Portfolio Media. Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

FCA's 1st-To-File Bar — When Is An Action 'Pending'?

Law360, New York (August 17, 2012, 1:37 PM ET) -- Recent decisions by two federal district courts indicate diverging interpretations of the False Claims Act's first-to-file bar.

So what does "pending" mean anyway? In the last month, one federal court found that a dismissed action constituted a "pending action." But another federal court found that a dismissed action did not. And both federal courts relied on the same appellate authority.

A federal court only has subject matter jurisdiction over the first qui tam complaint to allege a certain type of fraud. False Claims Act, 31 U.S.C. § 3729, et seq. ("FCA"). Known as the first-to-file bar, the statute provides as follows:

> 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).

Through enacting the first-to-file bar, Congress sought to temper its encouragement of qui tam actions by limiting parasitic or duplicative suits by successive and opportunistic plaintiffs, known as relators.

Asserting the first-to-file bar, defendants in both U.S. ex rel. Powell v. American InterContinental University Inc., and U.S. ex rel. Hoggett v. University of Phoenix sought dismissal. In Powell, the court found that the "prior, previously dismissed actions are 'pending' for purposes of the first-to-file rule." U.S. ex rel. Powell, No. 1:08–CV–2277, at *6 (N.D. Ga. July 12, 2012). Conversely, in Hoggett, the court reasoned that "[i]n the instant case, [the first-filed action] was dismissed before Relators brought their suit, and therefore was not 'pending' under § 3730(b)(5)." U.S. ex rel. Hoggett v. University of Phoenix, No. 2:10–cv–02478, at *4 (E.D. Cal. July 6, 2012).

How Did That happen?

The cases had many similarities. In both, relators alleged that the defendants submitted false claims for student financial aid funds to the United States Department of Education. Both cases involved, in part, allegations that the defendants — for-profit colleges — provided incentives to admissions officers based on numbers of students enrolled, conduct prohibited by the Higher Education Act. And in both cases, at least some of the defendants had been targeted by previous actions by relators under the FCA.

In Hoggett, that previous action "settled on or about Dec. 11, 2009, at a total cost of some $78.5 million, and involved virtually identical allegations of misconduct." Hoggett, at *1. The complaint in Hoggett, though involving those virtually identical allegations, referenced conduct beginning Dec. 12, 2009.

In Powell, the two moving defendants, American InterContinental University ("AIU") and its alleged corporate parent, Career Education Corporation ("CEC"), pointed to four previous qui tam suits: one in 2004 against CEC, two in 2005 against CEC (with AIU Online a party too), and one in 2006. All suits — as did the Powell complaint — alleged improper incentive-based compensation or the lack of the requisite proof of high school graduation, the two claims for which CEC and AIU sought dismissal.

Both courts looked to United States ex rel. Lujan v. Hughes Aircraft Co., 243 F.3d 1181, 1188 (9th Cir. 2001). Lujan held that a previous action, pending when Lujan filed her complaint but dismissed before the judge considered the first-to-file bar, constituted a pending action. The court held this because "Lujan's action is barred if she brought the claim while [the previous action] was pending." Id. at 1188. The court added the following, on which Powell relied: "Dismissed or not, [the previous] action promptly alerted the government to the essential facts of a fraudulent scheme — thereby fulfilling a goal behind the first-to-file rule." Id.

Powell relied on that goal — no doubt quoting Lujan, in part, because of the dearth of Eleventh Circuit authority on the first-to-file bar. The Powell court rejected a definition of 'pending' that would require an active action and instead stated as follows: "[T]he ultimate meaning of the clause is that the related action cannot be based on any facts raised in the first-filed action, whether its initial or any subsequently amended complaint." Powell, at *4.

It so stated because of concerns about "perverse incentives and 'reappearing' jurisdiction." Id. at *5. For example, "potential relators would sit on the sidelines hoping that the first relators' claims would be dismissed so that they could then file their own complaint later and receive the bounty." Id. In particular, "if the second set [of relators] waited the likely years it would take for a dismissal in the first — or here, first four — actions, they would be rewarded." Id.

These cited concerns do ignore that the statute of limitations would likely encourage relators not to wait on the sidelines too long. Nevertheless, the facts in Powell — the four previous actions — suggest that the court furthered the goal of eliminating parasitic suits.

The court in Hoggett relied on Lujan to find the first-to-file bar inapplicable "[b]ecause [it] only applies when the initial complaint is pending." Hoggett, at *4. The court found support in the purpose of the first-to-file bar: If defendant "UOPX is perpetrating a fraud similar to the fraud that it previously perpetrated against the government, then there is nothing either opportunistic or parasitic about bringing this suit." Id.

So What Do These Decisions Mean?

Though seemingly at odds, both decisions are probably correct. In Powell, the relators' two dismissed claims appeared to add nothing to complaints dismissed on four previous occasions, hence parasitic. In Hoggett, the relators made clear that they were alleging later conduct, hence not parasitic. These decisions provide a reminder to craft arguments — even at the pleading stage — about the purpose of the FCA and its accompanying civil qui tam provisions.

Jurisprudentially, the Powell decision suggests that the first-to-file bar can supplant the public disclosure bar — a much-litigated and "imprecise and at times contradictory" provision. John T. Boese, Civil False Claims and Qui Tam Actions § 4.02[A][1] (2012). Interpreting "pending action" the way Powell does broadens the first-to-file bar to permit dismissal in many situations in which a trickier public disclosure analysis would otherwise be needed.

Powell thus broadens the first-to-file bar—even while some courts have narrowed the bar by requiring pending actions with sufficiently alleged complaints before applying the bar. Instead of requiring the court to consider what has been disclosed and where and, then, whether the relator is an original source, the first-to-file bar under Powell essentially requires only that a court consider what a previous complaint has alleged.

At least until the Eleventh Circuit weighs in, Powell will assist FCA defendants, given both the recent, confining amendments to the public disclosure bar and the continued growth of qui tam suits.

--By Jack W. Selden and Cameron W. Ellis, Bradley Arant Boult Cummings LLP

Jack Selden is a partner and Cameron Ellis is an associate in Bradley Arant Boult Cummings' Birmingham, Ala., office.

The opinions expressed are those of the authors and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.
