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THE FALSE CLAIMS ACT'S FIRST-TO-FILE BAR: HOW THE PARTICULARITY REQUIREMENT OF CIVIL PROCEDURE MILITATES AGAINST COMBATING FRAUD

Joel Deuth[+]

Congress enacted the False Claims Act (FCA) to establish liability for any person who knowingly submits, or causes another to submit, a false claim or record to the government.[1] The Senate Judiciary Committee clarified in its committee report that the FCA was not designed "to produce class actions or multiple separate suits based on identical facts and circumstances."[2] To achieve this goal, Congress enacted 31 U.S.C. § 3730(b)(5), known as the "first-to-file" jurisdictional bar, to help achieve this goal.[3] Generally, the first-to-file bar excludes subsequent complaints from consideration after a suit with the same scheme has already been filed.[4] Courts have consistently struggled to balance the first-to-file bar with the FCA's legislative intent of encouraging private citizens, or "relators," to promptly alert the government of potential fraud.[5] The FCA's qui tam provisions,[6] which allow relators to bring

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1. 31 U.S.C. §§ 3729 et seq. (2006).

2. S. REP. NO. 99-345, at 25 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5290; *see* 31 U.S.C. §§ 3729–3733 (2006).

3. § 3730(b)(5) ("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."); *see* Campbell v. Redding Med. Ctr., 421 F.3d 817, 821 (9th Cir. 2005) (explaining that § 3730(b)(5) is known as the first-to-file bar and encourages a "race to the courthouse" by those with knowledge of fraudulent activity against the government). Commentators have taken issue with the "race to the courthouse" description because it implies that relators know that other relators exist. *See* Lesley A. Skillen & Megan M. Scheurer, *Who's on First: 31 U.S.C. § 3730(b)(5)*, 44 FALSE CL. ACT & QUI TAM Q. REV. 8, at *1 (2007). Typically, however, the multiple relators know nothing about each other's existence, which frequently results in lawsuits over jurisdictional bars. *Id.*

4. *See* Marc S. Raspanti & David M. Laigaie, *Current Practice and Procedure Under the Whistleblower Provisions of the Federal False Claims Act*, 71 TEMP. L. REV. 23, 35 (1998) (stating that once a person brings an action under this provision of the False Claims Act, "no person other than the Government may intervene or bring a related action based on the facts underlying the pending action").

5. *See* United States *ex rel.* Lujan v. Hughes Aircraft Co., 243 F.3d 1181, 1189 (9th Cir. 2001) (noting that the first-to-file rule's objective is to incentivize relators to alert the government of fraudulent activity in a time-sensitive manner); 1 JOHN T. BOESE, CIVIL FALSE CLAIMS AND

lawsuits on behalf of the government, also provide further evidence of congressional intent to encourage relators to bring actions alleging fraud against the government.[7] Judicial inconsistency in applying the first-to-file bar results in substantial costs to relators and the judicial system.[8] However, these burdens can be eliminated by "faithful application of the plain language and intent" of the statute.[9]

Section 3730(b)(5) reads: "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*."[10] Historically, courts battled over whether facts needed to be identical or material.[11] More recently, at least two circuit courts of appeals have struggled with a different portion of the statute—the relationship between the first-to-file

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QUI TAM ACTIONS 4-200.4 (4th ed. 2013) (noting that the 1986 amendments to the False Claims Act were meant to encourage relators to notify the government quickly of unknown frauds).

6. § 3730(b)(1) (providing for a private right of action).

7. *See* Note, *The History and Development of Qui Tam*, 1972 WASH U. L. Q. 81, 81 (1972) (referencing the House Committee report, which states that qui tam suits encourage enforcement of statutes). Through the 1986 FCA amendments, Congress sought to make it significantly easier for private citizens to bring qui tam actions on the government's behalf. *See* Todd J. Canni, *Who's Making False Claims, The Qui Tam Plaintiff or the Government Contractor? A Proposal to Amend the FCA to Require That All Qui Tam Plaintiffs Possess Direct Knowledge*, 37 PUB. CONT. L.J. 1, 7 (2007) (explaining that the FCA 1986 amendments were meant to rectify a problem created by the 1943 amendments that effectively barred qui tam suits).

8. *See* BOESE, *supra* note 5, at 4-200.4 to 4-200.5 (listing some of the social costs imposed as: (1) forcing the first relator to enter agreements with later-filing relators for shared recoveries; (2) reducing recovery to first-to-file relators; (3) providing rewards to undeserving relators; and (4) increasing overall litigation costs).

9. *Id.* at 4-200.5.

10. § 3730(b)(5) (emphasis added).

11. *See* United States *ex rel.* Chovanec v. Apria Healthcare Grp., Inc., 606 F.3d 361, 363 (7th Cir. 2010) (citing a number of courts that have interpreted the term "facts" to mean "material facts" or "essential facts"); *see also* United States *ex rel.* Duxbury v. Ortho Biotech Prods., LP, 579 F.3d 13, 32–33 (1st Cir. 2009) (adopting the essential facts standard but refusing to grant first-to-file protection to the original suit because the original complaint failed to allege all of the essential facts); United States *ex rel.* Branch Consultants v. Allstate Ins. Co., 560 F.3d 371, 377–79 (5th Cir. 2009) (noting the adoption of the material elements test by other circuits interpreting the provision); Walburn v. Lockheed Martin Corp., 431 F.3d 966, 971 (6th Cir. 2005) (adopting the principle that the first-to-file bar applies when two complaints allege the same "essential facts" even if there are slightly different details); United States *ex rel.* Grynberg v. Koch Gateway Pipeline Co., 390 F.3d 1276, 1279–80 (10th Cir. 2004) (rejecting the identical facts test because it is contrary to the plain meaning of the statute and to the purpose of § 3730(b)(5)); United States *ex rel.* Hampton v. Columbia/HCA Healthcare Corp., 318 F.3d 214, 217–18 (D.C. Cir. 2003) (adopting the material facts test based on the analysis completed by other appellate courts); United States *ex rel.* Lujan v. Hughes Aircraft Col, 243 F.3d 1181, 1188–89 (9th Cir. 2001) (rejecting the identical facts test in favor of the material facts test based on the plain language of the statute); United States *ex rel.* LaCorte v. SmithKline Beecham Clinical Labs., Inc., 149 F.3d 227, 232–33 (3d Cir. 1998) (affirming first-to-file protection for the original suit under the material facts test).

bar, a jurisdictional bar by design,[12] and the particularity requirement in Rule 9(b) of the Federal Rules of Civil Procedure.[13] Resolving how to characterize Rule 9(b)'s role under these circuit court decisions is significant, because Rule 9(b)'s application to the first-to-file bar impacts the original purpose of the FCA.[14]

In 2005, the U.S. Court of Appeals for the Sixth Circuit confronted the Rule 9(b) issue in *Walburn v. Lockheed Martin Corp.*, a lawsuit filed by a private citizen alleging the same material facts as a previously filed suit.[15] The second relator in the case argued that the first-filed suit should not bar the later-filed suit under § 3730(b)(5) because the first complaint failed to state a claim with sufficient particularity under Rule 9(b).[16] Agreeing with the second relator, the court held that a "fatally-broad complaint" that did not satisfy Rule 9(b) was not a complaint and thus the court could not exclude subsequent complaints under the first-to-file bar.[17]

In 2011, the U.S. Court of Appeals for the District of Columbia Circuit confronted a similar but not identical fact pattern in *United States ex rel. Batiste v. SLM Corp.*, in which a private citizen brought suit alleging the same material facts as a previously filed complaint.[18] The D.C. Circuit, in contrast

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12. *See* BOESE, *supra* note 5, at 4-181 (noting numerous courts that have treated the first-to-file bar as a "threshold jurisdictional provision").

13. FED. R. CIV. P. 9(b) ("In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally."). *Compare* United States *ex rel.* Batiste v. SLM Corp., 740 F. Supp. 2d 98, 104 (D.C. Cir. 2010) (finding that even if a claim fails Rule 9(b)'s particularity requirements, a court may still bar subsequently filed claims alleging the same material facts under the first-to-file bar), *with Walburn*, 431 F.3d at 972 (holding that an original claim that fails the particularity requirement is "legally infirm from its inception," and, therefore, the first-to-file bar is inapplicable to subsequent filed claims alleging the same material facts).

14. *See* S. REP. NO. 99-345, at 2 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5266–67 (stating that the purpose of the amendments is to encourage private individuals to come forward if they have knowledge of government fraud); *see also* Mike Scarcella, *How Similar Is Too Small?: D.C. Circuit to Weigh Whether Past Filing Could Jeopardize Whistleblower Suit*, 34 NAT'L L.J. 27, 27, 32 (2011) (quoting a government contract attorney who said that the D.C. Circuit's *Batiste* decision could "reduce the number of whistleblower suits").

15. *See Walburn*, 431 F.3d at 969 (addressing whether the failure to comply with Rule 9(b) makes the first-to-file bar inapplicable).

16. *Id.* at 972 (citing United States *ex rel.* Bledsoe v. Cmty. Health Sys., Inc., 342 F.3d 634, 641–43 (6th Cir. 2003)) (acknowledging previous cases that required actions under the FCA to comply with Rule 9(b)).

17. *Id.* at 972–73 (reasoning that such a "fatally-broad complaint," which fails to provide the time, place, and content of a fraudulent claim, does not further the FCA's purpose of notifying the government of potential fraud because a flawed complaint cannot provide sufficient notice to the government).

18. 659 F.3d 1204, 1206–07 (D.C. Cir. 2011) (considering whether the first-to-file rule applies when the first relator fails to meet the requirements of Rule 9(b)). Notably, the *Batiste* and *Walburn* facts are slightly different because the first-filed complaint in *Walburn* was dismissed under the public disclosure bar, whereas the first-filed complaint in *Batiste* was dismissed for failing to obtain counsel. *See infra* Part I.E.

to the Sixth Circuit, held that, notwithstanding Rule 9(b), subsequent complaints alleging the same material facts will be barred under § 3730(b)(5) as long as a first-filed complaint was pending at the time the second complaint was filed.[19] The court reasoned that *Walburn*'s approach put courts in the uncomfortable position of determining the sufficiency of a complaint in another jurisdiction and could result in two courts disagreeing over whether a complaint meets Rule 9(b)'s particularity requirement.[20]

This Comment examines the Sixth and D.C. Circuits' approaches as to whether Rule 9(b)'s particularity requirement should be read into the first-to-file bar such that complaints must satisfy Rule 9(b)'s threshold both at the initial court filing and later, when challenged on jurisdiction grounds under § 3730(b)(5). To resolve the conflict, this Comment recommends that future courts adhere to a truly exception-free first-to-file bar by avoiding arguments raised by both the Sixth and D.C. Circuits.

This Comment first traces the steps of the FCA from its inception in 1863, in response to contractor fraud during the Civil War, to the 1986 amendments, which brought the FCA into modern times. This Comment then provides an in-depth review of Rule 9(b), which requires fraud claims to be alleged with particularity. Despite Rule 9(b)'s relatively straightforward language, this Comment examines how courts have applied the rule to the first-to-file bar and highlights how district courts are struggling to reach a resolution under the circuit court decisions. Next, this Comment examines why the Sixth Circuit concluded that a complaint that violates Rule 9(b) is not a complaint for purposes of the first-to-file bar. By comparison, this Comment also analyzes the D.C. Circuit's decision that Rule 9(b) need not apply at the first-to-file stage because it is already applied at the filing stage of an FCA suit. This Comment concludes by recommending that courts adopt an exception-free first-to-file bar that closely adheres to the FCA's legislative intent and general purpose. This Comment argues that Rule 9(b) should not be utilized in a

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19. *Batiste*, 659 F.3d at 1210 (finding that the first-filed complaint need not meet the heightened pleading requirements under Rule 9(b) to invoke the first-to-file bar). In the general first-to-file context, the Seventh and Ninth Circuits have concluded that a pending first-filed complaint precludes subsequent complaints, even if the first-filed complaint is later dismissed, because the earlier complaint alerted the government to the essential facts of potential fraud. *See* United States *ex rel.* Chovanec v. Apria Healthcare Grp. Inc., 606 F.3d 361, 365 (7th Cir. 2010) (stating that a later-filed suit is permissible when a first-filed action is dismissed without prejudice, or if it alleges a different transaction); United States *ex rel.* Lujan v. Hughes Aircraft Co., 243 F.3d 1181, 1188 (9th Cir. 2001) (holding that a first-filed action precludes a subsequent complaint if the first-filed action was still pending when the later-filed action was filed).

20. *Batiste*, 659 F.3d at 1210. The *Batiste* court's effort to avoid disagreement among the district courts on the same issue may have been influenced by the purported tendency among appellate judges to suppress disagreement out of fear that it is detrimental to the judicial system. *See* Jeffrey A. Lefstin, *The Measure of the Doubt: Dissent, Indeterminancy, and Interpretation at the Federal Circuit*, 58 HASTINGS L.J. 1025, 1033 (2007) (stating that at the appellate level, judges seek consensus even if it means compromising their own opinions on the ultimate decision of the case).

manner that subverts the primary purpose of one of the most important anti-fraud statutes. An overly vigorous application of Rule 9(b) to the first-to-file bar risks eroding the anti-fraud effectiveness of the FCA and discouraging private citizens from filing suits.

I. THE FALSE CLAIMS ACT THROUGHOUT HISTORY: HOW CONGRESS HAS CONTINUED ITS EFFORTS TO PERFECT AN EFFECTIVE STATUTE

Senator Charles Grassley, rationalizing the need for the False Claims Reform Act, stated, "[c]ontractors have us over a barrel. Our choice is inexorably clear. If we like being over a barrel, I would suggest we leave the law the way it is and instead grin and bear continued rapes and pillages of the Treasury."[21] From the beginning of the FCA's existence in 1863 to the major amendments enacted in 1986,[22] lawmakers have sought to prevemt fraud perpetrated against the government by both incentivizing private individuals to bring forth claims and enforcing those claims when they assist the government.[23]

Congress enacted the FCA to prevent contractors from defrauding the government during the Civil War.[24] A primary purpose of the statute was to "encourage individuals to ferret out fraud against the government."[25] When

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21. 131 CONG. REC. 22,322 (1985) (statement of Sen. Charles Grassley). Senator Charles Grassley, R-Iowa, and Representative Howard Berman, D-Cal., shepherded the 1986 legislation enacted in response to court opinions that placed increasingly restrictive measures on qui tam relators. *See* Raspanti & Laigaie, *supra* note 4, at 27 (noting the leadership role of Sen. Grassley and Rep. Berman in the passage of the 1986 amendments).

22. False Claims Amendments Act of 1986, Pub. L. 99-562, § 3, § 3730(b),(d), 100 Stat. 3153, 3154–57 (1986); *see* S. REP. NO. 99-345, at 2 (1986) (stating that the purpose of the amendments is to encourage private individuals with knowledge of fradulent claims presented to the government to come forward).

23. 78 AM. JUR. 3D *Proof of Facts*, *Proof of Violation Under the False Claims Act*, § 2 (reinforcing Congress's purpose of the amended FCA to encourage private enforcement suits).

24. 131 CONG. REC. 22,322 (1985) (statement of Sen. Grassley) (recounting the enactment of the FCA as a "response to Civil War era horror stories that sound all too familiar, contractors selling boxes of sawdust in place of boxes of muskets, and reselling horses to the cavalry two and three times"); *see also* Campbell v. Redding Med. Ctr., 421 F.3d 817, 823 (9th Cir. 2005) (noting that the FCA was enacted during the Civil war to address fraud); BOESE, *supra* note 5, at 1–5 (stating that the original FCA was known as the "Informer's Act" and the "Lincoln Law"); Jonathan T. Brollier, *Mutiny of the Bounty: A Moderate Change in the Incentive Structure of Qui Tam Actions Brought Under the False Claims Act*, 67 OHIO ST. L.J. 693, 699 (2006) ("During the Civil War, President Abraham Lincoln groused that his troops found sawdust instead of gunpowder when they pried open ammunition crates at the front." (quoting ANDY PASZTOR, WHEN THE PENTAGON WAS FOR SALE 11 (1995))); Pamela H. Bucy, *Private Justice*, 76 S. CAL. L. REV. 1, 43–44 (2002) ("[T]he FCA provided the federal government with a way of combating the fraud suffered by the Union Army when it received deliveries of defective or nonexisting military supplies.").

25. 131 CONG. REC. 22,323 (1985) (statement of Sen. Charles Grassley) (arguing that confronting fraud was even more crucial in 1985 because, at that time, the government was spending billions of dollars to contract many of its functions).

Congress amended the FCA in 1943, it sought to exclude "parasitical suits,"[26] which occur when the government has already obtained information regarding the alleged fraud before a private citizen brings suit under the qui tam whistleblower provisions.[27] In response to court interpretations that narrowly construed the 1943 amendments, lawmakers amended the FCA again in 1986 to repeal the restrictive interpretations of the qui tam provisions in order to encourage private citizens to bring forth their lawsuits.[28]

In 2011, the Department of Justice recovered three billion dollars from civil cases involving fraud against the government, demonstrating the effectiveness of the FCA.[29] More notably, 2.8 billion of the 3 billion dollars recovered was the result of the FCA's whistleblower provisions.[30] Given the effectiveness of the qui tam provisions, the U.S. government has a significant interest in

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26. Leading up to congressional approval of the 1943 amendments, the U.S. Attorney General suggested that Congress repeal the qui tam provisions because of the rise in "parasitic lawsuits." *See* Canni, *supra* note 7, at 6. The phrase, "parasitic lawsuits," was gleaned from suits in which individuals alleged facts based on public sources, rather than independent knowledge, to reap the monetary rewards. *Id.* at 5–6. In fact, in January 1943, the Supreme Court held that a private relator who had received information about fraudulent activity from a previous indictment was permitted to receive a reward. *See* United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 545–46 (1943) (noting that nothing in the statute creates an exception to the ability of a private plaintiff to recover a monetary award).

27. *See Campbell*, 421 F.3d at 823 (noting that courts read the 1943 amendments as foreclosing all qui tam actions if the government had knowledge of the fraud, even in those instances where the relator discovered the fraud independently); *see also* Brollier, *supra* note 24, at 699–700 (stating that the 1943 amendments modified the "faulty portion" of the FCA that "permitted relators to copy criminal indictments and then come forward, prosecute the claim, and collect a bounty as if they had ferreted out the false claim themselves").

28. *See* J. Randy Beck, *The False Claims Act and the English Eradication of Qui Tam Legislation*, 78 N.C. L. REV. 539, 561 (2000) (acknowledging public pressure to amend the FCA and describing the 1980s as "the era of the $435 hammer, the $640 toilet seat cover, and the $7622 coffee maker," because the government experienced a number of scandals involving defense contractors excessively billing the government); Brollier, *supra* note 24, at 699 ("The 1986 amendments . . . did not create the False Claims Act, but rather added teeth to a Civil War era statute."); Raspanti & Laigaie, *supra* note 4, at 27 (stating that the 1986 amendments "reinvigorated the False Claims Act" by concentrating on the relator's role and eliminating restrictions that had developed in the courts over time).

29. Press Release, Dep't of Justice, Justice Department Recovers $3 Billion in False Claims Act Cases in Fiscal Year 2011 (Dec. 19, 2011), *available at* http://www.justice.gov/opa/pr/2011/December/11-civ-1665.html (observing that 2011 was the second consecutive year for recoveries over three billion dollars).

30. *Id.* (stating that qui tam provisions peaked at 638 in Fiscal Year 2011). The relevant whistleblower provision states:

> A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

31 U.S.C. § 3730(b)(1) (2006).

continuing to encourage private citizens to bring suits on the government's behalf.[31]

A. The Qui Tam Provisions' Purpose Is to Enlist the Help of Private Citizens in the Government's Effort to Combat Fraud

The FCA's qui tam provisions[32] incentivize private citizens to bring actions alleging that others are defrauding the government.[33] If the private citizen's suit results in a successful monetary judgment, the private citizen is entitled to a portion of that reward.[34] Congress determined that increased rewards would advance the goal of the qui tam provisions.[35]

Given the potentially significant monetary rewards available to qui tam plaintiffs, the FCA includes certain provisions that bar some qui tam actions.[36] In addition to the "public disclosure" bar[37] and "original source" exception,[38]

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31. *See* Brief for the United States as Amicus Curiae Supporting of Appellant at 2, United States *ex rel.* Batiste v. SLM Corp., 659 F.3d 1204 (2011) (No. 10-7140) (stressing the United States' support of the correct application of the FCA because of the FCA's impact in reducing fraud and recovering losses); *see also* Bucy, *supra* note 24, at 52 (explaining that because of the FCA's "explosive growth" in private actions, federal government intervention is "increasingly difficult").

32. *See* Note, *supra* note 7, at 83 (stating that the literal translation of the expression "qui tam" is "he who as much for the king as for himself").

33. § 3730(b), (d); *see* Harvinder S. Anand, Note, *Competing Relators and Competing Objectives Under the False Claims Act: Barring Subsequent Claims Should Look Beyond the Plain Language of Section 3730(b)(5)*, 28 PUB. CONT. L.J. 89, 90 (1998) (stating that "[relators] are motivated by the prospect of a big payday" (internal quotation marks omitted)).

34. § 3730(d) (awarding the qui tam plaintiff at least fifteen percent of the proceeds if the government proceeds with the action brought by the qui tam plaintiff, and between twenty-five and thirty percent if the government does not). However, the prospect of a monetary reward may also prompt private citizens to file complaints even if they are aware of a first-filed complaint, which contradicts the jurisdictional bar's inherent purpose of preventing "duplicative recoveries." *See* Anand, *supra* note 33, at 90. Congress increased the award amount in 1986 after hearing from witnesses that the previous rewards were insufficient to guarantee financial security. False Claims Amendments Act of 1980, Pub. L. No. 99-562, Sec. 3, § 3730(d), 100 Stat. 3153, 3156–57 (1986); S. REP. NO. 99-345, at 28 (1986) (stating that a ten percent minimum recovery is a "finder's fee," to which a relator should have a right for bringing the action).

35. S. REP. NO. 99-345, at 28. However, Congress staggered the allowable percentages for recovery based on the contribution of the relator as determined by the court. *Id.* The committee report highlights that such a risk analysis by the relator requires them to first read and understand the statute. *Id.* (noting that a "potential plaintiff may decide it is too risky to proceed in the face of a totally unpredictable recovery").

36. § 3730(e)(4). Courts have no jurisdiction over suits based on the public disclosure of allegations or transactions generally, unless the action is brought by the original source of the information. *Id.*

37. § 3730(e)(4)(A) ("No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions . . . unless the action is brought by the Attorney General.").

38. § 3730(e)(4)(B) ("'[O]riginal source' means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily

Congress enacted the first-to-file bar to prevent "class actions or multiple separate suits based on identical facts and circumstances."[39] In its entirety, the first-to-file bar reads, "[w]hen a person brings an action under [§ 3730(b)], no person other than the Government may intervene or bring a related action based on the facts underlying the pending action."[40] Generally, this provision suggests that only the first-filed suit will survive if two or more qui tam suits have been filed alleging the same scheme.[41] Consequently, courts have developed tests to determine whether a subsequently filed suit alleges the same facts as the first suit the extent that it should be precluded.[42]

B. Courts Adopt the Broader "Material" Facts Test over the "Identical" Facts Interpretation of the First-to-File Bar

Historically, courts interpreted § 3730(b)(5)'s language of "facts underlying the pending action" in two different ways.[43] Some courts interpreted the phrase as barring actions alleging facts *identical* to those alleged in a pending action, while others would only bar actions alleging the same *material* or *essential* facts.[44] Significant consequences result from the "identical facts" and "material facts" tests.[45] For instance, under the "identical facts" test, relators may be discouraged from filing complaints, even if they have knowledge of fraudulent activity, due to the likelihood that other relators will bring similar actions.[46] If the cases had slightly different facts that fall outside of the "identical facts" requirement, the FCA's monetary reward would be

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provided the information to the Government before filing an action."); *see* Campbell v. Redding Med. Ctr., 421 F.3d 817, 822 (9th Cir. 2005) (stating that a non-original source is a source that did not contribute to the government's awareness of the fraud, whereas an original source contains valuable information that may assist the government in prosecuting false claims).

39. S. REP. NO. 99-345, at 25; *see* § 3730(b)(5) (preventing duplicative recoveries).

40. § 3730(b)(5).

41. Skillen & Scheurer, *supra* note 3, at *69 (stating that the "race" to get an FCA suit filed first implies that the private citizens know of each other's existence, which is unlikely).

42. *See infra* text accompanying notes 43–46.

43. § 3730(b)(5).

44. *Compare* United States *ex rel.* Dorsey v. Warren E. Smith Cmty. Health/Mental Retardation & Substance Abuse Ctrs., No. 95-7446, 1997 WL 381761 (E.D. Pa. June 25, 1997) (adopting an "identical facts" test), *overruled by* United States *ex rel.* LaCorte v. SmithKline Beecham Clinical Labs., Inc., 149 F.3d 227, 233–34 (3d Cir. 1998), *as recognized in* United States *ex rel.* Lujan v. Hughes Aircraft Co., 243 F.3d 1181, 1188–89 (9th Cir. 2001) (reasoning that barring actions that state only facts identical to the pending action is contrary to the plain language and intent of the first-to-file bar), *with* United States *ex rel.* Chovanec v. Apria Healthcare Grp., Inc., 606 F3d 361, 363 (7th Cir. 2010) (adopting a "material facts" test).

45. *See* Anand, *supra* note 33, at 92.

46. *LaCorte*, 149 F.3d at 234 (arguing that the "identical facts" test means that a number of relators could receive a share of recovery from the same fraudulent conduct, thus reducing the monetary reward).

diminished.[47] Furthermore, the government would receive notice after the first claim, and therefore, additional claims would no longer serve the primary purpose of notifying the government of fraud.[48] Another implication suggested by some commentators is that the identical facts test gives defendants an advantage when numerous qui tam suits are filed against the same defendant.[49]

Over time, however, courts resolved the dispute between the two interpretations in favor of the "essential" or "material facts" test.[50] To reach this conclusion, courts interpreting the statute noted the purposes of the qui tam provisions and concluded that these purposes counseled against the adoption of the identical facts test.[51] In *United States ex rel. Chovanec v. Apria Healthcare Group, Inc.*, the Seventh Circuit held that an "identical facts" test would make the word "related" in § 3730(b)(5) irrelevant.[52] However, the court also stated that not all similar frauds are related because that would remove the "same-facts" language from the statute.[53] Instead, the court looked to other circuits that have held that "material" or "essential" facts were those "on which the original relator [was] entitled to compensation if the suit prevail[ed]."[54]

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47. *Id.* (stating how a decreased reward disincentivizes private citizens from bringing qui tam actions).

48. *See id.* (recognizing that any interpretation of the first-to-file bar must balance the 1986 amendments' competing goals of providing sufficient incentives to citizens with insider information and discouraging opportunistic plaintiffs from attempting to capitalize on someone else's efforts).

49. *See* Anand, *supra* note 33, at 92 (explaining that a first-filed, sufficiently broad complaint would contain any details that later-filed suits tried to allege and, therefore, those subsequent complaints would be barred, leaving the defendant to respond to only one case).

50. *See* United States *ex rel.* Chovanec v. Apria Healthcare Grp., Inc., 606 F.3d 361, 363 (7th Cir. 2010) (stating that when a statute contains the term "facts," courts often held that it means "material facts").

51. *See* United States *ex rel.* Hampton v. Columbia/HCA Healthcare Corp., 318 F.3d 214, 217–18 (D.C. Cir. 2003) (reaching its decision after recounting the legislative history of the qui tam provisions as "repeated congressional efforts to walk a fine line between encouraging whistle-blowing and discouraging opportunistic behavior" (quoting United States *ex rel.* Springfield Terminal Ry. v. Quinn, 14 F.3d 645, 651 (D.C. Cir. 1994))).

52. 606 F.3d at 633 (reasoning that the word "related" requires courts to examine both the claim's linguistic and functional context, which would not be the case under the "identical facts" test because only the words of the claim would be scrutinized).

53. *Id.* (rejecting the idea that a case be barred for arising out of a generally similar wrongdoing). The *Chovanec* court continued by stating that "[i]n Einstein's universe, everything is related to everything else. A materiality rule accommodates both parts of the statutory phrase-though at the expense of posing the question what 'material' means. It is a protean term that requires further analysis." *Id.*

54. *Id.* (citing Walburn v. Lockheed Martin Corp., 431 F.3d 966, 971 (6th Cir. 2005); *Hampton*, 318 F.3d at 217–18; United States *ex rel.* Lujan v. Hughes Aircraft Co., 243 F.3d 1181, 1187–89 (9th Cir. 2001); United States *ex rel.* LaCorte v. Smith-Kline Beecham Clinical Labs., Inc., 149 F.3d 227, 232–34 (3d Cir. 1998)).

Nevertheless, the "material" or "essential" facts test is nuanced depending on the circuit.[55] In *United States ex rel. Smith v. Yale-New Haven Hospital, Inc.*, the court adopted a hybrid approach that barred later claims unless: "(1) it alleges a different type of wrongdoing, based on different material facts than those alleged in the earlier suit; and (2) it gives rise to a separate recovery of actual damages by the government."[56]

Despite the growing complexity in applying the first-to-file bar, as evidenced by the initial disagreement regarding the "identical" and "material" facts tests, the bar's continued application is justified because of its essence of encouraging prompt notification of potential wrongdoing against the government.[57] As a group of commentators lamented: "[i]t may well be that the first-to-file rule, like democracy, is the worst possible system, except for all the others."[58]

C. Understanding Federal Rule of Civil Procedure 9(b) and Its Particularity Requirement in Alleging Fraud

Rule 9(b) of the Federal Rules of Civil Procedure provides that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally."[59] Rule 9(b)'s particularity requirement is justified by "the desire to protect the reputation of the defendant" and "the need to afford an opponent adequate notice in order to prepare a responsive pleading."[60] Due to the minimal legislative history that explains the precise instances in which Rule 9(b) should be applied, courts have developed its purpose over time.[61] In *Odom v. Microsoft Corp.*, the Ninth Circuit noted that the relator must identify the fraudulent party and state the time, place, and content of the fraud to comply with the Rule 9(b)

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55. United States *ex rel.* Smith v. Yale-New Haven Hosp., Inc., 411 F. Supp. 2d 64, 75–76 (D. Conn. 2005) (stating that the Third, Ninth, and D.C. Circuits have adopted a "same material facts" test, while the Tenth Circuit takes into account the "core fact or general conduct relied upon in the first qui tam action"); *see* Skillen & Scheurer, *supra* note 3, at 72 (pointing out that the Sixth Circuit considered multiple circuit court precedents in adopting the "essential facts" test).

56. 411 F. Supp. 2d at 76 (quoting United States *ex rel.* Capella v. United Techs. Corp., No. 3:94-CV-2063 (EBB), 1999 WL 464536, at *9 (D. Conn. June 3, 1999)).

57. *See* Skillen & Scheurer, *supra* note 3, at 75–76 (describing the usefulness of the first-to-file bar).

58. *Id.* at 77.

59. FED. R. CIV. P. 9(b).

60. William M. Richman, Donald E. Lively & Patricia Mell, *The Pleading of Fraud: Rhymes Without Reason*, 60 S. CAL. L. REV. 959, 961 (1987) (criticizing these justifications because the "meager analysis done by courts that mechanically advert to reputation interests has left too many questions unanswered and competing interests unfactored").

61. *See id.* at 965–66 (noting that Rule 9(b) has not been amended since appearing in the first draft of the Federal Rules in 1936, and congressional hearings have not discussed the rule).

requirement.[62] In *Bly-Magee v. California*, the Ninth Circuit held that the relator's first amended complaint failed to satisfy Rule 9(b) because the complaint lacked the requisite particularity.[63] Similar to the Ninth Circuit's approach in *Odom*, the *Bly-Magee* court stated that Rule 9(b) gives notice to defendants of specific fraudulent conduct against which they must defend and deters complaints as a "pretext for the discovery of unknown wrongs, to protect [defendants] from the harm that comes from being subject to fraud charges."[64]

Similarly, the D.C. Circuit, in *Kowal v. MCI Communications Corp.*, held that Rule 8 of the Federal Rules of Civil Procedure,[65] when read in conjunction with Rule 9(b), resulted in requiring a "pleader [to] state the time, place and content of the false misrepresentations, the fact misrepresented and what was retained or given up as a consequence of the fraud."[66] In *United State ex rel. Ortega v. Columbia Healthcare Inc.*, the D.C. district court recognized the frequently cited purpose of 9(b) of providing notice to the defendant to prepare an adequate case.[67] However, the court went on to highlight that the D.C. Circuit has taken "a generous approach" to the extent that it has ruled that

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62. 486 F.3d 541, 553 (9th Cir. 2007) (affirming that Rule 9(b) gives the defendant time to prepare an adequate answer to the allegations, but under the facts in the case, the defendants were not disadvantaged by the plaintiffs' failure to provide names of employees engaged in fraud). In the case, the plaintiff alleged that Microsoft and Best Buy entered into an agreement whereby Microsoft would promote Best Buy's online store if Best Buy agreed to promote MSN, an Internet access service owned by Microsoft. *Id.*

63. 236 F.3d 1014, 1018–19 (9th Cir. 2001) (holding that the allegations made in the complaint were too broad and had "no particularized supporting detail"). In *Bly-Magee*, the plaintiff, a former employee of a California non-profit agency that provided services to disabled and elderly individuals, filed suit against California for misappropriating federal funds that were appropriated to the state for vocational rehabilitation services. *Id.* at 1016.

64. *Id.* at 1018. *But see* Christopher M. Fairman, *An Invitation to the Rulemakers—Strike Rule 9(b)*, 38 U.C. DAVIS. L. REV. 281, 292 (2004) (arguing that, in certain circumstances, reputational harm is an unpersuasive basis for the Rule's reasoning because it is unclear how fraud differs from other equally serious claims, such as professional malpractice).

65. FED. R. CIV. P. 8 ("A pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief."); *see* United States *ex rel.* Bledsoe v. Cmty. Health Sys., 501 F.3d 493, 503 (6th Cir. 2007) (finding that technical pleading requirements such as those under Rule 9(b) are rejected by Rule 8 in favor of "notice pleading," which is designed to reach the action's merits).

66. 16 F.3d 1271, 1278 (D.C. Cir. 1994) (stating that where securities fraud is alleged based on the plaintiffs' assertions, the complaint must also plead sufficient facts). In the case, the plaintiffs were members of class that had purchased defendant-MCI's common stock and alleged that MCI made optimistic statements and projections of future earnings that falsely inflated the price of its common stock. *Id.* at 1273–74. The court dismissed the plaintiffs' complaint for failure to meet the heightened particularity standard of Rule 9(b). *Id.* at 1276.

67. 240 F. Supp. 2d 8, 18 (D.D.C. 2003) (stating that the purpose is to "ensure that defendants have sufficient notice of the claims against them to prepare a defense"). The plaintiff in *Ortega* alleged that Columbia Healthcare (HCA) was fraudulently procuring certification that allowed it to submit claims for Medicare reimbursement. *Id.* at 10–11. HCA moved to dismiss the complaint for failure to plead fraud with particularity. *Id.* at 18.

"9(b) does not completely vitiate the liberality of Rule 8."[68] Perhaps the best statement to summarize the D.C. Circuit's view of Rule 9(b) is from *United States ex rel. Harris v. George Washington Primary Care Associates*, in which the court stated that "one of the purposes of 9(b) is to prevent such 'fishing expeditions' that are based only on vague and unsubstantiated claims."[69]

Because Rule 9(b) requires fraud to be stated with particularity and because the FCA is an anti-fraud statute, the particularity requirement should apply when an FCA case is initially filed.[70] The D.C. Circuit cited this principle in *United States ex rel. Batiste v. SLM Corp.*, for example, to strike down the argument that Rule 9(b)'s particularity requirement should also apply at the first-to-file stage, stating that "[e]ven without grafting a Rule 9(b) requirement onto the first-to-file rule, the first plaintiff's complaint is still subject to the Rule 9(b) pleading requirements in order for a court to hear the case."[71]

Despite the apparent unanimity among the courts on whether Rule 9(b) should apply to qui tam actions, some commentators are advocating to change the Rule's application under the FCA.[72] One commentator argued that courts should adopt a standard that considers particularity under Rule 9(b) sufficient when the relator establishes the fraudulent scheme with some detail.[73] Under

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68. *Id.* (quoting United States *ex rel*. Joseph v. Cannon, 642 F.2d 1373, 1385–86 (D.C. Cir. 1981)) (conceding that Rule 9(b) requires more particularity than Rule 8 but noting that "a complaint is not deficient merely because it fails to set out a prima facie case" (citing Sparrow v. United Air Lines, Inc., 216 F.3d 1111 (D.C. Cir. 2000))).

69. No. 98-7192, 1999 WL 1021936, at *1 (D.C. Cir. Oct. 19, 1999) (citing Viacom, Inc. v. Harbridge Merch. Servs., Inc., 20 F.3d 771, 777 (7th Cir. 1994)) (stating that the overly general allegations would result in burdensome discovery that could turn the relator's complaint into a "fishing expedition"). In *Harris*, the plaintiff alleged that the defendant engaged in Medicare fraud. *Id.* The D.C. Circuit affirmed the district court's dismissal of the complaint under Rule 9(b) because the complaint included only two specific examples of fraud, which may have even been permissible under Medicare regulations. *Id.*

70. *See* United States *ex rel.* Totten v. Bombardier Corp., 286 F.3d 542, 551–52 (D.C. Cir. 2002) (rejecting a relator's claim that his complaint need not comply with Rule 9(b) because his complaint alleged "false" claims instead of "fraudulent" ones, and further stating "that the [FCA] is self-evidently an anti-fraud statute"); *see also* Bly-Magee v. California, 236 F.3d 1014, 1018 (9th Cir. 2001) (highlighting that 31 U.S.C. § 3729(a) uses the terms "false or fraudulent," "conspires to defraud," and "intending to defraud").

71. United States *ex rel.* Batiste v. SLM Corp., 659 F.3d 1204, 1210–11 (D.C. Cir. 2011) (finding that a second application of Rule 9(b) is unnecessary because the complaint would already be dismissed at the pleading stage if it did not state fraud with particularity).

72. *See* Charis Ann Mitchell, Comment, *A Fraudulent Scheme's Particularity Under Rule 9(b) of the Federal Rules of Civil Procedure*, 4 LIB. U. L. REV. 337, 365–66 (2010) (arguing that Rule 9(b) should not apply to qui tam actions under the FCA because fraud is merely one reason why a relator might bring an action); *see also* Fairman, *supra* note 64, at 304–05 (advocating for the outright elimination of Rule 9(b) because of the courts' inconsistent application of the rule).

73. Mitchell, *supra* note 72, at 367–68.

this standard, Rule 9(b) would be applied to the defendant's knowledge of falsity—the third element of an FCA violation.[74]

D. Slowly Eroding the Exception-Free First-to-File Bar Would Conflict with Legislative Intent

In *United States ex rel. Lujan v. Hughes Aircraft Co.*, the Ninth Circuit held that the plain language of the first-to-file bar does not include any exceptions—a second-filed complaint must be dismissed if a pending action based on the same underlying material facts already exists.[75] *Lujan* rejected the arguments made by the second-relator that the second action should be allowed to proceed because the second-relator was the "original source," the second action was benefiting the Treasury Department, and that the first-filed action was subsequently dismissed.[76] The *Lujan* court stated that an exception-free approach "conforms with the dual purposes of the 1986 amendments: to promote incentives for whistle-blowing insiders and prevent opportunistic successive plaintiffs."[77]

However, the *Lujan* court's succinctly laid out exception-free reading has been eroded by numerous challenges to the first-to-file bar. In *Campbell v. Redding Medical Center*, the Ninth Circuit declined to apply the *Lujan* rule to dismiss a second action because the first-filed action was not initiated by an "original source" and thereby failed to meet the jurisdictional prerequisites of the public disclosure bar, another FCA provision.[78] Unlike the *Lujan* court, the *Campbell* court stated that construing the first-to-file bar as absolute would be contrary to the purpose of the qui tam provisions by encouraging "opportunistic plaintiffs with no inside information to displace actual insiders

74. *See id.* at 368 (concluding that such a standard is also consistent with the FCA's goal of encouraging private citizens to bring lawsuits assisting the government, while furthering Rule 9(b)'s goal of protecting the defendant against overly broad complaints that can negatively impact a defendant's reputation).

75. 243 F.3d 1181, 1187 (9th Cir. 2001) (stating that the plain language of the statute unambiguously creates a first-to-file bar with no exceptions). Two separate plaintiffs, Linda Lujan and William Schumer, filed actions against Hughes Aircraft for entering into unauthorized and illegal agreements allocating costs within the B-2 bomber program. *Id.* at 1184. Schumer's action was filed first, but subsequently dismissed. *Id.* at 1185. Nevertheless, the court held that Lujan's second-filed complaint was barred because Schumer's complaint was a pending action under § 3730(b)(5). *Id.* at 1183–85.

76. *Id.* at 1183–85.

77. *Id.* at 1187 (refusing to read exceptions into the statute's plain language).

78. 421 F.3d 817, 825 (9th Cir. 2005) (holding that the first-to-file bar applies only if a complaint satisfies the requirements under 31 U.S.C. § 3730(e)(4), the public disclosure bar). Second-relator Patrick Campbell, a physician, alleged the same material facts as the first relators against Redding Medical Center. *Id.* at 819.

with knowledge of the fraud."[79] Following *Campbell*, the first-to-file bar's exception-free characteristic began to erode.[80]

In *United States ex rel. Poteet v. Medtronic, Inc.*, the Sixth Circuit agreed with the Ninth Circuit's *Campbell* decision and held that if a first-filed qui tam action is dismissed on jurisdictional grounds or on other grounds "related to its viability as a federal action," the first action cannot preclude a later-filed suit under the first-to-file bar.[81] Further, the Sixth Circuit, citing *Lujan*, held that first-filed complaints dismissed on their merits might preclude subsequent complaints, under the first-to-file bar, even if the subsequent complaints were more meritorious.[82] In reaching this conclusion, the *Poteet* court misinterpreted *Lujan* as embodying the proposition that only a merit-based dismissal could preclude a later-filed suit.[83] Rather, *Lujan* established a bright-line rule that when a first-filed suit is pending when a second action is filed, the second action must be dismissed under the first-to-file bar, regardless of whether and why the first-filed action is dismissed.[84] Nonetheless, the *Campbell* and *Poteet* holdings illustrate the growing trend to permit exceptions to the first-to-file bar that were unintended by Congress.[85]

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79. *Id.* at 824.

80. *See* United States *ex rel*. Poteet v. Medtronic, Inc., 552 F.3d 503, 516–17 (6th Cir. 2009) (holding that in order to preclude subsequent actions, a first-to-file action must not itself be jurisdictionally barred).

81. *Id.* ("Indeed, if the first complaint is either jurisdictionally precluded, or legally incapable of serving as a complaint, then it does not properly qualify as a 'pending action' brought under the FCA." (internal citations omitted)). In *Poteet*, two relators filed suit against Medtronic for illegal kickback violations before plaintiff Jacqueline Kay Poteet filed a qui tam complaint alleging the same material facts. *Id.* at 508.

82. *Id.* at 516–17. In *United States ex rel. Heineman-Guta v. Guidant Corp.*, 874 F. Supp. 2d 35 (D. Mass. 2012), relator Heidi Heineman-Guta, an account manager for Guidant Corporation, alleged that Guidant induced and rewarded doctors if they recommended Guidant's cardiac rhythm device. 874 F. Supp. at 36–37. Heineman-Guta provided specific examples of so-called kickbacks that were offered to the doctors. *Id.* The court agreed with the concurrence's skepticism in *Poteet* on whether a first-filed complaint dismissed on its merits should be able to bar subsequent, more meritorious complaints. *Id.* at 39 (sharing the skepticism of Judge David McKeague's concurring opinion in *Poteet* regarding the Sixth Circuit's first-to-file requirements).

83. *Poteet*, 552 F.3d at 515–16.

84. *See* United States *ex rel.* Lujan v. Hughes Aircraft Co., 243 F.3d 1181, 1188 (9th Cir. 2001) (explaining that the later-filed suit was brought in 1992 while the first-filed suit was still pending and the first-filed suit was not dismissed until 1997); *see* United States *ex rel.* Piacentile v. Sanofi Synthelabo, Inc., No. 05-2927, 2010 WL 5466043, at *4 (D.N.J. Dec. 30, 2010) (agreeing with *Lujan*'s holding that a first-filed complaint, which is pending when the subsequent complaint is filed, is a "pending action" even if the first-filed complaint is later dismissed).

85. *Lujan*, 243 F.3d at 1187 (finding as a matter of fact that the first-to-file bar's plain language does not contain exceptions, and the original purposes of the 1986 amendments demonstrate that exceptions were never originally intended).

E. Significant Recent Exceptions to the First-to-File Bar in Walburn *and* Batiste *Show the Urgency of a Solution*

The most recent illustrations of the first-to-file bar's erosion are the Sixth and D.C. Circuits' approaches on whether Rule 9(b) of the Federal Rules of Civil Procedure should be incorporated into the first-to-file bar.[86] If Rule 9(b) is read into the jurisdictional bar, later-filed suits that comply with Rule 9(b)'s particularity requirements would be not precluded by the first-filed suit that violated Rule 9(b).[87]

1. Walburn v. Lockheed Martin Corp.

In *Walburn*, the plaintiff-relator Jeff Walburn filed a qui tam suit under the FCA against defendant Lockheed Martin for allegedly falsifying records containing compensation and incentive payments required to operate an Ohio diffusion plant under a contract with the United States.[88] Specifically, Walburn alleged that Lockheed Martin changed the reading of his dosimeter, which measures individual doses of radiation exposure, after he was exposed to radiation gases as a security officer at the Ohio plant.[89] Lockheed Martin was required to keep records for each employee as part of the terms of their contract with the United States.[90] Lockheed Martin's compliance with the terms allowed the company to maintain accreditation from the Department of Energy and receive payment from the federal government.[91]

The district court dismissed Walburn's complaint under the FCA's first-to-file bar because it found that an earlier filed complaint alleged the same material facts as Walburn's complaint.[92] The earlier-filed complaint alleged that Lockheed Martin:

> [I]mproperly disposed of toxic waste in and around ports in violation of an affirmative statutory and contractual duty to report environmental spills as a condition of payment under their contract

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86. *See* United States *ex rel.* Batiste v. SLM Corp., 659 F.3d 1204, 1206 (D.C. Cir. 2011); Walburn v. Lockheed Martin Corp., 431 F.3d 966, 973 (6th Cir. 2005); *see also infra* Part I.E.1–2 (discussing *Batiste* and *Walburn*).

87. *See Walburn*, 431 F.3d at 973 (holding that a complaint that is insufficient under Rule 9(b) is not a complaint for the purposes of the first-to-file bar and, therefore, has no preemptive effect).

88. *Id.* at 969. Relator Jeff Walburn alleged that he was employed as a security officer at the Ohio plant and patrolled the uranium and nuclear storage areas. *Id.*

89. *Id.* Walburn alleged that Lockheed changed employees' readings between four hundred and six hundred times to maintain accreditation from the Department of Energy. *Id.*

90. *Id.*

91. *Id.*

92. United States *ex rel.* Walburn v. Lockheed Martin Corp., 312 F. Supp. 2d 936, 940–41 (S.D. Ohio 2004), *aff'd*, 431 F.3d 966 (6th Cir. 2005).

> with the United States government, and they received payment from the government for the proper disposal of the toxic waste.[93]

On appeal to the Sixth Circuit, Walburn argued the first-filed complaint should not preempt his complaint because the allegations in the first-filed complaint were "so fatally broad" that they violated Rule 9(b)'s particularity requirement.[94] The Sixth Circuit agreed with Walburn that the first-filed complaint was "legally infirm from its inception," therefore violative of Rule 9(b), and as a result, could not preclude a later-filed suit.[95] Despite finding that a first-filed complaint that violates Rule 9(b) cannot preempt a later-filed complaint, the Sixth Circuit still dismissed Walburn's complaint under § 3730(e)(4)'s public disclosure bar that prohibits allegations based on publicly disclosed information and made by someone other than the original source.[96]

2. United States ex rel. Batiste v. SLM Corp.

In *Batiste*, the relator, Sheldon Batiste, filed a complaint on June 13, 2008, in which he accused SLM Corporation[97] of knowingly submitting false claims to the government, which stated that it had complied with federal laws and regulations.[98] Batiste, a former senior loan associate at SLM, asserted that the company routinely and unlawfully granted forbearances on student loans in order to reduce delinquencies.[99] In response, SLM argued that Batiste's complaint alleged nearly identical facts to an earlier-filed complaint.[100] The

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93. United States *ex rel.* Brooks v. Lockheed Martin Corp., No. Civ. L-00-1088, 2005 WL 841997, at *1 (D. Md. April 24, 2000) (alleging other fraudulent activity including that Lockheed Martin represented to the government that it had "corrected various Occupational Safety and Health Act (OSHA) violations," "operated ports at below normal production capacity without disclosing this information to the government," and retaliated against the plaintiff in violation of the FCA's anti-discrimination provisions).

94. *Walburn*, 431 F.3d at 972 (characterizing the first-relator's complaint as a "haystack of fraud set forth . . . [that] may . . . be said to 'encompass' the needle of the specific fraud Walburn seeks to bring to the government's attention").

95. *Id.* at 972–73 (stating that "[a] complaint that fails to give adequate notice to the defendant can hardly be said to have given the government notice").

96. *Id.* at 975–76.

97. "SLM" is commonly known as Sallie Mae. *See* United States *ex rel.* Batiste v. SLM Corp., 659 F.3d 1204, 1206 (D.C. Cir. 2011).

98. *Id.* (stating that Sheldon Batiste alleged that Sallie Mae was defrauding the government, from October 5, 2004 to June 13, 2008 by submitting false certifications to the government regarding the accuracy of SLM's student-loan data).

99. *Id.* Batiste alleged that loan managers told loan officers like himself to "'forget' their formal training and to grant forbearances to 'anyone who is delinquent regardless of excuse or whether the borrower had any intention of ever repaying the loan.'" *Id.* at 1207.

100. United States *ex rel.* Batiste v. SLM Corp., 740 F. Supp. 2d 98, 101 (D.D.C. 2010), *aff'd*, 659 F.3d 1204 (D.C. Cir. 2011). SLM also argued that the plaintiff was not the original source of the information because the information was available in the public domain before the plaintiff filed his complaint. *Id.* In the alternative, SLM argued that the case should be dismissed because the plaintiffs failed to state a claim for relief due to a insufficient facts to infer fraud. *Id.*

first-filed complaint alleged that SLM knowingly falsified forbearance records to indicate that the borrowers orally agreed to forbearances even though the company never actually spoke to the borrowers.[101] The first-filed complaint was dismissed by the district court without prejudice for failing to obtain counsel within the applicable time parameters.[102] Even though the first-filed claim was subsequently dismissed, the district court found that Batiste's complaint was precluded under the first-to-file bar.[103]

On appeal, the D.C. Circuit, in a matter of first impression, held that "first-filed complaints need not meet the heightened standard of Rule 9(b) to bar later complaints; they must provide only sufficient notice for the government to initiate an investigation into the allegedly fraudulent practices, should it choose to do so."[104] In reaching its holding, the court rejected *Walburn*, noting that § 3730(b)(5)'s language does not require first-filed complaints to meet Rule 9(b)'s particularity requirement to bar subsequent complaints.[105] In refusing to follow *Walburn*, the court noted that such a requirement "would not minimize duplicative claims, would encourage opportunistic behavior, and would have a negligible impact on desirable whistle-blowing."[106]

II. THE *WALBURN* AND *BATISTE* APPROACHES UNNECESSARILY STRETCH THEIR OWN PRECEDENT

A. Walburn*'s "Legally-Infirm" Rationale is Inconsistent With Sixth Circuit Precedent as to What Features of a Complaint Serve to Preclude Later-Filed Complaints*

In *Walburn*, the Sixth Circuit did not apply the first-to-file bar when the first-filed complaint failed to meet Rule 9(b)'s particularity requirement. The approach taken in *Walburn* is best demonstrated by the following statement in the court's decision:

Lastly, SLM argued that the plaintiff lacked standing because SLM is "merely a passive holding company that has no role to play in granting forbearances." *Id.*

101. *Batiste*, 659 F.3d at 1207 (alleging that SLM undertook these actions relating to forbearance records in order to maintain its "Exceptional Performer" status, which allowed SLM to receive higher-guarantee payments than other lenders on its defaulted loans).

102. *Id.* (citing United States *ex rel.* Zahara v. SLM Corp., No. 1:06-cv-088-SEB-JMS (S.D. Ind. March 12, 2009)).

103. *Batiste*, 740 F. Supp. 2d at 103, 104–05 (finding that Batiste's attempt to differentiate his complaint from the first-filed complaint was feeble and rejecting Batiste's argument that the first-filed complaint was not a "pending action").

104. *Batiste*, 659 F.3d at 1210.

105. *Id.* ("The command is simple: as long as a first-filed complaint remains pending, no related complaint may be filed.").

106. *Id.* at 1211 (quoting United States *ex rel.* Folliard v. Synnex Corp., 798 F. Supp. 2d 66, 74 (D.D.C. 2011)).

> [W]e fail to see how according preemptive effect to a fatally broad complaint furthers the policy of encouraging whistleblowers to notify the government of potential frauds. A complaint that is insufficient under Rule 9(b) is dismissed precisely because it fails to provide adequate notice to the defendant of the fraud it alleges.[107]

In reaching this conclusion, the Sixth Circuit rejected the district court's holding that a subsequently filed suit alleging the same material facts as the first-filed suit is barred under § 3730(b)(5).[108]

Walburn's view that a complaint that is jurisdictionally "infirm" under Rule 9(b) cannot preempt a future complaint was taken an unfortunate step further by *Poteet*, in which the Sixth Circuit narrowly held that a first-filed complaint dismissed on its merits, might bar more meritorious subsequent complaints.[109] Notwithstanding the *Poteet* holding, the Sixth Circuit should hold that a first-filed complaint that is dismissed on its merits is "legally-infirm from its inception" when compared to a meritorious complaint that fails merely because of a jurisdictional bar.[110] Under such a holding, meritless first-filed complaints will not preclude more meritorious later-filed complaints.[111]

Furthermore, numerous circuits, including the Sixth Circuit, have held that the purpose of an exception to the first-to-file bar is to "further the policy of encouraging whistleblowers to notify the government of potential frauds."[112] Allowing meritless complaints to preclude a later-filed complaint will only discourage private citizens from bringing forth actions.[113] As such, neither *Walburn* nor *Poteet* establish exceptions to the first-to-file bar that comport with FCA policy.[114]

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107. Walburn v. Lockheed Martin Corp., 431 F.3d 966, 973 (6th Cir. 2005) (rejecting the defendant's argument that reading Rule 9(b) into the first-to-file bar creates an exception to the exception-free rule).

108. *See id.* at 972 (calling the district court's conclusion "unremarkable" because it does not answer whether an overly-broad complaint should preclude subsequent complaints). The district court, applying the "material facts" test, did not raise Rule 9(b) as an issue in its holding. *See* United States *ex rel.* Walburn v. Lockheed Martin Corp., 312 F. Supp. 2d 936, 941 (S.D. Ohio 2004), *aff'd*, 431 F.3d 966 (6th Cir. 2006).

109. *See* United States *ex rel.* Poteet v. Medtronic, Inc., 552 F.3d 503, 516–17 (6th Cir. 2009).

110. *See* Brief of Appellee SLM Corp. at 25–26, *Batiste*, 659 F.3d 1204 (No. 10-7140) (arguing that *Walburn*'s "legally infirm from its inception" principle can be applied to a variety of complaints, including failure to state a claim).

111. *Poteet*, 552 F.3d at 516–17 (stating that a first-filed complaint dismissed on its merits can still preclude a later-filed and more meritorious complaint under the first-to-file bar).

112. *Walburn*, 431 F.3d at 973; *see Poteet*, 552 F.3d at 516–17; Campbell v. Redding Med. Ctr., 421 F.3d 817, 825 (9th Cir. 2005); *supra* Part I.D. *But cf.* United States *ex rel.* Lujan v. Hughes Aircraft Co., 243 F.3d 1181, 1187 (9th Cir. 2001) (stating unequivocally that the first-to-file bar "does not contain exceptions").

113. *See, e.g.*, *Walburn*, 431 F.3d at 973 (finding that "according preemptive effect to a factually-broad complaint" will not result in promoting whistleblower actions).

114. *See supra* Part I.A (discussing FCA's qui tam provisions' purpose).

B. Batiste*'s Claim that Rule 9(b) Is a Separate FCA Pleading Requirement Confuses D.C. Precedent*

Although *Walburn* did not directly address the issue, it implicitly held that when the complaint is originally filed, a court should examine whether the first-filed complaint satisfies the "particularity" requirement and that the examination should also occur when a later-filed suit alleges that it should not be barred by § 3730(b)(5).[115] Conversely, *Batiste* stated that "[e]ven without grafting a Rule 9(b) requirement onto the first-to-file rule, the first plaintiff's complaint is still subject to the Rule 9(b) pleading requirements in order for the court to hear the case."[116]

Although *Batiste* suggests that every first-filed complaint is measured by Rule 9(b) in order to survive dismissal, the D.C. Circuit and D.C. District Court's practice on how to apply Rule 9(b) is less definitive.[117] In *United States ex rel. Joseph v. Cannon*, the court presented Rule 9(b)'s requirement as a statement of the "time, place and content of the false misrepresentations, the fact misrepresented and what was obtained or given up as a consequence of the fraud,"[118] but then continued that Rule 9(b) should not be "read in isolation."[119] As a result, the court concluded that "Rule 9(b)'s requirement of particularity is a less certain standard for measuring the sufficiency of a complaint,"[120] suggesting that it may be permissible for a court to not dismiss a complaint that does not allege fraud with particularity.[121] Although the *Joseph* court dismissed the complaint for its deficient pleading, the dismissal was not due to

115. *See Walburn*, 431 F.3d at 972 (stating that plaintiffs alleging FCA violations must do so with particularity as required by Rule 9(b) and striking down the first-filed complaint because it failed the "particularity" requirement even though the complaint should have already been subject to Rule 9(b)).

116. United States *ex rel.* Batiste v. SLM Corp., 659 F.3d 1204, 1211 (D.C. Cir. 2011) (calling the second application of Rule 9(b) "unnecessary" and suggesting that the would-be relator should be unable to receive a monetary award as a result).

117. *See* United States *ex rel.* Joseph v. Cannon, 642 F.2d 1373 (D.C. Cir. 1981) (finding allegations that a senator accepted unauthorized payment as too vague to overcome a Rule 9(b) analysis); United States *ex rel.* Ortega v. Columbia Healthcare, Inc., 240 F. Supp. 2d 8, 18–19 (D.D.C. 2003) (concluding that a description of a hospital's fraudulent scheme and pleading with sufficient particularity to proceed under Rule 9(b)).

118. *Joseph*, 642 F.2d at 1385 (quoting 2A JAMES MOORE, MOORE'S FEDERAL PRACTICE ¶ 9.03, at 9-20 to 9-24 (2d ed. 1980)).

119. *Id.* at 1386. In *Joseph*, the relator alleged that former Nevada Senator Howard Cannon authorized payments to his administrative assistant even though the assistant was not performing "official legislative and representational duties," thus making the salary payments false claims to the Treasury Department. *Id.* at 1375–76.

120. *Id.* Despite the court's finding that the complaint was overly "generalized and vague," the court was not prepared to dismiss the complaint for lack of particularity. *Id.*

121. *Id.* at 1385–86.

a strict reading of Rule 9(b), but because of the plaintiff's insufficient eleven-month effort to remedy the complaint's deficiencies.[122]

Similar to *Joseph*, the court in *United States ex rel. Ortega v. Columbia Healthcare, Inc.*, noting that the D.C. Circuit takes a "generous approach to pleadings," stating that Rule 9(b)'s particularity requirement does "not completely vitiate the liberality of Rule 8."[123] In *Ortega*, the court concluded that a plaintiff having filed an ordinarily deficient complaint would be granted leave to amend, but declined to provide such leave in the case because the complaint was insufficient for failure to state a claim.[124]

Based on its own precedent, the *Batiste* court should re-examine its rationale that Rule 9(b) is not necessary for the first-to-file bar because it is applied at the pleading stage.[125] The court asserted that a complaint might be sufficient to alert the government of fraudulent activity, but still be dismissed for failing to state the fraud with sufficient particularity.[126] However, the precedent indicates that the D.C. Circuit applies a generous approach to Rule 9(b) at the pleading stage, such that the the heightened standard required to protect against "parasitic suits" may be less effective than *Batiste* asserts.[127]

C. Rule 9(b), As Demonstrated in Batiste *and* Walburn*, is Inconsistently Applied, Resulting in Inconsistent Rules*

As the different approaches between past D.C. Circuit precedent and *Walburn* indicate, courts inconsistently apply Rule 9(b).[128] The scarce

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122. *Id.* (stating that the usual method for allowing a litigant his day in court is to grant leave to amend or to dismiss the complaint without prejudice; however, those methods are not available if the litigant does not display an effort to comply with pleading requirements).

123. 240 F. Supp. 2d 8, 18 (D.D.C. 2003). Rule 8 requires a "short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2). In *Ortega*, a relator filed suit alleging that HCA-owned Columbia Medical Center West fraudulently procured certification as a healthcare organization, which precluded it from participating in Medicare. *Id.* at 11. The relator argued that Columbia Healthcare falsely submitted claims for Medicare reimbursement and fraudulently booked costs to raise the base for Medicare funding. *Id.*

124. *See id.* at 18–19 (finding that the complaint failed to connect the alleged fraudulent scheme of falsifying committee minutes with claims for payment).

125. *See* United States *ex rel.* Batiste v. SLM Corp., 659 F.3d 1204, 1211 (D.C. Cir. 2011) ("The threat of a second application of Rule 9(b) is unnecessary.").

126. *See id.* at 1210; *see also* United States *ex rel.* Folliard v. Synnex Corp., 798 F. Supp. 2d 66, 74 (D.D.C. 2011) (stating that if the government knows the essential facts of the fraud, the complaint may be dismissed under Rule 9(b) and yet still preclude subsequent complaints stating the same fraud with particularity required under Rule 9(b)).

127. *See Ortega*, 240 F. Supp. 2d at 18–19 (noting the leniency of the D.C. Circuit); *see also* United States *ex rel.* LaCorte v. Smith Kline Beecham Clinical Labs., Inc., 149 F. 3d 227, 223 (3d Cir. 1998) (quoting Pettis *ex rel.* United States v. Morrison Co., 577 F.2d 688 (9th Cir. 1978) (commenting that the FCA's purpose was to avoid "parasitic suits")).

128. *See* Richman, Lively & Mell, *supra* note 60, at 973. *Compare* Tomera v. Galt, 511 F.2d 504, 508 (7th Cir. 1975) (concluding that, to give defendants notice, Rule 9(b) requires "slightly more" than the liberal approach of Rule 8), *overruled by* Short v. Belleville Shoe Mfg. Co., 908

legislative history on Rule 9(b) leaves courts to develop their own interpretations of a heightened pleading standard.[129] In *United States ex rel. Bledsoe v. Community Health Systems, Inc.*, the Sixth Circuit stated that Rule 9(b) "enables defendants to prepare an informed pleading responsive to the specific allegations of fraud."[130] One commentator argues that this rationale makes Rule 9(b) superfluous because it does not further Rule 8 pleading standards.[131] If a complaint alleging fraud is too vague for a response, other remedies exist for the defendant such as a motion for a more definite statement or a motion to dismiss.[132]

Courts take various approaches when applying Rule 9(b), including conducting a "circumstances" analysis, requiring the plaintiff to plead elements of fraud, requiring particularity to be "simple, brief, and designed to give the defendant fair notice of the fraud claim," or requiring exact details of the fraud.[133] This inconsistent application and seemingly unnecessary existence has led one commentator to call for the outright elimination of Rule 9(b).[134] Other commentators argue that the particularity requirement should only apply to the defendant's knowledge of falsity.[135]

Striking Rule 9(b) altogether may not be the answer in FCA suits given the deep-rooted history and widespread agreement that Rule 9(b) should apply in some form at the pleading stage. Rule 9(b)'s application beyond the early pleading stage, however, is the primary source of inconsistent court rules: either courts preclude complaints that violate Rule 9(b) as against the

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F.2d 1385 (7th Cir. 1990), *with* Denny v. Barber, 576 F.2d 465, 469 (2d Cir. 1978) (applying a strict approach to particularity).

129. *See* Richman, Lively & Mell, *supra* note 60, at 965 (citing Advisory Committee drafts, congressional hearings, and American Bar Association proceedings and finding virtually no mention of Rule 9(b)).

130. 501 F.3d 493, 509 (6th Cir. 2007) (internal citation omitted). In *Bledsoe*, the relator, a respiratory staff therapist at one of the several hospitals owned by Community Health Systems, alleged that the hospital was engaged in "illegal and fraudulent billing practices." *Id.* at 497. The court held that a "paragraph-by-paragraph" approach by a court for determining Rule 9(b) sufficiency is required and that courts should narrowly construe a false or fraudulent scheme. *Id.* at 509–10.

131. *See* Fairman, *supra* note 64, at 296–97. Other purposes for Rule 9(b) include: "defense of settled transactions, protection of defendants' reputations, [and] deterrence of frivolous or strike suits." *Id.* at 290.

132. *See id.* at 296–97 (stating that missing details should be remedied through motions or obtained through the regular discovery process).

133. *See id.* at 297–99 (asserting that a court's chosen approach is based largely on its rationalization for the Rule).

134. *See id.* at 299, 304–05, 307 (arguing that if Rule 9(b) is not challenged, it will "contaminate other substantive areas of law").

135. *See* Mitchell, *supra* note 72, at 337, 374 (arguing that, because fraud is only one reason for bringing a FCA action, the particularity requirement should not be imposed on all qui tam suits).

defendant but not for first-to-file purposes,[136] or courts do not apply Rule 9(b) to the first-to-file bar because it would be duplicative.[137]

III. FUTURE COURTS SHOULD ADHERE TO *LUJAN*'S ZERO-EXCEPTION RULE FOR THE FIRST-TO-FILE BAR

In *Lujan*, the court stated that "an exception-free, first-to-file bar conforms with the dual purposes of the 1986 amendments: to promote incentives for whistle-blowing insiders and [to] prevent opportunistic successive plaintiffs."[138] Even though courts have acknowledged this exception-free principle, in practice, they have failed to apply it.[139] Most notably, by holding that a first-filed complaint violative of Rule 9(b) is "legally infirm from its inception," thereby permitting later-filed suits to proceed, courts have created an exception to the first-to-file bar.[140] Creation of such exceptions indicates that courts are heading down a slippery slope with respect to the original intent of the first-to-file bar and are creating more confusion than clarity.

In order to prevent further erosion of the first-to-file bar, courts should develop rules based on the purposes of the bar and Rule 9(b).[141] Courts can consistently apply the first-to-file bar to cases as long as the rule is exception-free. Particularly, Rule 9(b) should not be read into the first-to-file bar because: (1) a complaint should not be dismissed while still precluding subsequent complaints alleging the same material facts; and (2) a complaint dismissed on its merits should have the same non-preclusion impact as a complaint dismissed for lack of jurisdiction.

A. Meritless Complaints Should Not Preclude Later-Filed Complaints and Jurisdictionally-Barred Complaints Should Preclude Later-Filed Complaints

The basic purpose of the first-to-file bar is to incentivize whistleblowers to file suits, while discouraging duplicative claims that do not help reduce fraud.[142] Yet another purpose, and perhaps a more important one, of the first-to-file bar is to prevent the "practical effect of dividing the bounty among

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136. *See* United States *ex rel.* Poteet v. Medtronic, Inc., 552 F.3d 503, 517 (6th Cir. 2009).

137. *See* United States *ex rel.* Batiste v. SLM Corp., 659 F.3d 1204, 1210 (D.C. Cir. 2011).

138. United States *ex rel.* Lujan v. Hughes Aircraft Co., 243 F.3d 1181, 1187 (9th Cir. 2001) (rejecting the second relator's contentions that the first-to-file bar should not apply to her case because her complaint would benefit the Treasury, she had personal knowledge of the fraudulent activity, and she informed the government of her allegations before the first complaint was filed).

139. *See supra* notes 80–85 and accompanying text (discussing *Poteet*'s misinterpretation of *Lujan*).

140. *See* Walburn v. Lockheed Martin Corp., 431 F.3d 966, 972 (6th Cir. 2005).

141. For a brief history and explanation of Rule 9(b)'s purpose, see Mitchell, *supra* note 72, at 344.

142. Skillen & Scheurer, *supra* note 3, at 76 (quoting Unites States *ex rel.* Ortega v. Columbia Healthcare, Inc., 240 F. Supp. 2d 8, 12 (D.D.C. 2003)) (arguing for a strict-interpretation of the first-to-file rule in order to adhere closely to Congress' goal of encouraging whistleblowers to file actions as soon as they learn of fraud on the government).

more and more relators, thereby reducing the incentive to come forward with information on wrongdoing."[143] Certainly, disputes over the first-filed suit affect litigants because of the potential for a monetary award, particularly if the government chooses to join the action.[144]

Unfortunately, courts have not developed rules with this practicality in mind.[145] For example, *Poteet* held that a first-filed qui tam suit dismissed on its merits could still preclude a more meritorious, later-filed suit.[146] *Walburn* noted that a first-filed suit that was dismissed on jurisdictional grounds precluded a later-filed suit.[147] These holdings do not conform to the basic purpose of the first-to-file bar, which is to alert the government of fraudulent activity.[148] A complaint dismissed on its merits, by definition, is more likely to lead the government astray—or at least preoccupy valuable resources in determining whether it is a claim worth pursuing—as opposed to a dismissed complaint that is merely jurisdictionally insufficient. For example, although a complaint pled by a non-original source, which is one form of jurisdictional insufficiency, raises the *possibility* of inaccurate information being provided to the government, a meritless complaint will almost certainly provide information that is plainly false.[149]

Second, allowing meritless complaints but not jurisdictionally deficient complaints, discourages whistleblowers from coming forward and alerting the government of fraud. For example, if a private citizen knew of fraudulent activity occurring within a company he may not immediately file a complaint because, if his lawyer drafts an insufficient complaint, he may be subject to a

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143. *Ortega*, 240 F. Supp. 2d at 12.

144. *See* BOESE, *supra* note 5, at 4-268 (stating that one of the most important changes of the 1986 amendment was to increase relators' awards to a maximum of thirty percent of the proceeds of the action). Often, the potential for the greatest reward occurs when the government chooses to intervene because of the government's plethora of resources and selectivity in choosing cases that are likely to maximize the return on its investment. *See* John C. Ruhnka, Edward J. Gac & Heidi Boerstler, *Qui Tam Claims: Threat to Voluntary Compliance Programs in Health Care Organizations*, 25 J. HEALTH POL. POL'Y & L. 283, 301–03 (2000) (describing the prospects of substantial rewards when the government joins); *see also* Michael Lawrence Kolis, Comment, *Settling for Less: The Department of Justice's Command Performance Under the 1986 False Claims Amendments Act*, 7 ADMIN. L.J. AM. U. 409, 444 (1993) (stating that the heavy burden on the Department of Justice to litigate FCA claims has caused it to pursue only cases that will yield financial rewards).

145. *See* United States *ex rel.* Poteet v. Medtronic, Inc., 552 F.3d 503, 517–18 (6th Cir. 2009); *Walburn*, 431 F.3d at 972–73.

146. *Poteet*, 552 F.3d at 517–18.

147. *Walburn*, 431 F.3d at 972.

148. *See* Skillen & Scheurer, *supra* note 3, at 76 ("The basic objective of the qui tam provisions is, after all, to enable the government, through private enforcement, to restore stolen money to the federal fisc.").

149. *See* Elletta S. Callahan & Terry M. Dworkin, *Do Good and Get Rich: Financial Incentives for Whistleblowing and the False Claims Act*, 37 VILL. L. REV. 273, 325 (1992) (acknowledging commentators who believe that greed of increased rewards encourages more meritless claims that waste government resources).

jurisdictional bar, leaving someone else to potentially reap the monetary reward. The better rule would be to apply the first-to-file bar on complaints that are dismissed on jurisdictional grounds.

B. Dismissing a Complaint Against the Defendant, but Not for Purposes of the First-to-File Rule, Misses the Point

Recent courts have held that there is a sliding scale of particularity required at the pleading stage.[150] In *United States ex rel. Folliard v. Synnex Corp.*, the D.C. Circuit agreed with the rationale in *Batiste* that a complaint may state sufficient information to put the government on notice for purposes of the first-to-file bar, yet not state the activity with enough particularity to put the defendant on notice.[151] Although this reasoning recognizes the purpose of alerting the government to fraud, it is contrary to the purpose of incentivizing private citizens to bring forth claims.[152] If a relator foresees that his or her complaint will be dismissed, but the government may still use the information the relator provided in the complaint to bring a suit against the defendant, then the relator may be discouraged from bringing the suit initially.[153] In that case, the government will not be alerted to the possible fraud.[154]

In 2011, the government recovered over three billion dollars from successful actions, of which ninety-three percent was due to whistleblowers.[155] If courts were to closely follow a rule in which a complaint is dismissed against the defendant, but the government still pursues the case, clarification would be needed regarding whether the initial relator is entitled to a resulting monetary reward. If courts erode that possibility over time, the effectiveness of the qui

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150. *See* United States *ex rel.* Batiste v. SLM Corp., 740 F. Supp. 2d 98, 104 (D.D.C. 2010) (discussing the different levels of particularity required to satisfy the first-to-file bar and the Rule 9(b) requirement), *aff'd*, 659 F.3d 1204.

151. 798 F. Supp. 2d 66, 74 (D.D.C. 2011) (arguably agreeing with a possible *Walburn*-type approach in certain situations by stating that there are some cases in which a prior complaint dismissed for failing Rule 9(b) does not preclude subsequent complaints). The *Folliard* court stated that the government's investigation into the first-filed complaint sufficiently revealed facts that were also included in the second-filed complaint, and thus, the second complaint should be dismissed under § 3730(b)(5). *Id.*; *see also Batiste*, 740 F. Supp. 2d at 104 (disagreeing with *Walburn*'s finding that a complaint dismissed under Rule 9(b) cannot provide notice to the government); United States *ex rel.* Piacentile v. Sanofi Synthelabo, Inc., No. 05-2927, 2010 WL 5466043, at *5 (D.N.J. Dec. 30, 2010) (arguing that since a qui tam claim is kept under seal for at least 60 days, the government's ensuing investigation is presumed to result in notice to the government notwithstanding the notice to the defendant).

152. *See supra* Part I.A.

153. *See* Scarcella, *supra* note 14, at 3 (noting that whistleblowers will be wary of bringing actions if there is a high probability that the action will be dismissed).

154. *See* Mitchell, *supra* note 72, at 340 (stating that the government's reliance on whistleblowers to uncover fraud).

155. Press Release, Dep't of Justice, Justice Department Recovers $3 Billion in False Claims Act Cases in Fiscal Year 2011 (Dec. 19, 2011), http://www.justice.gov/opa/pr/2011/December/11-civ-1665.html.

tam provisions will likely decrease substantially.[156] If courts disregard the monetary incentive for bringing suits forward, the FCA will suffer a detrimental impact, given the other potential negative consequences of whistleblowing.[157]

C. Eliminating the Slowly Evolving "Particularity" Exception to the First-to-File Bar Is a Practical Solution

The *Batiste* court, in reaching its conclusion—that as long as a first-filed action is "pending," any subsequently-filed complaint is barred by the first-to-file rule—reasoned that if it followed *Walburn*'s approach of reading a particularity requirement into § 3730(b)(5), a "strange judicial dynamic" would be created.[158] The *Batiste* court sought to avoid creating a requirement in which one court in a given jurisdiction was forced to evaluate whether a court in a different jurisdiction correctly decided the sufficiency of a complaint.[159]

In addition to *Batiste*'s practical approach toward Rule 9(b), courts should only apply Rule 9(b) during the pleading stage.[160] After extensive analysis, one commentator concluded that "[d]ecades of inconsistent treatment by the federal bench now obscure whatever the drafters thought was the proper way to apply the Rule [9(b)]. Uniformity is an illusory goal."[161] The fact-specific approach taken by courts in the context of FCA claims caused an uncertain outcome as to whether a complaint will be excluded by the first-to-file bar.[162] Courts should recognize this ongoing phenomenon and eliminate a particularity requirement from the first-to-file bar.

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156. *See* James F. Barger, Jr., Pamela H. Bucy, Melinda M. Eubanks & Marc S. Raspanti, *States, Statutes, and Fraud: An Empirical Study of Emerging State False Claims Acts*, 80 TUL. L. REV. 465, 471–73 (2005) (explaining that the 1986 amendments "invigorat[ed] qui tam actions" by relaxing jurisdictional bar provisions and increasing relator rewards).

157. *See id.* (noting the increase of qui tam cases after the 1986 amendments to the FCA).

158. United States *ex rel.* Batiste v. SLM Corp., 659 F.3d 1204, 1210 (D.C. Cir. 2011); *see* United States *ex rel.* Heineman-Guta v. Guidant Corp., 874 F. Supp. 2d 35, 41 (D. Mass. 2012) (agreeing with the *Batiste* court that the "strange judicial dynamic" of asking one court to evaluate another jurisdiction's determination of legal sufficiency should be avoided); United States *ex rel.* Piacentile v. Sanofi Synthelabo, Inc., No. 05-2927, 2010 WL 5466043, at *5 (D.N.J. Dec. 30, 2010) (interpreting the *Walburn* holding to suggest that the first-filed complaint did not preclude Walburn's subsequent complaint, even if the first court had found that the first filed complaint satisfied Rule 9(b)).

159. *Batiste*, 659 F.3d at 1210.

160. *See* Miller v. Holtzmann, No. Civ.A.95-1231RCLJMF, 2006 WL 568722, at *8 (D.D.C. March 9, 2006) (providing the standard for determining whether the particularity requirement has been satisfied at the pleading stage when the complaint is first filed). The *Miller* court stated that, under D.C. District Court precedent, Rule 9(b) and Rule 8(a) must be read together to require the plaintiff "to state, for example, the time, place and content of false representations made to induce the government to pay the false claim." *Id.*

161. Fairman, *supra* note 64, at 297–98.

162. *See supra* Part I.E (discussing the differing approaches between the Ninth and D.C. Circuits).

IV. CONCLUSION

"Why would I tell my client to jeopardize his career to bring a complaint that will be barred?"[163] This quote by Robert Vogel, an attorney with a Washington D.C. law firm, demonstrates the real-world implications that result from the various approaches taken by the Sixth and D.C. Circuits. If *Walburn* is followed, then whistleblowers may be reluctant to bring valuable information to the government. If *Batiste* is followed, complaints could be dismissed against the defendant for reasons other than the first-to-file bar, and whistleblowers may be reluctant to bring suits without the incentive of a monetary reward.

To resolve this dilemma, courts should adhere to the exception-free rule envisioned in *Lujan*. To appropriately apply this rule and serve the purpose of the first-to-file bar, courts should not read Rule 9(b)'s particularity requirement into the first-to-file bar. Additionally, complaints dismissed on their merits should not preclude later-filed suits, and relators should be given the opportunity to state a claim with sufficient particularity.

163. *See* Scarcella, *supra* note 14, at 13 (stating that Sallie Mae "argu[ed] for a free pass for all time on the basis the first complaint did not have enough detail, and that is wrong.").