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INTRODUCTION TO THE FALSE CLAIMS ACT AND THE FIRST-TO-FILE PROVISION

The False Claims Act (FCA)[1] is the United States of America's (the "Government") "primary weapon" to combat fraudulent activity affecting the Government and American taxpayers.[2] Recognizing that the Government would be unable to uncover all such fraudulent activity on its own, Congress enacted the *qui tam* provisions of the FCA, which rewards whistleblowers for reporting previously undisclosed fraud.[3] Besides the psychic rewards of doing the right thing, righting a wrong, and saving lives, successful FCA cases can result in monetary rewards, sometimes even large monetary payouts.[4] Therefore, *qui tam* whistleblowers, known as *Relators*, have substantial incentive to present their claims on behalf of the Government. Because these rewards can be substantial, Congress recognized the need to place certain limits on the FCA to protect both whistleblowers and defendants from repetitive and unjustified use of the *qui tam* provisions. For example, Congress enacted the Public Disclosure Bar, which precludes receipt of an award by

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[1] 31 U.S.C. §§ 3729–3733.

[2] Press Release, Department of Justice Recovers $3 Billion in False Claims Cases in Fiscal Year 2010, Justice.gov, Nov. 22, 2010, *available at* https://www.justice.gov/opa/pr/department-justice-recovers-3-billion-false-claims-cases-fiscal-year-2010; Press Release, Justice Department Recovers Over $4.7 Billion From False Claims Act Cases in Fiscal Year 2016, Justice.gov, Dec. 14, 2016, *available at* https://www.justice.gov/opa/pr/justice-department-recovers-over-47-billion-false-claims-act-cases-fiscal-year-2016; accord U.S. ex rel. Wood v. Allergan, Inc., 246 F. Supp. 3d 772, 797 (S.D.N.Y. 2017), interlocutory appeal pending, (2d Cir. 2017).

[3] *See* 31 U.S.C. § 3730.

[4] Under the FCA, successful Relators receive a percentage of the Government's recovery. 31 U.S.C. § 3730(d). In many instances, depending on the fraud, the Government's recovery can be billions of dollars. *See* https://taf.org/Public/Home_Page_Buttons/Top_100_Fraud_Cases.aspx.

Relators who present information that is substantially available in the public forum, *e.g.*, information already disclosed in news articles or available to the public on the internet.[5] Another of Congress' limitations—and the one at the center of this article—seeks to prevent repetitive cases from being filed; this limitation is known as the first-to-file rule/bar.[6]

While the general theory behind the First-to-File bar may appear relatively simple, properly and practically applying it is a difficult task.[7] Though there are many complexities involved with First-to-File litigation, this article focuses on the current disagreement among the various circuit courts of appeals as to whether the First-to-File bar is a jurisdictional bar to litigation.[8] This article is not intended to offer an exhaustive analysis or resolution to this issue, but rather, will simply introduce the current debate and offer initial thoughts on why the authors believe the First-to-File bar is a non-jurisdictional provision. Those seeking a more detailed analysis of the case law are encouraged to review, *inter alia*, Chapter 25 of the American Bar Association's 2018 Edition of Developments in Business and Corporate Litigation.

I. THE FIRST-TO-FILE BAR

The first-to-file bar states that "[w]hen a person brings an action under [the FCA], no person other than the Government may intervene or bring a related action based on the facts underlying the pending action."[9]

Despite the statutory command that no person can *bring* a subsequent related action, in practice, Relators routinely bring related actions under seal and, therefore, do not learn until years into litigation that another Relator has filed a sealed case against the same defendant. This practical reality is largely due to the fact that, unlike more typical matters, actions brought pursuant to the FCA must be filed and investigated under seal, thereby concealing their existence from other Relators attempting to determine whether any other related action has been filed. As a result, it is not until a pending action is unsealed, or the Government alerts Relators in similarly-situated matters of competing cases by partially unsealing the cases, that Relators learn of any

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[5] 31 U.S.C. § 3730(e)(4)(A).

[6] 31 U.S.C. § 3730(b)(5).

[7] The Supreme Court has recognized that "qui tam provisions present many interpretive challenges." Kellogg Brown & Root Servs. v. U.S. ex rel. Carter, 135 S. Ct. 1970, 1979 (2015).

[8] Compare U.S. ex rel. Heath v. AT&T, Inc., 791 F.3d 112, 119 (D.C. Cir. 2015), cert. denied, 136 S. Ct. 2505 (2016) with U.S. ex rel. Lujan v. Hughes Aircraft Co., 243 F.3d 1181, 1183 (9th Cir. 2001).

[9] 31 U.S.C. § 3730(b)(5).

related actions. The question facing courts then becomes, since multiple related actions may be pending at any one time, and in different jurisdictions, how does the First-to-File bar impact those actions.

II. Application of the First-to-File Bar

The recent trend amongst the circuit courts aligns with the practical realties of *qui tam* practice, concluding that the First-to-File provision is not jurisdictional and requires reviewing all related actions at the time a First-to-File objection is lodged.[10]

In *United States ex rel. Heath v. AT&T, Inc.*,[11] the D.C. Circuit concluded that because the First-to-File provision does not explicitly state that it is jurisdictional in nature, it is not within the court's province to expand Congress' intent.[12] Following the Supreme Court's holding in *Kwai Fun Wong*, the court found that deeming the First-to-File bar jurisdictional would be improper in light of the fact that Congress did not clearly command the courts to do so. Absent a clear statement by Congress to apply a procedural rule as jurisdictional, the Court held that, "courts should treat the restriction as nonjurisdictional in character."[13]

In supporting its conclusion, the D.C. Circuit looked to the plain language of the First-to-File provision and the FCA as a whole, ultimately concluding that the First-to-File bar's "statutory structure confirms what the plain text indicates[:] . . . [w]hen Congress wanted limitations on False Claims Act suits to operate with jurisdictional force, it said so explicitly."[14] "For example, while the first-to-file bar appears in a subsection labeled 'Actions by Private Persons,' a neighboring subsection is labeled 'Certain Actions Barred' and a number of those provisions are expressly couched in jurisdictional terms."[15] Pointing to Section 3730(e)(1), the D.C. Circuit noted that Congress directed—for that provision—that "[n]o court shall have jurisdiction over an action brought by a former or present member of the armed forces * * * against a member of the armed forces arising out of such person's service[.]"[16] The D.C.

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[10] *See* Heath, 791 F.3d at 119.

[11] 791 F.3d 112, 119 (D.C. Cir. 2015), cert. denied, 136 S. Ct. 2505 (2016).

[12] *See id.* at 120–21 (quoting United States v. Kwai Fun Wong, 135 S. Ct. 1625, 1632 (2015) ("Courts should not lightly attach such drastic consequences to a procedural requirement. Instead, such rules will be held to "cabin a court's power only if Congress has 'clearly state[d]' as much.")).

[13] *Id.* (quoting Auburn Regional, 133 S. Ct. at 824).

[14] *Id.*

[15] *Id.*

[16] *Id.* (quoting 31 U.S.C. § 3730(e)(1)).

Circuit found similar support in Section 3730(e)(2), which commands that "[n]o court shall have jurisdiction over an action brought * * * against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought."[17] Therefore, the D.C. Circuit found that "Congress, in other words, knew how to reference 'jurisdiction expressly' in the False Claims Act if 'that [was] its purpose.' But it did not do so in the first-to-file rule."[18] As such, "[b]ecause nothing in the text or structure of the first-to-file rule suggests, let alone 'clearly state[s],' that the bar is jurisdictional, *Kwai Fun Wong*, 135 S. Ct. at 1632, *we hold that the first-to-file rule bears only on whether a qui tam plaintiff has properly stated a claim*."[19]

A year later, the Second Circuit followed the D.C. Circuit's lead in *United States ex rel. Hayes v. Allstate Ins. Co.*[20] Under a similar analysis, the Second Circuit concluded that

> Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion. *Kucana v. Holder*, 558 U.S. 233, 249 (2010) (brackets omitted). Because the FCA "clearly state[s]" that *other* limitations on *qui tam* actions are jurisdictional, but does not "clearly state[]" that the first-to-file rule is jurisdictional, we must treat the first-to-file rule "as nonjurisdictional in character." *Auburn Reg'l Med. Ctr.*, 133 S. Ct. at 824 (quoting *Arbaugh*, 546 U.S. at 515-16).[21]

Diverging from the D.C. Circuit and Second Circuit's opinions, several circuit decisions predating *Heath* and *Hayes* concluded that the First-to-File bar was jurisdictional, despite no explicit direction from Congress to implement the provision as a jurisdictional bar to litigation.[22] These courts determined that the First-to-File bar is applied by looking at all pending actions, the date they were filed, and dismissing for lack of subject matter jurisdiction those complaints filed after the initial, related action.[23]

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[17] *Id.* (quoting 31 U.S.C. § 3730(e)(2)(A)).

[18] *Id.*

[19] *Id.* (emphasis added).

[20] 853 F.3d 80 (2d Cir.), cert. denied, 86 U.S.L.W. 3153 (Oct. 2, 2017).

[21] U.S. ex rel. Hayes v. Allstate Ins. Co., 853 F.3d 80, 85–86 (2d Cir.), cert. denied, 86 U.S.L.W. 3153 (Oct. 2, 2017).

[22] *See, e.g.*, U.S. ex rel. Lujan v. Hughes Aircraft Co., 243 F.3d 1181, 1183 (9th Cir. 2001).

[23] *See, e.g.*, U.S. ex rel. Carter v. Halliburton Co., 710 F.3d 171, 181 (4th Cir. 2013), rev'd in part on other grounds sub nom., Kellogg Brown & Root Servs., Inc. v. U.S., ex rel. Carter, 135 S. Ct. 1970 (2015); Walburn v. Lockheed Martin Corp., 431 F.3d 966, 970 (6th Cir. 2005); U.S. ex rel. Lujan v. Hughes Aircraft

For example, in *United States ex rel. Branch Consultants v. Allstate Ins. Co.*, the Fifth Circuit concluded that the existence of a first-filed FCA action divests the court of subject matter jurisdiction as to the later-filed, related FCA action.[24] In reaching that conclusion, the Fifth Circuit turned to the historical lineage of congressional intent in drafting and amending the FCA, setting forth its view of Congress' intent in enacting the First-to-File bar:

> The history of the FCA's *qui tam* provisions demonstrates repeated attempts by Congress to balance two competing policy goals. On the one hand, the provisions seek to encourage whistleblowers with genuinely valuable information to act as private attorneys general in bringing suits for the common good. *Id*. On the other hand, the provisions seek to discourage opportunistic plaintiffs from filing parasitic lawsuits that merely feed off previous disclosures of fraud. *Id*. To promote the latter goal, Congress has placed a number of jurisdictional limits on the FCA's *qui tam* provisions, including § 3730(b)(5)'s first-to-file bar. Under this provision, if [the Relator's] claim had already been filed by another, the district court lacked subject matter jurisdiction and was required to dismiss the action.[25]

Despite the Fifth Circuit's conclusion that the First-to-File bar imposes a jurisdictional limitation, section 3730(b)(5) does not, on its face, support that conclusion; as explained by the D.C. Circuit and the Second Circuit, Congress never included in its statutory enactment the term *jurisdiction*. Further, inquiry into how the Fifth Circuit reached its conclusion is difficult, as the Fifth Circuit failed to explain its basis for finding that the First-to-File bar imposes a jurisdictional limitation on *qui tam* filings. Because the court did not identify how it reached its conclusion, we are left unable to analyze the validity of the court's analysis. Notwithstanding, the majority of other circuits to have addressed the issue reached similar conclusions, likewise providing little support for their findings.[26]

In what is arguably the most robust discussion of the issue by a court finding the First-to-File provision jurisdictional, the Fourth Circuit in *United*

Co., 243 F.3d 1181, 1183 (9th Cir. 2001); Grynberg v. Koch Gateway Pipeline Co., 390 F.3d 1276, 1278 (10th Cir. 2004).

[24] 560 F.3d 371, 376 (5th Cir. 2009).

[25] *Id.* at 376–77.

[26] *See, e.g.*, U.S. ex rel. Carter v. Halliburton Co., 710 F.3d 171, 181 (4th Cir. 2013), rev'd in part on other grounds sub nom., Kellogg Brown & Root Servs., Inc. v. U.S., ex rel. Carter, 135 S. Ct. 1970 (2015); Walburn v. Lockheed Martin Corp., 431 F.3d 966, 970 (6th Cir. 2005); U.S. ex rel. Lujan v. Hughes Aircraft Co., 243 F.3d 1181, 1183 (9th Cir. 2001); Grynberg v. Koch Gateway Pipeline Co., 390 F.3d 1276, 1278 (10th Cir. 2004).

States ex rel. Carter v. Halliburton Co.[27] concluded that the "first-to-file bar [i]s an absolute, unambiguous exception-free rule."[28] In the Forth Circuit's view, "whoever wins the race to the courthouse prevails and the other case must be dismissed."[29] Upon defendant's appeal to the Supreme Court, the Court granted certiorari and heard the case on its merits, partially addressing—albeit not squarely—how to properly apply the First-to-File provision.[30] While not directly on point, the Court's discussion of the issue helps provide background and context on the question addressed in this article:

> The first-to-file bar provides that "[w]hen a person brings an action . . . no person other than the Government may intervene or bring a related action based on the facts underlying the *pending* action." 31 U.S.C. §3730(b)(5) (emphasis added). The term "pending" means "[r]emaining undecided; awaiting decision." Black's 1314 (10th ed. 2014). *See also* Webster's Third 1669 (1976) (defining "pending" to mean "not yet decided: in continuance: in suspense"). If the reference to a "pending" action in the FCA is interpreted in this way, an earlier suit bars a later suit while the earlier suit remains undecided but ceases to bar that suit once it is dismissed. We see no reason not to interpret the term "pending" in the FCA in accordance with its ordinary meaning.
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> Petitioners argue that Congress used the term "pending" in a very different—and very peculiar—way. In the FCA, according to petitioners, the term "pending" "is 'used as a short-hand for the first filed action.'" Brief for Petitioners 44. Thus, as petitioners see things, the first-filed action remains "pending" even after it has been dismissed, and it forever bars any subsequent related action.
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> This interpretation does not comport with any known usage of the term "pending." Under this interpretation, *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 2 L. Ed. 60 (1803), is still "pending." So is the trial of Socrates.
>
> Not only does petitioners' argument push the term "pending" far beyond the breaking point, but it would lead to strange results that Congress is unlikely to have wanted. Under petitioners' interpretation, a first-filed suit would bar all subsequent related suits even if that earlier suit was dismissed for a reason having nothing to do with the merits. Here, for example, the *Thorpe* suit, which provided the ground for the initial invocation of the first-to-file rule,

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27 For purposes of transparency, the authors represent Relator Carter in this action.

28 Carter, 710 F.3d at 181 (citing U.S. ex rel. LaCorte v. Wagner, 185 F.3d 188, 191 (4th Cir. 1999)).

29 *Id.*

30 Kellogg Brown & Root Servs. v. U.S. ex rel. Carter, 135 S. Ct. 1970, 1978–79 (2015).

> was dismissed for failure to prosecute. *Why would Congress want the abandonment of an earlier suit to bar a later potentially successful suit that might result in a large recovery for the Government*?
>
> Petitioners contend that interpreting "pending" to mean pending would produce practical problems, and there is some merit to their arguments. In particular, as petitioners note, if the first-to-file bar is lifted once the first-filed action ends, defendants may be reluctant to settle such actions for the full amount that they would accept if there were no prospect of subsequent suits asserting the same claims. *See* Brief for Petitioners at 56-57. Respondent and the United States argue that the doctrine of claim preclusion may protect defendants if the first-filed action is decided on the merits, *id.*, at 60-61; United States Brief 30, but that issue is not before us in this case. The False Claims Act's *qui tam* provisions present many interpretive challenges, and it is beyond our ability in this case to make them operate together smoothly like a finely tuned machine. We hold that a *qui tam* suit under the FCA ceases to be "pending" once it is dismissed. We therefore agree with the Fourth Circuit that the dismissal with prejudice of respondent's one live claim was error.[31]

The Court's analysis appears to support the conclusion that the first-to-file analysis may be affected by post-filing events, specifically, the status of earlier-filed complaints at the time the first-to-file issue is raised. Where earlier-filed complaints are dismissed, the Court's holding supports the theory that later-filed cases may proceed, despite having been filed after the initial, related complaint. This conclusion contradicts the Fourth Circuit's ruling that the First-to-File provision is an "exception-free rule" measured solely by who wins the race to the courthouse.[32]

With the benefit of the Supreme Court's decision in *Carter*, First Circuit jurisprudence presents an interesting view into the current state of the law, and may preview how courts addressing the issue post-*Carter* may act. In 2014, the First Circuit cited the Ninth Circuit's decision in *Lujan* in holding that "[t]he FCA first-to-file rule is jurisdictional."[33] The First Circuit explained that "[t]he rule comes from the statutory prohibition that bars any 'person other than the Government' from 'bring[ing] a *related action* based on *the facts* underlying the pending action' in the FCA context."[34] The First Circuit then concluded

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[31] Kellogg Brown & Root Servs. v. U.S. ex rel. Carter, 135 S. Ct. 1970, 1978–79 (2015).

[32] Carter, 710 F.3d at 181 (emphasis added) (citing U.S. ex rel. LaCorte v. Wagner, 185 F.3d 188, 191 (4th Cir. 1999)).

[33] U.S. ex rel. Wilson v. Bristol-Myers Squibb Inc.750 F.3d 111, 117 (1st Cir. 2014) (citing Lujan, 243 F.3d at 1187).

[34] *Id.* (citing 31 U.S.C. § 3730(b)(5)).

that there is no exception to the First-to-File bar.[35] In *United States ex rel. Ven-A-Care of the Fla. Keys, Inc. v. Baxter Healthcare Corp.*, the First Circuit reemphasized its conclusion that the first-to-file bar is jurisdictional, this time slightly expanding its discussion of the topic, while also recognizing the D.C. Circuit's contrary position.[36]

The following year, in *United States ex rel. Gadbois v. PharMerica Corp.*, the First Circuit changed course, noting that "the tectonic plates [had] shifted."[37] The shift in tectonic plates the First Circuit was referencing was:

> the Supreme Court['s] . . . decision [in] *Kellogg Brown & Root Services, Inc. v. United States ex rel. Carter*, 135 S. Ct. 1970 (2015), which construed the phrase "pending action" as used in 31 U.S.C. § 3730(b)(5). The Court held that, under the wording of the statute, "an earlier suit bars a later suit while the earlier suit remains undecided but ceases to bar that suit once it is dismissed." *Id.* at 1978. Accordingly, the dismissal of a section 3730(b)(5) claim ordinarily should be without prejudice, because the claim could be refiled once the first-filed action is no longer pending. *See id.* at 1979.[38]

In light of the Supreme Court's directive in *Carter*, the First Circuit appears to have walked-back its earlier conclusion:

> Noting that we have described the first-to-file bar as jurisdictional, *see, e.g.*, *United States ex rel. Wilson v. Bristol-Myers Squibb, Inc.*, 750 F.3d 111, 117 (1st Cir. 2014), PharMerica suggests that the fact that the Relator's claim was barred when brought prevents him from using Rule 15(d) to cure the jurisdictional defect. This suggestion is bolstered, PharMerica says, by the FCA itself, which provides that no one can "bring" an action based on the same facts as those undergirding a pending action. 31 U.S.C. § 3730(b)(5).
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> After careful consideration, we find PharMerica's position untenable.[39]

The First Circuit found that, despite the existence of a previously-filed related action, Relator could amend the complaint and potentially cure the first-to-file issue:

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35 *Id.* (citations omitted).
36 772 F.3d 932, 936–37 (1st Cir. 2014).
37 809 F.3d 1, 3 (1st Cir. 2015).
38 *Id.*
39 *Id.* at *5–6.

> [W]e think it manifest that the Relator's case is well suited to a motion for leave to supplement. Developments occurring after the filing of the second amended complaint—the Carter decision and the dismissal of the Wisconsin action—have dissolved the jurisdictional bar that the court below found dispositive. Although the order of dismissal may have been proper at the time it was entered, the Relator timely appealed and the critical developments occurred during the pendency of that appeal. Consequently, this case is analogous to the cases in which a jurisdictional prerequisite (such as an exhaustion requirement) is satisfied only after suit is commenced. Under the circumstances, it would be a pointless formality to let the dismissal of the second amended complaint stand—and doing so would needlessly expose the Relator to the vagaries of filing a new action. We hold, therefore, that the Relator's second amended complaint is eligible for the proposed supplementation.[40]

Therefore, *Gadbois* presents an example of how circuits may handle this issue post *Heath* and *Carter*. Further litigation will tell.

III. THE FIRST-TO-FILE BAR IS BEST VIEWED AS NON-JURISDICTIONAL

Application of the First-to-File provision as an exception-free jurisdictional bar appears logically inconsistent with the Supreme Court's directive in *Carter*. The procedural posture of *Carter* and similar situations proves instructive. For example, assume Action #1 is filed in 2014, alleging Fact X, which proves Hypothetical Corporation violated the FCA. In 2015, Action #2 is filed, also alleging Fact X against Hypothetical Corporation. Assume that these actions are related. While both actions remain under seal, Action #1 is dismissed without reaching the merits of the case and the court orders it unsealed. Under the Fourth Circuit's approach (and the approach of various other circuits), Action #2 would have to be dismissed for lack of subject matter jurisdiction, despite never being litigated on its merits. Under such an approach, defendants would potentially circumvent FCA liability. For example, a defendant who fears potential FCA liability could recruit a potential whistleblower to file a *qui tam* action alleging violations consistent with the areas in which the defendant fears potential liability, and then simply orchestrate dismissal. Such a scheme would, under the Fourth Circuit's view, prevent any other Relator from successfully bringing a related action.

While such actions may appear extreme, the potential penalties imposed by a successful FCA case may tempt such exploitations. For example, successful

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40 *Id.* at *5–6.

qui tam actions may result in multi-billion dollar financial burdens on defendants. Worse, the FCA provides for potential debarment, by which defendants could lose the ability to bid on and service Government contracts—a debilitating penalty for companies that rely heavily on Government contracts as part of their businesses.[41]

Instead, the First-to-File provision should be viewed as a non-jurisdictional bar, consistent with apparent congressional intent. Congress, despite having deemed other provisions within the FCA jurisdictional, explicitly left out such language in the First-to-File section. As directed by the Supreme Court, courts should not deem a procedural rule jurisdictional absent clear direction by Congress to do so.[42]

CONCLUSION

Recognizing the differing approaches taken by the circuit courts of, this issue appears ripe for Supreme Court intervention. Until then, the issue must be analyzed on a circuit-by-circuit basis.

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[41] *See generally* Federal Acquisition Regulations, Subpart 9.4. Debarment, Suspension and Ineligibility, *available at* https://www.acquisition.gov/far/html/Subpart%209_4.html (last visited Dec. 15, 2017). For example, defense contractors and pharmaceutical companies are heavily reliant on Government contracts as a source of revenue.

[42] Kwai Fun Wong, 135 S. Ct. at 1632; Auburn Regional, 133 S. Ct. at 824.