

\$34 Million Reversal: First Circuit Overturns Its Precedent and Redirects Relator's FCA Award to Another

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Earlier this month, the U.S. Court of Appeals for the First Circuit overturned its own precedent to hold the FCA's first-to-file rule is "non-jurisdictional." In so doing, the First Circuit flipped the district court's award of \$34 million from one whistleblower to another. *United States v. Millenium Labs., Inc.*, No. 17-1106, 2019 U.S. App. LEXIS 13506 (1st Cir. May 6, 2019).

The appeal arises out of the government's successful intervention in and settlement of several qui tam suits against drug-testing giant Millennium Health for \$227 million. Fifteen percent of the settlement, totaling just over \$34 million, was set aside for the relator's share under the FCA. While the FCA encourages such qui tam suits by permitting relators to share in any recovery obtained by the government, the statute's "first-to-file" rule ensures that the potential payout is not diluted by prohibiting relators other than the first from bringing a related action and sharing in the recovery. The first-to-file rule specifically states that "[w]hen a person brings an action [under the FCA], 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).

The First Circuit had to address whether Mark McGuire or Robert Cunningham—both of whom had filed related qui tams against Millennium Health—was the first-to-file relator. McGuire, who had filed his qui tam *after* Cunningham, brought a claim for declaratory judgment that he was the first to file. Cunningham moved to dismiss the claim under Rule 12(b)(1), arguing that because he filed his complaint first in time the district court lacked subject matter jurisdiction to consider McGuire's claim. Under existing First Circuit precedent, the district court addressed the "first-to-file" question as "jurisdictional," and therefore looked beyond the pleadings to consider extrinsic evidence on the question of whether Cunningham truly was the first to provide sufficient notice to the government that it was a victim of the alleged fraud. After considering such evidence, the district court found that Cunningham was the first to file and, therefore, that McGuire's claim was barred.

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On appeal, however, the First Circuit relied on “new developments,” including the Supreme Court’s decision in *Kellogg Brown & Root Services, Inc. v. United States ex rel. Carter*, 135 S. Ct. 1970 (2015), to overturn its precedent and join the D.C. and Second Circuits in holding that the first-to-file rule is “non-jurisdictional.” As a result, the First Circuit parted company with the Fourth Circuit’s decision post-*Carter* that maintained the first-to-file rule as jurisdictional, flagging a circuit split that may ultimately require clarification by the Supreme Court.

The First Circuit’s reversal of its own precedent was critical because it meant its analysis of the first-to-file rule was limited to the allegations in the pleadings under a Rule 12(b)(6) analysis. Analyzing only the facts alleged within the four corners of the complaints, the First Circuit determined McGuire was the first-to-file relator because Cunningham’s general allegations did not include the “essential facts” of the fraud McGuire alleged, which was the fraud that the government ultimately pursued. The First Circuit reiterated that mere notice – particularly of a different fraud than the government chose to pursue – is not sufficient; the first-to-file complaint must contain all the essential facts of the fraud it alleges.