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Last Call: According First-Filed Qui Tam Complaints Greater Preclusive Effect under *Batiste*'s Narrow Interpretation of the First-to-File Rule

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LAST CALL: ACCORDING FIRST-FILED QUI TAM COMPLAINTS GREATER PRECLUSIVE EFFECT UNDER *BATISTE*'S NARROW INTERPRETATION OF THE FIRST-TO-FILE RULE

Abstract: On November 4, 2011, in *United States ex rel. Batiste v. SLM Corp.*, the U.S. Court of Appeals for the D.C. Circuit held that the False Claims Act's "first-to-file" bar does not require that a first-filed complaint plead allegations of fraud with particularity to bar subsequent complaints alleging the same material elements of fraud. In so doing, the D.C. Circuit created a circuit split with the Sixth Circuit regarding the pleading standards required by the first-to-file rule. This Comment argues that the D.C. Circuit's interpretation better comports with the first-to-file rule's twin policies of encouraging parties to promptly alert the government of fraud and of discouraging parasitic complaints that merely allege the same material elements of fraud as earlier-filed complaints. This Comment further argues that future courts should follow the D.C. Circuit's interpretation of the pleading standards required by the first-to-file rule.

Introduction

In 2011, the United States recovered over $3 billion in settlements and judgments from fraudulent claims.[1] Congress passed the False Claims Act to prevent the submission of fraudulent or false claims for payment to the U.S. government.[2] The Act encourages whistleblowing

[1] *Fraud Statistics—Overview, October 1, 1987—September 30, 2012*, U.S. Dep't of Justice (Oct. 24, 2012), http://www.justice.gov/civil/docs_forms/C-FRAUDS_FCA_Statistics.pdf. Examples of fraudulent claims against the government include welfare fraud, Medicare fraud, false claims submitted by government contractors for government funding, fraudulent applications for government loans, and many others. S. Rep. No. 99-345, at 9 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5274.

[2] *See* 31 U.S.C. §§ 3729–3733 (2006 & Supp. V 2011) (prohibiting a person or entity from knowingly presenting or causing to be presented to the U.S. government a false or fraudulent claim for payment or approval); S. Rep. No. 99-345, at 1, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5266; *see also* Christopher M. Alexion, Note, *Open the Door, Not the Floodgates: Controlling Qui Tam Litigation Under the False Claims Act*, 69 Wash. & Lee L. Rev. 365, 369 (2012) (stating that the False Claims Act is the government's primary means of apprehending companies that submit false claims for payment).

as a means of putting the U.S. government on notice of fraud.[3] To accomplish this goal, the False Claims Act contains qui tam provisions that allow "whistleblowers" to file complaints under seal on behalf of the U.S. government.[4] The government may then intervene in the action and prosecute the claim.[5] If it does not intervene, however, the plaintiff may prosecute the action as long as jurisdiction is proper.[6] In either instance, the plaintiff shares in the recovery.[7]

For a qui tam plaintiff to recover, the False Claims Act's "first-to-file" rule requires that the plaintiff be the first to bring an action based on a specific set of underlying facts.[8] Whether a plaintiff is the first to allege a claim based on a set of underlying facts depends on the court's interpretation of the first-to-file rule.[9] In November 2011, in *United States ex rel. Batiste v. SLM Corp.*, the U.S. Court of Appeals for the D.C. Circuit held that a relator's qui tam complaint was barred by an earlier complaint under the first-to-file rule.[10] The D.C. Circuit further held that a first-filed complaint does not have to meet the heightened pleading requirement of Federal Rule of Civil Procedure 9(b) to bar subse-

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[3] *See* United States *ex rel.* Batiste v. SLM Corp. (*Batiste II*), 659 F.3d 1204, 1210 (D.C. Cir. 2011); United States *ex rel.* Lujan v. Hughes Aircraft Co., 243 F.3d 1181, 1187 (9th Cir. 2001); S. Rep. No. 99-345, at 1, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5266.

[4] 31 U.S.C. § 3730(b)(1). The Latin term qui tam is a short version of a longer phrase that translates to "who as well sues for the king as for himself sues in this matter." Black's Law Dictionary 1368 (9th ed. 2009). Under the False Claims Act, a qui tam action filed under seal is "for the judge's eyes only," and the defendant does not get notice of the complaint for at least sixty days. Keith D. Barber et al., *Prolific Plaintiffs or Rabid Relators? Recent Developments in False Claims Act Litigation*, 1 Ind. Health L. Rev. 131, 138 (2004).

[5] 31 U.S.C. § 3730(b)(2). A copy of the complaint and "substantially all material evidence and information" must be served on the government by the person filing the complaint. *Id.* The government may elect to intervene and may proceed with the action within 60 days of being served with the complaint and relevant evidence. *Id.*

[6] *Id.* § 3730(b)(5), (c)(3); United States *ex rel.* Batiste v. SLM Corp. (*Batiste I*), 740 F. Supp. 2d 98, 102 (D.D.C. 2010).

[7] 31 U.S.C. § 3730(d). If the government proceeds with the action, the person who filed the complaint will receive at least 15%, but not more than 25%, of the recovery. *Id.* § 3730(d)(1). If the government declines to proceed with the action, the person who filed the qui tam complaint has the right to conduct the action and will receive no less than 25% and no more than 30% of any recovery. *Id.* § 3730(d)(2).

[8] *Id.* § 3730(b)(5). The first-to-file rule provides that when a person brings an action under the qui tam provisions of the False Claims Act, no person other than the government may intervene or bring a related action based on the facts underlying the pending action. *Id.*

[9] *See Batiste II*, 659 F.3d at 1204, 1205–06; United States *ex rel.* Walburn v. Lockheed Martin Corp., 431 F.3d 966, 970 (6th Cir. 2005).

[10] 659 F.3d at 1205–06.

quent complaints.[11] In so doing, the D.C. Circuit created a circuit split with the Sixth Circuit.[12]

Part I of this Comment provides an overview of the factual background and procedure of *Batiste* and discusses the previously filed qui tam complaint that barred the *Batiste* action under the first-to-file rule.[13] Part II examines and discusses the different interpretations of the first-to-file rule's pleading standards adopted by the D.C. Circuit and Sixth Circuit.[14] Finally, Part III argues that the D.C. Circuit's interpretation is preferable to that of the Sixth Circuit because it better promotes the policies underlying the first-to-file rule.[15]

I. Overlapping Allegations of Fraud and the First-to-File Rule

Section A of this Part describes the plaintiff's allegations in *Batiste*.[16] Then, Section B details another plaintiff's complaint in an earlier action filed in 2005 and explains how this complaint barred the plaintiff's action in *Batiste* under the first-to-file rule.[17]

A. *Batiste's Qui Tam Complaint Alleging Fraudulent Activity*

In *Batiste*, the plaintiff, Sheldon Batiste, filed a qui tam complaint on June 13, 2008, in the U.S. District Court for the District of Columbia.[18] In the complaint, Batiste alleged that the defendant, SLM Corp. ("Sallie Mae"), defrauded the U.S. government by presenting fraudu-

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[11] *Id.* at 1206. Federal Rule of Civil Procedure 9(b) requires a party alleging fraud to "state with particularity" the circumstances constituting fraud. Fed. R. Civ. P. 9(b). Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally. *Id.* Such requirements for fraud allegations constitute a more stringent pleading standard than the "short and plain statement" required by Federal Rule of Civil Procedure 8(a). *Compare* Fed. R. Civ. P. 9(b) (requiring that allegations of fraud be stated with particularity), *with* Fed. R. Civ. P. 8(a) (requiring a pleading to contain a short and plain statement of the grounds for the court's jurisdiction and a short and plain statement of the claim showing the pleader is entitled to relief). *See generally* Michael S. Pardo, *Pleadings, Proof, and Judgment: A Unified Theory of Civil Litigation*, 51 B.C. L. Rev. 1451 (2010) (examining the different pleading standards required by the Federal Rules of Civil Procedure).

[12] *Compare Batiste II*, 659 F.3d at 1205–06 (holding that a first-filed complaint does not need to meet the heightened pleading standard of Federal Rule of Civil Procedure 9(b) to bar later filed complaints), *with Walburn*, 431 F.3d at 972 (holding that a first-filed complaint must meet Federal Rule of Civil Procedure 9(b)'s pleading requirements to bar later filed qui tam complaints).

[13] *See infra* notes 16–43 and accompanying text.

[14] *See infra* notes 44–90 and accompanying text.

[15] *See infra* notes 91–111 and accompanying text.

[16] *See infra* notes 18–32 and accompanying text.

[17] *See infra* notes 33–43 and accompanying text.

[18] *See Batiste I*, 740 F. Supp. 2d at 100.

lent claims for government funds.[19] Batiste worked as a senior loan associate at SLM Financial Corporation, a subsidiary of Sallie Mae, from September 2004 through April 2006.[20] Sallie Mae administered federally guaranteed student loans under the Federal Family Education Loan Program.[21] Batiste alleged that Sallie Mae defrauded the U.S. government by presenting claims for government funds and falsely certifying that these claims were correct and in compliance with federal law.[22]

Batiste alleged that Sallie Mae perpetrated this fraud through its administration of federally guaranteed student loans.[23] The complaint stated that Sallie Mae unlawfully put such loans into forbearance in violation of the Higher Education Act's forbearance regulations.[24] By putting the loans into forbearance, Sallie Mae allowed borrowers to cease payments temporarily, make payments over an extended period of time, or make smaller payments than the scheduled amount.[25] Batiste's complaint alleged that Sallie Mae granted forbearances to borrowers who made payments to bring their accounts current; this violated regulations requiring lenders to grant forbearances only when borrowers intend to pay their loans, but cannot afford to.[26] Additionally, Batiste's complaint alleged that Sallie Mae incentivized loan officers to improperly grant forbearances by giving bonuses to officers who reduced delinquencies.[27]

By granting these forbearances, Batiste's complaint alleged, Sallie Mae profited.[28] Interest continued to accrue on the loans while they were in forbearance.[29] Additionally, the Department of Education continued to pay special allowances to Sallie Mae while the loans were in

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

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.* Under 34 C.F.R. § 682.211, forbearance is defined as "permitting the temporary cessation of payments, allowing an extension of time for making payments, or temporarily accepting smaller payments than previously were scheduled." 34 C.F.R. § 682.211(a)(1) (2012). To grant a forbearance, one of two threshold conditions must be met: (1) a lender must reasonably believe that a borrower intends to repay the loan, but cannot due to poor health or other acceptable reasons, or (2) the borrower's payments of principal are deferred under § 682.210 and the Secretary of Education does not pay interest payments on behalf of the borrower. *Id.* § 682.211(a)(2). The lender and borrower must agree to the terms of the forbearance. *Id.* § 682.211(b)(1).

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

[26] *Id.*

[27] *Id.* at 1207.

[28] *See id.* at 1206–07.

[29] *Id.* at 1206.

forbearance, thus increasing Sallie Mae's return on each loan.[30] Finally, Sallie Mae delayed defaulting the loan while it was in forbearance.[31] This allegedly kept Sallie Mae's default rate low and helped Sallie Mae qualify as an eligible lender under U.S. Department of Education guidelines.[32]

B. *The District Court's Determination That an Earlier Complaint Barred Batiste's Action*

The district court dismissed Batiste's action pursuant to the False Claims Act's first-to-file rule.[33] This rule stipulates that when a person brings a qui tam action, no one other than the U.S. government "may intervene or bring a related action based on the facts underlying the pending action."[34] If the plaintiff cannot fulfill the False Claims Act's first-to-file requirement, a court does not have the power to hear the action.[35] Thus, the first-to-file rule blocks a qui tam plaintiff's ability to proceed on the basis of subject matter jurisdiction.[36]

Specifically, the district court dismissed Batiste's action on the grounds that the complaint was barred by a complaint filed in the U.S. District Court of the Central District of California over two years earlier in the 2005 case *United States ex rel. Zahara v. SLM Corp.*[37] The plaintiff in that case (Michael Zahara), like Batiste, was a former employee of a wholly-owned subsidiary of Sallie Mae who alleged that Sallie Mae perpetrated a scheme to defraud the U.S. government.[38] Under that scheme, Zahara alleged, Sallie Mae allowed its employees and agents to falsify forbearance records and delinquent loan records, and to represent that borrowers orally agreed to forbearances when the borrowers

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[30] *Id.*

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

[32] *Id.*

[33] *Batiste I*, 740 F. Supp. 2d at 105; *see* 31 U.S.C. § 3730(b)(5).

[34] 31 U.S.C. § 3730(b)(5); *Batiste I*, 740 F. Supp. 2d at 102.

[35] *See Batiste I*, 740 F. Supp. 2d at 101.

[36] *Id.* (citing United States *ex rel.* Ervin & Assocs., Inc. v. Hamilton Sec. Grp., Inc., 332 F. Supp. 2d 1, 4 (D.D.C. 2003)).

[37] *Id.* at 102–04; *see* United States *ex rel.* Zahara v. SLM Corp., No. 2:05-cv-8020 (C.D. Cal. Nov. 9, 2005) (transferred to the U.S. District Court of the Southern District of Indiana). The *Zahara* complaint was ultimately dismissed by the U.S. District Court of the Southern District of Indiana (the court to which the case had been transferred) when the plaintiff could not obtain counsel by the court's deadline. *See Batiste II*, 659 F.3d at 1207; United States *ex rel.* Zahara v. SLM Corp., No. 1:06-cv-088 (S.D. Ind. Mar. 12, 2009). The *Batiste* complaint was filed on June 13, 2008. *Batiste II*, 659 F.3d at 1206. Because the *Zahara* complaint was not dismissed until March 12, 2009, it was still pending when the *Batiste* complaint was filed. *See Batiste II*, 659 F.3d at 1210.

[38] *Batiste II*, 659 F.3d at 1207.

never spoke to company representatives.[39] Zahara's complaint further alleged that Sallie Mae encouraged such forbearance fabrications by imposing a quota system and bonus system, whereby employees would receive bonuses based on performance in bringing loans current.[40] According to the complaint, Sallie Mae perpetrated this scheme to increase its revenue and maintain its "Exceptional Performer" designation, which allowed the corporation to receive higher guarantee payments on its defaulted loans under the Higher Education Act.[41]

Batiste appealed the district court's dismissal of his action, claiming that his complaint and Zahara's complaint alleged different fraudulent schemes, and that a first-filed complaint must meet a heightened pleading standard to bar subsequent complaints under the first-to-file rule.[42] In support of his appeal, Batiste argued that the *Zahara* complaint did not meet the requirements of Federal Rule of Civil Procedure 9(b) because it did not plead the allegations of fraud with particularity.[43]

II. Issues Surrounding the First-to-File Rule: The Same Material Elements Requirement and Competing Interpretations of the Requisite Pleading Standard

On appeal, two primary issues confronted the D.C. Circuit in *Batiste*.[44] First, what constitutes a "related action based on the facts underlying the pending action" for the purposes of the first-to-file rule?[45] Second, must a first-filed complaint satisfy the heightened pleading requirement of Federal Rule of Procedure 9(b) to bar later-filed

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[39] *Id.* These falsifications and misrepresentations violated the Higher Education Act's forbearance regulations. *See id.* at 1206–07; *see also supra* note 24 (providing an overview of the Higher Education Act's forbearance regulations).

[40] *Id.*

[41] *Id.* A lender could achieve the "Exceptional Performer" designation by receiving a high "compliance performance rating" as determined by a lender's compliance with the Department of Education's due diligence requirements. *See* 20 U.S.C. § 1078-9(a)(1) (2006) (repealed 2007). When an exceptional performer submitted claims for payment to a guaranty agency, it was entitled to receive 99% of the unpaid principal and interest on loans that were the subject of the claims. *Id.* § 1078-9(b)(1). Without the "exceptional performer" designation, the lender would receive either 97% or 98% of the unpaid principal depending on when the loan was first disbursed. *See* 20 U.S.C. § 1078(b)(1)(G) (2006 & Supp. V 2011). There is no longer an "exceptional performance" designation under the Higher Education Act. *See id.* § 1078.

[42] *Batiste II*, 659 F.3d at 1208.

[43] *Id.*; *see* Fed. R. Civ. P. 9(b).

[44] United States *ex rel.* Batiste v. SLM Corp. (*Batiste II*), 659 F.3d 1204, 1208 (D.C. Cir. 2011).

[45] *See id.*

claims?[46] Section A of this Part examines how the D.C. Circuit applied the same material elements test to decide that the *Batiste* action was a "related action" based on the facts underlying *United States ex rel. Zahara v. SLM Corp.*, which was filed in the U.S. District Court of the Central District of California in 2005.[47] Then, Section B explores the split between the D.C. Circuit and the Sixth Circuit over whether a first-filed complaint must meet the pleading requirements of Federal Rule of Civil Procedure 9(b) to preclude subsequent complaints.[48]

A. *Application of the Same Material Elements Requirement*

The D.C. Circuit first evaluated what is considered a "related action based on the facts underlying" an earlier filed action.[49] In making this determination, courts have held that the first-to-file rule bars complaints alleging the same material elements of fraud.[50] The court in *Batiste* referred to this test as the "*Hampton* material facts test."[51] In addition to considering whether a later-filed complaint alleges the same material elements of fraud, courts may also consider whether a later-filed claim would give rise to a separate investigation or recovery by the government.[52] From a policy perspective, the first-to-file rule serves a dual purpose: (1) rejecting suits that the government already has notice of, and (2) promoting those suits that the government is not equipped to deal with on its own.[53] Thus, a first-filed claim notifies the govern-

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[46] *See id.*

[47] *See infra* notes 49–60 and accompanying text.

[48] *See infra* notes 61–90 and accompanying text.

[49] *Batiste II*, 659 F.3d at 1208–10.

[50] *See, e.g.*, *Batiste II*, 659 F.3d at 1208 (holding that the first-to-file rule bars complaints when a later-filed complaint alleges the same material elements of fraud as an earlier complaint); United States *ex rel.* Hampton v. Columbia/HCA Healthcare Corp., 318 F.3d 214, 217 (D.C. Cir. 2003) (holding that the first-to-file rule bars complaints alleging the same material elements of fraud as a prior complaint); United States *ex rel.* Lujan v. Hughes Aircraft Co., 243 F.3d 1181, 1188–89 (9th Cir. 2001) (holding that the first-to-file rule requires a complaint to allege the same material elements of fraud, rather than identical facts, to bar later-filed complaints).

[51] *Batiste II*, 659 F.3d at 1209. In 2003, in *United States ex rel. Hampton v. Columbia/HCA Healthcare Corp.*, the U.S. Court of Appeals for the D.C. Circuit held that two complaints do not need to allege identical facts for the first-filed claim to bar a subsequent claim. *See* 318 F.3d at 217–18. Rather, a later-filed complaint only needs to allege the "same material elements" to be barred by a first-filed complaint. *See id.*

[52] *Batiste II*, 659 F.3d at 1209–10 (citing United States *ex rel.* Ortega v. Columbia Healthcare, Inc., 240 F. Supp. 2d 8, 13 (D.D.C. 2003)).

[53] *Batiste II*, 659 F.3d at 1208 (quoting *Hampton*, 318 F.3d at 217); United States *ex rel.* Springfield Terminal Ry. Co. v. Quinn, 14 F.3d 645, 650–51 (D.C. Cir. 1994) (analyzing the 1986 amendments to the False Claims Act and concluding that they left significant barriers

ment of the essential facts of an alleged fraud, and the first-to-file rule bars repetitive claims and discourages opportunistic behavior by barring subsequent actions based on the same alleged fraud.[54]

Comparing Zahara's complaint with Batiste's complaint, the D.C. Circuit held that, under the *Hampton* test, both complaints alleged the same material facts of fraud.[55] Although Zahara and Batiste worked for different Sallie Mae subsidiaries, both alleged that the same fraudulent activities occurred at their respective offices and that Sallie Mae's policies promoted the fraudulent behavior.[56] The court determined that if the government investigated the facts alleged in Zahara's complaint on a nationwide basis, it would have discovered fraud at both offices.[57] Furthermore, the additional allegations in Batiste's complaint would not have led to a different investigation or recovery by the government.[58] Therefore, Batiste's complaint was barred by the Zahara complaint under the first-to-file rule.[59] Accordingly, the D.C. Circuit affirmed the district court's dismissal for lack of subject matter jurisdiction.[60]

B. *Disagreement over Whether a Plaintiff Must Plead with Particularity to Preclude Later-Filed Complaints*

Next, the D.C. Circuit considered which pleading standard a qui tam plaintiff must meet to bar subsequent complaints under the first-to-file rule.[61] Rule 9(b) of the Federal Rules of Civil Procedure requires that a party alleging fraud must state the fraudulent circumstances with particularity.[62] This is a heightened standard from Rule 8 of the Federal Rules of Civil Procedure, which requires a "short and plain statement" of the claim.[63] Requiring that a qui tam complaint under the False

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to parasitic suits); S. Rep. No. 99-345, at 1–2 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5266–67.

[54] United States *ex rel.* Batiste v. SLM Corp. (*Batiste I*), 740 F. Supp. 2d 98, 102 (D.D.C. 2010) (quoting *Lujan*, 243 F.3d at 1187). The rationale behind this policy is to encourage a whistleblower with valuable information to come forward, while discouraging "parasitic" plaintiffs from recovering damages as a result of previously disclosed fraud. *See* United States *ex rel.* Walburn v. Lockheed Martin Corp., 431 F.3d 966, 970 (6th Cir. 2005) (citing United States *ex rel.* Jones v. Horizon Healthcare Corp., 160 F.3d 326, 335 (6th Cir. 1998)).

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

[56] *Id.*

[57] *Id.*

[58] *Id.* at 1210.

[59] *See id.* at 1209–10.

[60] *Id.* at 1211.

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

[62] Fed. R. Civ. P. 9(b).

[63] *See* Fed. R. Civ. P. 8(a).

Claim Act meet the heightened pleading standard of Rule 9(b), however, would create an exception to the first-to-file rule's bar on all subsequent complaints alleging the same material elements of fraud.[64] Consequently, the D.C. Circuit held that a first-filed complaint does not need to meet the pleading requirement of Rule 9(b) to bar later-filed complaints under the first-to-file rule.[65] In so doing, the D.C. Circuit created a circuit split with the Sixth Circuit.[66]

In 2005, in *United States ex rel. Walburn v. Lockheed Martin Corp.*, the U.S. Court of Appeals for the Sixth Circuit held that a False Claims Act qui tam complaint must meet the pleading requirements of Federal Rule of Civil Procedure 9(b) to preclude a subsequent complaint.[67] The complaint in that case alleged that Lockheed Martin, a company engaged in uranium enrichment, conducted fraudulent activities to maintain its Department of Energy accreditation.[68] The district court held that the first-to-file rule barred the complaint because a complaint filed one month earlier in *United States ex rel. Brooks v. Lockheed Martin Corp.* encompassed Walburn's allegations.[69]

On appeal, the Sixth Circuit reversed the district court and created an exception to the first-to-file rule for complaints that do not meet the pleading standards of Federal Rule of Civil Procedure 9(b).[70] The court determined that the "vague and broad-ranging" allegations contained in the *Brooks* complaint encompassed the *Walburn* complaint's more

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

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

[66] *Compare Batiste II*, 659 F.3d at 1210 (holding that a first-filed complaint does not need to meet the heightened requirement of Federal Rule of Civil Procedure 9(b) because a complaint that is not specific enough to meet the heightened standard could still put the government on notice of fraudulent activity), *with Walburn*, 431 F.3d at 972–73 (holding that a first-filed complaint under the False Claims Act must meet the heightened pleading requirements of Federal Rule of Civil Procedure 9(b) to bar subsequent complaints because a detailed pleading is necessary to put the government on notice of fraud).

[67] *See Walburn*, 431 F.3d at 972–73.

[68] *Id.* at 969. The alleged fraudulent activities included concealing and changing radiation exposure dosage readings, which allowed Lockheed to satisfy the Department of Energy's requirements for accreditation. *Id.* The United States declined to intervene in the action; therefore, the plaintiff prosecuted the case on his own. *Id.*

[69] *Id.*; *see* United States *ex rel.* Brooks v. Lockheed Martin Corp., 423 F. Supp. 2d 522, 525 (D. Md. 2006). The *Brooks* complaint alleged that Lockheed "falsified, concealed and destroyed" documents pertaining to a plant's operations and submitted "false records and statements" to the government to induce payment. *Walburn*, 431 F.3d at 971. The *Walburn* complaint stated more specific allegations than the *Brooks* complaint regarding the means by which Lockheed assigned uranium exposure dosage readings to employees and how it used the readings to fraudulently obtain Department of Energy accreditation and payments under operating agreements. *See id.*

[70] *See Walburn*, 431 F.3d at 972–73.

detailed allegations, and therefore both complaints were related actions that alleged the same material elements of fraud.[71] The *Brooks* complaint, however, did not meet the pleading requirements of Federal Rule of Civil Procedure 9(b), because it did not specify the time, place, and nature of the alleged fraud.[72] The court reasoned that the *Brooks* complaint was not specific enough to put the defendant on notice.[73] Therefore, it could not have put the government on notice of the essential facts of the fraudulent scheme.[74]

As such, the Sixth Circuit recognized an exception to the first-to-file rule.[75] Although the two complaints were "related actions" alleging the same underlying facts, the *Brooks* complaint did not bar the *Walburn* complaint because it failed to meet Rule 9(b)'s requirements.[76] Accordingly, the court held that subject matter jurisdiction over the *Walburn* complaint was proper because the *Brooks* complaint was too broad to be protected by the first-to-file rule.[77] In so holding, the court emphasized that this exception furthered the False Claims Act's dual policy goals of encouraging whistleblowers to put the government on notice of fraud, while deterring plaintiffs from filing overly broad suits in an effort to preserve a larger recovery for themselves.[78] The court elaborated that such overly broad suits would fail to put the government on notice of fraud.[79]

In contrast to the Sixth Circuit, the D.C. Circuit in *Batiste* held that a first-filed complaint does not need to meet the particularity requirement of Federal Rule of Civil Procedure 9(b) to bar later-filed complaints alleging the same material elements of fraud.[80] Instead, a complaint need only provide sufficient notice for the government to launch an investigation into the alleged fraudulent activities.[81] In reaching this holding, the court relied on a textual interpretation of the first-to-file rule.[82] Nothing in the text of 31 U.S.C. § 3730(b)(5) requires that alle-

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[71] *Id.* at 971–72.
[72] *Id.*
[73] *Id.*
[74] *Id.* at 973.
[75] *See id.*
[76] *See Walburn*, 431 F.3d at 973.
[77] *See id.*
[78] *See id.*
[79] *Id.*
[80] *Batiste II*, 659 F.3d at 1210.
[81] *Id.*
[82] *Id.*; *see* 31 U.S.C. § 3730(b)(5) (2006) ("When a person brings an action under this subsection, no person other than the [g]overnment may intervene or bring a related action based on the facts underlying the pending action.").

gations of fraud be plead with particularity to bar later-filed complaints.[83] It only requires that an action be "pending" to bar later-filed complaints alleging the same material elements of fraud.[84] The court further reasoned that a complaint not specific enough to put a defendant on notice could still provide the government with sufficient notice to launch an investigation into the alleged fraudulent activities.[85] Additionally, the court implicitly reasoned that its approach would also promote the first-to-file rule's policy goal of barring opportunistic plaintiffs from filing parasitic actions.[86] Any subsequent complaints alleging the same material elements of fraud would be barred under this interpretation, thereby precluding the possibility of parasitic suits.[87]

The court also reasoned that requiring the first-filed complaint to meet the particularity standards of Federal Rule of Civil Procedure 9(b) would create a "strange judicial dynamic."[88] In this dynamic, it would be possible that one district court would have to determine the sufficiency of a complaint filed in another district court.[89] Such a scenario could potentially create disagreement between two district courts over a complaint's sufficiency.[90]

III. The First-to-File Rule Should Not Require a First-Filed Complaint to Plead with Particularity

The D.C. Circuit's approach in *Batiste* is preferable to the Sixth Circuit's approach in 2005 in *United States ex rel. Walburn v. Lockheed Martin Corp.*[91] The D.C. Circuit's approach better comports with the first-to-file rule's policies of alerting the government to fraudulent activ-

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

[84] *See* 31 U.S.C. § 3730(b)(5); *Batiste II*, 659 F.3d at 1210. A claim is considered "pending" for the purposes of the first-to-file rule if it has not yet been dismissed when the later claim is filed. *See Lujan*, 243 F.3d at 1188.

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

[86] *See id.* at 1210–11. The problem of "parasitic" suits filed under the False Claims Act arose in the 1930s. *See* Marc S. Raspanti & David M. Laigaie, *Current Practice and Procedure Under the Whistleblower Provisions of the Federal False Claims Act*, 71 Temp. L. Rev. 23, 24–25 (1998). After the Supreme Court upheld a $75,000 award to a qui tam plaintiff who merely alleged information that the government had already obtained, the False Claims Act was amended in 1943 to restrict the qui tam provisions, and thereby to discourage parasitic suits. *See id.* at 24–26. The 1943 version of the False Claims Act did not prevent fraud effectively, and the Act was amended in 1986 to its current form. *See id.* at 26–27.

[87] *See Batiste II*, 659 F.3d at 1210–11.

[88] *Id.* at 1210.

[89] *Id.*

[90] *Id.*

[91] *See infra* notes 92–111 and accompanying text.

ities and discouraging opportunistic plaintiffs from filing parasitic suits.[92] First, by declining to recognize an exception to the first-to-file rule, the *Batiste* court encourages plaintiffs to promptly put the government on notice of fraudulent activities.[93] If there are no exceptions to the first-to-file rule, to recover anything, a plaintiff must file a complaint before any other plaintiff files a complaint alleging the same material elements of fraud.[94] Otherwise, the plaintiff will be precluded by the earlier filed complaint.[95] This creates a "race to the courthouse" among plaintiffs.[96] As a result, a plaintiff's complaint will likely notify the government of fraud—and enable the government to recover stolen or misused funds—earlier.[97]

Second, a no-exception interpretation of the first-to-file rule also promotes the policy of discouraging opportunistic plaintiffs from filing parasitic complaints.[98] When no exceptions are recognized, the first-to-file rule bars all subsequent, repetitive complaints.[99] Conversely, if a Rule 9(b) pleading exception is recognized, repetitive or parasitic suits could still be valid even if the government has already been put on notice.[100] Such repetitive suits could have the effect of lessening the government's recovery.[101]

Moreover, although courts have criticized a strict, no-exception approach to the first-to-file rule, this criticism fails to recognize Federal

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[92] *See* United States *ex rel.* Batiste v. SLM Corp. (*Batiste II*), 659 F.3d 1204, 1210–11 (D.C. Cir. 2011); s*ee also* Leslie Ann Skillen & Megan M. Scheurer, *Who's on First: 31 U.S.C. § 3730(b)(5)*, 44 False Claims Act & Qui Tam Q. Rev., Jan. 2007, at 69, 75–76 (arguing that a strict first-to-file interpretation is preferable and that there should not be an exception for first-filed complaints that do not meet Rule 9(b)'s requirements). This approach is preferable because it creates incentives for potential whistleblowers to alert the government more quickly and therefore may spur quicker government investigation. *See* Skillen & Scheurer, *supra*, at 76.

[93] *See Batiste II*, 659 F.3d at 1210–11; United States *ex rel.* Lujan v. Hughes Aircraft Co., 243 F.3d 1181, 1187 (9th Cir. 2001) (holding that an exception-free first-to-file rule is congruent with the purposes of the rule, namely promoting whistleblowing while discouraging opportunistic plaintiffs).

[94] *See Batiste II*, 659 F.3d at 1210.

[95] *See id.*

[96] *See* Skillen & Scheurer, *supra* note 92, at 75–76 (arguing that a strict first-to-file interpretation encourages qui tam plaintiffs to file actions as quickly as possible and therefore allows the government to investigate and to make a recovery as quickly as possible).

[97] *See id.* at 76.

[98] *See Batiste II*, 659 F.3d at 1210–11; *Lujan*, 243 F.3d at 1187.

[99] *See Lujan*, 243 F.3d at 1187.

[100] *See Batiste II*, 659 F.3d at 1210–11.

[101] *See* Skillen & Scheurer, *supra* note 92, at 76 (arguing that duplicative claims filed after the government has been put on notice would drain public funds because such claims would permit double recovery on the same fraud).

Rule of Civil Procedure 9(b)'s safeguards.[102] A no-exception approach has been criticized for encouraging overly broad complaints filed by plaintiffs seeking to preserve any recovery for themselves.[103] To bar subsequent complaints under the first-to-file rule, however, a first-filed complaint must be specific enough to allege the same material elements of fraud as the subsequent complaint.[104] Otherwise, the subsequent complaint would not be barred.[105] Furthermore, to withstand a motion to dismiss for failure to state a claim, a plaintiff must also meet the requirements of Federal Rule of Civil Procedure 9(b).[106] Otherwise, the complaint would be dismissed and the plaintiff would not be able to recover.[107] Thus, the same material elements requirement and Rule 9(b) safeguard against frivolous, amorphous placeholder complaints.[108]

A strict interpretation of the first-to-file rule encourages potential whistleblowers to notify the government promptly, discourages opportunistic parasitic suits, and is generally not susceptible to frivolous placeholder complaints.[109] Consequently, the D.C. Circuit's interpretation of the pleading standards required by the first-to-file rule better comports with the False Claims Act's and first-to-file rule's policy goals than the approach followed by the Sixth Circuit.[110] As such, future courts should follow the D.C. Circuit's approach.[111]

Conclusion

In *Batiste*, the D.C. Circuit held that a first-filed complaint does not need to meet the requirements of Federal Rule of Civil Procedure 9(b) to bar subsequent complaints. In so doing, it created a circuit split with the Sixth Circuit. The approach taken by the D.C. Circuit is preferable

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[102] *See infra* notes 103–108 and accompanying text.

[103] *See* United States *ex rel.* Walburn v. Lockheed Martin Corp., 431 F.3d 966, 973 (6th Cir. 2005) (implying that a first-to-file interpretation that does not incorporate Rule 9(b)'s requirements would lead to overly broad complaints); Campbell v. Redding Med. Ctr., 421 F.3d 817, 824 (9th Cir. 2005) (recognizing that a first-filed "sham" complaint or "placeholder" complaint could displace a meritorious complaint under a strict interpretation of the first-to-file rule).

[104] *See Batiste II*, 659 F.3d at 1208; United States *ex rel.* Hampton v. Columbia/HCA Healthcare Corp., 318 F.3d 214, 217 (D.C. Cir. 2003); *Lujan*, 243 F.3d at 1189.

[105] *See Batiste II*, 659 F.3d at 1208.

[106] *See id.* at 1210–11.

[107] *See id.*

[108] *See id.*

[109] *See id.*; *Lujan*, 243 F.3d at 1187; Skillen & Scheurer, *supra* note 92, at 76–77.

[110] *See supra* notes 91–109 and accompanying text.

[111] *See supra* notes 91–110 and accompanying text.

because it better promotes the goals of promptly notifying the government of fraudulent claims and discouraging opportunistic suits.

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