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Closing the Courthouse Door on Private Attorneys General: Judicial Expansion of the First-to-file Bar in the False Claims Act is Inconsistent with the Act's Text and Purpose

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CLOSING THE COURTHOUSE DOOR ON PRIVATE ATTORNEYS GENERAL: *JUDICIAL EXPANSION OF THE FIRST-TO-FILE BAR IN THE FALSE CLAIMS ACT IS INCONSISTENT WITH THE ACT'S TEXT AND PURPOSE*

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Whistleblowers recover billions of dollars per year in fraud against the government under the Qui Tam act provision of the False Claims Act. The D.C. Circuit recently created a circuit split when it held that the Act's first-to-file bar should frequently prohibit a second whistleblower from bringing suit after a suit by an earlier whistleblower has been dismissed under Rule 9(b) of the Federal Rules of Civil Procedure for failing to plead fraud with particularity. The Third Circuit had previously held that suits dismissed under Rule 9(b) can never trigger the first-to-file bar. This article argues that the D.C. Circuit's position was undermined by Supreme Court's recent holdings on pleadings standards in Twombly *and* Iqbal *and that the D.C. Circuit's interpretation of the first-to-file bar is inconsistent with the anti-fraud purpose of the False Claims Act. The article also considers general arguments against "private attorneys general" provisions and concludes that the dangers are at a minimum in False Claims Acts cases because the government is acting as a market participant rather than in an enforcement role. The article concludes by arguing that Congressional action to further liberalize the first-to-file bar would significantly improve anti-fraud enforcement with minimal costs or unintended consequences.*

INTRODUCTION

The False Claims Act has allowed whistleblowers to help the federal government recover over $24 billion from companies that defrauded the government since the Act was strengthened in 1986, including recovery of $3.4 billion in 2012 alone.[1] False Claims Act litigation is now comparable in scale to antitrust and securities litigation.[2] However, recent interpretations of the first-to-file bar in in the Act threaten to bar suits by whistleblowers with new and valuable information. Consider the following example, which is based on a simplified version of the facts in *U.S. ex rel. Branch Consultants v. Allstate Ins. Co.*[3]

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[1] DEPARTMENT OF JUSTICE' FRAUD STATISTICS – OVERVIEW, October 1, 1987–September 30, 2012, available at http://www.justice.gov/civil/docs_forms/C-FRAUDS_FCA_Statistics.pdf.

[2] David F. Engstrom, *Harnessing the Private Attorney General: Evidence from Qui Tam Litigation*, 112 Colum. L. Rev. 1244, 1271 (2012).

[3] U.S. ex rel. Branch Consultants v. Allstate Ins. Co., 560 F.3d 371, 373 (5th Cir. 2009).

Hurricane Katrina damaged or destroyed approximately 275,000 homes and caused over $80 billion in damage.[4] Fortunately, many of the hurricane victims had flood insurance, often guaranteed by the federal government through the National Flood Insurance Program. To ensure timely payments to hurricane victims, FEMA waived certain reporting requirements to clear the backlog of claims more quickly. Private insurance companies administering the federal flood insurance policies apparently saw these relaxed reporting requirements as an opportunity to defraud the federal government. They encouraged their appraisers to report wind damage, which was covered by the private insurance companies, as flood damage, which was covered by the federal government.[5]

The private insurers administering insurance claims under the National Flood Insurance Program retained Branch Consultants to perform damage estimates. Branch Consultants observed many instances of wind damage being attributed to flood damage in order to defraud the government into paying claims that were actually the responsibility of the private insurers. They decided to "blow the whistle" on the fraud by filing a Qui Tam action under the False Claims Act, suing on behalf of the federal government to recover the fraudulently paid sums.[6] While the partners at Branch Consultants likely knew that filing this lawsuit would destroy their business with the insurance companies, subjecting them to some of the personal and financial difficulties typically faced by whistleblowers,[7] they likely felt that the potential reward of receiving 15%–30% of any funds recovered for the federal government[8] was worth the risk.

After Branch Consultants' complaint was unsealed, the insurance companies realized that an earlier Qui Tam lawsuit alleging a similar type of fraud had already been filed by a whistleblower named Kerri Rigsby.[9] Branch Consultants' complaint contained 57 specific examples of insurance companies overcharging for flood damage, complete with the homeowners' addresses and policy number plus

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[4] DEPARTMENT OF COMMERCE, SERVICE ASSESSMENT, HURRICANE KATRINA, AUGUST 23-31, 2005, *available at* http://www.nws.noaa.gov/om/assessments/pdfs/Katrina.pdf.

[5] *Branch Consultants*, 560 F.3d at 374.

[6] *Branch Consultants*, 560 F.3d at 374.

[7] Paul Sullivan, *The Price Whistle-Blowers Pay for Secrets*, N.Y. TIMES, Sept. 21, 2012, at B1, *available at* http://www.nytimes.com/2012/09/22/your-money/for-whistle-blowers-consider-the-risks-wealth-matters.html?pagewanted=all ("If you look at the field of whistle-blowers, you see a high degree of bankruptcies. You may find yourself unemployable. Home foreclosures, divorce, suicide and depression all go with this territory.").

[8] *See* 31 U.S.C. § 3730(d) (providing for a bounty to relator of 15%-25% in cases where the DOJ intervenes and 25%-30% in cases where the relator proceeds alone).

[9] *Branch Consultants*, 560 F.3d at 375.

the amount charged to the government and an estimate of the true damages in each case.[10] The Rigsby complaint, in contrast, offered only general allegations of fraud, which are insufficient to meet the Rule 9(b) standard for pleading fraud with particularity.[11] Nevertheless, the insurance companies moved to dismiss Branch Consultants' complaint under the first-to-file bar in the False Claims Act, claiming that Branch Consultants' action could not proceed because Rigsby had already won the race to the courthouse, regardless of the quality of her complaint.

The circuits are currently divided on the question of whether Branch Consultants' claim should be allowed to proceed or dismissed under the first-to-file bar. The Sixth Circuit, in *Walburn v. Lockheed Martin Corp.*,[12] held that when the earlier suit cannot meet the pleadings standard under Rule 9(b) of the Federal Rules of Civil Procedure, which requires pleading fraud with particularity,[13] the first-to-file bar does not apply.[14] Under this rule, Branch Consultants' claim may proceed. However, the D.C. Circuit recently held in *U.S. ex rel. Batiste v. SLM Corp.*[15] that the first-to-file bar should still apply as long as the earlier complaint provided "sufficient notice for the government to initiate an investigation into the allegedly fraudulent practices."[16] Under this rule, Branch Consultants' claim may not proceed. The rule for whether or not Branch Consultants' claim should be dismissed will have a significant impact on whether potential whistleblowers such as Branch Consultants will bring forward the detailed evidence needed to successfully prosecute fraud claims despite the significant personal costs involved in whistleblowing.

How courts interpret the first-to-file bar is particularly significant because the first-to-file bar frequently impacts whistleblowers with information about fraud occurring on a national scale, where multiple parties are particularly likely to have information about different aspects of the fraud. For example, the relator in *Batiste* alleged that Sallie Mae, a company that manages over $100 billion in federal student loans,[17]

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[10] *Branch Consultants*, 560 F.3d at 374-75.

[11] *Branch Consultants*, 560 F.3d at 376.

[12] Walburn v. Lockheed Martin Corp., 431 F.3d 966 (6th Cir. 2005).

[13] Fed. R. Civ. P. 9(b). This standard has been uniformly into the False Claims Act. *See, e.g., Walburn*, 431 F.3d at 972 ("Although not expressly required by the statutory language, we have previously held that a complaint alleging violations of the False Claims Act must allege the circumstances surrounding the fraud with particularity as required by Rule 9(b)."); *Bly-Magee v. California*, 236 F.3d 1014, 1018 (9th Cir. 2001) (collecting cases).

[14] *Walburn*, 431 F.3d at 972.

[15] U.S. ex rel. Batiste v. SLM Corp., 659 F.3d 1204 (D.C. Cir. 2011).

[16] *Batiste*, 659 F.3d at 1210.

[17] REUTERS, PROFILE, SLM CORP., available at http://www.reuters.com/finance/stocks/companyProfile?symbol=SLM.O&rpc=66.

submitted false information to the United States to obtain additional payments on federally guaranteed student loans held by students throughout the country.[18] Similarly, the relator in one health-care case alleged that a national manufacturer of medical devices paid kickbacks to physicians on purchases that were ultimately paid for by the federal government,[19] while a relator in another case of healthcare-related fraud alleged "performance of thousands of unnecessary invasive cardiac procedures [...] for the purposes of fraudulently billing Medicare."[20] Where the first relator knows of the widespread fraud, but has insufficient evidence to meet the pleading standard under Rule 9(b), it is especially common in large-scale frauds for another party to have more concrete details, as was the case in *Branch Consultants*. However, that second relator would be barred from bringing suit under the *Batiste* court's interpretation of the first-to-file bar.

This Note considers the circuit split on the first-to-file bar from both a statutory interpretation and a policy perspective. Prior to turning to these issues, Part I provides a brief summary of the mechanics and history of the first-to-file bar as background to the following analysis.

Part II contains a statutory interpretation analysis of the first-to-file bar. This section begins with a textual analysis of the statute. This section then focuses on two questions. First, whether it is consistent for courts to read the Rule 9(b) requirement of pleading fraud with particularity into the pleadings standard of the False Claims Act for the first-filed complaint, but not read the same Rule 9(b) standard into the first-to-file bar. Second, whether the reasoning behind *Batiste's* interpretation of the "same facts" requirement in the text of first-to-file[21] bar as a notice-based standard[22] has been undermined by the Supreme Court's reinterpretation of the notice-pleading standard in the text the Federal Rules of Civil Procedure[23] with a facts-oriented plausibility standard in *Twombly*[24] and *Iqbal*.[25]

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[18] *Batiste*, 659 F.3d at 1212.

[19] U.S. ex rel. Poteet v. Medtronic, Inc., 552 F.3d 503, 508 (6th Cir. 2009)

[20] Campbell v. Redding Med. Ctr., 421 F.3d 817, 818 (9th Cir. 2005).

[21] 31 U.S.C. § 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.").

[22] *Batiste*, 659 F.3d at 1210 (holding that the first-to-file bar applies as long as the earlier complaint provided "sufficient notice for the government to initiate an investigation into the allegedly fraudulent practices").

[23] *See* Fed. R. Civ. P. 8(a) (requiring only a "a short and plain statement of the claim showing that the pleader is entitled to relief").

[24] Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

[25] Ashcroft v. Iqbal, 556 U.S. 662 (2009).

Part III contains a policy analysis of the first-to-file bar. This section first considers how different interpretations of the first-to-file bar serve the specific policy goals of the first-to-file bar in the False Claims Act. This section then situates relators as private attorneys general within the larger universe of private attorneys general under various different statutes and the common law. This section considers how the relatively private "market participation" context of the False Claims Act, compared to other roles played by private attorneys general in regulatory enforcement contexts, reduces the risks involved in allowing greater participation by private attorneys general in promoting the False Claims Act's general policy goal of efficient prevention and remediation of fraud.

Part IV concludes by considering the implications of this policy analysis for potential future reforms of the False Claims Act.

I. BACKGROUND ON THE FALSE CLAIMS ACT

A. THE MECHANICS OF THE FALSE CLAIMS ACT

The False Claims Act is "one of the government's primary weapons to fight fraud against the government."[26] The Act prohibits knowingly presenting a "false or fraudulent claim" to the federal government and provides for civil penalties and treble damages for violations.[27] The government may bring a claim directly, but the Act also contains a "Qui Tam"[28] provision, which allows a private individual, typically a whistleblower with insider information about the fraud,[29] to bring a claim on behalf of the government.[30] The individual is called a "relator."

When a relator brings a claim, they must file the complaint in camera. The complaint will remain under seal for at least 60 days and will not be served on the defendant during that period. The relator must also provide the government with "substantially all" of her evidence against the defendant so the government can decide whether to intervene and

[26] Letter from Laurie E. Ekstrand, Director, Homeland Security and Justice, to Representative Sensenbrenner, Representative Cannon, and Senator Grassley (Jan. 31, 2006), *available at* http://www.gao.gov/new.items/d06320r.pdf (attaching a GAO report on the False Claims Act).

[27] 31 U.S.C. § 3729(a)(1)(G).

[28] A qui tam action is one "brought under a statute that allows a private person to sue for a penalty, part of which the government or some specified public institution will receive." Qui tam is short for "qui tam pro domino rege quam pro se ipso in hac parte sequitur" which means "who as well for the king as for himself sues in this matter." QUI TAM ACTION, Black's Law Dictionary (9th ed. 2009).

[29] Approximately 75% of Qui Tam claims under the False Claims Act are brought by insiders. David Freeman Engstrom, *Harnessing the Private Attorney General: Evidence from Qui Tam Litigation*, 112 Colum. L. Rev. 1244, 1294 (2012).

[30] 31 U.S.C. § 3730(b).

take over the case.[31] If the government elects to intervene in the case and assume primary responsibility for the litigation, the relator's share of the recovery is limited to 15%-25% of any recovery; if the government elects not the intervene and the relators conducts the litigation herself, she will receive 25%-30% of any recovery.[32]

B. THE HISTORY OF THE FALSE CLAIMS ACT

The False Claims Act was originally passed in 1863 to combat rampant fraud among Civil War defense contractors,[33] though the idea of combatting fraud through Qui Tam provisions dates back much further.[34] The Qui Tam provision of the False Claims Act serves a variety of policy goals. The Act's clearest purpose is to "enhance the Government's ability to recover losses sustained as a result of fraud against the Government,"[35] but the Act also serves an important deterrent function by increasing the probability that individuals who defraud the government will be caught.[36] However, another significant concern is allocating the costs of enforcement between direct government funding through the Department of Justice and the award of payments to relators. The Act was originally driven by the "necessity of ensuring enforcement ... with a minimum expenditure of resources from the already-stretched wartime government" during the Civil War.[37]

Legislators have also consistently been concerned with cabining the authority given to relators to avoid the costs associated with incentive mismatches between the relator and government. The original bill's sponsor went so far as to describe the Act as "setting a rogue to catch a rogue."[38] These early efforts to limit the scope of relator's authority under the Act have continued with the addition of various provisions to the Act. In 1943, Congress removed jurisdiction for claims where the government already had knowledge of fraud in order to stop parasitic relators from bringing civil claims based purely on publicly available criminal indictments.[39] This provision was later expanded into a general

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[31] 31 U.S.C. § 3730(b)(2).
[32] 31 U.S.C. § 3730(d).
[33] U.S. ex rel. Summers v. LHC Group, Inc., 623 F.3d 287, 291 (6th Cir. 2010).
[34] For a general discussion of historical acts containing qui tam provisions see Note, *The History and Development of Qui Tam*, 1972 Wash. U.L.Q. 81, 83 (1972).
[35] S. Rep. No. 345, S. REP. 99-345, 1986 U.S.C.C.A.N. 5266.
[36] S. Rep. No. 345, S. REP. 99-345, 1986 U.S.C.C.A.N. 5266 (recognizing that strengthening the qui tam provision was necessary in part because "[f]raud is perhaps so pervasive and, therefore, costly to the Government due to a lack of deterrence").
[37] S. Rep. No. 345, S. REP. 99-345, 1986 U.S.C.C.A.N. 5266.
[38] *Summers*, 623 F.3d at 291.
[39] *Summers*, 623 F.3d at 292.

public disclosure bar, which removed jurisdiction for any claim based on publicly available data unless the relator was an original source of the information prior to the disclosure.[40] The provision that the relator must file under seal and provide the government with the evidence against the defendant was added to avoid tipping off defendants whom the government was already investigating and give the government time to decide whether to intervene and take over the case.[41] The first-to-file bar, which is the subject of this note, similarly seeks to balance the collateral costs of enforcement by individuals with the benefits of higher levels of anti-fraud enforcement and deterrence made possible by the increased investigation and litigation resources provided by relators acting as private attorneys general.

II. INTERPRETING THE FIRST-TO-FILE BAR

A. THE TEXT AND LEGISLATIVE HISTORY

The process of interpreting the first-to-file bar must start with the text of the statute.[42] The text of the first-to-file bar reads: "[w]hen 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."[43] Courts are split over whether there is sufficient ambiguity in the precise meaning of the phrases "related action" and "facts underlying" to consult the legislative history.[44] However, the legislative history provides little additional detail.[45] The Senate Committee Report states that:

"[This section] further clarifies that only the Government may intervene in a qui tam action. While there are few known instances

[40] 31 U.S.C. § 3730(3)(4)(A) ("The court shall dismiss an action or claim under this section, unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed" in the news or in federal proceedings).

[41] *See* 31 U.S.C. § 3730(b)(2) ("The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders" and "[a] copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government."); *Summers*, 623 F.3d at 292 (stating that "the under-seal requirement gave the Government the chance to determine whether it was already investigating the claims stated in the suit and then to consider whether it wished to intervene prior to the defendant's learning of the litigation") (internal quotation marks omitted).

[42] *See, e.g.*, U.S. ex rel. LaCorte v. SmithKline Beecham Clinical Laboratories, Inc., 149 F.3d 227, 233 (3d Cir. 1998) ("[W]e may examine [the False Claims Act's] legislative history to determine its meaning only if the text of the statute is ambiguous.").

[43] 31 U.S.C. § 3730(b)(5).

[44] *Compare U.S. ex rel. Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181, 1187 (9th Cir. 2001) ("Section 3730(b)(5)'s plain language refers to 'related' not 'Identical' actions. Therefore, we need not review the legislative history.") *with Walburn*, 431 F.3d at 970 (the legislative history "demonstrates repeated attempts by Congress to balance two competing policies."). *See also*, LaCorte, 149 F.3d at 233 (considering legislative history in the alternative without relying on it).

[45] *LaCourt*, 149 F.3d at 233 (referring to "the statute's scant legislative history").

of multiple parties intervening in past qui tam cases, *United States v. Baker-Lockwood Manufacturing Co.*, 138 F.2d 48 (8th Cir.1943), the Committee wishes to clarify in the statute that private enforcement under the civil False Claims Act is not meant to produce class actions or multiple separate suits based on identical facts and circumstances."[46] While plaintiffs have argued that the "identical facts" language in the legislative history means that the first-to-file bar should be interpreted narrowly,[47] courts have interpreted the first-to-file bar more broadly. There is general agreement that the addition of minor details in the later complaint does not defeat the first-to-file bar.[48] Initially, courts applied the test of considering whether the later complaint alleges the same "essential facts" underlying the fraud.[49] However, some courts have – likely unintentionally – begun to blur the distinction between facts and allegations[50] as discussed in more detail in Part II.C of this Note.

B. THE CIRCUIT SPLIT

Two circuit courts have split on the issue of whether a complaint that fails to meet the standard under Rule 9(b) for pleading fraud with particularity may nevertheless bar later cases. In 2005, in *Walburn v. Lockheed Martin Corp.*, the Sixth Circuit held that a case dismissed under Rule 9(b) is never sufficient to trigger the first-to-file bar.[51] However, in 2011, in *U.S. ex rel. Batiste v. SLM Corp.*, the D.C. Circuit took the opposite view, holding that, for the first-to-file bar to apply, the earlier complaint "must provide only sufficient notice for the government to initiate an investigation into the allegedly fraudulent practices, should it choose to do so."[52]

1. THE *WALBURN* CASE

In *Walburn*, a security guard at a government-owned uranium enrichment plant claimed that Lockheed Martin, the private operator of the plant, had falsified reports on the level of radiation exposure of

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[46] S.Rep. No. 99-345, at 25 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5290.

[47] *See, e.g., LaCourt*, 149 F.3d at 233.

[48] Multiple circuits have agreed that an action cannot escape the first-to-file bar by "incorporat[ing] somewhat different details." *Walburn*, 431 F.3d at 971 (quoting *LaCourt*, 149 F.3d at 232-33, Grynberg v. Koch Gateway Pipeline Co., 390 F.3d 1276, 1279 (10th Cir.2004); United States ex rel. Hampton v. Columbia/HCA Healthcare Corp., 318 F.3d 214, 217-18 (D.C.Cir.2003), and *Lujan*, 243 F.3d at 1189).

[49] *Branch Consultants*, 560 F.3d at 377 (circuits which have articulated a test "have uniformly asked whether the later-filed action alleges the same material or essential elements of fraud described in the pending action.")

[50] *Branch Consultants* itself did not make a clean distinction between allegations and facts. See discussion in Part II.C of this Note.

[51] *Walburn*, 431 F.3d at 973.

[52] *Batiste*, 659 F.3d at 1210.

its employees in order to maintain Department of Energy accreditation, which was contractually required in order for Lockheed Martin to continue to receive payments from the government.[53] However, an earlier relator had filed a complaint containing broad allegations of fraud, claiming that "Lockheed 'falsified, concealed and destroyed documentation' relating to 'plant management and operations' and knowingly submitted these 'false records and statements' to the government."[54] The district court concluded that Walburn's specific claim was "encompassed" by the earlier broad allegations and dismissed his suit under the first-to-file bar.[55]

The Sixth Circuit, however, found that the first-to-file bar did not apply because a suit that has been dismissed for failing to plead fraud with particularity inherently cannot trigger the first-to-file bar. The court reasoned that a later action "cannot be 'based on the facts underlying' the [earlier] action when the facts necessary to put the government on notice of the fraud alleged are conspicuously absent from" the earlier complaint given that the earlier complaint failed to meet the particularity standard under Rule 9(b).[56] The court noted that *any* later allegation of fraud regarding the operation of the Lockheed Martin facility would have been encompassed in the vague allegations of the earlier complaint, so a broad interpretation of the first-to-file bar would not serve either the goal of preventing parasitic suits or encouraging whistleblowers to bring forward useful information.[57]

2. THE *BATISTE* CASE

In *Batiste*, an employee of Sallie Mae (a company that manages over $100 billion in federal student loans[58]), brought a Qui Tam action claiming that Sallie Mae had defrauded the government by using unlawful methods to put additional loans into forbearance, triggering additional payments to Sallie Mae from the Department of Education that increased Sallie Mae's return on each loan.[59] Batiste claimed personal knowledge of managers instructing employees to violate federal regulations on forbearance procedures and an incentive system

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[53] *Walburn*, 431 F.3d at 969.

[54] *Id.* at 971.

[55] *Id.* at 972.

[56] *Id.* at 973.

[57] See *Id.* ("[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.") and *Id.* at 970 (The first-to-file bar "seek[s] to discourage opportunistic plaintiffs from bringing parasitic lawsuits whereby would-be relators merely feed off a previous disclosure of fraud.").

[58] REUTERS, PROFILE, SLM CORP., available at http://www.reuters.com/finance/stocks/companyProfile?symbol=SLM.O&rpc=66.

[59] *Batiste*, 659 F.3d at 1206.

that encouraged such violations in his New Jersey office of Sallie Mae.[60] A complaint by an earlier relator had alleged that employees in the Nevada office of Sallie Mae had defrauded the government by falsely claiming that borrowers had orally agreed to enter forbearance.[61] The earlier complaint was dismissed for failure to obtain counsel by a deadline imposed by the court.[62] The district court dismissed Batiste's suit under the first-to-file bar.[63]

The D.C. Circuit affirmed the district court's dismissal under the first-to-file bar after interpreting the first-to-file bar to apply when the earlier complaint provides "sufficient notice for the government to initiate an investigation into the allegedly fraudulent practices, should it choose to do so."[64] The court specifically rejected Batiste's argument, supported by the United States as *amicus curiae*, that it should adopt the standard articulated in *Walburn*.[65] The court based its decision in part on the fact that the Rule 9(b) standard is not mentioned in the text of the first-to-file bar, but did not address the fact that the court had previously read Rule 9(b) into other portions of the Act without requiring an explicit reference in the text.[66] The court did not fully explain how its notice-based standard is grounded in the text of the first-to-file bar, though the court did cite a district court case for the proposition that "an examination of possible recovery ... aids in the determination of whether the later-filed complaint alleges a different type of wrongdoing on new and different material facts" and found that "the Batiste Complaint alleges a fraudulent scheme the government already would be equipped to investigate based on the [earlier] complaint."[67] The court also found the *Walburn* standard unnecessary to deter over-broad pleading by the earlier relator[68] and expressed concern that the *Walburn* standard would create a "strange judicial dynamic, potentially requiring one district court to determine the sufficiency of a complaint filed in another district court, and possibly creating a situation in which the two district courts disagree on a complaint's sufficiency."[69]

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[60] *Id.*
[61] *Id.* at 1207.
[62] *Id.*
[63] *Id.*
[64] *Id.* at 1210.
[65] *Id.*
[66] *See Id.* at 1216.
[67] *See Id.* at 1209-10.
[68] *Id.* at 1210.
[69] *Id.*

C. IMPACT OF PLEADING STANDARDS ON INTERPRETATION OF THE FIRST-TO-FILE BAR

1. THE REQUIREMENT TO PLEAD FRAUD WITH PARTICULARITY UNDER RULE 9(B) SHOULD BE READ INTO THE FALSE CLAIMS ACT IN A UNIFORM MANNER

The fact that courts have uniformly read a Rule 9(b) requirement into the pleadings standard of the False Claims Act by courts supports the proposition that the Rule 9(b) requirement may also need to be read into the first-to-file bar in the Act as well for consistency. The False Claims Act prohibits knowingly presenting claims that are merely "false" (in addition to claims that are "fraudulent") to the federal government.[70] Nevertheless, the courts to consider the issue agree that "it is self-evident that the [False Claims Act] is an anti-fraud statute,"[71] so "complaints brought under the False Claims Act must fulfill the requirements of Rule 9(b)" because "defendants accused of defrauding the federal government have the same protections as defendants sued for fraud in other contexts."[72]

The first-to-file bar should similarly be read in light of the Act's anti-fraud purpose. The heightened pleading standard in required under Rule 9(b) is required because "fraud encompasses a wide variety of activities," so more specific information is required to understand a claim of fraud.[73] Therefore, as held in *Walburn*, "a complaint that fails to provide adequate notice to a defendant can hardly be said to have given the government notice of the essential facts of a fraudulent scheme, and therefore would not enable the government to uncover related frauds."[74] Courts should at least analyze whether the same considerations that require reading the Rule 9(b) standard into the pleadings standard for each complaint might also require reading the Rule 9(b) standard into the comparison of complaints in the first-to-file bar to remain consistent.

2. THE HEIGHTENED PLEADING STANDARD ARTICULATED IN *TWOMBLY* AND *IQBAL* UNDERMINED PRECEDENT USED IN BATISTE

Many courts interpreting the first-to-file bar have articulated tests that blur the line between facts and allegations in the relevant complaints. The

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[70] 31 U.S.C. § 3729(a)(1) (using the disjunctive "or" in imposing liability for a "false *or* fraudulent claim").

[71] *Gold v. Morrison-Knudsen Co.*, 68 F.3d 1475 (2d Cir. 1995), *cert. denied*, 517 U.S. 1213.

[72] *Bly-Magee v. California*, 236 F.3d 1014 (9th Cir. 2001).

[73] *United States ex rel. Williams v. Martin-Baker Aircraft Co.*, 389 F.3d 1251, 1256 (D.C. Cir. 2004).

[74] *Walburn*, 431 F.3d at 973.

D.C. Circuit's decision in *Batiste* relied on this line of cases that blurred the line between facts and allegations in the context of the first-to-file bar. After the Supreme Court's articulation of a fact-oriented plausibility-based pleading standard in *Twombly* and *Iqbal*, courts must make careful distinctions between facts and allegations. Therefore, the entire line of precedent leading up to *Batiste* must be reconsidered.

This lack of distinction between facts and allegations began with the first circuit court to interpret the first-to-file bar, the Third Circuit in *U.S. ex rel. LaCorte v. SmithKline Beecham Clinical Laboratories, Inc.*[75] The court used the words "facts" and "allegations" interchangeably in stating its test for whether the first-to-file bar was triggered. The court first stated that the first-to-file bar is triggered when "a later allegation states all the essential *facts* of a previously-filed claim" and then later rephrased the same test as when a later complaint "*alleg[es]* the same elements of a fraud described in an earlier suit"[76] (emphasis mine). This phrasing, using "facts" and "allegations" interchangeably, implies that the court believed that facts and allegations should be treated identically for purposes of interpreting the first-to-file bar. The court apparently found this proposition so intuitive that it provided no explanation for using the terms "facts" and "allegations" interchangeably.

The second court to address the distinction between facts and allegations made its reasoning more explicit. The Ninth Circuit, in *United States ex rel. Lujan v. Hughes Aircraft Co.*, stated that:

> Plaintiff also contends that the district court impermissibly equated facts with allegations, and that [the first-to-file bar] requires an analysis of Lujan and Schumer's facts, not their allegations. We reject this contention. In motions to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), the reviewing court must accept as true the allegations of the complaint. See Miranda v. Reno, 238 F.3d 1156, 1157 n. 1 (9th Cir.2001). For purposes of this inquiry, there is no difference between allegations and the underlying facts.[77]

The *Lujan* court thus explicitly relied on the then-current notice pleading standard to equate allegations and facts for the purposes of the first-to-file bar.

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[75] *Lacorte*, 149 F.3d 227. The court in *Lujan* later stated that the Third Circuit in *LaCorte* was at that time "the only appellate court to discuss and apply § 3730(b)(5) [the first-to-file bar]." *Lujan*, 243 F.3d at 1189.

[76] *Lacorte*, 149 F.3d at 232-33.

[77] *Lujan*, 243 F.3d at 1189.

The D.C. Circuit adopted the equivalence between allegations and facts expressed in *Lujan* in the 2003 case *U.S. ex rel. Hampton v. Columbia/HCA Healthcare Corp.*[78] The D.C. Circuit then relied upon *Hampton* in its interpretation in *Batiste* that the first-to-file bar applies when the later complaint "alleges the same material elements of fraud" which "suffices to put the U.S. government on notice of allegedly fraudulent" activity.[79]

Since the *Lujan* court relied on a proposition that has been dramatically altered by the decisions in *Twombly* and *Iqbal*,[80] the entire line of precedent leading from *Lujan* to *Batiste* is infirm and must be reconsidered. While there is still active debate over the precise meaning of *Twombly* and *Iqbal*,[81] it is "hard to see how a plaintiff could satisfy" the plausibility standard "without some factual allegation in the complaint," as the Supreme Court itself stated in *Twombly*.[82] Therefore, the new standard articulated in *Twombly* and *Iqbal* certainly does not allow the complete interchangeability of facts and allegations originally relied upon in *Lujan*, and subsequently in *Hampton* and *Batiste*.

Moreover, even under the previous notice pleadings standard, the contention that facts and allegations may be treated as equivalent for purposes of the first-to-file bar requires scrutiny. The first-to-file bar applies to a "related action based on the facts underlying the pending action."[83] The pending action refers to the earlier-filed complaint, not the complaint in the current case. There was no rule under the original notice pleading standard that courts must consider the allegations *in other complaints* as true. Congress' particular choice to refer to "underlying facts" rather than allegations should not have been so lightly ignored.

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[78] U.S. ex rel. Hampton v. Columbia/HCA Healthcare Corp., 318 F.3d 214 (D.C. Cir. 2003).

[79] *Batiste*, 659 F.3d at 1209.

[80] Although *Twombly* and *Iqbal* considered 12(b)(6) motions for failure to state a claim and courts have applied the first-to-file bar after 12(b)(1) motions for lack of subject matter jurisdiction, *Twombly* and *Iqbal* still apply here because the first-to-file is likely actually properly considered under 12(b)(6) per the Court's recent holding in Arbaugh v. Y&H Corp., 546 U.S. 500 (2006), that such restrictions go the merits rather than jurisdiction. Further, several courts have applied the *Twombly* and *Iqbal* standard to jurisdiction. *See, e.g.*, Selevan v. N.Y. Thruway Auth., 584 F.3d 82, 88 (2d Cir. 2009) and Cassirer v. Kingdom of Spain, 580 F.3d 1048, 1052 n.2 (9th Cir. 2009), *rev'd in part on other grounds en banc*, 616 F.3d 1019 (9th Cir. 2010). However, one observer has criticized these decisions as the product of "cut and paste precedent" where the reason for the extension was not articulated by the courts. Jacob Taber, Note, *Silly Jurist, Twiqbal's for Claims*, [unpublished manuscript forthcoming in the NYU Law Review; citation to be revised].

[81] As the Tenth Circuit recently stated, it is unclear "whether this new standard requires minimal change or whether it in fact requires a significantly heightened fact-pleading standard." Khalik v. United Air Lines, 671 F.3d 1188, 1191 (10th Cir. 2012).

[82] *Twombly*, 550 U.S. at 556 n. 3.

[83] 31 U.S.C. § 3730(b)(5).

3. THE DIFFERENT TREATMENT OF FACTS IN THE PLEADING STANDARDS IN *BATISTE* COMPARED TO *TWOMBLY* AND *IQBAL* PRESENTS A CASE OF JUDICIAL SCHIZOPHRENIA

Although the first-to-file bar is not a pleading standard, so its interpretation not strictly controlled by *Twombly* and *Iqbal*, it is hard to reconcile the judicial philosophy behind *Twombly* and *Iqbal* with a notice-based interpretation of the first-to-file bar. *Twombly* and *Iqbal* demonstrate a trend away from a notice standard in reading complaints toward a fact-based standard[84] despite the absence of the term "facts" in Rule 8(a).[85] The D.C. Circuit in *Batiste*, however, has reinterpreted a statute containing the phrase "underlying facts" into a notice-based standard.[86] These judicial crosscurrents are hard to reconcile. The only consistent element between them is the unfortunate appearance that the plaintiff always loses. The argument that *Batiste* does benefit the plaintiff who filed the earlier claim is unavailing since that plaintiff, whose claim could not survive a motion to dismiss under Rule 9(b), is already unlikely to recover any award.[87] Reconsideration of the notice standard in *Batiste* would help establish a more coherent judicial philosophy.

III. POLICY GOALS OF THE FIRST-TO-FILE BAR

A. THE IMPACT OF ALTERNATIVE INTERPRETATIONS OF THE FIRST-TO-FILE BAR ON ITS SPECIFIC POLICY GOALS

The first-to-file bar serves a variety of goals that sometimes conflict with each other. This section identifies the various goals of the first-to-file bar and how they interrelate, then considers how different interpretations of the first-to-file bar would affect the attainment of these specific goals.

As a preliminary matter, reducing the number of potentially duplicative claims is not an end-goal of the first-to-file bar. Some courts do refer to reducing the number of potentially duplicative claims as a goal of the first-to-file bar, but the more informative view is that reducing the number of potentially duplicative claims is an intermediate step toward another end goal such as conserving judicial resources.

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[84] *See Khalik*, 671 F.3d at 1191 (discussing varying views on *Twombly* and *Iqbal* and noting that all involve at least some movement toward requiring facts).

[85] Fed. R. Civ. P. 8(a) (requiring a "a short and plain statement of the claim showing that the pleader is entitled to relief").

[86] *Batiste*, 659 F.3d at 1209.

[87] The mere fact that the United States has declined to intervene reduces the likelihood of a recovery from 90% to 10%, see Engstrom, *supra* note 2, at n. 24, and the court's dismissal doubtless further reduces the probability of any recovery.

The goals of the first-to-file bar consist of: maximizing the incentives for relators to bring claims and expose fraud by avoiding dilution of the claims of meritorious relators, encouraging relators to bring claims quickly through the threat of another relator winning the "race to the courthouse," avoiding unnecessary payments to relators where the government is equipped to bring claims itself, avoiding unnecessary burdens on defendants, and judicial efficiency. Allowing cases that have been dismissed under Rule 9(b) to trigger the first-to-file bar does not materially advance any of these policy goals.

First, *Batiste's* interpretation of the first-to-file bar does not materially help avoid dilution of the award to the first relator, and can reduce incentives for relators to bring forward information they posses about frauds against the government. A goal of the first-to-file bar is avoiding diluting the potential award to the first relator by allowing subsequent relators to "poach" related claims that the first relator would eventually have discovered and added to the original suit.[88] However, when the first claim has proven legally infirm, there is no longer any risk to diluting that claim. The goal of rewarding plaintiffs who can effectively pursue frauds against the government is better served by providing an incentive for a new relator with additional valuable information to come forward, rather than destroying the that incentive entirely by barring additional claims.

Interpreting the first-to-file bar not to apply after a Rule 9(b) dismissal also reduces incentives for plaintiffs to file bare bones or haphazard claims in an effort to file first, thus maximizing the reward for meritorious relators. During Congressional reconsideration of the Act, the Attorney General's office expressed concern that the first-to-file bar encourages some plaintiffs' attorneys to focus on quantity over quality in filings, and that many of these plaintiff's attorneys do not meaningfully contribute to the litigation, but are content "to sit back and pick up their check at the end."[89] Judge Posner has even expressed concern that a strict interpretation of the first-to-file bar could result in a "market" for first-filed claims, where relators who have made many bare-bones claims wait for a relator with useful information who is actually willing to pursue the case, and then allow that relator to

[88] Congress' amendments to the Act in 1943 were specifically intended, in part, to curtail "parasitic" lawsuits. *See* Michael Lawrence Kolis, Comment, Settling for Less: The Department of Justice's Command Performance Under the 1986 False Claims Amendments Act, 7 Admin. L. Rev. Am. U. 409, 415 (1993); S. REP. NO. 345, 99th Cong., 2d Sess. 8 (1986) (discussing prior amendment to the False Claims Act).

[89] *See* False Claims Act Implementation: Hearing Before the Subcomm. on Admin. Law & Governmental Relations of the H. Comm. on the Judiciary, 101st Cong. 21 (1990) (statement of Stuart Gerson, Assistant Att'y Gen. of the United States).

make use of the first-filed suit for a fee.[90] Payments in such a claims market would obviously reduce the incentives of relators with useful information to come forward. Therefore, interpreting the first-to-file bar not to apply after dismissal of an earlier complaint under Rule 9(b) would actually maintain or increase the potential rewards for relators with valuable information, contrary to worries about dilution of rewards for meritorious relators.

Second, a significant incentive to file quickly exists under either interpretation of the first-to-file bar, so allowing cases that have been dismissed under Rule 9(b) to trigger the first-to-file bar is not necessary to advance this policy goal. Preserving the incentive to file quickly is necessary because the government has a significant interest in encouraging relators to bring forward information about fraud as quickly as possible to prevent additional losses. For example, in one case, the government opposed an award to a relator because the relator allegedly waited to let additional damages accrue before reporting the fraud, costing the government an additional $27 million.[91] However, even if the first-to-file bar is interpreted not to apply to suits dismissed under Rule 9(b), an earlier relator still has two significant incentives to file as soon as possible. First, another relator may well be able to meet the requirements of Rule 9(b), triggering the first-to-file bar under either interpretation. Second, filing suit informs the United States about the fraud. If the fraud claim is significant and credible, the government will likely choose to intervene. Even if the first relator was unable to provide sufficient evidence to meet the Rule 9(b) standard on her own, the government may be able to investigate and uncover additional information. If the government ultimately wins, the first relator will still receive a share of the proceeds. Therefore, this interpretation of the first-to-file bar does not materially dilute the incentive to file quickly.

Third, interpreting the first-to-file bar not to apply after dismissal under Rule 9(b) will only result in additional payments to a future relator in a case where the government chose not to intervene or lost in the earlier case, minimizing the risk of "unnecessary" payments. The court in *Batiste* justified its decision that the first-to-file bar should apply even after Rule 9(b) dismissals in part on the grounds that government

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[90] *See* William M. Landes & Richard A. Posner, The Private Enforcement of Law, 4 J. Legal Stud. 1, 34 (1975).

[91] Amal Kumar Naj, *General Electric Pleads Guilty, Pays $69 Million to Settle Whistle-Blower Suit*, Wall St. J., July 23, 1992, at A2. *See also* Ben Depoorter & Jef De Mot, *Whistle Blowing: An Economic Analysis of the False Claims Act*, 14 Supreme Ct. Econ. Rev. 135 (2006) (claiming that the structure of the FCA does not provide sufficient incentives for relators to halt fraud at the socially optimal time).

may still be put sufficiently on notice to investigate the fraud itself.[92] However, if the government has not intervened in the earlier case, it implies that the fraud is not viewed as a high priority by the government or that the government is not in fact on notice of a significant fraud. If the government did intervene, then the dismissal makes it apparent that government did not have sufficient evidence available. In either case, a subsequent relator who is able to provide sufficient additional information to meet the Rule 9(b) pleading standard appears to be providing some value. The public disclosure bar already ensures that the new relator must bring valuable additional information, since the prior federal suit would qualify as a public disclosure, so mere re-filing of the same complaint is already barred.[93] Characterizing payments to a relator in that situation as "unnecessary" will frequently be inaccurate.

Fourth, the goal of avoiding unnecessary burdens on innocent defendants depends heavily on determining when a lawsuit is likely frivolous. Current complaints about haphazard filing of Qui Tam actions concern the filing of suits about new instances of alleged fraud, not instances of repeated filings regarding the same alleged fraud.[94] There is limited utility in addressing a problem – re-filing of essentially identical actions – that currently does not seem to exist. If a set of connected relators or attorneys actually filed the same suit repeatedly purely for the purpose of coercing a settlement, sanctions would likely be available to address such an abuse. Therefore, there is no evidence that an alternative interpretation of the first-to-file bar would reduce unnecessary burdens on defendants.

Fifth, judicial efficiency in the sense of merely choosing the interpretation of the first-to-file bar resulting in the fewest lawsuits may be a false economy. The better question is whether the expenditure of additional judicial resources to reduce fraud against the government is superior to available alternatives to reduce fraud. This question is addressed in the following section, which considers the general case for private attorneys general in the context of the first-to-file bar.

Judicial efficiency in the sense of creating clear rules for courts to apply is also better served by interpreting the first-to-file bar not to apply after a Rule 9(b) dismissal of an earlier suit. The court in *Batiste* did express concern that allowing a later-filed complaint to proceed

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[92] *Batiste*, 659 F.3d at 1210 (stating that "a complaint may provide the government sufficient information to launch an investigation of a fraudulent scheme even if the complaint does not meet the particularity standards of Rule 9(b)").

[93] *See* 31 U.S.C. § 3730(e)(4)(A).

[94] *See, e.g.*, Michael Lawrence Kolis, Comment, *Settling for Less: The Department of Justice's Command Performance Under the 1986 False Claims Amendments Act*, 7 Admin. L. Rev. Am. U. 409, 452 (1993).

where the earlier complaint failed to satisfy Rule 9(b) would "create a strange judicial dynamic, potentially requiring one district court to determine the sufficiency of a complaint filed in another district court, and possibly creating a situation in which the two district courts disagree on a complaint's sufficiency."[95] However, this dynamic is inherently present in the False Claims Act. Under the first-to-file bar, multiple courts will have to determine what Congress meant by "a related action based on the facts underlying the pending action" [96] regardless of the particular interpretation of that phrase. Under the interpretation in *Batiste*, a second court will still be required to determine if a complaint in another court "provided the government sufficient information to launch an investigation of a fraudulent scheme,"[97] which could equally place the two district courts into conflict if the earlier-filed complaint was dismissed without prejudice and that relator later acquires additional information sufficient to make a case.

Interpreting the first-to-file bar as applying the same standard as Rule 9(b) would actually serve the purpose of judicial efficiency by adopting a standard that all district courts are familiar with. The standard in Rule 9(b) has been interpreted countless times since the Federal Rules of Civil Procedure were created in 1938.[98] The Court in *Batiste*, however, created a vague new standard that is more likely to suffer from inconsistent interpretation from district court to district court. The standard requires a district court to predict when the Department of Justice will find information "sufficient" to "launch an investigation."[99] Requiring multiple courts to predict the behavior of executive officers surely creates more uncertainty than requiring multiple district courts to apply a familiar standard from the Federal Rules of Civil Procedure.

On balance, interpreting the first-to-file bar not to apply after a Rule 9(b) dismissal of an earlier suit generally either serves or does not offend the various specific policy goals of the first-to-file bar and False Claims Act generally. To the extent that these policy goals were articulated by Congress, it is appropriate for courts to consider these policy goals when attempting to resolve the circuit split.

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[95] *Batiste*, 659 F.3d at 1210.

[96] 31 U.S.C. § 3730(b)(5).

[97] *Batiste*, 659 F.3d at 1210.

[98] COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVE, FEDERAL RULES OF CIVIL PROCEDURE, vii (historical note), available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/CV2009.pdf. Rule 9(b) has been applied so frequently that courts consider its contours well defined in a variety of highly specific contexts. *See, e.g.*, *Stevelman v. Alias Research Inc.*, 174 F.3d 79, 84 (2d Cir. 1999) (securities fraud).

[99] *Batiste*, 659 F.3d at 1210.

B. IMPACT OF THE FIRST-TO-FILE BAR ON THE POLICY GOALS OF THE FALSE CLAIMS ACT AS A PRIVATE ATTORNEY GENERAL STATUTE

1. THE FALSE CLAIMS ACT RELATORS COMPARED TO OTHER PRIVATE ATTORNEYS GENERAL

Which interpretation of the first-to-file bar is the better policy choice from a general perspective depends in part on whether private attorneys general provisions in general are typically beneficial or detrimental. However, the label "private attorney general" is applied in a wide variety of contexts. Because relators under the False Claims Act only represent the government when the government is acting in a relatively "private" role where it is contracting for services as a market participant, many of the policy critiques of private attorneys general apply with less force to False Claims Act relators.

Professor Rubenstein has developed a taxonomy of the various roles labeled as "private attorneys general" which demonstrates how False Claims Act relators differ materially from other private attorneys general roles.[100] Qui Tam relators under the False Claims Act "substitutes for the attorney general, but only in what is arguably the most 'private' of government functions: the recoupment of compensatory damages."[101] That is because the False Claims Act applies primarily in areas where the government acts like a private corporation, seeking compensatory damages rather than vindicating a public right, activity that the Supreme Court has labeled "market participation.[102] This role is significantly different from the traditional definition of a private attorney general, who, according to Black's Law Dictionary, may recover attorneys' fees because she "brings a lawsuit that benefits a significant number of people, requires private enforcement, and is important to society as a whole."[103] This definition envisions a situation where a fund that benefits a larger group is obtained through individual litigation and the plaintiff who acted as a private attorney general by bringing the case is awarded a fee from the fund on an unjust enrichment theory

[100] William B. Rubenstein, *On What A "Private Attorney General" Is-and Why It Matters*, 57 Vand. L. Rev. 2129 (2004). Rubenstein notes that private attorney general is an expansive term, and classifies different actors labeled as private attorneys general based on the three characteristics: the client (individual vs. collective), fee (contingent/hours vs. salary), and goal (compensation vs. deterrence). Rubenstein notes that each characteristic consists of a sliding scale, not black-and-white alternatives. *Id.* at 2142.

[101] *Id.* at 2145.

[102] *Id.* at 2140-41.

[103] PRIVATE-ATTORNEY-GENERAL DOCTRINE, Black's Law Dictionary (9th ed. 2009).

to avoid free-riding.[104] However, the False Claims Act relator's role – essentially as a contractor of the attorney general – is quite different.

In sum, the False Claims Act can be viewed as the United States hiring a group of private attorneys and investigators on a contingent-fee basis to bring the same general type fraud cases that any private company may bring when it has been defrauded. It is therefore less problematic to evaluate the False Claims Act primarily in terms of economic efficiency, akin to normal government subcontracting, than other Private Attorney General statutes. However, some public policy concerns beyond those associated with routine types of subcontracting remain, primarily related to prosecutorial discretion.

The False Claims Act provides transparency into government decisions to exercise prosecutorial discretion without eliminating that discretion. Critics of the False Claims Act claim that "private parties may be less sensitive than government agencies to the economic and social costs of particular enforcement actions."[105] However, the False Claims Act does, in effect, provide for significant prosecutorial discretion. The Act provides that the government may dismiss or settle the action over the relator's objections after a hearing.[106] Courts have interpreted this provision broadly, allowing dismissal for any government purpose that is not arbitrary or unlawful.[107] Prosecutorial discretion is in effect only constrained by the political considerations involved in stating why the government would choose not to vigorously pursue a fraud claim and shifting the default rule from no suit without government action to allowing suit without government action. This salutary shift can provide greater deterrence as government contractors realize that fraud claims are more likely to be pursued and avoid either the perception or reality of under-enforcement against fraud for political reasons even while allowing for prosecutorial discretion where clearly necessary. Even some members of Congress have claimed that the Department of Justice is "on the side of the defense contractors,"[108]

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[104] Rubenstein, *supra* note 109 at 2154.

[105] Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 Va. L. Rev. 93, 115 (2005).

[106] *See* 31 U.S.C. § 3730(c)(2)(A).

[107] *See, e.g.*, United States ex rel. Sequoia Orange Co. v. Sunland Packing House Co., 912 F. Supp. 1325 (E.D. Cal. 1995).

[108] False Claims Reform Act: Hearings Before the Subcomm. on Admin. Practice and Procedure of the S. Comm. on the Judiciary, 99th Cong. 15 (1985) (statement of Sen. Howard Metzenbaum). *See also, e.g.*, Charles E. Grassley, Op-Ed., *Abe Lincoln vs. the Justice Department*, N.Y. Times, Jan. 16, 1993, at L21 ("the Justice Department has been consistently hostile to whistleblowers" perhaps because "the executive branch dislikes citizens interfering in the cozy relationships it has with defense companies and other public contractors"); J. Randy Beck, *The False Claims Act and the English Eradication of Qui Tam Legislation*, 78 N.C. L. Rev. 539 (2000).

so the potential benefits to requiring transparency in the exercise of prosecutorial discretion may be large.

2. SUITS FILED AFTER AN EARLIER RULE 9(B) DISMISSAL ARE PARTICULARLY LIKELY TO BENEFIT FROM THE INVOLVEMENT OF PRIVATE ATTORNEYS GENERAL

Allowing the private market for legal services to determine whether to pursue cases where the government has already decided not to intervene in the earlier action presents the potential for substantial efficiency gains. Cases where an earlier action has already been dismissed are precisely where the screening function inherent in a market can provide the greatest benefit in allocating resources.

The probability of a recovery by the plaintiff drops dramatically when the DOJ fails to intervene. One study found that plaintiffs recovered funds for the government in 90% of cases where the DOJ intervened compared to only 10% where the DOJ did not.[109] Similar logic applies where the DOJ has declined to intervene in an earlier case. However, some relators and plaintiffs' attorneys are willing to litigate such presumably marginal cases. For example, the website of one such firm claims that "in some of our cases the United States Government has not intervened, but we have nonetheless pursued the defendants on behalf of our clients and the United States, settling many and seeing others through to jury verdict."[110]

Empirical evidence indicates that firms specializing in Qui Tam litigation achieve higher recovery rates,[111] indicating that such experienced firms are adept at screening cases to determine if they are worth pursuing. Allowing the private market for legal services to determine whether such marginal cases are worth pursuing, while shifting the risk of allocating too many resources to marginal claims away from the United States through a contingent fee structure, has obvious benefits. Therefore, interpreting the first-to-file bar to allow a subsequent relator to proceed when an earlier suit was dismissed under Rule 9(b) is particularly unlikely to result in suits where the DOJ would likely would have achieved the same result on its own at lower cost. On the contrary, this interpretation of the first-to-file bar would allow the United States to realize greater benefits from actions by Qui Tam relators acting as private attorneys general.

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[109] Engstrom, *supra* note 2, at n. 24.

[110] *About Our Practice*, HELMER, MARTINS, RICE & POPHAM CO., L.P.A., http://www.fcalawfirm.com/fcalawsite/practice/index.html (last visited April 16, 2013)

[111] Engstrom, *supra* note 2, at 18.

IV. CONCLUSIONS

Interpreting the first-to-file bar not to apply after an earlier suit is dismissed under Rule 9(b) is thus more consistent with the text and purpose of the False Claims Act than competing interpretations. However, it is not clear that the existing first-to-file bar, under either interpretation, represents optimal policy. This Note discussed the statutory interpretation and policy concerns related to the first-to-file bar as written. However, the same policy analysis applies equally to potential revision of the first-to-file bar by Congress. The implications of the above analysis on potential reforms of the first-to-file bar, discussed briefly below, provide interesting topics for potential future investigation.

Other aspects of the False Claims Act have been successfully reformed to allow an expanded role for private attorneys general while maintaining government control where necessary. For example, the public disclosure bar was recently reformed as part of the Patient Protection and Affordable Care Act.[112] The changes broaden the "original source" exception to the bar and otherwise allow more suits to proceed: relators with "knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions" now qualify as original sources, only federal – not state – proceedings now count as public disclosures, and suits may not be dismissed under the public disclosure bar if the government opposes dismissal.[113] The inclusion of these reforms in health care legislation suggests Congressional opinion that the False Claims Act has been effective and that strengthening the False Claims Act will be particularly useful in the context of the healthcare. This is unsurprising given that more than half of Qui Tam actions filed under the False Claims Act have related to healthcare, recovering nearly $10 billion.[114] The principles behind these reforms can be applied to the first-to-file bar.

The first-to-file bar could be modified to provide a relator some reward for useful information even when the relator is not the first to bring suit. Just as a court may determine whether new information "materially adds" to the case under the public disclosure bar, courts could be asked to make a similar determination under a revised first-to-file bar. The court is already charged with assessing the efficacy of the relators involvement in determining the relator's share of a recovery,[115]

[112] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).
[113] *Id.*
[114] *See* S. Comm. on the Judiciary, False Claims Act Correction Act of 2008, S. Rep. No. 110-507, at 8 (2008).
[115] The court already has discretion to decrease a relator's share by up to 40% where the court

so making a similar determination among multiple relators should be feasible, and likely no more difficult than current determination required to interpret whether the first-to-file bar applies.

Congress could change who must oppose the later-filed suit to have it dismissed under the first-to-file bar. If the purpose of the first-to-file bar is to protect the relator in the earlier suit from additional parasitic suits, then a subsequent suit should be allowed to proceed unless the relator in the earlier suit objects. In the vast majority of cases, a relator in a suit where the government has declined to intervene and the court has dismissed the suit for failing to satisfy Rule 9(b) may see her prospects for success as dim, and not object if another relator with additional information wishes to bring suit.[116] Where the first-to-file bar protects defendants, not an earlier relator, it does not serve the purpose of the Act. An alternative rule could allow the government to be the decision-maker, either allowing the suit to proceed unless the government objects, or preventing the suit from being dismissed under the first-to-file bar if the government objects, as in the reformed public disclosure bar.

Even more far-reaching reform might consider separating the whistleblower incentives and the legal services incentives in the False Claims Act. As currently structured, the Act explicitly provides an incentive for whistleblowers, who then choose an attorney to provide the legal services necessary to file a claim. However, a whistleblower is unlikely to be the party best positioned to choose competent counsel for the United States at the right price.

Disaggregating incentives for information about fraud and private provision of legal services to bring suit to recover the fraudulent payment could help resolve this difficulty. For example, after relators have brought forward information about a fraud, the plaintiffs' attorney could be chosen using a class-action based model where the court picks the attorney best able to bring the suit from multiple applicants based on factors such as experience in similar actions or cost to the government to bring the suit.[117] The Court could then equitably consider the value of the information supplied by each relator and the degree of legal work

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believes the relators contributions where small. *See* 31 U.S.C. § 3730(d).

[116] Such a rule would raise interesting questions about the mechanics of preclusion in Qui Tam suits that are beyond the scope of this discussion. For a discussion of preclusion in Qui Tam actions under the False Claims Act see Nathan D. Sturycz, *The King and I?: An Examination of the Interest Qui Tam Relators Represent and the Implications for Future False Claims Act Litigation*, 28 St. Louis U. Pub. L. Rev. 459 (2009).

[117] Compare to Fed. R. Civ. P. 23(g) (requiring consideration of factors including "the work counsel has done in identifying or investigating potential claims," experience in handling similar cases, "resources that counsel will commit" to the case, and any other factors the court finds appropriate).

required in approving a portion of the award to various relators and plaintiffs' attorneys. However, in considering such potential reforms, Congress would have to balance the possibility that the increased complexity associated with such a system might not be worth the efficiency gains.

The history of the False Claims Act shows that Congress has actively updated the False Claims Act, including passing legislation that specifically responds to decisions that Congress disagrees with, so Congressional reform to clarify or improve the first-to-file bar may be a realistic possibility. Senator Grassley is a particularly strong supporter of a broad role for private attorneys general under the False Claims Act. His website states that "there are constant threats to the strength of the False Claims Act and its qui tam provision" but "I will stay vigilant in working to protect this proven anti-fraud law from efforts to weaken or even gut it."[118] Senator Grassley was a sponsor of the Fraud Enforcement And Recovery Act of 2009 that was intended in part to "correct erroneous interpretations of the [False Claims Act] that were decided in *Allison Engine Co. v. United States ex rel. Sanders*."[119] The bill passed the Senate on a vote of 94 to 4 the House on a vote 338 to 52, indicating broad bipartisan support for the measures to strengthen the False Claims Act.[120] The False Claims Act was further strengthened in the Patient Protection and Affordable Care Act of 2010.[121] These amendments show that legislators in both parties have supported strengthening the qui tam provisions in the False Claims Act and have actively addressed court decisions that run counter to their desired interpretation of the Act, so a legislative response to either *Batiste* itself or a potential Supreme Court decision endorsing *Batiste* may be a realistic possibility.

Nevertheless, Congressional action can still be difficult and time consuming. Action by the Court to clarify that the first-to-file bar should not to apply after an earlier suit is dismissed under 9(b) would be more efficient than Congressional action reversing such a decision. In addition, interpreting the first-to-file bar not to apply after an earlier suit is dismissed under 9(b) would both be more consistent the text of the statute and recent pleadings developments and improve the effectiveness of the False Claims Act at combatting fraud.

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[118] These statements appear on Senator Grassley's official website. Q&A ON THE FALSE CLAIMS ACT AT 25 YEARS AND $30 BILLION IN RECOVERIES, http://www.grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=38787 (last visited May 27, 2013).

[119] S. Rep. No. 10, S. REP. 111-10, 10, 2009 U.S.C.C.A.N. 430, 430, 438.

[120] *See* S. 386 (111th): FERA, http://www.govtrack.us/congress/bills/111/s386 (last visited May 26, 2013).

[121] PATIENT PROTECTION AND AFFORDABLE CARE ACT, PL 111-148, March 23, 2010, 124 Stat 119.