*, the Seventh Circuit held that the FCA barred a *qui tam* suit "whenever the government has knowledge of the 'essential information upon which the suit is predicated' before the suit is filed, even when the plaintiff is the source of that knowledge."[6]

In the 1980's, Congress became alarmed at the perceived level of fraud in government contracting and cases such as *Dean* led Congress to believe that the FCA no longer served as an effective enforcement tool or as a sufficient deterrent to fraud. Therefore, Congress, in 1986, made only the second major revision of the Act since 1863 in an effort to reinvigorate the FCA. Congress took the opportunity to expand the availability of *qui tam* actions, increase the financial incentive to bring such suits and clarify statutory language which had led to conflicting judicial interpretations of the pre-1986 Act. In particular, several new *qui tam* provisions were enacted which were designed to encourage whistle-blowing at the earliest possible time while also discouraging opportunistic behavior.[7]

Section 3730(b)(5), commonly known as the first-to-file bar, provides:

> 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).

Section 3730(e)(3), commonly known as the pending government action bar, provides:

> In no event may a person bring an action under [the *qui tam* provisions] which is based upon allegations or transactions which

> are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

31 U.S.C. § 3730(e)(3).

Both sections 3730(e)(3) and 3730(b)(5) "establish[ ] a first in time rule,"[8] which applies even where the prior action has yet to be unsealed.[9] Thus, "[t]he *qui tam* complaint filed first blocks subsequent *qui tam* suits based on the same underlying facts," or which share a "host/parasite" relationship with the earlier filed suit.[10]

Section 3730(e)(4), commonly known as the public disclosure bar, provides:

> (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

31 U.S.C. § 3730(e)(4). The public disclosure bar is intended to filter out parasitic *qui tam* lawsuits that "the government is capable of pursuing itself" based on information already in its possession.[11] Thus, if the allegations in the relator's *qui tam* complaint "do not benefit the government because the government already knew about them, then § 3730(e)(4)(A) bars jurisdiction" (unless the relator can establish that she is an original source).[12]

II. DISPLACING A FIRST-TO-FILE RELATOR

Given the financial incentives under the FCA, it is no surprise that multiple relators sometimes file overlapping suits. Indeed, Congress recognized the potential for such multiple *qui tam* claims and enacted the first-to-file bar to address the concern. In furtherance of the FCA's goal of incentivizing early disclosure, the first-to-file bar's plain words seemingly reward the earliest-filing relator. Not all courts, however, agree that the language of 31 U.S.C. § 3730(b)(5) is so plain.

A. *UNITED STATES EX REL. CAMPBELL V. REDDING MEDICAL CENTER*

At first glance, one may conclude that the issue of which of multiple relators has primacy is of importance only to the relators competing for the right to share in any eventual recovery. That conclusion, however, would overlook the complexities of the FCA. If the action is based

upon publicly disclosed allegations or transactions, for example, the court is divested of jurisdiction over the action unless the relator is an "original source" of the information. In some instances, one relator may qualify as an "original source," while the other may not. As such, the choice of relator can determine whether or not the action proceeds, even when all the relators' allegations are essentially identical. This was precisely the case in *United States ex rel. Campbell v. Redding Med. Ctr.*, 421 F.3d 817 (9th Cir. 2005).

In *Campbell*, FCA actions were filed by two competing relator groups. The first-filed action was brought by two individuals, Corapi and Zerga (collectively, "Corapi"), under the FCA and the California FCA alleging that the defendants had submitted false claims to federal and state medical insurance programs. The second-filed action was brought three days later by Campbell, who filed his complaint under the same two statutes against the same defendants and alleging the same fraudulent scheme. Notwithstanding the government's and Campbell's filing of notices of related cases, the *Corapi* court declined to treat the cases as related, resulting in Campbell's case being assigned to a different judge within the same district court.

Upon the government's motion, and relying on the Ninth Circuit's previous decision in *United States ex rel. Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181 (9th Cir. 2001) (dismissing second-filed complaint under first-to-file bar despite dismissal of first-filed complaint on the merits), the *Campbell* court dismissed Campbell's complaint for lack of subject matter jurisdiction under the FCA's first-to-file bar. The *Campbell* court seemingly was on strong ground in concluding that *Lujan* compelled the dismissal of Campbell's suit. In *Lujan*, the Ninth Circuit had expressed a bright-line standard for resolving competing *qui tam* actions, stating that:

> Section 3730(b)(5)'s plain language unambiguously establishes a first-to-file bar, preventing successive plaintiffs from bringing related actions based on the same underlying facts . . . . Moreover, an **exception-free, first-to-file bar** conforms with the dual purposes of the 1986 amendments: to promote incentives for whistle-blowing insiders and prevent opportunistic successive plaintiffs.

Id. at 1187 (emphasis added).

On appeal, the Ninth Circuit in *Campbell*, however, expressed concern that "[c]onstruing § 3730(b)(5) to create an absolute bar would permit opportunistic plaintiffs with no inside information to displace actual insiders with knowledge of the fraud."[13] It further noted that "[t]he government conceded at oral argument that under its interpretation of § 3730(b)(5), a purely frivolous sham complaint filed in an instance where the allegations had been publicly disclosed would bar a subsequently filed action by an original source."[14] Troubled by the potential for abuse of this hypothetical loophole, the Ninth Circuit distinguished *Lujan* and reversed the lower court's dismissal of Campbell's complaint, clarifying "that in a public disclosure case, the first-to-file rule of § 3730(5) bars only subsequent complaints filed after a complaint that fulfills the jurisdictional prerequisites of § 3730(e)(4)."[15]

B. *WALBURN V. LOCKHEED MARTIN CORP.*

As did the Ninth Circuit, the Sixth Circuit, in *Walburn*, declined to adopt an absolute bar against subsequent-filed *qui tam* suits, holding that an insufficient complaint under Rule 9(b) would not preclude a subsequent-filed case even if the first-filed complaint clearly "encompassed" the allegations of the subsequent complaint.[16]

In *Walburn*, Walburn filed a *qui tam* suit alleging that Lockheed had altered the recorded readings of dosimeters that measured radiation exposure at one of its plants used to enrich uranium and store nuclear materials. Walburn's suit was filed one month after another relator, Brooks, filed a *qui tam* suit in a Maryland District Court alleging, *inter alia*, falsification of documentation at the same plant, apparently without any specific reference to dosimeter readings. After finding that Walburn's allegations were encompassed within Brooks's complaint, the district court in *Walburn* dismissed Walburn's action for lack of subject matter jurisdiction under the first-to-file bar.

On appeal, Walburn argued that Brooks's action should not be given preemptive effect under the first-to-file rule because it failed to satisfy Rule 9(b). Notably, it was not until the pendency of the appeal that the *Brooks* court ultimately dismissed Brooks's action for failure to comply with Rule 9(b). While the Sixth Circuit acknowledged the dismissal of Brooks's action, it expressly stated that its holding was not based on the *Brooks* court's dismissal "because the ultimate fate of an earlier-filed action does not determine whether it bars a later action under 3730(b)(5) – rather, the question is only whether the earlier action was 'pending' at the time the later action was filed."[17] Under the Sixth Circuit's standard, therefore, the court in the second-filed case must independently review the sufficiency of the first-filed complaint. The Sixth Circuit proceeded to undertake its own independent evaluation of the sufficiency of Brooks's complaint and held that it failed to satisfy Rule 9(b), "render[ing] it legally infirm from its inception, and therefore it cannot preempt Walburn's action under the first-to-file bar."[18]

C. OPEN QUESTIONS

In declining to adopt an absolute "no-exceptions" interpretation of the first-to-file rule, the Sixth and Ninth Circuits have invited a potential quagmire for the courts when faced with multiple *qui tam* claims. The uncertainties and complexities that can result from such an imprecise rule are immediately apparent in the facts of *Campbell* and *Walburn*.

In reversing the dismissal of Campbell's complaint, the Ninth Circuit acknowledged that the district court would necessarily have to determine if Corapi was an original source and that, "[a]s a practical matter, there is almost no way that this determination can be made unless both the Corapi/Zerga and Campbell cases are consolidated."[19] How would the courts deal with this issue, however, if the *Corapi/Zerga* case had already been dismissed upon final judgment or settlement? What if the *Corapi/Zerga* and *Campbell* cases had been filed in different courts – or different Circuits, with different interpretations of the public disclosure and first-to-file bars? In which court would the cases be consolidated? And which Circuit's precedents would be binding?

Moreover, the public disclosure bar does not appear to have been raised in the *Corapi* case – indeed, the government had already settled the case with the defendants and agreed to pay Corapi a substantial share of the recovery. Once the government pays a relator its share of the recovery, does that foreclose challenges by other relators?

The Sixth Circuit held that for purposes of the first-to-file bar, the determination of the sufficiency of Brooks's complaint need not, and should not, be made by the *Brooks* court. The Sixth Circuit instead independently determined that Brooks's complaint failed to satisfy Rule 9(b) and that Walburn's complaint therefore was not precluded by the first-to-file bar. Yet, Brooks had appealed the dismissal of his complaint under Rule 9(b), an appeal which remains pending. If Walburn's action had not been precluded by the public disclosure bar and the Fourth Circuit ultimately reverses the dismissal of Brooks's action, how will the courts determine which action should be dismissed? If Brooks had cured the Rule 9(b) deficiencies in an amended complaint, but only after the filing of Walburn's complaint, would Walburn's action be dismissed? Would the pending government action bar preclude a relator's action if the government's initial complaint was found to be insufficient under Rule 9(b)?

Ultimately, Walburn's suit was dismissed under the public disclosure bar because it was based upon the public disclosure of allegations or transactions in a non-FCA case that he had brought against Lockheed years earlier. Had he not brought that non-FCA case, however, could Walburn's suit have been dismissed under the public disclosure bar as based upon the public disclosure of allegations or transactions in *Brooks*?[20] The public disclosure bar is triggered by the public disclosure of the "allegations or transactions" of the fraud, and is not dependent on whether the "particulars" of the allegations or transactions were themselves disclosed – consequently, it should not matter that Brooks's complaint failed to comply with Rule 9(b). Does it depend, however, on whether Walburn filed his *qui tam* suit before the complaint in *Brooks* was unsealed?

These are just some of the myriad issues that the courts may have to decide in future cases.

III. FILING IN THE WRONG VENUE DOES NOT COMMENCE AN FCA SUIT FOR STATUTE OF LIMITATIONS PURPOSES

Consequences stemming from the insufficiency of a relator's initial complaint are not limited to situations involving multiple *qui tam* claims. They also impact whether or not a subsequent-filed complaint can relate back, for statute of limitations purposes, to the original-filed complaint. In this way, it can impact not only **who** the plaintiff will be, but also **what** claims can be pursued.

A. *UNITED STATES V. BAYLOR UNIV. MEDICAL CENTER*

In *United States v. Baylor Univ. Med. Ctr.*, 469 F.3d 263 (2d Cir. 2006), the Second Circuit held that a government's complaint-in-intervention cannot relate back, under Fed. R. Civ. P. 15, to a relator's original *qui tam* complaint because "the seal provision of the FCA deprives the defendant of notice, which is the touchstone of Rule 15(c)(2)."[21] In this case, a relator had filed a *qui tam* suit in March 1994 in the Western District of Washington against 132 hospitals in

thirty states, alleging that the hospitals had defrauded Medicare since 1986 by seeking and obtaining reimbursements in connection with clinical trials that involved cardiac devices that had not received FDA premarket approval. There was no allegation that the various hospitals had collaborated or conspired with each other, and only two of the 132 hospitals were located in the Western District of Washington.

In 1999, more than five years after the suit was filed under seal, the government – without formally intervening – filed *ex parte* motions for severance and transfer of venue as to particular hospitals to the districts where the hospitals were located. Finally, in late 2002 to early 2003, after having negotiated settlements with some hospitals and dismissing others, the government filed complaints-in-intervention against the remaining hospitals. The government's complaints-in-intervention alleged that the hospitals made their last false claims in 1995. After the cases were consolidated in the District of Columbia by the United States Judicial Panel on Multi-district Litigation, the hospitals moved to dismiss the cases on various grounds, including that the claims were time-barred. The Second Circuit agreed, holding that for statute of limitations purposes, each action had not commenced until the government filed its complaint-in-intervention in 2002-2003, more than six years after the last alleged false claim.[22]

The Second Circuit next considered whether the government's claims related back to the original complaint pursuant to Fed. R. Civ. P. 15(c)(2), which provides that "[a]n amendment of a pleading relates back to the date of the original pleading when . . . the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." The district court had held that Rule 15(c)(2) could apply to the government's complaint-in-intervention even though it was not an amended complaint by the original party. The Second Circuit disagreed, noting that the *qui tam* provision is "distinctive for the secrecy it affords the relator's *qui tam* complaint," and that such secrecy "is incompatible with Rule 15(c)(2), because (as is well-settled) the touchstone for relation back pursuant to Rule 15(c)(2) is notice, *i.e.*, whether the original pleading gave a party 'adequate notice of the conduct, transaction, or occurrence that forms the basis of the claim or defense'."[23] The Second Circuit held that, as a result, all of the government's claims were time-barred.

B. OPEN QUESTIONS

The *Baylor University Medical Center* case has potentially wide-ranging implications for *qui tam* suits under the False Claims Act. When the government intervenes in a *qui tam* suit, it almost always files its own complaint-in-intervention. Where a relator initially files in the correct venue, can the government intervene without risking the dismissal of claims as time-barred? Or is the holding of *Baylor University Medical Center* limited to cases where the government has filed in a new venue?

As the Second Circuit acknowledged, when the government decides to intervene in a *qui tam* suit, "the intervention will almost always involve an amended complaint."[24] However, there is no statutory requirement that it do so. If the government had merely joined in the relator's original complaint, rather than filing an amended complaint, would the claims have been time-barred? If not, could the government in *Baylor University Medical Center* have initially joined in the relator's original complaint and then later amended it, thereby accomplishing in two steps what it tried to accomplish in one step?

This case also raises interesting questions for cases in which the government ultimately declines to intervene. In a footnote, the Second Circuit hinted that a relator's "grossly insufficient" complaint may not commence an action for statute-of-limitations purposes, in part because it prolongs the time needed by the government to determine whether or not to intervene, thereby delaying "notice" to the defendants and thwarting the purpose of the statute of limitations.[25] Given the frequency in which relators file complaints that are grossly deficient under Rule 9(b), at what point will a court hold that such a deficient complaint fails to commence the action for statute of limitations purposes?

Will the court's concerns regarding notice extend to the often protracted period of time that *qui tam* suits remain under seal?[26] It is no longer unheard of for six years or more to pass before the government files notice that it declines to intervene in the action, with the complaint remaining under seal for that entire time period. In such circumstances, are there instances in which the government's delay will cause a relator's claims to be time-barred? Does it depend on whether the government or relator has obtained a partial unsealing of the complaint for the limited purpose of advising the defendant of the suit?

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1 "The prompt reporting of fraud is essential to the effectiveness of the *qui tam* scheme and to the government's ability to recover under the FCA," and that "objective is best served if relators are encouraged to 'race to the courthouse.'" *United States ex rel. Merena v. SmithKline Beecham Corp.*, No. 93-5974, 1997 U.S. Dist. LEXIS 19896, at *58 (E.D. Pa. July 21, 1997); *see also, e.g.*, *United States ex rel. Campbell v. Redding Med. Ctr.*, 421 F.3d 817, 821 (9th Cir. 2005) (noting that the first-to-file bar creates "a race to the courthouse among those with knowledge of fraud").

2 *Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 685 (D.C. Cir. 1997).

3 *See* 31 U.S.C. §§ 3730(b)(5), (e)(3) and (e)(4).

4 *United States ex rel. Marcus v. Hess*, 317 U.S. 537, *reh. denied*, 318 U.S. 799 (1943).

5 31 U.S.C. § 232(C) (Supp. III 1943), 57 Stat. 608 (1943).

6 *United States ex rel. Wisconsin v. Dean*, 729 F.2d 1100, 1103 (7th Cir. 1984) (citing *United States ex rel. Weinberger v. Florida*, 615 F.2d 1370, 1371 (5th Cir. 1980)).

7 *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 651 (D.C. Cir. 1994); *United States ex rel. Barth v. Ridgedale Elec. & Eng'g.*, 44 F.3d 699, 704 (8th Cir. 1995).

8 *See United States ex rel. Erickson v. American Institute of Biological Sciences*, 716 F. Supp. 908, 918 (E.D. Va. 1989) (§ 3730(b)(5)); *United States ex rel. Alexander v. Dyncorp, Inc.*, 924 F. Supp. 292, 302-03 (D.D.C. 1996) (dismissing, pursuant to § 3730(e)(3), four allegations that were previously alleged in an earlier filed case).

9 *See Merena*, 1997 U.S. Dist. LEXIS 19896, at *57.

10 *Erickson*, 716 F. Supp. at 918 (§ 3730(b)(5)); *United States ex rel. Prawer & Co. v. Fleet Bank*, 24 F.3d 320, 327 (1st Cir. 1994) (§ 3730(e)(3)); *see also Alexander*, 924 F. Supp. at 302 (same).

11 *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 651 (D.C. Cir. 1994); *cf. United States ex rel. Karvelas v. Melrose-Wakefield Hosp.*, 360 F.3d 220, 230 (1st Cir. 2004) (noting that "individuals who must rely upon information already in the

possession of the government to adequately state their claim" cannot be "original sources" under the FCA).

[12] *United States ex rel. Biddle v. Bd. of Trustees of the Leland Stanford, Jr. Univ.*, 161 F.3d 533, 539 (9th Cir. 1998); *see also United States ex rel. Schwedt v. Planning Research Corp.*, 39 F. Supp. 2d 28, 33 n.3 (D.D.C. 1999) ("qui tam suits are jurisdictionally barred when public disclosure of the transactions is sufficient to raise the inference of fraud").

[13] *Campbell*, 421 F.3d at 824.

[14] *Id.*

[15] *Id.* at 825.

[16] *Walburn v. Lockheed Martin Corp.*, 431 F.3d 966, 969 (2005).

[17] *Id.* at 972 n.5.

[18] *Id.* While holding that the first-to-file bar did not preclude Walburn's action, the Sixth Circuit nonetheless affirmed the dismissal of the action under the public disclosure bar, finding that Walburn's action was based on information that had been publicly disclosed in a non-FCA suit filed by Walburn years earlier. The Sixth Circuit also found that Walburn did not qualify as an original source of the information because he did not disclose it to the government prior to the filing of his non-FCA suit. *Id.* at 973-76.

[19] *Campbell*, 421 F.3d at 825.

[20] *See* 31 U.S.C. § 3730(e)(4).

[21] *See also United States ex rel. Health Outcomes Technologies v. Hallmark Health Sys., Inc.*, 409 F. Supp. 2d 43 (D. Mass. 2006) (holding that the government's claims in intervention did not relate back to the relator's original complaint where the relator's claims were originally made in the wrong venue).

[22] *Baylor Univ. Med. Ctr.*, 469 F.3d 263 (2d Cir. 2006).

[23] *Id.* at 269.

[24] *Id.*

[25] *Id.*

[26] Although § 3730(b) provides that the government's intervention decision shall be made "within 60 days after it receives both the [relator's] complaint and the material evidence and information," the government can seek extensions of the 60-day period "for good cause." 31 U.S.C. § 3730(b)(2) and (b)(3).