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Conflicting Requirements of Notice: The Incorporation of Rule 9(b) into the False Claims Act's First-to-File Bar

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NOTE

Conflicting Requirements of Notice: The Incorporation of Rule 9(b) into the False Claims Act's First-to-File Bar

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Intended to prevent fraud against the government, the False Claims Act ("FCA") contains a qui tam provision allowing private individuals, known as relators, to bring suits on behalf of the government and receive a portion of the damages. At the heart of the qui tam provision lies the first-to-file bar, which provides that, once a first relator has filed a complaint, subsequent relators are prohibited from coming forward with complaints based on the facts underlying the first relator's pending action. A circuit split has recently emerged regarding the incorporation of Federal Rule of Civil Procedure 9(b)'s heightened pleading standard into the FCA's first-to-file rule. Neither the circuit court decisions nor the relevant scholarship on this issue, however, has provided a comprehensive explanation as to why the government's notice requirements should differ—if indeed they should differ at all—from defendants' notice requirements for purposes of the first-to-file bar. This Note aims to fill that void and argues that, unlike garden-variety civil defendants in an adversarial context, the government maintains a partnership with the relator and has sufficient investigatory tools beyond the four corners of the complaint to assess adequately the merits of the relator's allegations. Thus, the government does not require the heightened notice of Rule 9(b) at the first-to-file stage, and courts should ultimately adopt the approach employed by the First and D.C. Circuits in affording preclusive effect to first-filed FCA complaints, even if they are deficient under Rule 9(b).

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Introduction

The False Claims Act ("FCA")'s origins trace back to the Civil War in 1863.[1] With the rebel forces swiftly moving toward Washington, D.C., Union armies faced dwindling supplies of muskets, horses, and mules due to government contractor profiteering.[2] Recognizing the lack of government resources and the potential for private citizens to combat defense-procurement fraud, President Lincoln signed the FCA into law.[3] The FCA was intended to encourage private individuals to alert the government to fraud.[4] To effectuate this goal, the Act contains a qui tam provision, which allows private citizens—also known as relators—to bring suits on behalf of the government and receive a portion of the damages.[5]

Throughout the FCA's history, Congress has sought a delicate balance between two competing policy objectives: encouraging whistleblowers to

1. 131 Cong. Rec. 22,322 (1985) (statement of Sen. Charles Grassley) ("The main purpose behind the enactment of the False Claims Act of 1863 [was] to encourage individuals to ferret out fraud against the government . . . .").

2. James B. Helmer, Jr. & Robert Clark Neff, Jr., *War Stories: A History of the* Qui Tam *Provisions of the False Claims Act, the 1986 Amendments to the False Claims Act, and Their Application in the* United States ex rel. Gravitt v. General Electric Co. *Litigation*, 18 Ohio N.U. L. Rev. 35, 35 (1991).

3. 131 Cong. Rec. 22,322; Helmer & Neff, *supra* note 2, at 35.

4. 131 Cong. Rec. 22,322.

5. 31 U.S.C. § 3730(b) (2012). "The name '*qui tam*' comes from a longer Latin phrase, '*qui tam pro domino rege quam pro si ipso in hac parte sequitur*,' which means '[w]ho sues on behalf of the King as well as for himself.'" J. Randy Beck, *The False Claims Act and the English Eradication of* Qui Tam *Legislation*, 78 N.C. L. Rev. 539, 541 n.3 (2000) (quoting Black's Law Dictionary 1251 (6th ed. 1990)).

come forward and alert the government to fraudulent activity and simultaneously discouraging opportunistic plaintiffs from initiating parasitic lawsuits.[6] These dual policy goals have come to the forefront in the circuit split regarding the incorporation of Federal Rule of Civil Procedure 9(b) ("Rule 9(b)")'s heightened pleading standard[7] into the FCA's first-to-file provision, which prohibits anyone other than the government from intervening or bringing "a related action based on the facts underlying the pending action."[8] In opposition to the Sixth Circuit,[9] the First Circuit recently joined the D.C. Circuit in holding that an earlier-filed FCA complaint need not satisfy Rule 9(b)'s particularity requirement to provide the government with sufficient notice of the alleged fraud and to preclude a later-filed complaint.[10]

Commentators in favor of eliminating Rule 9(b) from the first-to-file bar argue that this approach better comports with the FCA's twin policy goals of encouraging parties promptly to report fraud and deterring parasitic relators,[11] and further that it provides a clear, exception-free application of 31 U.S.C. § 3730(b)(5) for courts to follow.[12] By contrast, those commentators in favor of grafting Rule 9(b) onto the first-to-file bar claim that including Rule 9(b)'s particularity requirement will better serve to "minimize social loss from false claims" and more effectively use relators as government

6. *E.g.*, United States *ex rel.* Heineman-Guta v. Guidant Corp., 718 F.3d 28, 35 (1st Cir. 2013); United States *ex rel.* Batiste v. SLM Corp., 659 F.3d 1204, 1210 (D.C. Cir. 2011); Walburn v. Lockheed Martin Corp., 431 F.3d 966, 970 (6th Cir. 2005).

7. Unlike the "short and plain statement of the claim showing that the pleader is entitled to relief" required by Federal Rule of Civil Procedure 8 for typical notice pleading, FED. R. CIV. P. 8(a)(2), the significantly more demanding Rule 9(b) provides that a party alleging fraud or mistake in its complaint "must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." FED. R. CIV. P. 9(b).

8. 31 U.S.C. § 3730(b)(5).

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

10. *Guidant*, 718 F.3d at 36; *Batiste*, 659 F.3d at 1210.

11. Daniel Long, Comment, *Last Call: According First-Filed Qui Tam Complaints Greater Preclusive Effect Under* Batiste*'s Narrow Interpretation of the First-to-File Rule*, 54 B.C. L. REV. E. SUPP. 161 (2013), http://www.bclawreview.org/files/2013/04/12_Long.pdf. Discussing the D.C. Circuit's holding in *Batiste*, Long provides a policy analysis and contends that the court's approach "is preferable because it better promotes the goals of promptly notifying the government of fraudulent claims and discouraging opportunistic suits." *Id.* at 173–74.

12. Joel Deuth, Comment, *The False Claims Act's First-to-File Bar: How the Particularity Requirement of Civil Procedure Militates Against Combating Fraud*, 62 CATH. U. L. REV. 795, 796, 798–99 (2013). In *United States ex rel. Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181, 1187 (9th Cir. 2001), the Ninth Circuit noted that "§ 3730(b)(5)'s plain language does not contain exceptions" and ruled that "an exception-free, first-to-file bar conforms with the dual purposes of the 1986 amendments: to promote incentives for whistle-blowing insiders and prevent opportunistic successive plaintiffs." Drawing from the Ninth Circuit's "exception-free" principle, Deuth posits that exceptions to the first-to-file bar would create a slippery slope and further contends that "[c]ourts can consistently apply the first-to-file bar to cases as long as the rule is exception-free." Deuth, *supra*, at 816. Recommending that courts first and foremost adhere to this exception-free approach, he concludes that complaints that are jurisdictionally deficient under the first-to-file bar should preclude later-filed complaints but that "complaints

resources.[13] These broad policy arguments, however, fail adequately to address Rule 9(b)'s practical utility in providing notice to the government at the first-to-file stage.

Critically, neither the circuit court decisions nor the relevant scholarship on this issue has provided a comprehensive explanation as to why the government's notice requirements should differ—if indeed they should differ at all—from defendants' notice requirements for purposes of the first-to-file bar. If the government needs the same heightened notice as common law fraud defendants, Rule 9(b) should be incorporated into the first-to-file bar, and complaints that are deficient under Rule 9(b) will not preclude later-filed complaints. But if the government does not need such particularized notice, Rule 9(b) should not apply to the first-to-file bar, and complaints that are deficient under Rule 9(b) will accordingly preclude later-filed complaints. This Note resolves the conflict underlying the circuit split by identifying and justifying the difference in FCA notice requirements for the government at the first-to-file stage and for defendants at the pleading stage.

This Note argues that, when interpreting the FCA's first-to-file bar, courts should follow the approach adopted by the First and D.C. Circuits in affording preclusive effect to first-filed complaints even if they are deficient under Rule 9(b). Unlike garden-variety civil defendants in an adversarial context, the government pursues a partnership with the plaintiff and therefore does not require heightened notice in the complaint to shield its reputation or to prepare a defense strategy. Part I addresses the congressional intent behind 31 U.S.C. § 3730(b)(5) and analyzes the current circuit split regarding the incorporation of Rule 9(b) into the FCA's first-to-file rule. Part II contrasts the underlying purposes of 31 U.S.C. § 3730(b)(5) and Rule 9(b) and maintains that Rule 9(b)'s heightened pleading standard, which primarily protects the defendant, should not apply to the first-to-file bar. Part III argues that, because the government has sufficient investigatory resources beyond the four corners of the complaint to assess adequately the merits of the relator's allegations, complaints need not satisfy Rule 9(b) to provide the government with notice sufficient to launch an investigation into the defendant's alleged conduct.

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dismissed on their merits should not preclude later-filed suits, and relators should be given the opportunity to state a claim with sufficient particularity." *Id.* at 820.

13. Ni Qian, Note, *Necessary Evils: How to Stop Worrying and Love Qui Tam*, 2013 Colum. Bus. L. Rev. 594, 624–25. Qian asserts that the U.S. Department of Justice ("DOJ") should readjust its resource allocation to refrain from intervening in cases where the opportunity cost of nonintervention is low, especially in cases where the penalty is small and the government's intervention will not be material to the relator's success. *Id.* at 624. Accordingly, in such cases, "the DOJ should simply take a backseat and let the relator pursue the case alone." *Id.* Qian further argues that, once the DOJ readjusts its resource allocation and intervenes in fewer cases, the expected value of allowing later-filed cases to proceed increases, and courts should respond by following the Sixth Circuit's *Walburn* decision. *Id.* This approach purportedly eliminates undue hostility to relators and allows them to act as private attorneys general, which in turn conserves the government's resources. *Id.* at 624–25.

I. Congressional Intent Behind 31 U.S.C. § 3730(b)(5) and the Current Circuit Split Regarding the Incorporation of Rule 9(b)

This Part provides an overview of qui tam procedure, the first-to-file bar, and the conflicting circuit court decisions regarding the inclusion of Rule 9(b) in 31 U.S.C. § 3730(b)(5). Section I.A discusses the procedure followed by relators bringing suit under the FCA and the dual policy interests underlying the qui tam provision. Section I.B details the Sixth Circuit's approach of incorporating Rule 9(b) into the first-to-file bar and accordingly rendering first-filed complaints "legally infirm"[14] if they are deficient under Rule 9(b). Finally, Section I.C examines the more recent approach adopted by the First and D.C. Circuits, which have declined to create an exception to the first-to-file rule by including Rule 9(b) therein and in turn have afforded preclusive effect to first-filed complaints that fail to pass Rule 9(b)'s scrutiny.[15]

A. *Competing Policy Interests in the Qui Tam Provision*

When a relator brings suit under the FCA, his complaint remains under seal for at least sixty days, during which time the government decides whether to intervene in the action before it is served on the defendant.[16] If the government elects to intervene, it bears the primary burden of prosecuting the case, although the relator still has the opportunity to continue as a party in the action.[17] Further, the relator has the potential to receive up to 25% of any monetary damages or settlement of the claim, depending on the extent of his participation in the case.[18] If the government declines to intervene, however, the plaintiff can still prosecute the action himself[19] and receive up to 30% of the proceeds.[20]

The qui tam provision balances the dual policy goals of encouraging whistleblowers to provide notice of fraudulent activity to the government and deterring parasitic plaintiffs who have no original information to provide.[21] Indeed, the FCA seeks to achieve "the golden mean between adequate incentives for whistle-blowing insiders with genuinely valuable information

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

15. *Guidant*, 718 F.3d 28; *Batiste*, 659 F.3d 1204.

16. 31 U.S.C. § 3730(b)(2) (2012).

17. *Id.* § 3730(c)(1).

18. *Id.* § 3730(d)(1).

19. *Id.* § 3730(c)(3).

20. *Id.* § 3730(d)(2).

21. *E.g.*, United States *ex rel.* Heineman-Guta v. Guidant Corp., 718 F.3d 28, 35 (1st Cir. 2013); Walburn v. Lockheed Martin Corp., 431 F.3d 966, 970 (6th Cir. 2005); 132 Cong. Rec. 22,339–40 (1986) (statement of Rep. Berkley Bedell).

and discouragement of opportunistic plaintiffs who have no significant information to contribute of their own."[22] This approach is particularly reflected in the FCA's first-to-file rule, which prohibits anyone other than the government from intervening or bringing "a related action based on the facts underlying the pending action."[23] Congress implemented the first-to-file provision as part of the 1986 Amendments Act, which significantly overhauled the FCA.[24] Although Congress intended the amendments to facilitate and encourage additional relators to bring suit under the FCA in light of increasing fraud against the government,[25] the Senate Committee on the Judiciary clarified that the first-to-file rule was drafted to prevent "class actions" and "multiple separate suits based on identical facts and circumstances."[26]

Accordingly, the first-to-file rule tasks federal courts with weeding out parasitic complaints in which "would-be relators merely feed off a previous disclosure of fraud."[27] Although courts initially contested "whether facts needed to be identical or material,"[28] a growing dispute has arisen regarding the incorporation of Rule 9(b)'s particularity requirement into the first-to-file rule.[29] Rejecting the Sixth Circuit's approach, the First Circuit recently joined the D.C. Circuit in holding that an earlier-filed FCA complaint "need not meet the heightened pleading standard of Rule 9(b) to provide sufficient notice to the government of the alleged fraud and bar a later-filed complaint."[30] The First Circuit thereby substantially limited the possibility of additional qui tam actions based on similar facts.

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22. United States *ex rel.* Springfield Terminal Ry. Co. v. Quinn, 14 F.3d 645, 649 (D.C. Cir. 1994).

23. 31 U.S.C. § 3730(b)(5).

24. Harvinder S. Anand, Note, *Competing Relators and Competing Objectives Under the False Claims Act: Barring Subsequent Claims Should Look Beyond the Plain Language of Section 3730(b)(5)*, 28 PUB. CONT. L.J. 89, 95–96 (1998); *see* False Claims Amendments Act of 1986, Pub. L. No. 99-562, sec. 3, § 3730, 100 Stat. 3153, 3154–55 (1986).

25. S. REP. No. 99-345, at 1–2 (1986). The 1986 Amendments Act further encouraged whistleblowers to bring suit under the FCA by modernizing jurisdiction and venue provisions, increasing recoverable damages, raising civil forfeiture and criminal penalties, defining the mental element required for a successful prosecution, and clarifying the burden of proof in civil false claims actions. *Id.* at 2–3.

26. *Id.* at 24.

27. Walburn v. Lockheed Martin Corp., 431 F.3d 966, 970 (6th Cir. 2005).

28. Deuth, *supra* note 12, at 796. In interpreting the "facts underlying the same pending action" language of the first-to-file bar, circuit courts have primarily adopted either the "material" or "essential" facts test. *Id.* The Third, Ninth, and D.C. Circuits have applied the "same material facts" test, while the Tenth Circuit has considered the "core fact or general conduct relied upon in the first qui tam action." United States *ex rel.* Smith v. Yale-New Haven Hosp., Inc., 411 F. Supp. 2d 64, 75–76 (D. Conn. 2005).

29. *See* United States *ex rel.* Heineman-Guta v. Guidant Corp., 718 F.3d 28, 35 (1st Cir. 2013); United States *ex rel.* Batiste v. SLM Corp., 659 F.3d 1204, 1210 (D.C. Cir. 2011); *Walburn*, 431 F.3d at 972; *see also* Deuth, *supra* note 12, at 804–07; Long, *supra* note 11, at 162–63; Qian, *supra* note 13, at 614–15.

30. *Guidant*, 718 F.3d at 36; *see also Batiste*, 659 F.3d at 1210.

B. *The Sixth Circuit's "Legally Infirm" Approach*

In *Walburn v. Lockheed Martin Corp.*, the relator, a former security officer at a government-owned power plant, alleged that Lockheed Martin falsified dosage readings obtained from dosimeters worn by employees to maintain its accreditation with the Department of Energy and continue receiving funding pursuant to its contract with the federal government.[31] Determining that Walburn's allegations were "encompassed" by the allegations in an earlier-filed action by Kenneth Brooks,[32] the district court dismissed his complaint for lack of subject matter jurisdiction under 31 U.S.C. § 3730(b)(5).[33] The Sixth Circuit, however, ruled that "the Brooks complaint's failure to comply with Rule 9(b) rendered it legally infirm from its inception" and therefore incapable of precluding Walburn's action under the first-to-file provision.[34]

Unconvinced by the defendant's argument that such a holding would carve out an exception from the "exception-free" first-to-file bar, the court responded that the Brooks complaint was insufficient to put both the government and the defendant on notice of the underlying fraud.[35] Declining to draw any distinction between the notice requirements for the government in a qui tam action and those for a defendant in standard civil litigation, the Sixth Circuit summarily concluded that "[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."[36] Significantly, the court failed to provide a developed analysis that would justify grafting Rule 9(b) onto the government's notice requirements. Instead, the court simply posited that the incorporation of Rule 9(b) into the first-to-file bar would better comport with the policies of the FCA, as it would presumably

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31. *Walburn*, 431 F.3d at 974.

32. United States *ex rel.* Brooks v. Lockheed Martin Corp., No. Civ. L-00-1088, 2005 WL 841997 (D. Md. Mar. 22, 2005).

33. *Walburn*, 431 F.3d at 969. The first relator, Kenneth P. Brooks, had initially filed a qui tam action on April 14, 2000, in the U.S. District Court for the District of Maryland, similarly alleging that Lockheed Martin had improperly disposed of waste and misrepresented its compliance with its Department of Energy contract while continuing to receive government funding. *Brooks*, 2005 WL 841997, at *1. The United States filed a Notice of Election to Decline Intervention on January 30, 2003. *Id.* Concluding that the Brooks complaint failed to provide particular details as to each of the defendant's fraudulent claims, the district court dismissed the complaint pursuant to Rule 9(b). *Id.* at *2–3. Jeff Walburn, the second relator, filed his own qui tam action on November 12, 2002. United States *ex rel.* Walburn v. Lockheed Martin Corp., 312 F. Supp. 2d 936, 937 (S.D. Ohio 2004), *aff'd sub nom.* Walburn v. Lockheed Martin Corp., 431 F.3d 966 (6th Cir. 2005). Noting that Brooks's allegations were "the same as Plaintiff's but more expansive," the district court dismissed Walburn's complaint under 31 U.S.C. § 3730(b)(5) because it "contain[ed] the same material elements of fraud as Brooks's complaint and . . . was filed second." *Id.* at 940–41.

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

35. *Id.* at 973.

36. *Id.*

"deter[ ] would-be relators from making overly broad allegations" that would preclude future relators from bringing suit.[37]

C. *The First and D.C. Circuits Have Declined to Incorporate Rule 9(b) in the First-to-File Context*

The D.C. Circuit has rejected the Sixth Circuit's approach and held that first-filed complaints need not satisfy Rule 9(b) in order to preclude later-filed complaints under the first-to-file bar.[38] In *United States ex rel. Batiste v. SLM Corp.*, the relator, a former senior loan associate at SLM Corporation's subsidiary, alleged that the defendant defrauded the government in administering student loans under the Federal Family Education Loan Program ("FFELP") by falsely certifying that the data submitted with its claims for payment complied with federal law.[39] Two years prior to Batiste's filing, however, Michael Zahara, another relator, had launched a qui tam action against SLM in the U.S. District Court for the Southern District of Indiana, similarly alleging that the defendant had encouraged its employees to falsify loan records regarding delinquent FFELP loans and had given bonuses to employees granting forbearances on loans.[40] Finding that Batiste's complaint "allege[d] the same essential wrongdoing by the same defendant" as the Zahara complaint, the district court dismissed his complaint with prejudice for lack of subject matter jurisdiction, even though Zahara's complaint admittedly had failed to satisfy Rule 9(b).[41]

The D.C. Circuit affirmed the district court on appeal, asserting that "first-filed complaints need not meet the heightened standard of Rule 9(b) to bar later complaints; they must provide only sufficient notice for the government to initiate an investigation into the allegedly fraudulent activities, should it choose to do so."[42] Accordingly, the court rejected Batiste's argument that grafting a Rule 9(b) requirement onto the first-to-file bar would provide adequate information for the government to launch an investigation

37. *Id.* (internal quotation marks omitted). Notably, the Sixth Circuit's policy rationale of deterring parasitic plaintiffs seems particularly baffling when the court immediately conceded that there was "no indication that the *Brooks* relator worded his complaint in excessively general terms in order to preserve the lion's share of any potential recovery for himself." *Id.*

38. United States *ex rel.* Batiste v. SLM Corp., 659 F.3d 1204, 1210–11 (D.C. Cir. 2011).

39. *Id.* at 1206. Batiste further alleged that SLM encouraged "loan officers to grant unlawful forbearances by giving bonuses to individuals who reduced delinquencies," either by "bringing borrowers current on their loans or granting them forbearances." *Id.* at 1207.

40. *Id.*

41. United States *ex rel.* Batiste v. SLM Corp., 740 F. Supp. 2d 98, 102, 104–05 (D.D.C. 2010), *aff'd*, 659 F.3d 1204 (D.C. Cir. 2011). "The Southern District of Indiana previously dismissed Zahara's complaint without prejudice after he was unable to obtain counsel by a set deadline." *Batiste*, 659 F.3d at 1207. Nonetheless, Batiste claimed that Zahara's complaint was not a "pending action" because of its supposed failure to comply with Rule 9(b). *Batiste*, 740 F. Supp. 2d at 104. Unconvinced by this argument, the district court rejected *Walburn*'s "legally infirm" rationale and concluded that, "once the whistle has sounded, the government has little need for additional whistle-blowers." *Id.*

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

and prohibit placeholder complaints from precluding more particularized, later-filed complaints.[43] The court further noted that imposing a heightened pleading standard on FCA complaints "would create a strange judicial dynamic," potentially requiring multiple district courts to disagree with each other regarding a complaint's sufficiency.[44]

Recently, the First Circuit joined the D.C. Circuit in holding that a first-filed complaint need not meet Rule 9(b)'s particularity requirement in order to provide sufficient notice to the government and preclude a later-filed complaint.[45] In *United States ex rel. Heineman-Guta v. Guidant Corp.*, the relator, a former account manager in Boston Scientific Corporation ("BSC")'s heart-failure management group, alleged that BSC defrauded the government by launching a scheme to provide kickbacks to physicians, encouraging them to implant its cardiac-rhythm management devices and refer patients who could be implanted with these devices.[46] About a year earlier, however, Elaine Bennett had initiated a nearly identical qui tam suit, which was still pending at the time Heineman-Guta filed her complaint.[47] Similar to Heineman-Guta, Bennett, a former employee at BSC, alleged that the defendant had engaged in a kickback scheme that coaxed hospitals and physicians into using BSC's devices, which led the physicians who received kickbacks to submit to Medicare false claims for payment.[48]

Affirming the district court's dismissal of the complaint, the First Circuit ruled that "the question of whether allegations in a complaint have been plead with sufficient particularity under Rule 9(b) to withstand a defendant's motion to dismiss is distinct from whether the allegations give the government adequate notice of potential fraud to begin an investigation under the first-to-file rule."[49] Therefore, even though her complaint contained numerous conclusory allegations and failed to allege the particulars of the defendant's kickback schemes, "there is no question that the Bennett Complaint provided the essential facts of BSC's alleged fraud" in order to give the government adequate notice.[50] The court further concluded that,

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43. *Id.*

44. *Id.* Should Rule 9(b)'s heightened pleading standard apply to the first-to-file bar, the court in the forum of the later-filing relator may need to adjudicate the sufficiency of the first-filed complaint pending in another forum "under a wide variety of procedural and substantive requirements," which would certainly bring about a host of administrative difficulties. Brief of Appellee at 26, *Batiste*, 659 F.3d 1204 (No. 10-7140).

45. United States *ex rel.* Heineman-Guta v. Guidant Corp., 718 F.3d 28, 35 (1st Cir. 2013).

46. *Id.* at 32.

47. *Id.* at 30–32.

48. *Id.* at 31.

49. *Id.* at 36.

50. *Id.* at 37. The court additionally posited that the first-to-file bar did not require that both complaints allege either particularized or identical facts but rather that they exhibit an overlap in their material facts. *Id.*

"[o]nce the government is put on notice of its potential fraud claim, the purpose behind allowing qui tam litigation is satisfied."[51]

Although both the First and D.C. Circuits drew a distinction between the FCA notice requirements for the government at the first-to-file stage and for defendants at the pleading stage, the courts failed to provide a satisfactory explanation to account for this difference. Instead of advancing detailed justifications as to why the government does not require the heightened notice of Rule 9(b), the courts summarily asserted that complaints deficient under Rule 9(b) "may nonetheless provide the government sufficient notice to begin an investigation of an alleged fraudulent scheme."[52] Thus, especially when viewed in conjunction with the conclusory reasoning from the Sixth Circuit,[53] the circuit court opinions fail to offer a workable resolution of this issue that derives support both from a textual analysis of the first-to-file provision and Rule 9(b) and from the government's fact-finding procedures in FCA actions.[54] Parts II and III address these deficiencies: Part II discusses the text and intent of 31 U.S.C. § 3730(b)(5) and Rule 9(b), and Part III examines the government's investigatory resources that supplement the four corners of the relator's complaint.

II. The Plain Language and Underlying Purposes of 31 U.S.C. § 3730(b)(5) and Rule 9(b)

Part II argues that neither the plain language nor the underlying purposes of 31 U.S.C. § 3730(b)(5) and Rule 9(b) suggests that a first-filed complaint must satisfy Rule 9(b)'s heightened pleading standard in order to preclude later-filed complaints. Section II.A examines the text and intent of both § 3730(b)(5) and Rule 9(b). This Section notes the conspicuous absence of any reference to Rule 9(b) in the first-to-file provision and discusses the conflicting policy goals animating § 3730(b)(5) and Rule 9(b)'s particularity requirement. Section II.B considers the problems inherent in the Sixth Circuit's "legally infirm" approach and concludes that the First and D.C. Circuits' distinction between the notice requirements to the government at

51. *Id.* at 38 (quoting Grynberg v. Koch Gateway Pipeline Co., 390 F.3d 1276, 1279 (10th Cir. 2004)) (internal quotation marks omitted).

52. *Id.* at 36; United States *ex rel.* Batiste v. SLM Corp., 659 F.3d 1204, 1210 (D.C. Cir. 2011) ("[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).").

53. *See supra* notes 34–37 and accompanying text.

54. The D.C. Circuit offered only a cursory inspection of the text and purpose of the first-to-file bar and Rule 9(b) and quickly dismissed the Sixth Circuit's decision on the broad policy grounds that the imposition of Rule 9(b) "would not minimize duplicative claims, [but] would [instead] encourage opportunistic behavior." *Batiste*, 659 F.3d at 1211 (quoting United States *ex rel.* Folliard v. Synnex Corp., 798 F. Supp. 2d 66, 74 (D.D.C. 2011)). Admittedly, the First Circuit made significant inroads in discussing the statutory language and congressional intent of 31 U.S.C. § 3730(b)(5) and Rule 9(b). *Guidant*, 718 F.3d at 34–36. Nonetheless, the First Circuit declined to provide an analysis of the governmental procedures involved in "initiat[ing] an investigation into allegedly fraudulent practices." *Id.* at 37.

the first-to-file stage and the notice requirements to the defendant at the pleading stage honors both the language and intent of § 3730(b)(5) and Rule 9(b).

A. *The Text and Policy Goals of § 3730(b)(5) and Rule 9(b)*

An initial inquiry into the first-to-file rule's meaning should begin with the plain language of § 3730(b)(5).[55] Indeed, "courts must presume that a legislature says in a statute what it means and means in a statute what it says there."[56] Nowhere does § 3730(b)(5) include any language even tacitly referring to Rule 9(b) or the incorporation of a particularity requirement into the first-to-file rule.[57] The failure to allude to Rule 9(b) or its heightened pleading standard surely forecloses the incorporation of the rule into § 3730(b)(5).[58]

Looking to the plain language of § 3730(b)(5), the D.C. Circuit concluded that the statute's "command is simple: as long as a first-filed complaint remains pending, no related complaint may be filed."[59] This straightforward approach should hardly seem controversial, particularly in light of the numerous inferential leaps needed to insert Rule 9(b) into the language of the first-to-file bar.[60] The Sixth Circuit, by contrast, blithely sailed past the plain text of § 3730(b)(5) and read Rule 9(b) into the first-to-file rule in light of the FCA's "policy of encouraging whistleblowers to notify the government of potential frauds."[61] Not only does this approach introduce erroneous language into the first-to-file rule but it also distorts the balance in the FCA's dual policy goals by easily allowing "would-be relators [to] merely feed off a previous disclosure of fraud"[62] and therefore failing to deter parasitic plaintiffs. Indeed, under such an interpretation, "dozens of

55. Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997) ("Our first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.").

56. Barnhart v. Sigmon Coal Co., 534 U.S. 438, 461–62 (2002) (quoting Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253–54 (1992)). The Court goes on to hold that, "[w]hen the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete." *Id.* at 462 (quoting *Germain*, 503 U.S. at 253–54) (internal quotation marks omitted).

57. 31 U.S.C. § 3730(b)(5) (2012).

58. Lamie v. U.S. Tr., 540 U.S. 526, 538 (2004) (refusing to add a word); Brief for Appellees at 41, *Guidant*, 718 F.3d 28 (No. 12-1867) ("Section 3730(b)(5)'s lack of any reference to a 'particularity' requirement precludes reading the statute to require one."); *see also infra* notes 59–63 and accompanying text.

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

60. *See Lamie*, 540 U.S. at 537 ("There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted." (quoting Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 625 (1978)) (internal quotation marks omitted)).

61. Walburn v. Lockheed Martin Corp., 431 F.3d 966, 973 (6th Cir. 2005).

62. *Id.* at 970.

relators could expect to share a recovery for the same conduct, decreasing their incentive to bring a qui tam action in the first place."[63]

Moreover, references to the Federal Rules of Civil Procedure abound elsewhere in the FCA.[64] The text of § 3730(b) twice incorporates Federal Rule of Civil Procedure 4(d) when outlining the service process for the relator's complaint.[65] Congress also expressly included the Federal Rules of Civil Procedure in other provisions of the FCA.[66] It is well settled that, "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the deliberate inclusion of exclusion."[67] Thus, the repeated incorporation of the Federal Rules of Civil Procedure throughout the FCA, most noticeably in § 3730(b) itself, shows that Congress was perfectly capable of including Rule 9(b) in the first-to-file provision but elected not to do so.[68]

Moving beyond the plain language of the statute, the intent of the first-to-file provision conflicts with Rule 9(b)'s heightened pleading standard. In passing the 1986 Amendments Act, Congress sought "to reconcile two conflicting goals, specifically, preventing opportunistic suits, on the one hand, while encouraging citizens to act as whistleblowers, on the other."[69] To achieve such a delicate balance, Congress "recognized the need for standards to ensure that only truly deserving relators shared the Government's recovery."[70] The first-to-file provision "reflects the strong congressional policy of

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63. United States *ex rel.* LaCorte v. SmithKline Beecham Clinical Labs., Inc., 149 F.3d 227, 234 (3d Cir. 1998). "By contrast, interpreting section 3730(b)(5) as imposing a broader bar furthers the Act's purpose by encouraging qui tam plaintiffs to report fraud promptly." *Id.*

64. *See, e.g.*, 31 U.S.C. §§ 3730(b)(2)–(3), 3732(a) (2012); *see also* Brief of Appellee, *supra* note 44, at 23.

65. 31 U.S.C. § 3730(b)(2) ("A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure."); *id.* § 3730(b)(3) ("The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.").

66. *E.g.*, *id.* § 3732(a) ("A summons as required by the Federal Rules of Civil Procedure shall be issued by the appropriate district court" in an action brought under § 3730.); *id.* § 3733(b)(1)(B) (prohibiting discovery demands that are inconsistent with "the standards applicable to discovery requests under the Federal Rules of Civil Procedure"); *id.* § 3733(c)(2) (providing that a civil investigative demand may be served on anyone outside of the United States "in such manner as the Federal Rules of Civil Procedure prescribe for service in a foreign country"); *id.* § 3733(h)(1) (permitting "the taking of testimony by any means authorized by, and in a manner consistent with, the Federal Rules of Civil Procedure"); *id.* § 3733(j)(6) ("The Federal Rules of Civil Procedure shall apply to any petition under this subsection, to the extent that such rules are not inconsistent with the provisions of this section.").

67. Russello v. United States, 464 U.S. 16, 23 (1983) (quoting United States v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1972)).

68. Brief of Appellee, *supra* note 44, at 24.

69. United States *ex rel.* LaCorte v. SmithKline Beecham Clinical Labs., Inc., 149 F.3d 227, 233 (3d Cir. 1998).

70. Anand, *supra* note 24, at 95.

encouraging whistleblowers to come forward by rewarding the first to do so."[71] This race to the courthouse among potential relators further facilitates Congress's goal of allowing the government to launch a timely investigation into fraudulent activity and swiftly to recover stolen funds.[72] In turn, by enacting the first-to-file rule, Congress prioritized a "prompt disclosure of fraud" over an extensive period of delay waiting for the ideal relator to come forward with a perfectly pleaded complaint.[73]

Notably, the policy goals of the first-to-file bar share little, if any, relation with either the language or the purpose of Rule 9(b). In contrast to Rule 8, which "does not require 'detailed factual allegations,'"[74] Rule 9(b) demands that a party alleging fraud or mistake "state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally."[75] Legislative history regarding Rule 9(b) is virtually nonexistent, as both congressional and American Bar Association hearings held at the time the Federal Rules were adopted failed to discuss Rule 9(b) or the reasons behind its elevated pleading standards.[76] The Advisory Committee notes of 1937 indicate that Rule 9(b) is drawn from the English Rules established in the Judicature Act, where fraud could be used only as an affirmative defense in courts of equity.[77] Accordingly, a party asserting fraud or mistake as a defense in a court of law would have to raise it in a separate proceeding in a court of equity.[78] The particularity requirement afforded protection to the prior judgment and relieved judges from reopening settled actions.[79]

Given the merger of courts of law and equity, Rule 9(b) now merits alternative justifications for its continued use in pleading.[80] Chief among Rule 9(b)'s current purposes "is to afford defendant fair notice of the plaintiff's claim and the factual ground upon which it is based."[81] Rule 9(b)'s

71. Campbell v. Redding Med. Ctr., 421 F.3d 817, 824 (9th Cir. 2005).

72. Lesley Ann Skillen & Megan M. Scheurer, *Who's on First: 31 U.S.C. § 3730(b)(5)*, False Claims Act & Qui Tam Q. Rev., Jan. 2007, at 67, 76.

73. *Campbell*, 421 F.3d at 821.

74. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)).

75. Fed. R. Civ. P. 9(b). Although Rule 9(b) permits the pleader to allege conditions of mind "generally," it must also be emphasized that "Rule 9 merely excuses a party from pleading discriminatory intent under an elevated pleading standard. It does not give him license to evade the less rigid—though still operative—strictures of Rule 8." *Iqbal*, 129 S. Ct. at 1954.

76. Christopher M. Fairman, *An Invitation to the Rulemakers—Strike Rule 9(b)*, 38 U.C. Davis L. Rev. 281, 287 (2004).

77. *Id.* at 287.

78. *Id.* at 284.

79. *Id.* at 285.

80. Qian, *supra* note 13, at 614.

81. Ross v. Bolton, 904 F.2d 819, 823 (2d Cir. 1990).

particularity requirement also serves to "safeguard[ ] [the] defendant's reputation and goodwill from improvident charges of wrongdoing" and "to inhibit the institution of strike suits."[82] This more demanding standard in turn aims "to eliminate the filing of a conclusory complaint as a pretext for using discovery to uncover wrongs."[83] Crucially, these primary justifications for Rule 9(b) all revolve around protecting the defendant's interests when the plaintiff brings allegations of fraud at the pleading stage.

In light of the FCA's status as one of the most potent antifraud statutes, various circuit courts have applied Rule 9(b) with little fanfare to protect defendants at the pleading stage in FCA actions.[84] Indeed, even the Supreme Court has indicated—without providing an extensive rationale—that FCA complaints served on defendants must meet the requirements of Rule 9(b).[85] Looking to the plain language of the FCA, the Sixth Circuit has ruled that "[a] clear and unequivocal requirement that a relator allege specific false claims emerges from the conjunction of Rule 9(b) and the statutory text of the FCA."[86] Because § 3729(a)(1) prohibits only "a narrow species of fraudulent activity[,] 'present[ing], or caus[ing] to be presented . . . a false or fraudulent claim for payment or approval,'" the relator "must include an averment that a false or fraudulent claim for payment or approval has been submitted to the government."[87] The Ninth Circuit has further justified this interpretation on the grounds of protecting FCA defendants accused of fraudulent activity.[88] Thus, the imposition of Rule 9(b) on FCA complaints to safeguard defendants at the pleading stage is decidedly consistent with both the text and policy of Rule 9(b) and the FCA. Nonetheless, the application of Rule 9(b) at the first-to-file stage to provide notice to the government in FCA actions proves far more problematic.

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82. *Id.*

83. A.I. Credit Corp. v. Hartford Computer Grp., Inc., 847 F. Supp. 588, 597 (N.D. Ill. 1994). Further, the court noted that "Rule 9(b) is not to be read blindly, but it is to be applied in order to effectuate the purposes of the rule." *Id.*; *see also* Inman v. Am. Paramount Fin., 517 F. App'x 744, 748 (11th Cir. 2013) ("Rule 9(b) serves an important purpose in fraud actions by alerting defendants to the precise misconduct with which they are charged and protecting defendants against spurious charges of immoral and fraudulent behavior." (quoting Brooks v. Blue Cross & Blue Shield of Fla., Inc., 116 F.3d 1364, 1366 (11th Cir. 1997)) (internal quotation marks omitted)).

84. *See, e.g.*, Bly-Magee v. California, 236 F.3d 1014, 1018 (9th Cir. 2001); United States *ex rel.* Thompson v. Columbia/HCA Healthcare Corp., 125 F.3d 899, 903 (5th Cir. 1997); Gold v. Morrison-Knudsen Co., 68 F.3d 1475, 1476–77 (2d Cir. 1995); United States *ex rel.* Cooper v. Blue Cross & Blue Shield of Fla., Inc., 19 F.3d 562, 568 (11th Cir. 1994).

85. Schindler Elevator Corp. v. United States *ex rel.* Kirk, 131 S. Ct. 1885, 1898 (2011).

86. United States *ex rel.* Bledsoe v. Cmty. Health Sys., 501 F.3d 493, 504 (6th Cir. 2007).

87. *Id.* (quoting United States *ex rel.* Bledsoe v. Cmty. Health Sys., Inc., 342 F.3d 634, 640 (6th Cir. 2003)). Additionally, the court noted that "pleading an actual false claim with particularity is an indispensable element of a complaint that alleges an FCA violation." *Id.*

88. *Bly-Magee*, 236 F.3d at 1018 (holding that "defendants accused of defrauding the federal government have the same protections as defendants sued for fraud in other contexts").

B. *The Distinction Between Notice Requirements Under § 3730(b)(5) and Under Rule 9(b)*

Although the heightened notice requirements of Rule 9(b) comfortably apply to shield the defendant at the pleading stage, they have no place in § 3730(b)(5).[89] Rule 9(b)'s inclusion in § 3729(a) clearly serves to protect the interests of the defendant in FCA litigation, and a discussion of the government's interests with respect to Rule 9(b) is noticeably lacking.[90] Unlike § 3729, which explicitly makes reference to the defendant's fraudulent submissions and activity intended to "defraud the Government,"[91] the first-to-file bar contains no mention of the requirements the relator must satisfy in his complaint and expressly refers to the government's interest in barring later-filing relators.[92] Consequently, the first-to-file bar focuses on the notice to the government during its investigation period—notice that is certainly less stringent than the exacting notice required for the defendant at the subsequent pleading stage.[93] In declining to apply Rule 9(b) at the first-to-file stage, the First and D.C. Circuits recognized this acute distinction.[94]

The Sixth Circuit's treatment of first-filed complaints as "legally infirm"[95] when they are deficient under Rule 9(b) forces an exception onto the decidedly exception-free § 3730(b)(5) and significantly rewrites plain statutory language.[96] Moreover, the Sixth Circuit's attempt to promote later-filing whistleblowers in no way serves the markedly prodefendant policy interests advanced by Rule 9(b).[97] In short, the language of § 3730(b)(5) is "plain and simple: an action is barred if it is a 'related action' that is 'based on the facts underlying the pending action.' "[98]

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89. *See* United States *ex rel.* Wickliffe v. EMC Corp., 473 F. App'x 849, 851 (10th Cir. 2012) ("We admit to being uneasy with the parties' suggestion that Rule 9(b)'s particularity requirement should be applied to the first-to-file bar.").

90. Section 3729(a) "imposes civil penalties and treble damages on persons who submit false or fraudulent claims for payment to the United States." *Schindler*, 131 S. Ct. at 1890.

91. 31 U.S.C. § 3729(a) (2012).

92. *Id.* § 3730(b)(5).

93. United States *ex rel.* Beauchamp v. Academi Training Ctr., Inc., 933 F. Supp. 2d 825, 837 (E.D. Va. 2013) (noting that a complaint's failure to satisfy Rule 9(b) does not preclude the application of the first-to-file bar, because, at the first-to-file stage, "the Government needs only notice of the fraud in order to conduct its own investigation").

94. *See supra* Section I.C.

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

96. *See* United States *ex rel.* Heineman-Guta v. Guidant Corp., 718 F.3d 28, 35 (1st Cir. 2013).

97. *See id.*

98. *Id.* (quoting 31 U.S.C. § 3730(b)(5) (2012)); *see also* United States *ex rel.* LaCorte v. SmithKline Beecham Clinical Labs., Inc., 149 F.3d 227, 233 (3d Cir. 1998) ("[S]ection 3730(b)(5)'s plain language is conclusive; the statute speaks of a 'related action,' not an identical one. Thus we need not search the legislative history to determine the Congressional will.").

Additionally, the peril of Rule 9(b)'s more demanding review still looms at the pleading stage, should the relator survive the first-to-file bar.[99] If the initial relator failed to allege the defendant's fraudulent conduct with particularity, "he would lose his own shot at monetary reward. The threat of a second application of Rule 9(b) is unnecessary."[100] In short, Rule 9(b)'s exacting review at the pleading stage "provides sufficient deterrence against overly broad allegations."[101] The distinction between the requirements to meet the first-to-file bar and the requirements to survive Rule 9(b) at the pleading stage therefore better advances the language and intent of both § 3730(b)(5) and Rule 9(b).[102] Furthermore, this distinction provides straightforward guidelines to federal district courts instead of requiring them to make arbitrary distinctions as to the meaning and application of Rule 9(b) at various stages in the litigation.

III. The Government Has Sufficient Investigatory Resources Beyond the Four Corners of the Complaint to Assess Adequately the Merits of the Relator's Allegations

Although Part II's discussion of the language and intent of 31 U.S.C. § 3730(b)(5) and Rule 9(b) cautions against the incorporation of Rule 9(b) into the first-to-file provision, that discussion does not fully consider the government's notice requirements in FCA actions from a practical standpoint. Indeed, any analysis of the government's notice demands at the first-to-file stage should examine the government's relationship with the relator and its fact-finding procedures during the period under seal. Part III addresses the government's investigatory efforts in practice and contends that, unlike defendants in civil fraud litigation, the government has a wide variety of resources at its disposal outside of the complaint in evaluating prospective FCA claims. Section III.A demonstrates that the relator himself serves as a readily accessible resource for the government's preliminary investigation. Instead of operating as an adversary in the litigation, the relator functions as

99. United States *ex rel.* Batiste v. SLM Corp., 659 F.3d 1204, 1211 (D.C. Cir. 2011). Moreover, even if Rule 9(b)'s particularity requirement were relaxed on a motion to dismiss, *see, e.g.*, United States *ex rel.* Klein v. Empire Educ. Corp., 959 F. Supp. 2d 248, 257 (N.D.N.Y. 2013), the relator's complaint must still "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face'" in order to satisfy Rule 8. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). Given that courts cannot "credit a complaint's conclusory statements without reference to its factual context" to survive a less demanding Rule 12(b)(6) motion to dismiss, relators already have adequate incentives to avoid proffering bare bones complaints filled with broad allegations. *Id.* at 1954; *see also* Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 Duke L.J. 1, 88 (2010).

100. *Batiste*, 659 F.3d at 1211.

101. *LaCorte*, 149 F.3d at 234. "Moreover, there is no indication that any of the original plaintiffs in this case worded their complaints in excessively general terms for the purpose of thwarting later claims." *Id.*

102. *See supra* Section I.C.

a partner to the government in uncovering the defendant's fraudulent conduct. Thus, Rule 9(b)'s purpose of providing heightened notice to an adverse party proves inapplicable to the government in the context of FCA actions. Section III.B describes the government's extensive investigation into the merits of the relator's complaint during the period under seal. In its preliminary fact finding, the government goes beyond the four corners of the complaint and utilizes a variety of resources, including interviews and discovery with the relator and relator's counsel. Section III.C concludes that, on account of these multiple tools—which supplement the complaint itself—the government will not decline to intervene in a meritorious suit simply because the relator's complaint does not comply with Rule 9(b).

A. *The Relator's Function as a Resource to the Government*

The government's most conspicuous tool during its initial investigation is the relator. Unlike a plaintiff asserting a common law fraud claim against a defendant, the relator does not function as an adversary to the government but rather as a helpful partner in uncovering and combating fraudulent conduct.[103] The 1986 Amendments Act recognized that "a solid partnership needs to be forged between government prosecutors and private whistleblowers and their counsel" to successfully prevent fraud against the government.[104] Indeed, informative whistleblowers have played a significant role in the FCA's success as a regulatory and prosecutorial tool.[105] Governmental officials have in turn praised the efforts of insider relators and their counsel, regarding them as "essential" assistants to the government in these actions.[106]

In light of this cooperative and mutually beneficial relationship between the relator and the government, it seems incongruous to apply Rule 9(b), which concerns adversarial relationships, to the first-to-file bar. Rule 9(b)'s particularity requirement exists "to provide adversaries with fair 'notice of the precise misconduct with which they are charged, and to safeguard defendants against spurious charges of immoral and fraudulent behavior.'"[107] When a plaintiff alleges fraud in his complaint, he is hardly attempting to aid the defendant in uncovering and combating the fraudulent conduct. Instead, he is attempting to provide the defendant with adequate notice of why

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103. Thomas Grande, *The False Claims Act: A Consumer's Tool to Combat Fraud Against the Government*, 12 Loy. Consumer L. Rev. 129, 134 (2000).

104. James B. Helmer, Jr., *False Claims Act: Incentivizing Integrity for 150 Years for Rogues, Privateers, Parasites and Patriots*, 81 U. Cin. L. Rev. 1261, 1273 (2013).

105. *See* Pamela Bucy et al., *States, Statutes, and Fraud: A Study of Emerging State Efforts to Combat White Collar Crime*, 31 Cardozo L. Rev. 1523, 1530 (2010) ("Insiders . . . can be enormously helpful since fraud generally is complex, hidden within an organization, and concealed by false documentation.").

106. *Id.*

107. Marks v. Struble, 347 F. Supp. 2d 136, 146 (D.N.J. 2004) (quoting Seville Indus. Mach. Corp. v. Southmost Mach. Corp., 742 F.2d 786, 791 (3d Cir. 1984)).

he is being sued and enable him to prepare a responsive pleading.[108] In this adversarial setting, both the defendant and the court view the prototypical fraud claim through the lens of the plaintiff's complaint.[109] In the context of the FCA, however, the government possesses multiple lenses through which it can examine the merits of the relator's claim. As both ally and informant to the government, then, the relator surely renders Rule 9(b)'s heightened notice requirements inapplicable to the government in the FCA setting.

Indeed, not only do relators serve as partners to the government but they also provide information to the government beyond the four corners of the complaint. As an initial matter, when filing the complaint under seal, the relator must also prepare and serve the government with a "written disclosure of substantially all material evidence and information [he] possesses."[110] The disclosure statement includes relevant "information, documents, damage theories, lists of witnesses, and the names of potential expert witnesses."[111] In turn, the written disclosure requirement provides information supplemental to the complaint that significantly factors into the government's choice of whether to intervene or move to dismiss the complaint because of jurisdictional bars.[112] Accordingly, the relator already provides the government with additional facts to paint a more colorable picture of his claim before the defendant even becomes involved in the lawsuit.[113] In short, a complaint's deficiency under Rule 9(b) will not necessarily impede the government's ability to launch an investigation.

B. *The Government's Investigative Efforts During the Period Under Seal*

The government certainly utilizes the relator's collateral information in its investigative efforts during the sixty-day period when the complaint remains under seal.[114] Notably, Congress intended the initial period under seal "to allow the Government an adequate opportunity to fully evaluate the private enforcement suit and determine both if that suit involves matters the Government is already investigating and whether it is in the Government's

108. *See* Elliott J. Weiss & Janet E. Moser, *Enter Yossarian: How to Resolve the Procedural Catch-22 that the Private Securities Litigation Reform Act Creates*, 76 WASH. U. L.Q. 457, 503 (1998).

109. Henry S. Noyes, *The Rise of the Common Law of Federal Pleading:* Iqbal*,* Twombly*, and the Application of Judicial Experience*, 56 VILL. L. REV. 857, 857–58 (2012).

110. 31 U.S.C. § 3730(b)(2) (2012).

111. Donald H. Caldwell, Jr., Qui Tam *Actions: Best Practices for Relator's Counsel*, 38 J. HEALTH L. 367, 377–78 (2005). The relator's counsel includes this information "with an eye to maximizing the government's interest in the case." *Id.* at 378.

112. Martie Ross & Jenny Brannon, *False Claims Act and Qui Tam Litigation: The Government Giveth and the Government Taketh Away (And Then Some)*, J. KAN. B. ASS'N, Nov.–Dec. 1999, at 20, 32.

113. *Id.* at 32.

114. *See* 31 U.S.C. § 3730(b)(2).

interest to intervene and take over the civil action."[115] In practice, the government typically utilizes the investigative period to communicate and collaborate with the relator and relator's counsel, often to the point of "outsourcing."[116]

Although ideally the allegations in the plaintiff's complaint would provide the government with an adequate basis to assess the merits of his claim and make an intervention decision, counsel for the government has openly recognized that such complaints seldom surface.[117] Consequently, when launching its investigation, the government uses the complaint as a springboard rather than as an exhaustive manual.[118] Interviewing the relator is one of the first steps in the government's investigation process.[119] During the interview, at which the relator's counsel is present, the government typically attempts to "probe the motive and background of the relator as would be done for any witness coming forward."[120] If the relator's interview and the disclosure of material evidence suggest the need for additional review, the government may also conduct further discovery, including interviews with relevant witnesses, a review of government records, and the issuance of a subpoena for the defendant's records.[121] To be sure, the government has a variety of tools that it can use prior to the discovery mechanisms of the Federal Rules of Civil Procedure at the postfiling stage, such as civil investigative demands, Inspector General subpoenas, and grand jury materials.[122]

In sum, the relator's complaint serves a markedly different purpose in the context of an FCA claim than does a typical plaintiff's complaint in the context of a common law fraud claim. Unlike a defendant alleged to have committed fraud, the government suffers no reputational damage from the qui tam plaintiff's allegations that would merit particularized pleading.[123] On the contrary, the government itself has suffered as the defrauded party in the litigation, and it does not require heightened factual details to prepare a

115. S. Rep. No. 99-345, at 24 (1986).

116. Robert Fabrikant & Nkechinyem Nwabuzor, *In the Shadow of the False Claims Act: "Outsourcing" the Investigation by Government Counsel to Relator Counsel During the Seal Period*, 83 N.D. L. Rev. 837, 837–38 (2007) ("It is also common knowledge that government counsel routinely permit, indeed invite, whistleblower's counsel to do much of the government's investigative work during the seal period.").

117. Kathleen McDermott, Qui Tam*: An AUSA's Perspective*, False Claims Act & Qui Tam Q. Rev., Oct. 1997, at 20, 24 ("It is a rare qui tam that comes with all the evidence necessary to make an intervention decision.").

118. *See id.*

119. *Id.* at 24. Further, DOJ performs the primary investigative role of assessing FCA complaints because "the government . . . is in the best position to access necessary data and move the investigation to a successful result." *Id.* at 25.

120. *Id.* at 24.

121. *Id.* at 24–25.

122. Ross & Brannon, *supra* note 112, at 32.

123. *See* Fairman, *supra* note 76, at 292.

defense to the plaintiff's claim at the onset of litigation.[124] Rather, the government pursues an extensive, synergistic effort before the complaint is even unsealed and the formal litigation process begins.[125] Given that the government frequently relies on efforts of the relator outside of the complaint, it does not require the exacting scrutiny of Rule 9(b) in pursuing its investigation.[126]

C. *The Government Will Not Decline to Intervene in a Meritorious Suit Simply Because the Relator's Complaint Does Not Comply with Rule 9(b)*

A pleading deficiency in a meritorious case should not and will not automatically preclude the government from intervening in the action. As an initial matter, it is in the relator's best interest to provide as many factual allegations as possible to support his claim, which would increase the likelihood that the government will intervene, successfully prosecute the action, and apportion him a share of monetary damages.[127] Indeed, "relators' counsel already have a profound financial interest in 'preparing a thorough, complete, and convincing written statement for the government'" to avoid the risk of declination.[128] Even if the relator has a meritorious claim and is unable to proffer a complaint that satisfies Rule 9(b), however, the government still has investigative tools supplemental to the complaint that allow for a proper assessment of the merits of the relator's claim. Because the success of the action will likely turn on the government's intervention decision, "the

124. *See* Mark D. Robins, *The Resurgence and Limits of the Demurrer*, 27 SUFFOLK U. L. REV. 637, 710–11 (1993); *see also* Brief for Appellees, *supra* note 58, at 38 ("There is no necessary reason why the same facts needed to protect defendants' reputations from unjustified fraud charges and give them sufficient notice to prepare a fraud defense must be the same facts needed to give the government notice that an investigation may be merited.").

125. *See* Fabrikant & Nwabuzor, *supra* note 116, at 837–38.

126. *See id.* at 844–45; Robins, *supra* note 124, at 710–11; *see also* Roberts v. Accenture, LLP, 707 F.3d 1011, 1018 (8th Cir. 2013) (noting that the FCA's "primary purpose of . . . encourag[ing and rewarding] whistleblowers to come forward with allegations of fraud . . . is advanced when a relator files a complaint which 'provides the government sufficient information to pursue an investigation' into the allegedly fraudulent practices" (quoting United States *ex rel.* Batiste v. SLM Corp., 659 F.3d 1204, 1210 (D.C. Cir. 2011))). Interpreting § 3730(d), the Eighth Circuit recognized in *Roberts* that the "relators' complaint and assistance in prosecuting the action" against the defendant resulted in the government's successful investigation of the defendant computer manufacturer's defective pricing practices. 707 F.3d at 1019. As a result of the relators' assistance to the government outside of the initial complaint, the government ultimately reached a favorable settlement and "the relators' action served its intended purpose." *Id.*

127. *See, e.g.*, Pamela H. Bucy, *Games and Stories: Game Theory and the Civil False Claims Act*, 31 FLA. ST. U. L. REV. 603, 675–76 (2004); Jack E. Fernandez, Jr., Commentary, *The False Claims Act: What Every Employment Lawyer Must Know*, ANDREWS EMP. LITIG. REP., Mar. 29, 2005, at 13, 15 (noting that "the greatest predictor of the success of any False Claims Act lawsuit is whether the government chooses to intervene").

128. Jonathan T. Brollier, Note, *Mutiny of the Bounty: A Moderate Change in the Incentive Structure of* Qui Tam *Actions Brought Under the False Claims Act*, 67 OHIO ST. L.J. 693, 711 (2006) (quoting Pamela H. Bucy, *Private Justice*, 76 S. CAL. L. REV. 1, 51 (2002)).

relator's strategy is to provide the government with the maximum amount of assistance as possible during the seal period in the hope of convincing the government to intervene."[129] Moreover, when determining the apportionment of the plaintiff's recovery, the DOJ Relator's Share Guidelines expressly consider whether "[t]he relator provided substantial assistance during the investigation and/or pretrial phases of the case."[130] Therefore, both the relator and the government share a mutual interest in cooperative fact finding during the period under seal, with the understanding that the government's intervention decision will not turn solely on the facts alleged in the complaint.[131]

Accordingly, the Sixth Circuit's assertion that a complaint deficient under Rule 9(b) is rendered "legally infirm from its inception" seriously misconstrues the government's notice requirements in the FCA context.[132] The Sixth Circuit expressed concern that "according preemptive effect to a fatally-broad complaint [would not] further[ ] the policy of encouraging whistleblowers to notify the government of potential frauds."[133] This approach surely echoes the Ninth Circuit's fear that "an absolute first-to-file rule would permit displacement of real whistleblowers by sham complaints."[134] The Sixth Circuit's characterization of "fatally-broad" complaints, however, fails to consider the government's investigative procedures and the FCA's policy goals of deterring parasitic plaintiffs. By enacting a statute allowing the government to evaluate the merits of the complaint before the defendant can raise Rule 9(b) objections, Congress clearly understood "that the government can possess the necessary information to investigate and proceed with the action regardless of the formalities of Rule 9(b)."[135]

Indeed, given the government's considerable investigative efforts, counsel for the government hardly requires a complaint to allege the particularized "facts of a fraudulent scheme."[136] To the contrary, "it is highly unlikely

129. Fabrikant & Nwabuzor, *supra* note 116, at 852. The Government Accountability Office's review of DOJ's data "conclusively demonstrates that the relator is much better off if the government intervenes." *Id.* Indeed, "where the government does not intervene, and the relator has to go it alone, the median of settlements in non-intervened cases is less than ten percent than in intervened cases." *Id.*

130. Dep't of Justice, Relator's Share Guidelines 2 (1996), *available at* http://vsg-law.com/VSG-Legal-Articles/doj_relator.pdf.

131. *See id.*; *see also* United States *ex rel.* Piacentile v. Sanofi Synthelabo, Inc., No. 05-civ-2927, 2010 WL 5466043, at *5 (D.N.J. Dec. 30, 2010) ("After an extensive investigation of a relator's claim, the government is likely to have ample notice of the underlying facts, regardless of whether the complaint is later dismissed.").

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

133. *Id.* at 973.

134. Campbell v. Redding Med. Ctr., 421 F.3d 817, 824 (9th Cir. 2005).

135. Brief for Appellees, *supra* note 58, at 39; *see also* United States *ex rel.* Sandager v. Dell Mktg., L.P., 872 F. Supp. 2d 801, 811 (D. Minn. 2012) ("The ultimate question is whether the Government had a basis on which to investigate the fraudulent scheme. That standard may be met even if the first-filed complaint is technically deficient.").

136. *Walburn*, 431 F.3d at 973.

that prosecutors, the audience to which the qui tam notice is directed, would fail to investigate just because a complaint failed to satisfy Rule 9(b)."[137] Thus, the Sixth Circuit's fear that a first-to-file relator with a placeholder complaint would preclude subsequent relators alleging actionable conduct appears unfounded. If the first relator has a meritless case, the government will certainly make that assessment and elect not to intervene, leaving the relator to prosecute the action alone, in which case his complaint will likely be dismissed under Rule 9(b) or Rule 12(b)(6).[138] If the first relator's complaint is deficient under Rule 9(b) but alleges the same actionable conduct as subsequent relators might allege, however, the government has supplemental resources to make an informed decision as to the merits of the case in the first instance.[139]

Admittedly, there is merit in the Sixth Circuit's implicit acknowledgment that some relators stand in a much better position than others to assist the government and proffer particularized complaints.[140] For example, suppose two employees—Andrew, a compliance officer, and Charles, a receptionist—work at a partnership of physicians that has been submitting to Medicare fraudulent claims for payment. Andrew, who collects records of patient visits and billings, performs audits, and oversees the practice's submissions to the government, would be ideally situated to plead the details of the practice's fraudulent scheme. Charles, by contrast, would have minimal, if any, access to the physicians' records and would in turn be unlikely to set forth a complaint alleging the particularized facts needed to satisfy Rule 9(b). The Sixth Circuit's nightmare involves a scenario where Charles, getting wind of Andrew's soon-to-be-filed claim, quickly compiles a complaint with only a basic sketch of the facts and subsequently precludes Andrew's

137. Brief for Appellees, *supra* note 58, at 38 (internal quotation marks omitted).

138. *See, e.g.*, Sean Elameto, *Guarding the Guardians: Accountability in Qui Tam Litigation Under the Civil False Claims Act*, 41 Pub. Cont. L.J. 813, 826 (2012) ("The immense disparity between recoveries in qui tam actions in which the Government intervened and those in which it did not suggests that most qui tam actions brought without government intervention assert meritless or frivolous claims.").

139. Notably, courts have frequently relaxed the procedural hurdle of Rule 9(b) in the FCA context. *See, e.g.*, United States *ex rel.* Klein v. Empire Educ. Corp., 959 F. Supp. 2d 248, 257 (N.D.N.Y. 2013) (providing that a plaintiff-relator's lack of access to relevant documents "may trigger the relaxation of Rule 9(b)"); Christopher L. Martin, Jr., Comment, *Reining in Lincoln's Law: A Call to Limit the Implied Certification Theory of Liability Under the False Claims Act*, 101 Calif. L. Rev. 227, 272 n.249 (2013). Further, even if the first relator's initial complaint is deficient under Rule 9(b), "the usual practice is to grant leave to amend the complaint" in accordance with the liberal amendment policy of Federal Rule of Civil Procedure 15. *Klein*, 959 F. Supp. 2d at 260. Therefore, should the government decline to intervene, the first-filing relator would still have ample opportunity to cure any pleading deficiencies and prosecute the action on his own. These procedural reprieves surely serve to eliminate concerns that, in actionable cases, a first-filing relator proffering a conclusory complaint would unfairly preclude subsequent relators on account of his inadequate pleading.

140. *See Walburn*, 431 F.3d at 973.

action, thus potentially promoting a policy of poor pleading among relators.[141]

Even in this scenario, however, the limited factual allegations in Charles's first-filed complaint would not deprive the government of adequate notice of the partnership's fraudulent conduct as a matter of course. During the period under seal, the government would work closely with Charles and his counsel and be able to discover the underlying facts of the defendant's scheme.[142] Regardless of the complaint's ability to satisfy Rule 9(b), the government would be able to initiate interviews with the relevant players, including Andrew, and review the relevant documents, including the fraudulent records to which Charles lacked easy access.[143] Even if Andrew provided a complaint that passed Rule 9(b) with flying colors, governmental agents would follow a decidedly similar process of "reviewing boxes of documents, compiling and analyzing statistical data, interviewing witnesses, and . . . speaking with experts to determine whether the case warrants federal intervention."[144] In sum, given the government's considerable investigative efforts beyond the complaint, there is little reason to believe that complaints that satisfy Rule 9(b)'s scrutiny are systematically better at providing notice to the government.

At first blush, this approach may seem unfair to Andrew and other relators who might be ideally situated to bring forward detailed complaints only to be preempted in the race to the courthouse. Any fairness concerns of precluding later-filing relators, however, fail to consider the plain statutory command that qui tam actions "shall be brought in the name of the Government," the true injured party, as opposed to compensating fully any relator

141. *See id.* (positing that Rule 9(b) can deter "would-be relators from making 'overly broad allegations' that fail to adequately alert the government to possible fraud in an effort to preclude future relators from sharing in any bounty eventually recovered" (quoting United States *ex rel.* Bledsoe v. Cmty. Health Sys., Inc., 342 F.3d 634, 642 (6th Cir. 2003))).

142. *See* Pamela H. Bucy, *Game Theory and the Civil False Claims Act: Iterated Games and Close-Knit Groups*, 35 Loy. U. Chi. L.J. 1021, 1040 (2004) ("[T]he expectations are that DOJ attorneys will work closely with the relator and the defendant and their respective attorneys early in the case."); *see also* Memorandum, Dep't of Justice, False Claims Act Cases: Government Intervention in Qui Tam (Whistleblower) Suits, *available at* http://www.justice.gov/usao/pae/Civil_Division/InternetWhistleblower%20update.pdf (stating that "the Attorney General (or a Department of Justice attorney) must investigate the allegations of violations of the False Claims Act"). Furthermore, FCA practices contain several norms of behavior, including "the expectation that relators' counsel will bring only meritorious cases to the DOJ's attention, will warn DOJ attorneys if problems develop in the case, will be trustworthy and accurate in their representations about the case, and will deliver on what they promise." Bucy, *supra*, at 1039 (footnotes omitted).

143. *See supra* notes 119–122 and accompanying text; *see also* John T. Bentivoglio et al., *False Claims Act Investigations: Time for a New Approach?*, 3 Fin. Fraud L. Rep. 801, 806–07 (2011), *available at* http://www.skadden.com/sites/default/files/publications/Publications2548_0.pdf (recognizing that, while FCA matters in the past may have stagnated due to "a shortage of government resources," it is now common practice that "the government will continue to initiate investigations and issue subpoenas, and to take action to keep investigations secret and under seal for as long as possible").

144. Caldwell, *supra* note 111, at 378.

who may possess useful information.[145] To be sure, "although qui tam actions allow individual citizens to initiate enforcement against wrongdoers who cause injury to the public at large, the Government remains the real party in interest in any such action."[146] Consequently, the relator has "not personally suffered actual or threatened injury" but rather aids in the prosecution of the FCA suit and receives a portion of the government's recovery only upon prevailing.[147]

Moreover, an exception-free approach to the first-to-file bar that does not incorporate Rule 9(b) more clearly aligns with the FCA's policy goals of promoting genuine whistleblowing and dissuading parasitic plaintiffs. In enacting the first-to-file provision, Congress desired to "spur the prompt reporting of fraud," therefore placing a premium on the timeliest complaints over the most detailed.[148] Consequently, the first-to-file bar does not purport to allow the government "to intervene at its discretion in materially similar fraud actions, but to protect the first-filed relator precisely in order to incentivize private citizens to bring informative claims under the FCA."[149] Grafting Rule 9(b) onto the first-to-file provision, thereby instituting a ranking system among FCA complaints without regard to the time of filing, would run contrary to the goals of the first-to-file bar and turn the race to the courthouse "into a beauty contest between pleadings based on the same underlying facts."[150] This approach would surely "weaken the incentive to dig out the facts and launch the initial action" and would deter many relators from coming forward.[151] In short, rewarding first-filing relators, even those with complaints deficient under Rule 9(b), furthers the intent of the first-to-file bar, while rewarding later-filing relators, even those with highly detailed complaints, would seriously erode the bar.

Indeed, creating an exception to the first-to-file bar by incorporating Rule 9(b)'s heightened pleading standard disrupts the careful balance of the FCA's twin policy aims by encouraging duplicative and opportunistic litigation.[152] Especially in close cases, subsequent relators could easily feed off dismissed complaints and inundate multiple federal court dockets with similar complaints offering only a few additional factual allegations. Assuredly, "dozens of relators could expect to share a recovery for the same conduct,

145. 31 U.S.C. § 3730(b)(1) (2012).

146. United States *ex rel.* Kreindler & Kreindler v. United Techs. Corp., 985 F.2d 1148, 1154 (2d Cir. 1993) (quoting Minotti v. Lensink, 895 F.2d 100, 104 (2d Cir. 1990)) (internal quotation marks omitted).

147. *Id.* at 1153–54.

148. United States *ex rel.* Branch Consultants v. Allstate Ins. Co., 560 F.3d 371, 377 (5th Cir. 2009) (quoting United States *ex rel.* LaCorte v. SmithKline Beecham Clinical Labs., Inc., 149 F.3d 227, 234 (3d Cir. 1998)) (internal quotation marks omitted).

149. United States *ex rel.* Folliard v. CDW Tech. Servs., Inc., 722 F. Supp. 2d 37, 43 (D.D.C. 2010).

150. Brief for Appellees, *supra* note 58, at 41.

151. United States *ex rel.* Chovanec v. Apria Healthcare Grp. Inc., 606 F.3d 361, 364 (7th Cir. 2010).

152. Brief for Appellees, *supra* note 58, at 15.

decreasing their incentive to bring a qui tam action in the first place."[153] Such an exception would severely undermine the first-to-file bar's goals to create a "race to the courthouse among eligible relators" and "spur the prompt reporting of fraud."[154] Further, the imposition of Rule 9(b) would certainly "create intra-judicial conflicts and practical difficulties."[155] Thus, an exception-free approach to the first-to-file bar—one that does not incorporate Rule 9(b)—more closely adheres to the FCA's goals of promptly alerting the government to fraudulent conduct and deterring duplicative suits.[156]

Conclusion

Rule 9(b)'s exacting requirements of notice pleading have no place in the FCA's first-to-file bar. Neither the plain language nor the intent of 31 U.S.C. § 3730(b)(5) and Rule 9(b) indicates that first-filed complaints must pass the scrutiny of Rule 9(b). Indeed, the notice requirements of defendants in commonplace civil litigation differ markedly from those of the government in the FCA context. Unlike common law fraud defendants who face plaintiffs in an adversarial setting and require heightened notice to shield their reputations and prepare defense strategies, the government facilitates a partnership with FCA plaintiffs and uses a host of investigatory tools supplemental to the complaint to assess plaintiffs' allegations. Although the failure of fraud plaintiffs to plead with particularity could have detrimental effects for defendants, FCA plaintiffs' failure to meet Rule 9(b) would surely not preclude the government from intervening in actionable suits. Thus, FCA complaints need not satisfy Rule 9(b) in order to provide the government with sufficient notice. Moreover, this exception-free approach to the first-to-file bar aligns with the FCA's goals of promptly alerting the government to fraudulent conduct and deterring duplicative suits. Accordingly, courts should ultimately adopt the approach employed by the First and D.C. Circuits in declining to incorporate Rule 9(b) into the first-to-file bar and consequently affording preclusive effect to first-filed complaints deficient under Rule 9(b).

153. United States *ex rel.* LaCorte v. SmithKline Beecham Clinical Labs., Inc., 149 F.3d 227, 234 (3d Cir. 1998).

154. *Id.* (quoting United States *ex rel.* Stinson v. Prudential Ins. Co., 944 F.2d 1149, 1176 n.5 (3d Cir. 1991) (Scirica, J., dissenting)) (internal quotation marks omitted).

155. Brief for Appellees, *supra* note 58, at 15.

156. Long, *supra* note 11, at 161–63.