

## U.S. Circuits Split on False Claims Act Issues

Under the *False Claims Act* (FCA), it is illegal for a person to knowingly present, or cause to be presented to the government, a false or fraudulent claim for payment or approval.<sup>1</sup> One way in which a person or entity files a false claim is known as an *implied false claim*, wherein the provider submits a claim to a government payor, such as Medicare and Medicaid, while the submitter is materially noncompliant with the government program’s payment agreement.<sup>2</sup> Further, a whistleblower can bring a suit alleging a violation under the FCA on behalf of the United States government through what is known as a *qui tam* action. Through a *qui tam* action, a whistleblower is entitled to a percentage of the judgment or settlement, unless the information was already publicly disclosed, in which event the action is prohibited (unless opposed by the government), i.e., the suit is subject to a *public disclosure bar*.<sup>3</sup>

In addition to the *public disclosure bar*, the *first-to-file* rule states that “no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.”<sup>4</sup> This prevents abusive litigation because only one suit can be filed per instance or scheme.<sup>5</sup> Until 2015, the *first-to-file* provision was held universally as *jurisdictional* (i.e., that the claim can only be brought in a court that has the power to hear and rule on that claim, in contrast to non-jurisdictional, wherein any court could hear and rule on the claim<sup>6</sup>) by the First, Fourth, Ninth, and Tenth circuits.<sup>7</sup> However, in the 2015 *U.S. ex rel. Heath v. AT&T Inc.* case, the D.C. Circuit became the first court to rule opposite stating that “[t]he *first-to-file* rule is not jurisdictional” but “bears only on whether a *qui tam* plaintiff has properly stated a claim.”<sup>8</sup> This was significant because it created a *circuit split* (i.e., a disagreement among the various U.S. circuit courts regarding the interpretation of a given statute, law,

or regulation) ruling that the *first-to-file* rule is merely a matter of adequate pleading (i.e., that defendants only argue that the plaintiff’s complaint is not well pled,<sup>9</sup> and cannot argue a lack of jurisdiction).<sup>10</sup> In April 2017, the Second Circuit “join[ed] the D.C. Circuit in holding that the FCA’s *first-to-file* rule bears only on whether a *qui tam* plaintiff has properly stated a claim.”<sup>11</sup> The Second Circuit noted that subsections 3730(e)(1) and 3730(e)(2) start with the words “No court shall have jurisdiction over” while the public disclosure bar subsection does not contain that language.<sup>12</sup> In 2013, the *Supreme Court of the United States* (SCOTUS) held that, unless Congress clearly states that a statutory provision is *jurisdictional*, it is presumed to be *non-jurisdictional*.<sup>13</sup> Further, until 2010, the *public disclosure bar* provision explicitly stated that it was *jurisdictional*, but in an amendment to that the provision, excluded that language, which factored into the D.C. Circuit and Second Circuit courts’ conclusions.<sup>14</sup>

Due to this circuit split, courts may decide in the future to follow the minority rule that the *first-to-file* rule is a pleading standard and is *non-jurisdictional*. Therefore, in order to assert the *first-to-file* defense, the defendant will have to invoke this rule at the outset of litigation.<sup>15</sup> Because this split exists (and appears to be “gaining steam” with more than one circuit following this minority reasoning), SCOTUS may decide to hear a case on this issue, resolve the circuit split, and provide clarity to both healthcare providers and whistleblowers. Those providers that participate in government payor programs, as well as their professional advisors, will be well-served to monitor developments related to this evolving case law, as the resolution of this split could serve to directly impact the outcome of future litigation on claims made under the FCA.

1 “False Claims” 31 U.S.C. § 3729(a)(1) (2009).

2 For more in depth analysis of implied false claims see “Implied False Certification’ Theory under False Claims Act Upheld by the Supreme Court” Health Capital Topics, Vol. 9, No. 7 (July 2016).

3 “Civil Actions for False Claims” 31 U.S.C. § 3730(e)(4)(A) (2009).

4 “Civil Actions for False Claims” 31 U.S.C § 3730 (2010).

5 “The Growing Circuit Split Over FCA First-To-File Rule” By Brian Boyle, Courtney Saleski, and Lesli Esposito, Law360, August 4, 2017, <https://www.law360.com/articles/950797> (Accessed 10/6/17).

6 This is of particular importance because whether or not a law is jurisdictional drives the types of claims that a defendant can

make on a motion to dismiss (e.g., lack of subject matter jurisdiction).

7 Boyle et al, August 4, 2017.

8 *U.S. ex rel. Heath v. AT&T Inc.*, 791 F.3d 112, 119 (D.C. Cir. 2015).

9 See Rule 12(b)(3)-(7) “Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing” Rule 12, Federal Rules of Civil Procedure.

10 Boyle et al, August 4, 2017; “Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing” Rule 12(b), Federal Rules of Civil Procedure.

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- 11 *U.S. ex rel. Hayes v. Allstate Ins. Co.*, 2017 WL 1228551 (2d Cir. Apr. 4, 2017).
- 12 “Civil Actions for False Clams” 31 U.S.C § 3730(e)(1) (2010); “Civil Actions for False Clams” 31 U.S.C § 3730(e)(2) (2010); “Civil Actions for False Clams” 31 U.S.C § 3730(e)(4) (2010).
- 13 *Sebelius v. Auburn Regional Medical Ctr.*, 817, 824 (2013).
- 14 “Mark Twain & Disagreement on Qui Tam Pleading Standards” by Norman Tabler, Jr., and Faegre Baker Daniels LLP, American Health Lawyers Association, August 11, 2017,

- <http://www.thehealthcareloop.com/american-health-lawyers-association/?id=124804> (Accessed 9/8/17).
- 15 “D.C. Circuit Creates Circuit Split Regarding Jurisdictional Nature of the False Claims Act’s First-to-File Rule” By Patrick Stanton and Kathy Brown, *Inside Government Contracts*, July 9, 2015, <https://www.insidegovernmentcontracts.com/2015/07/d-c-circuit-creates-circuit-split-regarding-jurisdictional-nature-of-the-false-claims-acts-first-to-file-rule/> (Accessed 10/20/17).



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