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Dismissal Granted in False Claims Action on First-to-File Grounds

In the instances of *False Claims Act (FCA)* litigation with more than one relator, the first-to-file provision ensures that the government is in possession of enough information that uncovers potential fraud, whether the specific allegations from one case to another mirror each other.

This point was recently illustrated in *United States ex rel. Dale v. Lincare Holdings, Inc.* when the U.S. District Court for the Southern District of Mississippi granted a motion to dismiss to the defendant. The court ruled that the claims against Lincare Holdings were prohibited by the first-to-file provision of the FCA.

Whistle-blower alleges manipulated testing by Medicare Part B provider

In the role of respiratory care provider, Lincare Holdings serves Medicare Part B enrollees through sales and leasing of medical oxygen equipment. A former sales representative for a branch of Lincare Holdings filed an FCA complaint against the company in February of 2015. The relator alleged that Lincare was engaged in a scheme intended to distort medical necessity evaluation so that the company would be reimbursed by Medicare for servicing patients that were not truly entitled to the use of the equipment.

Specifically, the whistle-blower claimed that a Lincare nurse and office manager showed employees how to get patients to move in certain ways while sensors were reading oxygen levels (for instance, lifting their arms at crucial moments). Allegedly, the goal of that patient manipulation was the production of reports that showed low levels of arterial oxygen saturation.

In August of 2015, the United States government made known its declination to intervene.

Allegations are close enough to “been there, done that” to warrant dismissal

The court relied on the first-to-file bar in its decision to grant the defense the motion to dismiss, stating that the “fraudulent scheme depicted in Relator’s complaint is largely based on the same underlying facts as the [*United States ex rel. Robins v. Lincare, Inc.*] scheme.” This provision excludes plaintiffs from bringing a “related action based on the facts underlying [a] pending action.” 31 U.S.C. § 3730(b)(5).

The *Robins* case was the first brought, filed in the U.S. District Court for the District of Massachusetts. The U.S.

District Court for the Southern District of Mississippi decided that a “substantial overlap in material facts” existed between the two complaints and therefore they met the criteria for the first-to-file bar.

The relator argued that he furnished specifics about Lincare’s alleged fraud not available in the *Robins* case (i.e., allegations of the mechanics of how the medical-necessity tests were corrupted), but the court wasn’t swayed, stating that “[b]oth complaints essentially allege that Lincare violated the FCA by generating false reports and performing unauthorized assessments in an effort to improperly qualify patients for Medicare-covered oxygen. . . . *Robins* provided sufficient information to put the government on notice of the related fraud described here, as it is likely that an investigation into the *Robins* allegations would reveal the fraudulent conduct alleged in Relator’s complaint.”

The court went on to acknowledge that fraud claims do not need to be exact in the specifics they allege. Rather, the “essential focus” will be on the question of whether investigating the initial claim would result in the same underlying fraudulent behavior that the subsequent claim alleges.

However, the first-to-file preclusion wasn’t the whistle-blower’s only problem in this case.

Show the court the money….

The court further stated that the relator had not met requirements under Federal Rule of Civil Procedure 9(b). In other words, the relator’s complaint failed to include “reference to financial statements evidencing any claim, nor . . . any identifying information about the amount of specific claims or the dates on which they were submitted.”

The whistle-blower may have brought allegations about how tests were fooled, but the court recognized the absence of claim-submissions falsifying or billing system aberrations. The court noted that the “Relator assumes that Lincare submitted false claims at some point in time simply because delivery personnel were instructed to administer oximetry tests incorrectly.” Furthermore, the court stated that the complaint “failed to mention any financial obligation Lincare may have owed to the government.”

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