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# *Focus*

## ¶ 177

### The 'Pending' Pickle With The FCA's First-To-File Bar

The False Claims Act, 31 USCA § 3729 et seq. (2012), is among the Government's most powerful tools for combating alleged fraud. Originally enacted during the Civil War, the FCA was seldom used until 1986, when significant amendments strengthened its force, expanded its reach, and offered new incentives for private enforcement suits brought by qui tam relators (colloquially known as "whistleblowers"). Subsequent amendments in 2009 and 2010 further expanded the FCA's scope and reduced obstacles for whistleblowers. See Fraud Enforcement and Recovery Act of 2009, P.L. 111-21, 123 Stat. 1617 (2009); Patient Protection and Affordable Care Act, P.L. 111-148, 124 Stat. 119 (2010).

The FCA's current statutory scheme provides ample encouragement for whistleblowers to step forward. It provides for a relator's share of up to 25 or 30 percent, depending on whether the Government intervenes, as well as reasonable attorneys' fees, costs and expenses. 31 USCA § 3730(d)(1)–(2). Further, as relators are often current or former employees of the company against whom they bring their case, the FCA also provides protections and remedies for such whistleblowers who are retaliated against in connection with such activities.

It is widely recognized, however, that these incentives are not without limit. Rather, "[t]he False Claims Act's qui tam provisions are designed to encourage private citizens to expose fraud but to avoid actions by opportunists seeking to capitalize on public information." *Grynberg v. Koch Gateway Pipeline Co.*, 390 F.3d 1276, 1278 (10th Cir. 2004). The FCA therefore balances the financial incentives and protections it provides relators with several, specific limitations on qui tam actions. The most prominent is the public disclosure bar, which prohibits a relator from bringing an action when substantially the same allegations or transactions as alleged were publicly disclosed. Id. § 3730(e)(4). Another limitation, aptly termed the "first-to-file" bar, holds that if two or more "related" whistleblower actions are filed, only the earliest-filed suit may proceed.

These bars, among others, create the counterweight in what has been called the "balancing act of the FCA's qui tam provision." *U.S. ex rel. Wilson v. Bristol-Myers Squibb, Inc.*, 2014 WL 1688934, at *4 (1st Cir. April 30, 2014). Overall, the FCA's qui tam incentives and limits serve the statute's "twin goals of rejecting suits which the government is capable of pursuing itself, while promoting those which the government is not equipped to bring on its own." *U.S. ex rel. Batiste v. SLM Corp.*, 659 F.3d 1204, 1208 (D.C. Cir. 2011); 53 GC ¶ 396.

Although the public disclosure bar has served as a viable defense to qui tam suits and spawned a wealth of case law over the years, the first-to-file bar has recently gained more notoriety. As qui tam actions continue to rise, with a record 753 filed in fiscal year 2013, so, too, does the number of "related" or piggyback suits. See Department of Justice, "Fraud Statistics—Overview" (Dec. 23, 2013), available at *www.justice.gov/civil/docs_forms/C-FRAUDS_FCA_Statistics.pdf*.

At the same time, the force of the public disclosure and first-to-file bars has come into considerable question. While both bars have long been considered jurisdictional defenses, e.g., *Bristol-Myers*, 2014 WL 1688934, at *4, recent amendments have weakened the public disclosure bar substantially, removing its "jurisdictional" character while also narrowing the set of qualifying disclosures and original-source knowledge requirements for whistleblowers. See generally Rhoad and Lynch, Feature Comment, "New Questions Regarding The Jurisdictionality Of

The FCA's Public Disclosure Bar: Potential Hurdles And Increased Costs In Defending Against Parasitic Qui tam Actions," 55 GC ¶ 92. The power of the first-to-file bar to preclude related actions has also come under attack in the courts, a topic which we explore here.

**Application of the First-to-File Bar**—Situated in the qui tam provisions of the FCA, the first-to-file bar provides that "[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." 31 USCA § 3730(b)(5). In applying the bar, the circuit courts of appeals have uniformly rejected an "identical facts" test as contrary to the plain meaning of the statute and, instead, agree that a later-filed qui tam suit is "based on the facts underlying the pending action" if it shares the same essential facts or material elements of the earlier-filed suit. See *Bristol-Myers*, 2014 WL 1688934, at *5 (collecting cases from the U.S. Court of Appeals for the Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth and D.C. circuits).

This inquiry requires a comparison of the competing complaints. *U.S. ex rel. LaCorte v. SmithKline Beecham Clinical Labs., Inc.*, 149 F.3d 227, 235 n.6 (3d Cir. 1998); 40 GC ¶ 545. The Ninth Circuit explained that a narrow, identical-facts test not only fails the plain-language test, but it is contrary to the legislative intent of the FCA; it would not incentivize relators to bring qui tam actions promptly, it would encourage piggyback claims, and it could lead to multiple relators expecting to recover for conduct of which the Government had already been notified. *U.S. ex rel. Lujan Hughes Aircraft Co.*, 243 F.3d 1181, 1189 (9th Cir. 2001) ("The first-filed claim provides the government notice of the essential facts of an alleged fraud, while the first-to-file bar stops repetitive claims.").

The statutory text of the first-to-file bar contains no exceptions. The public disclosure bar, on the other hand, has two. To wit, an otherwise-barred action may proceed if either the Government opposes dismissal or the relator meets the requirements to qualify as an "original source" of the allegations upon which his action is based. See 31 USCA § 3730(e)(4)(B). But the first-to-file bar—with its plain, straightforward language—has been deemed "an absolute, unambiguous exception-free rule." *U.S. ex rel. Carter v. Halliburton Co.*, 710 F.3d 171, 181 (4th Cir. 2013), petition for cert. filed, No. 12-1497 (June 24, 2013); 55 GC ¶ 98; *Lujan*, 243 F.3d at 1187 ("§ 3730(b)(5)'s plain language does not contain exceptions"); *U.S. ex rel. Heineman-Guta v. Guidant Corp.*, 718 F.3d 28, 35 (1st Cir. 2013) (same); 55 GC ¶ 22.

**New Limitation on First-to-File Bar(?) and an Evolving Split in the Courts**—Although the courts uniformly agree on the relatedness test and the policy behind it, courts have split on another issue with broad ramifications. This point of contention is whether a later-filed, related action is barred permanently or only as long as the first-filed action remains "pending." Two circuits have recently come to opposite conclusions. In *Carter*, decided in March 2013, the Fourth Circuit placed a temporal limit on the first-to-file bar, holding that it only bars related actions filed while the earlier action remains pending. 710 F.3d at 183. As a result, the court ruled that a barred action could be dismissed only *without* prejudice to bringing it again. Id. On the other end of the spectrum, the D.C. Circuit this last April ruled that the first-to-file bar's proscription against later-in-time, related cases applies even if the initial action is no longer pending. *U.S. ex rel. Shea v. Cellco P'ship*, 2014 WL 1394687 (D.C. Cir. April 11, 2014).

In *Carter*, the relator alleged improper billing by defendant on a contract in Iraq. The district court held that the first-to-file bar precluded the relator's suit, filed in June 2011, because similar cases in Maryland and Texas were pending at that time. The Fourth Circuit agreed as to that point: "Because we look at the facts as they existed when the claim was brought to determine whether an action is barred by the first-to-file bar, we conclude that Carter's claims are barred by the [Maryland] and Texas actions." 710 F.3d at 183. "However," the court added, "this does not end our inquiry." Id. The Fourth Circuit went on to reverse the district court's dismissal of the relator's claims with prejudice because, it held, the first-to-file bar applies only while the earlier actions remain pending.

By the time *Carter* reached the Fourth Circuit, both of the related actions had been voluntarily dismissed (the Maryland case in October 2011 and the Texas case in March 2012). The court therefore reversed the dismissal with prejudice on the grounds that "once a case is no longer pending the first-to-file bar does not stop a relator from filing a related case." Id.

It ruled instead that the bar provides only for a dismissal *without* prejudice: "The first-to-file bar allows a plaintiff to bring a claim later; this is precisely

 

what a dismissal without prejudice allows a plaintiff to do as well." Id. In so holding, the Fourth Circuit joined the Seventh and Tenth circuits, both of which had recently reasoned (in dicta) that the first-to-file bar applies only while the earlier action is still pending. See *U.S. ex rel. Chovanec v. Apria Healthcare Group, Inc.*, 606 F.3d 361 (7th Cir. 2010); *In re Natural Gas Royalties Qui Tam Litig.,* 566 F.3d 956, 963–64 (10th Cir. 2009).

The D.C. Circuit came to the opposite conclusion in *Shea* just this April. There, the relator filed a qui tam action in January 2007 against Verizon that ultimately settled in February 2011. The same relator in June 2009 filed a second complaint, which he amended in September 2012. The district court dismissed the relator's second action pursuant to the first-to-file bar. On appeal, the relator argued that the dismissal should be without prejudice because his earlier, related case was no longer pending.

The D.C. Circuit, in a 2–1 split decision, disagreed. The court reasoned that the term "pending action" in § 3730(b)(5) is simply a straightforward reference to the first-filed action, nothing more. *Shea*, 2014 WL 1394687, at *4; see also *U.S. ex rel. Powell v. Am. Intercont'l Univ., Inc*., No. 1:08-cv-2277, 2012 WL 2885356, *4 (N.D. Ga. July 12, 2012) (same). To read the term as implying a temporal limit on the reach of the first-to-file bar would require one to supplement the plain language of the statute—something the D.C. Circuit declined to do. *Shea*, 2014 WL 1394687, at *5.

The court noted that its reading was consistent with the policy considerations underlying the FCA itself: "The resolution of a first-filed action does not somehow put the government off notice of its contents. On the other hand, reading the bar temporally would allow related qui tam suits indefinitely. ... Such duplicative suits would contribute nothing to the government's knowledge of fraud." Id.

**Which Court Has It Right?**—The Fourth and D.C. circuits arrived at diametrically opposed interpretations of the meaning and reach of the statutory first-to-file bar—each ostensibly drawn from the bar's plain language. The Fourth Circuit interprets the term "pending" to impose a finite limit on the reach of the first-to-file bar to block related actions, while the D.C. Circuit reads "pending" as providing only a qualifying reference in the statute that does not create any expiration to the bar's reach. So which one is right? The answer will have significant practical consequences for relators and defendants alike, and broader policy implications concerning the balance between the FCA's conflicting goals of preventing opportunistic/parasitic suits while encouraging citizens to act as whistleblowers. The D.C. Circuit's approach might arguably overload the power of the first-to-file bar as a defense; on the other hand, the Fourth Circuit's interpretation threatens to erode its effect altogether. Overall, the D.C. Circuit has the better read on both a plain language analysis and the FCA's policy considerations.

**The Plain Meaning of "Pending"**—In statutory interpretation, courts start with the text. "Where the language of the statute is plain and the meaning unambiguous, [the court] will do no more than enforce the statute in accordance with those plain terms." *Heineman-Guta*, 718 F.3d at 34 (citation omitted). When interpreting the first-to-file bar, the circuits have agreed that a plain meaning analysis is all that is necessary because the bar's "language is plain and simple." Id. at 35; see *Lujan*, 243 F.3d at 1187; *LaCorte*, 149 F.3d at 233.

As the D.C. Circuit reasoned, the "simplest reading of 'pending' is the referential one; it serves to identify which action bars the other." *Shea*, 2014 WL 1394687, at *5; see *Powell*, 2012 WL 2885356, at *4 (language of first-to-file bar refers to two actions, and term "pending" is "used as a short-hand for the first-filed action"). In contrast, the Fourth Circuit's reading of "pending" as limiting the first-to-file bar's application temporally is predicated on the addition of several words to the bar, as the *Shea* court observed in rejecting the same argument by the relator there:

> Shea reads the bar as if it provided that "when a person brings an action under this subsection, no person other than the Government may intervene or bring a related action *while the first action remains pending*." But this is not what the statute says. Instead it makes clear that the bar commences "when a person brings an action under this subsection," and thence forth bars any action "based on the facts underlying the pending action."

*Shea*, 2014 WL 1394687, at *5. In short, the D.C. Circuit's interpretation of the meaning of "pending" as used in the first-to-file bar does not require supplementation of the plain language, while the Fourth Circuit's interpretation does.

Ironically, the Fourth Circuit labels the first-to-file bar "an absolute, unambiguous exception-free rule," 710 F.3d at 181, yet it then creates an enormous

 

exception to the bar's reach by reading "pending" to mean that the bar applies only until the earlier action is resolved and therefore does not prevent a relator from refiling an action previously barred. In short, the court held that the first-to-file bar only permits a dismissal without prejudice to refiling. But where does the statute say that? As the D.C. Circuit noted, Congress could easily have included such an express limitation had it wanted the bar to be limited in that way, "as it has done in other contexts." *Shea*, 2014 WL 1394687, at *5 (citing examples); cf. *Heineman-Guta*, 718 F.3d at 35 (rejecting argument that the first-to-file bar does not apply where the earlier action does not meet Rule 9(b) particularity requirements, and noting that Congress did not incorporate any such requirement into the statutory bar's language). But it did not do so.

In contrast, the use of the term "pending" is both meaningful and straightforward under the D.C. Circuit's plain language interpretation. Certainly, a clarifying modifier of the term "action" helps distinguish which action is referenced in the bar's language. While it might have been better to modify "action" with a different but similar term, such as "earlier" or "first," this does not render the use of "pending" inaccurate or improper. The use of that term plainly references the earlier action as that which will undoubtedly be "pending" at the time "when" a person brings it, and it is at this point that the bar begins to preclude related suits. 31 USCA § 3730(b)(5) ("*When* a person brings an action under this subsection ...") (emphasis added). The first-to-file bar thus provides a starting point for its application by its plain language; conversely, nowhere does it express an ending point as the Fourth Circuit interpreted it.

**The FCA's Policy Considerations Favor an Exception-Free First-to-File Bar**—Recognizing that the courts have come to different conclusions as to the plain meaning of "pending" in the first-to-file bar, policy considerations shed important light on the subject. The D.C. Circuit's interpretation of the term "pending" as a modifier and not a limitation on the bar's reach is not only straightforward in application, it goes hand-in-hand with preserving the balance between the FCA's competing policy considerations. Most importantly, the *Shea* court recognized the critical purpose of the FCA's qui tam provisions in putting the Government on sufficient notice of fraud such that it is equipped to investigate that fraud. *Shea*, 2014 WL 1394687, at *5 (citing *Batiste*, 659 F.3d at 1208). In so doing, the D.C. Circuit seized upon a seemingly obvious proposition that the Fourth Circuit ignored: once the Government is equipped to investigate related frauds by a first-filed action, its resolution or dismissal "does not somehow put the government off notice of its contents." *Shea*, 2014 WL 1394687, at *5. Nor does barring a later action prevent the Government from investigating fraud related to that alleged in the earlier action. To permit related actions to go forward once the earlier action is resolved is tantamount to allowing claims that are simply parasitic of those of which the Government is already on notice. The D.C. Circuit's holding discourages such suits.

Under the D.C. Circuit's approach, then, the test for barring a later-filed suit remains the universally endorsed "essential facts" or "material elements" test. If it is related under this test, it is barred—whether filed during or after the pendency of the earlier action. If it is not a related action, it can proceed irrespective of the status of the first-filed case. Whether an earlier action might bar a later action concerning conduct years apart is left to the sound discretion of the court in applying the essential facts test.

Furthermore, the *Shea* court's reading of the first-to-file bar still encourages relators to step forward and be rewarded if they have truly valuable information of fraud that has not been exposed and of which the Government has not been notified or equipped to investigate. One need only consider the annual increase in whistleblower suits to dispel any notion that relators might be less inclined to bring a claim under a robust first-to-file bar. And they are encouraged to do so quickly, with the first-in-time relator reaping the reward of a share in any recovery obtained. Any concern that the D.C. Circuit's approach encourages the filing of overly broad complaints in an aim to win the race to the courthouse is dispelled by the fact that a relator who does not meet the pleading requirements of Rule 12 and Rule 9(b) will have his suit dismissed, along with the right to any potential reward. See, e.g., *Batiste*, 659 F.3d at 1210–11.

In contrast, the Fourth Circuit's limiting interpretation of the first-to-file bar's reach in *Carter* is problematic both in practical application and on a policy level. First, the Fourth Circuit's interpretation leads to what has been termed "reappearing" jurisdiction. *Powell*, 2012 WL 2885356, at *5. Like other courts, the Fourth Circuit holds the first-to-file bar to be jurisdictional. See *Carter*, 710 F.3d at 181; *Heineman-Guta*, 718 F.3d at 34. But in *Carter*, the Fourth

 

Circuit essentially holds that a qui tam suit may be jurisdictionally barred one day but not the next. Such a result is more than curious and has been rejected by other courts. *Lujan*, 243 F.3d at 1188; *Powell*, 2012 WL 2885356, at *5.

The flaws in the Fourth Circuit's reading of the term "pending" in the first-to-file bar are all the more exposed in light of the policy considerations of the FCA, which was amended with the intent of striking a balance between creating adequate incentives for whistleblowers to expose fraud while discouraging parasitic suits. *LaCorte*, 149 F.3d at 233–34. As to incentives, the *Carter* court noted that the first-to-file bar "protects the potential award of a relator" who wins the race to the courthouse. 710 F.3d at 183 (quoting *In re Natural Gas*, 566 F.3d at 963–64).

But it failed to address the equally if not more important counter consideration, that "[o]nce the government is put on notice of its potential fraud claim, the purpose behind allowing qui tam litigation is satisfied." *Grynberg*, 390 F.3d at 1279. Indeed, the first-to-file bar precludes later, related actions precisely because "once the government knows the essential facts of a fraudulent scheme, it has enough information to discover related frauds." *LaCorte*, 149 F.3d at 234. Of what use to the Government is a first-to-file provision that bars a suit because an earlier, pending suit put the Government on notice of related fraud, but then permits the blocked suit to go forward once the earlier suit is resolved?

Neither the Fourth, Seventh nor Tenth circuit offers any explanation for their interpretation of the first-to-file bar that satisfies *both* of the competing policy interests of the FCA, as the D.C. Circuit's opinion in *Shea* does. Indeed, they make no attempt to do so. The Tenth Circuit actually noted in *In re Natural Gas* that the first-to-file bar serves not only to protect the potential share of the first-in-time relator, but also to prevent piggyback claims, 566 F.3d at 961. Yet it utterly failed to address the second of these concerns. Id. at 963–64. Neither did the Fourth Circuit address this problem in *Carter*. 710 F.3d at 183.

In short, the *Carter* court failed to answer the obvious question: What purpose is served by permitting a related suit to be filed once the earlier one is no longer pending? Put another way, what is the purpose of the first-to-file bar if it ultimately permits a relator who *loses* the race to the courthouse to reap a reward anyway? Nothing in the first-to-file bar's language or history speaks of permitting a late-in-time relator to receive a bounty. Nor is there any real benefit to the Government in encouraging related suits once it has been notified of the essential facts or elements of the alleged fraud.

As the Tenth Circuit itself recognized, "the government does not cease to be on notice when a relator withdraws his claim or a court dismisses it." *In re Natural Gas*, 566 F.3d at 964. From the time that the first complaint is filed under seal and given to DOJ, the Government is on notice and becomes equipped to investigate the alleged fraud. The Government's interests are at risk under the Fourth Circuit's interpretation because the parasitic relator's share is money that the Government would otherwise recover.

And what about the defendant; if the first-to-file bar only temporarily precludes a related case, what comfort does that provide? How does that affect one's defense strategy? Will a defendant, having succeeded through litigation in barring a related action on first-to-file grounds, be saddled with the same case again once the earlier action is dismissed or resolved? These are not merely rhetorical questions in the Fourth, Seventh and Tenth circuits—they are serious concerns with very practical consequences.

The Fourth and Seventh circuits opine that a narrow reading of the first-to-file bar is balanced by other legal principles and FCA provisions. In *Chovanec*, the Seventh Circuit cited res judicata, suggesting that related cases might be blocked because of the resolution of an earlier action. 606 F.3d at 362. It further proposed that a later-in-time suit might be blocked by the FCA's public disclosure bar, as the earlier suit would constitute a qualifying disclosure. Id. at 365. And a later-filed qui tam suit might be subject to the six-year statute of limitations. 31 USCA § 3731(b).

These suggestions dodge the central issue as to why a later-in-time relator should be rewarded and are, in any event, unconvincing. A defendant always has the defense of res judicata available to it, just as it has the public disclosure bar and the statute of limitations. Of what use is the first-to-file bar if its power depends on these defenses? The first-to-file bar applies to related actions and, as such, has a wider reach than res judicata. And while an earlier action may trigger the public disclosure bar, that bar has a specific exception for original sources, an exception found nowhere in the first-to-file bar's language. 31 USCA § 3730(e)(4). And given that qui tam actions must be filed under seal and might be resolved or dismissed prior to being unsealed, not

 

all first-filed cases qualify as public disclosures. 31 USCA § 3730(b)(2).

Moreover, the notion that the statute of limitations might permanently bar suits temporarily delayed under the Fourth Circuit's reading of the first-to-file bar spawns yet another concern. Ironically, in the very same opinion in which it held that the first-to-file bar loses any effect once the earlier case is no longer pending, the *Carter* court also held that the Wartime Suspension of Limitations Act (WSLA) applies to civil qui tam FCA suits—even if the Government does not intervene—ruling that, as a result, the FCA's six-year statute of limitations is indefinitely tolled because the U.S. is "at war." 710 F.3d at 179–81.

The Fourth Circuit reasoned that no formal declaration of war is required to trigger the WSLA's suspension period, but a presidential proclamation or congressional resolution *is* required in order to terminate the WSLA's effect. Id. Thus, under the Fourth Circuit's holding in *Carter*, neither the first-to-file bar nor the statute of limitations any longer prohibits the relator from refiling his action now, some nine years after the claims were presented. Id.

Leaving aside the wisdom of the *Carter* court's WSLA analysis, the bottom line is that now, at least in the Fourth Circuit, there is no statute of limitations for a qui tam suit. Given the realities of today's political climate and the U.S.' involvement in conflicts around the world, the first-to-file and WSLA rulings in *Carter* make it more than conceivable that new relators could bring related cases in perpetuity (subject, of course, to any other applicable defenses). In sum, reliance on res judicata, the statute of limitations and the public disclosure bar do not support the Fourth Circuit's stance on the meaning of "pending" in the first-to-file bar; rather, they demonstrate that temporally limiting the bar's effect may render it altogether ineffective and unnecessary.

**Conclusion: Will the Supreme Court Tackle This "Pending" Pickle?**—The Supreme Court has yet to decide whether it will take up the *Carter* case, though it asked the Government to weigh in on the petition for certiorari, which the Solicitor General did this May, essentially rubberstamping the Fourth Circuit's reasoning and asking the Court to deny the petition. In the meantime, it remains to be seen how this evolving circuit split will grow and which side will gain more traction in the dispute. One thing is certain, though—the question of whether an earlier action bars related actions indefinitely or only while the earlier action remains "pending" is one that goes to the heart of the FCA's twin policy goals and whose answer will have important consequences for relators, defendants and the Government, alike.

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