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Third Circuit Addresses the Scope of the False Claims Act's First-to-File Bar

*By Christopher M. Denig and Tanya Kapoor**

A recent decision by the U.S. Court of Appeals for the Third Circuit raises numerous questions for practitioners regarding the scope of the False Claims Act's first-to-file bar. The authors of this article summarize the court's decision and highlight potential arguments that do not rely on the first-to-file bar as a basis for dismissal.

Under the False Claims Act's ("FCA") first-to-file bar, "no person other than the Government may intervene or bring a related action based on the facts underlying the pending action." But can a relator amend his or her complaint to add, remove, or substitute relators without violating the first-to-file bar?

Recently, the U.S. Court of Appeals for the Third Circuit in *In re Plavix* answered "yes," and concluded that the first-to-file bar does not preclude adding another relator through joinder, substitution, or an amendment. Instead, the first-to-file bar applies when a private party attempts to intervene in an FCA case under Federal Rule of Civil Procedure 24 or when a private party attempts to bring a new action on the same facts underlying the pending action.

The Third Circuit's decision in *In re Plavix* raises numerous questions for practitioners. Below, we summarize the court's decision, and highlight potential arguments that do not rely on the first-to-file bar as a basis for dismissal.

FACTUAL BACKGROUND OF *IN RE PLAVIX*

Three individuals formed a limited liability partnership in order to bring an FCA suit against two pharmaceutical companies. While the litigation was underway, one individual left the partnership, and another individual joined the partnership in his stead. The partnership amended the complaint, retaining the partnership as the sole relator, but reflecting the change in the partnership's membership.

The defendants moved to dismiss, invoking the first-to-file bar. The defendants argued that the partnership that filed the initial complaint ("original

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partnership”) was a distinct entity from the partnership that filed the amended complaint (“new partnership”) due to the change in the partnership’s membership. Because the new partnership was the relator in the operative complaint, the defendants contended that the new partnership intervened in violation of the first-to-file bar.

The district court granted the motion to dismiss. In ruling for the defendants, the court viewed the original partnership as a distinct entity from the new partnership. Because the new partnership was the relator in the operative complaint, the district court held that the new partnership impermissibly “intervened” within the meaning of the first-to-file bar.

THIRD CIRCUIT’S INTERPRETATION OF THE FIRST-TO-FILE BAR

The Third Circuit vacated and remanded in a unanimous opinion.

Before delving into the merits of the case, the court addressed a procedural issue—whether the first-to-file bar is jurisdictional. The court answered that question in the negative, holding that the first-to-file bar is not jurisdictional.

Turning to the merits, the Third Circuit certified several threshold questions relating to partnership law to the Delaware Supreme Court. After receiving input from the Delaware Supreme Court, the Third Circuit agreed with the district court’s premise that the original partnership was a distinct entity from the new partnership.

The Third Circuit, however, disagreed with the district court’s conclusion, and held that dismissal was not warranted under the first-to-file bar. In reaching its holding, the Third Circuit distinguished intervention from other methods of joining an existing case—e.g., joinder, impleader, interpleader, and substitution. The court explained that parties to a case take action to bring third parties into the case through methods other than “intervention,” such as joinder, impleader, and interpleader. By contrast, “a third party intervenes when he injects himself between two existing sides. . . . The choice to intervene is made not by the existing parties, but by the intervenor,” under Rule 24.

Given that distinction, the Third Circuit held that the first-to-file bar prohibits intervention under Rule 24, but does not preclude parties from adding, removing, or substituting a relator through an amendment. Therefore, the first-to-file bar did not prohibit the new partnership from replacing the original partnership by way of an amended complaint.

KEY TAKEAWAYS FOR FCA DEFENDANTS

Based on the Third Circuit’s ruling in *In re Plavix*, defendants should keep the following considerations in mind when asserting a first-to-file challenge.

- *Timing of a first-to-file challenge:* The Third Circuit is the latest circuit to address whether the first-to-file bar is jurisdictional. Currently, the circuits are divided on whether the first-to-file bar is jurisdictional—the U.S. Courts of Appeals for the First, Second, and D.C. Circuits share the Third Circuit’s view, but the U.S. Courts of Appeals for the Fourth, Fifth, Sixth, Ninth, and Eleventh Circuits have reached the opposite view.

Whether the first-to-file bar is jurisdictional affects the timing of a first-to-file challenge, which party carries the burden on a first-to-file challenge, and the type of evidence that can be submitted during a first-to-file challenge. Because the first-to-file bar is not jurisdictional in the Third Circuit, a defendant litigating in the Third Circuit must raise the first-to-file bar in a Rule 12(b)(6) motion, has the burden to prove that the first-to-file bar precludes a relator’s entry into the suit, and must follow Rule 12(b)(6)’s standard for submitting evidence that is extrinsic to the complaint. Defendants litigating in other circuits, however, might not follow the same approach.

Thus, a defendant should consider whether the first-to-file bar is jurisdictional under binding circuit precedent before asserting a first-to-file challenge. If the first-to-file bar is jurisdictional under binding precedent, the defendant may challenge jurisdiction at any time; the relator bears the burden of persuasion in establishing jurisdiction; and the defendant may submit evidence in connection with its jurisdictional challenge.

- *Potential arguments under Rule 15:* As the Third Circuit alluded in *In re Plavix*, an amendment that is permissible under the first-to-file bar might “exceed the bounds of Rule 15.”

Therefore, if a new relator is added, removed, or substituted in an amended complaint, a defendant should consider if it has colorable grounds for opposing leave to amend under Rule 15. Courts may deny leave to amend in cases of undue delay, bad faith, dilatory motive, unfair prejudice, or futility.

- *Potential arguments under the original source provision:* When a new relator is added to an FCA case, the defendant should consider assessing whether the relator is “an original source of the information.” As the Third Circuit acknowledged, the original source provision “limit[s] who can be a proper plaintiff,” and is distinct from the first-to-file bar.

The original source provision comes into play only if there has been

a qualifying public disclosure before the case is filed. Therefore, assuming the defendant can identify a qualifying public disclosure, the original source provision might be another means of seeking dismissal of an FCA suit brought by a new relator.

- *Potential counterarguments to the Third Circuit's interpretation of the scope of the first-to-file bar:* If the scope of the first-to-file bar is litigated in other circuits, relators may rely on the Third Circuit's reasoning, and claim that the first-to-file bar applies only to Rule 24 motions.

There are several counterarguments that defendants may consider including in their response. For example, the *In re Plavix* defendants emphasized the difference in language between the first-to-file bar and other provisions of the FCA: While other provisions of the FCA expressly refer to specific Federal Rules of Civil Procedure, the first-to-file bar does not reference any Rule, much less Rule 24.

That distinction suggests that the first-to-file bar's reach is not limited to Rule 24 or to any other Federal Rule of Civil Procedure. While the Third Circuit did not address that argument in its opinion, the argument may gain traction in other courts.