Whistleblower Defense Alert: Three Questions Every FCA Defendant Should Ask To Evaluate Whether Claim Preclusion Can Fill The Gap Created By The Supreme Court's Interpretation Of The First-To-File Rule

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A decision last week in an FCA case in Pennsylvania confirms that the FCA's first-to-file bar has been weakened. *See U.S. ex rel. Boise v. Cephalon, Inc.*, No. 08-CV-287 (E.D. Pa.). The court in the *Cephalon* case confirmed that the Supreme Court's decision in *Kellogg Brown & Root Servs., Inc. v. United States ex rel. Carter* means that the first-to-file bar does not apply when a previously filed case is no longer pending. See our previous Alert for additional analysis of the *Carter* decision.

But all is not lost for FCA defendants. Both the parties and the Court in *Carter* suggested that claim preclusion could be a shield to protect defendants against later-filed actions. Although claim preclusion is not applicable in in all situations, FCA defendants should carefully consider its application when preparing motions to dismiss. Because the Court provided little guidance in *Carter* as to how claim preclusion would work in the FCA context, this article provides three questions every defendant should ask when considering a claim preclusion defense.

As a preliminary matter, it is important to note that these questions must be considered immediately upon service of the complaint. While the first-to-file bar is jurisdictional (and can be raised at any time), claim preclusion is an affirmative defense that must be raised in a motion to dismiss and/or the answer. Courts will consider a claim preclusion defense at the motion to dismiss stage if the basis for the claim preclusion defense is apparent from the complaint or consists of matters appropriate for judicial notice, such as filings in the previously filed action. If a defendant cannot satisfy its burden of proof of preclusion through those avenues, the court may convert the motion to a summary judgment motion under Fed. R. Civ. P. 12(d).

Courts recognize four common elements of claim preclusion: (1) a final judgment on the merits; (2) rendered by a court of competent jurisdiction; (3) in a case involving the same parties, or those in privity

with them; and (4) the same cause of action. Assuming that the prior case was decided by a court of competent jurisdiction, there are three questions a defendant should ask when considering a claim preclusion defense.

A. Are the claims the same?

Although there is no universal test to determine whether two lawsuits involve the same claim, most courts follow the "transactional approach." Under the transactional approach, two claims are the same if they arise out of the same transaction or series of connected transactions.

In FCA lawsuits, courts normally define the underlying transaction as the defendant's submission of false statements to obtain federal funds. According to the transactional approach, all FCA suits that arise out of that underlying transaction should be considered the "same" for purposes of claim preclusion. This is true even if the subsequent action and the first-filed action are not strictly identical, or one action alleges greater misconduct than the other, or the second action alleges that the same claims for payment are false for different reasons.

B. Are the parties the same?

First and later-filed FCA lawsuits will almost always involve different relators. Because a relator "stands in the shoes" of the government as a partial assignee of the government's claim, the identity of parties element should be satisfied for all FCA cases against the same defendant. Courts generally consider relators and the government the "same party" for claim preclusion purposes, and the Supreme Court has even noted that "the United States is bound by the judgment in all FCA actions regardless of its participation in the case." *See U.S. ex rel. Eisenstein v. City of N.Y.*, 556 U.S. 928, 936 (2009). Neither a relator nor the government should be able to bring a subsequent FCA lawsuit against the same defendant unless it stems from a separate transaction, or the initial lawsuit concluded without a valid, final judgment on the merits.

C. Was there a final judgment on the merits?

A final judgment ends the litigation "on the merits." Courts typically equate the phrase on the merits to a dismissal "with prejudice." Because dismissals with prejudice normally satisfy the "final judgment on the merits" element, FCA defendants can prove it in many different ways. Examples include: (1) summary judgment, (2) a stipulation of dismissal with prejudice, (3) a dismissal with prejudice that arises out of a settlement agreement, (4) a Fed. R. Civ. P 9(b) dismissal with prejudice granted because the court found that leave to amend would be futile, and (5) an involuntary dismissal.

Note that in non-intervened cases in which the defendant settles only with the relator or successfully obtains dismissal of the relator's complaint, the Department of Justice usually insists that courts clarify that dismissal with respect to the government is "without prejudice." Under those circumstances, the settlement or dismissal likely could not be used to bar a subsequent relator.

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FCA defendants need to be aware of claim preclusion because it is the best—and perhaps only—way to fill the gap caused by the Supreme Court's decision in *Carter*. While the first-to-file rule is procedurally preferable, the doctrine of claim preclusion provides supplemental protection from serial lawsuits relating to the same underlying conduct. Defendants should also consider the doctrine of claim preclusion when negotiating settlements and crafting motions to dismiss first-filed lawsuits, particularly when they are aware of other pending lawsuits addressing the same or similar conduct.

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