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The Cure Is Worse: First Circuit Circumvents False Claims Act's First-to-File Rule in *United States ex rel. Gadbois v. PharMerica Corp.*

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THE CURE IS WORSE: FIRST CIRCUIT CIRCUMVENTS FALSE CLAIMS ACT'S FIRST-TO-FILE RULE IN *UNITED STATES EX REL. GADBOIS v. PHARMERICA CORP.*

Abstract: In 2015, in *United States ex rel. Gadbois v. PharMerica Corp.*, the U.S. Court of Appeals for the First Circuit held that a *qui tam* relator could use supplementation to cure a jurisdictional first-to-file defect in a False Claims Act ("FCA") action. In contrast, in 2010, the U.S. Court of Appeals for the Seventh Circuit in *United States ex rel. Chovanec v. Apria Healthcare Group, Inc.* held that relators barred by first-to-file must face dismissal without prejudice and then refile if they are to proceed. Separately, in 2015, the U.S. Court of Appeals for the D.C. Circuit in *United States ex rel. Heath v. AT & T, Inc.* held the first-to-file rule nonjurisdictional. This Comment argues that the Seventh and D.C. Circuits were correct. An approach that is inconsistent with either holding would contravene the plain language of the first-to-file rule and the FCA's structure. A refiling requirement also effectuates the FCA's purpose because it promotes the prompt resolution of cases that are most likely to yield government recoveries. Adopting this requirement is critical to reining in an expansive *qui tam* regime.

INTRODUCTION

The False Claims Act ("FCA") provides that private parties, called relators, may bring civil *qui tam* actions exposing fraud against the United States and collect a share of any resulting government recovery.[1] By creating incentives for whistleblowing, the *qui tam* provisions encourage the disclosure and prosecution of fraud against the United States.[2] Proper *qui tam* claims must be

[1] *See* False Claims Act, 31 U.S.C. §§ 3729–3733 (2012) (covering the entire text of the False Claims Act ("FCA")). Liability under the FCA extends to any person who knowingly makes or benefits from government payments acquired through intentional misrepresentation to the government. *Id.* § 3729(a)(1). Relators who file *qui tam* suits on behalf of the government can be awarded as much as thirty percent of the government's ultimate recovery. *Id.* § 3730(d)(2). The term *qui tam* comes from the Latin phrase "*qui tam pro domino rege quam pro se ipso in hac parte sequitur*," which is translated in English to "who pursues this action on our Lord the King's behalf as well as his own." Rockwell Int'l Corp. v. United States, 549 U.S. 457, 463 n.2 (2007); *see also* United States v. Neifert-White Co., 390 U.S. 228, 232–33 (1968) (determining that the FCA was intended to make actionable any direct or indirect diversion of federal resources through any form of fraudulent claim); S. REP. NO. 99-345, at 10 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5275 (noting that Congress included broad *qui tam* provisions when the FCA was first enacted in 1863).

[2] *See* 31 U.S.C. § 3730 (laying out *qui tam* provisions); S. REP. NO. 99-345, at 1–2, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5266–67 (explaining the purposes behind *qui tam*). When it amended the FCA in 1986, Congress emphasized the importance of reporting by private individuals with direct knowledge of fraud against the government in order to increase recoveries after citing to evidence

based on facts of fraud not yet known to the government or publicly disclosed.[3] The FCA's first-to-file rule bars *qui tam* actions based on facts previously disclosed in an already pending action, thus preventing duplicative claims that do not provide new information to the government.[4]

In 2015, in *United States ex rel. Gadbois v. PharMerica Corp.* ("*Gadbois II*"), the United States Court of Appeals for the First Circuit broke with the Courts of Appeals for the Fourth, Seventh, and Tenth Circuits when it concluded that the same *qui tam* case once barred by first-to-file could proceed after its first-filed counterpart had been dismissed.[5] The U.S. Court of Appeals for the First Circuit allowed the follow-on action to proceed on the grounds that a supplemental pleading reflecting the dismissal could cure the jurisdictional defect created by the first-to-file bar.[6] In contrast, the U.S. Court of Appeals for the Seventh Circuit's 2010 decision in *United States ex rel. Chovanec v. Apria Healthcare Group Inc.* ("*Chovanec II*") held that the plain terms of the first-to-file rule restricted a follow-on action until it was refiled.[7]

This Comment argues that the Seventh Circuit correctly read first-to-file as requiring follow-on actions to be refiled before proceeding, and that this requirement best furthers the FCA's purpose.[8] This Comment also argues that

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from polls showing that fraud was highly underreported under the then-existing *qui tam* regime. S. REP. NO. 99-345, at 4–5, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5269–70.

[3] 31 U.S.C. § 3730(e)(4)(A)–(B).

[4] *See id.* § 3730(b)(5) ("When a person brings an action under this subsection, no person other than the government may intervene or bring a related action based on the facts underlying the pending action."); United States *ex rel.* Lujan v. Hughes Aircraft Co., 243 F.3d 1181, 1187 (9th Cir. 2001) (noting that first-to-file is designed to curb duplicative allegations of fraud that do not provide new information to the government).

[5] *Compare* United States *ex rel.* Gadbois v. PharMerica Corp., 809 F.3d 1, 6 (1st Cir. 2015) (*Gadbois II*) (concluding that a *qui tam* action formerly barred by first-to-file could proceed after the dismissal of its first filed predecessor had been supplemented into the pleadings), *cert. denied*, 136 S. Ct. 2517 (2016), *with* United States *ex rel.* Carter v. Halliburton Co., 710 F.3d 171, 183 (4th Cir. 2013) (*Carter I*) (concluding that second-filed case must be dismissed before proceeding), *aff'd in part, rev'd in part and remanded* Kellogg Brown & Root Servs., Inc. v. United States *ex rel.* Carter, 135 S. Ct. 1970 (2015) (*Carter II*), United States *ex rel.* Chovanec v. Apria Healthcare Grp. Inc., 606 F.3d 361, 362 (7th Cir. 2010) (*Chovanec II*) (concluding the same), *and* Grynberg v. Koch Gateway Pipeline Co., 390 F.3d 1276, 1278–79 (10th Cir. 2004) (same).

[6] *Gadbois II*, 809 F.3d at 6.

[7] *Chovanec II*, 606 F.3d at 362. *Compare* United States *ex rel.* Boise v. Cephalon, Inc., 159 F. Supp. 3d 550, 558 (E.D. Pa. 2016) (allowing a follow-on claim to proceed by way of amendment following the dismissal of its first-filed counterpart), *with* United States *ex rel.* Shea v. Verizon Commc'ns, Inc., 160 F. Supp. 3d 16, 30 (D.D.C. 2015) (finding that, once the first-to-file defect attached to an action, it could not be cured until the action was dismissed without prejudice and refiled).

[8] *See Chovanec II*, 606 F.3d at 362–64 (concluding that first-to-file's prohibition on bringing an action mandates dismissal of that action, and noting that this prevents a build-up of follow-on cases); *Shea*, 160 F. Supp. 3d at 29–30 (finding that, by definition, a bar on actions cannot be cured by amending pleadings within those actions); 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, 404, 406 (2012) (noting that a relator's role is to provide information that increases government

the D.C. Circuit correctly defined first-to-file's procedural character when it concluded that the rule was nonjurisdictional in its 2015 *United States ex rel. Heath v. AT&T, Inc.* decision.[9] Part I of this Comment reviews the relevant legislative history of the FCA, the United States Supreme Court's 2015 decision on first-to-file in *Kellogg Brown & Root Services, Inc. v. United States ex rel. Carter* ("*Carter II*"), and the First Circuit's *Gadbois II* decision.[10] Part II explains the split between the First and Seventh Circuits as to the proper procedural fate of relators barred by first-to-file, and the D.C. Circuit's characterization of the rule as nonjurisdictional.[11] Part III concludes by arguing in favor of the D.C. Circuit's characterization of the first-to-file rule as nonjurisdictional, and the Seventh Circuit's holding that an action barred by the rule must be refiled if it is to proceed.[12]

I. LEGISLATIVE HISTORY OF THE FALSE CLAIMS ACT'S *QUI TAM* PROVISIONS AND THE INTERPRETATION OF FIRST-TO-FILE IN *CARTER II* AND *GADBOIS II*

In the FCA's *qui tam* provisions, Congress created incentives for prompt, constructive whistleblowing while attempting to combat duplicative suits by using procedural safeguards such as first-to-file.[13] Duplicative suits are seen as parasitic because they siphon financial and prosecutorial resources using information from host cases and do not independently further the discovery of

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recoveries, and discussing the prevalence of duplicative, non-meritorious follow-on suits in an expanded *qui tam* regime); *infra* notes 84–97 and accompanying text.

[9] *See* United States v. Kwai Fun Wong, 135 S. Ct. 1625, 1632 (2015) (opposing the characterization of statutory rules as jurisdictional when the terms of those rules do not evince Congress's intent to do so); United States *ex rel.* Heath v. AT&T, Inc., 791 F.3d 112, 119–21 (D.C. Cir. 2015) (holding that the first-to-file rule is nonjurisdictional after noting the absence of jurisdictional language in its terms, and the presence of that language in other sections of the FCA), *cert. denied*, AT&T, Inc. v. United States *ex rel.* Heath, 136 S. Ct. 2505 (2016); *infra* notes 80–83 and accompanying text.

[10] *See infra* notes 13–57 and accompanying text.

[11] *See infra* notes 58–75 and accompanying text.

[12] *See infra* notes 76–97 and accompanying text.

[13] *See* David Freeman Engstrom, *Harnessing the Private Attorney General: Evidence from Qui Tam Litigation*, 112 COLUM. L. REV. 1244, 1273–74 (2012) (discussing first-to-file as one of a series of provisions in the FCA designed to weed out claims that rehash information already in the possession of—or accessible to—the government); *see also* CHARLES DOYLE, CONG. RESEARCH SERV., R40785, QUI TAM: THE FALSE CLAIMS ACT AND RELATED FEDERAL STATUTES 2–3 (2009) (indicating that the purposes of early *qui tam* provisions and the tensions inherent in them date back to their origins in early medieval England). The earliest cited whistleblower law, which provided that an informer to the crown could receive half of a Sabbath-breaker's fine, illustrates an enduring incentive structure based on the value of such revelatory information to the government. DOYLE, *supra*, at 2. Modern *qui tam* tensions can also be traced back to the proliferation of whistleblower laws in medieval England that spawned a class of informants who tactically used and reused valuable information to their benefit. *Cf. id.* at 2–3 & n.13 (describing statutory safeguards that developed in response to opportunism, such as an eighteenth century rule forbidding copycat *qui tam* suits).

fraud.[14] The Supreme Court has struggled to resolve tensions between the *qui tam* provisions that use incentives to invite whistleblowers with information about fraud and those designed to turn their potentially parasitic claims away.[15] Against this backdrop, Section A of this Part reviews the legislative history of the FCA, focusing on Congress's evolving goals with regards to *qui tam*.[16] Section B of this Part then outlines the Supreme Court's refutation of a restrictive interpretation of the first-to-file rule in *Carter II*.[17] Finally, Section C of this Part details the First Circuit's subsequent 2015 decision in *Gadbois II*, where the First Circuit devised a novel solution to a procedural issue affecting follow-on relators in the wake of *Carter II*.[18]

A. The Historical Development of the FCA's Qui Tam Provisions

When originally enacted in 1863, the FCA was a blunt instrument designed to curb Civil War contractor fraud by rewarding successful relators with half of the government's recovery from a successful *qui tam* action.[19] In 1943, Congress sought to prevent opportunistic abuses of this private enforcement scheme by passing amendments that gave the government more control over *qui tam* suits, proscribed actions based on information already available to the government, and limited the availability of recovery.[20]

In 1986, Congress laid the groundwork for the rapid proliferation of *qui tam* suits when it amended the FCA in order to stimulate private enforcement.[21] Passed in response to reports of widespread fraud against the govern-

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[14] *See* J. Randy Beck, *The False Claims Act and the English Eradication of Qui Tam Legislation*, 78 N.C. L. REV. 539, 558 (2000) (noting that the spread of "parasitical" lawsuits based on prior successful FCA prosecutions spurred Congress to place restrictions on the *qui tam* provisions when it amended the FCA in 1943); *see also Carter I*, 710 F.3d at 181 (discussing the prevention of parasitic lawsuits as the purpose of first-to-file).

[15] *See Carter II*, 135 S. Ct. at 1979 (indicating that the terms of the *qui tam* provisions are not always consonant with one another, and may lead to practical difficulties for parties involved in *qui tam* litigation).

[16] *See infra* notes 19–29 and accompanying text.

[17] *See infra* notes 30–37 and accompanying text.

[18] *See infra* notes 38–57 and accompanying text.

[19] *See* Act of March 2, 1863, 12 Stat. 696 (1863) (laying out provisions of the original FCA); DOYLE, *supra* note 13, at 5 (discussing the purposes and breadth of the 1863 False Claims Act); Sean Elameto, *Guarding the Guardians: Accountability in Qui Tam Litigation Under the Civil False Claims Act*, 41 PUB. CONT. L.J. 813, 817 (2012) (same).

[20] *See* Pub. L. No. 78-213, 57 Stat. 608 (1943) (enacting 1943 amendments to the FCA); DOYLE, *supra* note 13, at 6–7 (discussing 1943 amendments); Elameto, *supra* note 19, at 817–18 (noting that, between 1943 and 1986, an average of six *qui tam* cases were brought annually).

[21] Pub. L. No. 99-562, 100 Stat. 3153 (1986) (enacting 1986 amendments to the FCA); S. REP. NO. 99-345, at 2, 24, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5267, 5289 (discussing 1986 amendments); Engstrom, *supra* note 13, at 1270–71 (same); *see* U.S. DEP'T OF JUSTICE, CIVIL DIV., FRAUD STATISTICS—OVERVIEW (2015), https://www.justice.gov/opa/file/796866/download [https://perma.cc/VZ8K-EBTP] [hereinafter FRAUD STATISTICS] (showing a steady increase in *qui tam* litigation after 1986); *see also* William E. Kovacic, *Whistleblower Bounty Lawsuits as Monitoring Devices in Gov-*

ment, the 1986 amendments increased the financial incentives for relators and lowered procedural barriers that had halted almost all *qui tam* suits after 1943.[22] Congress continued to create additional avenues for bringing *qui tam* actions when it amended the FCA in 2009 and 2010.[23]

Under the expanded *qui tam* regime, an average of over 650 actions were filed annually between 2011 and 2015, resulting in recoveries of roughly three billion dollars per year.[24] As the plaintiff in a *qui tam* case, the bulk of these recoveries go to the government, whose sweeping discretionary power to control *qui tam* suits has not been limited by recent FCA amendments.[25] Today's

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ernment Contracting, 29 LOY. L.A. L. REV. 1799, 1821 (1996) (noting that reports of government contractors defrauding the federal government spurred reforms to the FCA). Supporters of the 1986 amendments believed that deputizing private relators to report fraud would reduce governmental oversight costs and connect enforcement agencies to those with direct knowledge of fraud. Kovacic, *supra*, at 1821–22.

[22] *See* 31 U.S.C. § 3730(d)(1)–(2) (providing that relators are to receive at least fifteen percent of the recovery from a successful *qui tam* action in which the government intervenes and up to thirty percent of the recovery if the government does not intervene); *id.* § 3730(c)(1) (allowing a private relator to continue to prosecute a *qui tam* action when the government intervenes); *id.* § 3730(e)(4)(A)–(B) (allowing a relator to proceed in a suit based on information within the government's possession prior to it being made public, and allowing a relator to proceed based on public information if relator is an "original source"); S. REP. NO. 99-345, at 8, 23–24, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5267, 5288–89 (discussing impetus behind amendments); *see also* Graham Cty. Soil & Water Conservation Dist. v. United States *ex rel.* Wilson*,* 559 U.S. 280, 294–95 (2010) (noting that the 1986 amendments to the FCA sought to strike a balance between increasing reporting by relators with valuable new reports of fraud while quelling the claims of relators trading in stale information); DOYLE, *supra* note 13, at 6–7 (commenting on this schema).

[23] *See* 31 U.S.C. § 3730(e)(4)(A) (triggering the FCA's public disclosure bar when publicly disclosed information comes from federal proceedings in which the government was a party, from other federal sources, or from the media); Pub. L. No. 111-148, § 10104(j)(2), 124 Stat. 119 (2010) (altering the FCA's public disclosure bar in 2010); Pub. L. No. 111-21, § 4, 123 Stat. 1617 (2009) (enacting 2009 amendments to the FCA). Changes to the FCA's public disclosure requirements in 2010 have made information from state court and other proceedings available, and allow relators to proceed on the basis of second-hand information about fraud. *See* Pub. L. No. 111-148, § 10104(j)(2), 124 Stat. 119 (laying out new requirements); DOYLE, *supra* note 13, at 8 (discussing 2009 amendments); Beverly Cohen, *Kaboom! The Explosion of Qui Tam False Claims Under the Health Reform Law*, 116 PENN ST. L. REV. 77, 89–90 (2011) (predicting that minor changes made to the FCA's public disclosure bar in the Patient Protection and Affordable Care Act would set the stage for a flood of *qui tam* litigation); *see also* Engstrom, *supra* note 13, at 1274 n.104 (noting that 2010 amendments lowered the public disclosure bar's threshold and that, even after a court has imposed the bar, the DOJ can still allow a relator's case to proceed).

[24] *See* FRAUD STATISTICS, *supra* note 21 (compiling data on *qui tam* suits); Kovacic, *supra* note 21, at 1801–03 (indicating an average of only sixty-one *qui tam* suits filed annually between 1987 and 1995, and discussing the likelihood of an increase in *qui tam* litigation due in part to increased publicity and specialization of the plaintiff's bar); *see also* Kathleen Clark & Nancy J. Moore*, Financial Rewards for Whistleblowing Lawyers,* 56 B.C. L. REV. 1697, 1699 (2015) (noting that the success of *qui tam* in combating fraud against the government supported the creation of similar financial incentives for whistleblowers to report securities violations under the Dodd-Frank Wall Street Reform and Consumer Protection Act, 15 U.S.C. § 78u-6 (2012)).

[25] *See* Engstrom, *supra* note 13, at 1272–73 (discussing the government's *qui tam* involvement prerogatives).

FCA allows the Department of Justice ("DOJ") to take partial or complete control of *qui tam* litigation.[26] Among other powers, the government has almost complete discretion to extinguish a *qui tam* claim immediately and to settle with a defendant, even in the face of opposition from a relator.[27]

Added to the FCA in 1986, first-to-file is employed after the government declines to intervene in or dismiss a *qui tam* action, and a defendant seeks dismissal by pointing to allegations of fraud that it contends are similar to those contained in another pending case.[28] Judicial construction of the rule has far-reaching consequences for the government, relators, and defendants because, as a procedural roadblock, first-to-file stands to impede an entire subset of privately litigated *qui tam* claims.[29]

B. Supreme Court Addresses the Breadth of First-to-File Bar in Carter II

In the context of today's expanded FCA, the Supreme Court's 2015 decision in *Carter II* rejected a restrictive interpretation of the first-to-file rule by

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[26] Engstrom, *supra* note 13, at 1271–72. At the outset of *qui tam* litigation, the government has at least sixty days to evaluate a newly-filed complaint under seal, during which time it can elect to assert its control over a relator's action. 31 U.S.C. § 3730(b)(4). When the government intervenes in a *qui tam* action, it is statutorily obligated to manage its prosecution. *Id.* § 3730(c)(1). The current private prosecution mechanism was added in 1986 to counteract the desuetude of the FCA and to spur DOJ enforcement by encouraging private suits that, if successful, would reduce the government's portion of the recovery. *See* Engstrom, *supra* note 13, at 1273 & n.100 (discussing the purposes of the private prosecution provision as related to the 1986 amendments).

[27] 31 U.S.C. § 3730(c)(2)(A)–(B).

[28] *Id.* § 3730(b)(5), (c)(3), (d)(2); *Gadbois II*, 809 F.3d at 3; *see* S. REP. NO. 99-345, at 25, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5290 (noting that first-to-file was added to the FCA to prevent separate factually identical actions and class actions from being brought through the private prosecution mechanism). Legislative history regarding first-to-file discusses actions based on "identical facts" as barred by the rule. S. REP. NO. 99-345, at 25, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5290. When the Tenth Circuit Court of Appeals in *Grynberg v. Koch Gateway Pipeline Co.* in 2010 looked to the similarity of "material elements" to determine whether an action was related to a prior suit, it explained that courts have never employed a narrow "identical facts" test because the FCA expressly refers to "related" actions. 31 U.S.C. § 3730(b)(5); *Grynberg*, 390 F.3d at 1279. The court further concluded that a narrow test based on identical facts would contravene the objective of first-to-file, reasoning that "[o]nce the government is put on notice of its potential fraud claim, the purpose behind allowing *qui tam* litigation is satisfied." *Grynberg*, 390 F.3d at 1279. Although first-to-file was codified in the FCA in 1986, it had previously been employed by federal courts as a matter of common law derived from the English tradition dating back at least to the Eighteenth Century. *See* United States *ex rel.* Benjamin v. Hendrick, 52 F. Supp. 60, 61 (S.D.N.Y. 1943) (relying on *Blackstone's Commentaries* and stating as settled that a *qui tam* action is barred when it has the same identity as an action already commenced by the government). Blackstone stated a first-to-file analogue as follows: "if any one hath begun a *qui tam* . . . action, no other person can pursue it; and the verdict passed upon the defendant in the first suit is a bar to all others, and conclusive even to the king himself." 3 WILLIAM BLACKSTONE, COMMENTARIES *160.

[29] *See* Recent Case, *False Claims Act: D.C. Circuit Holds That False Claims Act First-to-File Rule Is Nonjurisdictional*, 129 HARV. L. REV. 574, 577 (2015) (noting the prevalence of first-to-file litigation).

giving effect to the rule's plain terms.[30] The Court was presented with the question of whether the first-to-file rule could continue to bar follow-on *qui tam* relators after an underlying "pending" action was dismissed.[31] The Court determined that allowing abandoned FCA suits to foreclose the possibility of government recovery in later related actions was contrary to Congress's intent.[32] Relying on the commonly accepted meaning of the term pending, the Court held that, after a *qui tam* action was dismissed, it could no longer bar related actions.[33] The Court affirmed the Fourth Circuit in holding that a follow-on relator's case should have been dismissed under first-to-file without prejudice, thereby allowing it to be refiled and proceed anew.[34]

The *Carter II* Court noted that its ruling had not resolved lingering interpretive difficulties present in the *qui tam* provisions, and that the ruling could make defendants less likely to settle with the government given the possible increase in follow-on suits.[35] One issue not addressed in *Carter II* was the procedural fate of follow-on *qui tam* actions that are still in progress when a pending action that once barred them is dismissed.[36] The First Circuit addressed that issue for the first time in the wake of *Carter II*.[37]

C. First Circuit Resuscitates Follow-On Qui Tam Action in Gadbois v. PharMerica

In 2010, Robert Gadbois worked as a staff pharmacist in Rhode Island for PharMerica Corporation ("PharMerica").[38] That year, Gadbois commenced a

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[30] *Carter II*, 135 S. Ct. at 1979.

[31] 31 U.S.C. § 3730(b)(5); *Carter II*, 135 S. Ct. at 1978–79.

[32] *Carter II*, 135 S. Ct. at 1979. The Court's statement that the first-to-file rule should not unnecessarily bar follow-on actions has been used to curtail interpretive attempts to increase the breadth of first-to-file. *See* United States *ex rel.* Saldivar v. Fresenius Med. Care Holdings, Inc., 157 F. Supp. 3d 1311, 1326 (N.D. Ga. 2015) (rejecting a broad definition of "pending action"), *rev'd*, 841 F.3d 927 (11th Cir. 2016); Brief in Opposition at 1–2, PharMerica Corp. v. United States *ex rel.* Gadbois, No. 15-1309 (U.S. May 23, 2016), 2016 WL 3014495, at *1–2 (arguing that Congress would not want first-to-file and the FCA's statute of limitations to double-bar potentially valuable *qui tam* claims).

[33] *Carter II*, 135 S. Ct. at 1979. The court referred to a dictionary definition of the term "pending," and concluded that, as used in § 3730(b)(5), the term referred to cases that were still on the docket but—according to common sense—not those that had been dismissed. *Id.*

[34] *Id.*

[35] *Id.*; *see* Rogers v. Ferriter, 796 F.3d 1009, 1015 (9th Cir. 2015) (referencing exposure to continuous *qui tam* suits as a difficulty faced by defendants in light of *Carter II*); *see also Carter II*, 135 S. Ct. at 1979 (noting that claim preclusion may bar actions that are filed after first-to-file no longer applies when an action alleging the same fraud has already been resolved on the merits).

[36] *See Gadbois II*, 809 F.3d at 3–4 (noting that this issue had arisen when a relator's first-filed counterpart was dismissed shortly after *Carter II* was decided).

[37] *Id.*

[38] United States *ex rel.* Gadbois v. PharMerica Corp., No. 10-471, 2014 BL 462369, at *2 (D.R.I. Oct. 3, 2014) (*Gadbois I*). The pharmacy where Gadbois worked was one of a network of approximately ninety-one owned and operated by PharMerica in forty-five states. *Id.* at *1. PharMerica filled

qui tam action against his employer in Rhode Island federal district court, filing a complaint under seal on behalf of himself, the United States, and twenty-two individual states.[39] In his complaint, Gadbois alleged, *inter alia*, that PharMerica had profited from overbilling Medicaid and Medicare Part D for prescription medications, in violation of the FCA.[40]

After the government declined to intervene in Gadbois's action, PharMerica received his unsealed complaint and moved to dismiss for lack of subject matter jurisdiction based on first-to-file.[41] PharMerica argued that Gadbois's action lacked jurisdiction because it was filed while a related action was pending in Wisconsin.[42] The Wisconsin *qui tam* action against PharMerica had been filed by another pharmacist named Jennifer Denk over one year before Gadbois commenced litigation.[43] Gadbois argued that the two actions were not related because he had alleged a scheme involving controlled and non-controlled substances, whereas Denk's allegations involved only controlled substances.[44]

Comparing the two sets of allegations, the district court reasoned that Gadbois had raised a distinction without a difference as to the essential or material facts alleged in the two actions that otherwise described similar fraudulent practices and victims.[45] Accordingly, the court found that Denk's action was the first to alert the government to the essential facts of a PharMerica scheme to overbill Medicare and Medicaid for prescription drugs.[46] Holding that Denk was the first-filer and that Gadbois's action was therefore barred, the district court dismissed his case.[47]

On appeal, the First Circuit held that Gadbois could cure the first-to-file defect in his *qui tam* action by filing a supplemental pleading.[48] In so holding, the court deemed dispositive two intervening events that occurred while Gadbois's appeal was briefed that caused the case to take on a novel procedural posture.[49] First, the Supreme Court had held in *Carter II* that, once dismissed, a case was no longer "pending," meaning that it could no longer bar follow-on

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approximately forty million prescriptions annually between 2007 and 2009. United States *ex rel.* Buth v. PharMerica Corp., No. 9-720, 2014 WL 4355342, at *1 (E.D. Wis. Sept. 3, 2014).

[39] *Gadbois I,* 2014 BL 462369, at *1.

[40] *Id.* at *1–2.

[41] *Id.* at *1–2, *8.

[42] *Id.* at *8–9.

[43] *Id.* at *9.

[44] *Id.*

[45] *Id.* at *9–10.

[46] *Id.* Moreover, the court noted that Denk had been involved in a federal investigation of PharMerica, that her action had been consolidated with another action in Florida, and that it had moved past a motion to dismiss after the United States intervened. *Id.* at *5–6, *9-10.

[47] *Id.* at *10.

[48] *Gadbois II*, 809 F.3d at 6.

[49] *Id.* at 4, 6.

actions through first-to-file.[50] Second, Denk's case was dismissed after the government settled with PharMerica.[51]

The First Circuit decided that Gadbois could proceed after supplementing his pleading under Federal Rule of Civil Procedure 15(d).[52] To reach this conclusion, the First Circuit started with the premise that the first-to-file rule was jurisdictional.[53] It then reasoned that, if the rule had previously rendered Gadbois's action jurisdictionally defective, he ought to be able to cure the defect by supplementing his complaint with new facts.[54] After examining Rule 15(d), the court determined that the Rule could serve an efficient, curative function with regards to certain defects of subject matter jurisdiction, including first-to-file.[55]

According to the First Circuit, PharMerica's proposed procedural route of refiling would have been pointlessly inefficient and based only on an unnecessary adherence to the rule that jurisdiction is set in stone at the time that an original complaint is filed.[56] The court determined that a time-of-filing rule had limited application in the federal question context, and that proceeding through supplementation would spare Gadbois from having to recommence his case.[57]

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[50] 31 U.S.C. § 3730(b)(5); *Carter II*, 135 S. Ct. at 1979; *Gadbois II*, 809 F.3d at 6.

[51] *Gadbois II*, 809 F.3d at 6. PharMerica reached a $31.5 million settlement with the government in Denk's case, of which she received a $4.3 million share. Press Release, Dep't of Justice, Long-Term Care Pharmacy to Pay $31.5 Million to Settle Lawsuit Alleging Violations of Controlled Substances Act and False Claims Act (May 14, 2015), https://www.justice.gov/opa/pr/long-term-care-pharmacy-pay-315-million-settle-lawsuit-alleging-violations-controlled [https://perma.cc/T9GM-QSW8].

[52] *Gadbois II,* 809 F.3d at 6. The court remanded his motion to supplement to the district court. *Id.* at 7–8. Subject to the court's discretion, Rule 15(d) allows for occurrences subsequent to the filing of a complaint to be reflected therein and, by virtue of a 1963 addition to the Rule, it can serve as a means for rectifying errors that barred a complaint from proceeding. FED. R. CIV. P. 15 advisory committee's note to 1963 amendment. The 1963 addition was made in part to remedy the inefficient judicial practice of holding parties to their defective pleadings. *Id.*

[53] *Gadbois II,* 809 F.3d at 3, 6.

[54] *Id.* at 6.

[55] FED. R. CIV. P. 15(d); *Gadbois II,* 809 F.3d at 5–6. In 1976, in *Mathews v. Diaz*, the Supreme Court indicated that a defect of subject matter jurisdiction caused by a failure to file an application for federal benefits could be cured under Rule 15(d). 426 U.S. 67, 75 (1976). The First Circuit determined that *Mathews* and related Courts of Appeals cases illustrated that the time-of-filing rule should not be applied rigidly to dismiss jurisdictionally defective cases in the manner that the 1963 addition to Rule 15(d) was designed to prevent. *Gadbois II,* 809 F.3d at 5 (citing Prasco, LLC v. Medicis Pharm. Corp., 537 F.3d 1329, 1337 (Fed. Cir. 2008); Franks v. Ross, 313 F.3d 184, 198 (4th Cir. 2002)).

[56] *Gadbois II*, 809 F.3d at 5–6. *See generally* Grupo Dataflux v. Atlas Glob. Grp., L.P., 541 U.S. 567, 570–71 (2004) (citing Mollan v. Torrance, 22 U.S. (9 Wheat.) 537, 539 (1824)) (noting that the time-of-filing rule requires the propriety of subject matter jurisdiction to be determined based on facts that existed when an action was filed).

[57] *Gadbois II*, 809 F.3d at 5–6. In 2004, in *Grupo Dataflux v. Atlas Global Group, L.P.*, the Supreme Court squarely revisited the traditional time-of-filing rule. 541 U.S. at 574–75. The Court concluded that exceptions to the rule would encourage dismissed parties to engage in litigation over the jurisdictional dismissal itself, as opposed to proceeding with new actions. *Id.* at 582.

II. Circuits in Conflict Over the Procedural Implications of the FCA's First-to-File Rule

The FCA does not directly address the fate of an action that is still on the docket when a first-filed counterpart has been dismissed, ostensibly lifting the first-to-file bar.[58] That issue raises the question of whether a barred follow-on action must forever be defined as a defective "related action" for the purposes of first-to-file, even following the dismissal of the first-filed case that was initially a disqualifier.[59] The U.S. Court of Appeals for the First Circuit's 2015 decision in *United States ex rel. Gadbois v. PharMerica Corp.* ("*Gadbois II*") did not directly address that definitional question when it allowed a relator to proceed with the same action that had once been barred by first-to-file, concluding that the rule's jurisdictional bar could be lifted by way of a supplemental pleading.[60] Section A of this Part briefly examines the U.S. Court of Appeals for the D.C. Circuit's 2015 decision in *United States ex rel. Heath v. AT&T, Inc.* that concluded that the first-to-file rule is nonjurisdictional.[61] Section B of this Part details the U.S. Court of Appeals for the Seventh Circuit's 2010 decision in *United States ex rel. Chovanec v. Apria Healthcare Group, Inc.* ("*Chovanec II*"), in which the court concluded that a related action is always impermissible under first-to-file and must be refiled to proceed.[62]

A. D.C. Circuit: First-to-File Is Nonjurisdictional

In 2015, in *Gadbois II*, the First Circuit articulated the generally accepted view of the first-to-file rule as jurisdictional in nature.[63] Indeed, the court's inquiry in *Gadbois II* dealt primarily with the question of whether a *qui tam* action that once lacked subject matter jurisdiction under first-to-file could acquire jurisdiction and proceed.[64] The D.C. Circuit's prior 2015 decision in

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[58] False Claims Act, 31 U.S.C. § 3730(b)(5) (2012); *see* United States v. Cephalon, Inc., 159 F. Supp. 3d 550, 558 (E.D. Pa. 2016) (noting that the Supreme Court's interpretation of first-to-file in *Carter II* did not resolve this issue).

[59] 31 U.S.C. § 3730(b)(5); *see* United States *ex rel.* Chovanec v. Apria Healthcare Grp. Inc., 606 F.3d 361, 362 (7th Cir. 2010) (*Chovanec II*) (addressing this question).

[60] *See* United States *ex rel.* Gadbois v. PharMerica Corp., 809 F.3d 1, 4–5 (1st Cir. 2015) (*Gadbois II*) (alluding to this issue of statutory interpretation but not addressing it in detail), *cert. denied*, 136 S. Ct. 2517 (2016).

[61] *See infra* notes 63–68 and accompanying text.

[62] *See infra* notes 69–75 and accompanying text.

[63] *See Gadbois II,* 809 F.3d at 6; Recent Case, *supra* note 29, at 575 n.23 (noting that courts holding the consensus view of the first-to-file rule as jurisdictional in nature accepted this characterization of the rule without probing it); *see, e.g.*, United States *ex rel.* Ven-A-Care of the Fla. Keys, Inc. v. Baxter Healthcare Corp., 772 F.3d 932, 936 (1st Cir. 2014) (stating as settled that the first-to-file rule is jurisdictional).

[64] *Gadbois II,* 809 F.3d at 5–6.

Heath was the first to consider, and ultimately attempt to refute, the characterization of the first-to-file rule as jurisdictional.[65]

The *Heath* court held that application of the first-to-file rule indicates that a relator has failed to state a claim, not that a court lacks jurisdiction to hear the relator's case.[66] In so holding, the court noted the Supreme Court's unwillingness to characterize rules as jurisdictional when Congress had not explicitly labeled them as such, given the ramifications for courts and litigants.[67] The *Heath* court further noted that first-to-file referred only to when a case could be brought, unlike other FCA restrictions that spoke in explicitly jurisdictional terms.[68]

B. Seventh Circuit: Actions Barred by First-to-File Cannot Be Stayed

Without addressing whether first-to-file was jurisdictional, the Seventh Circuit in *Chovanec II* held that a follow-on *qui tam* action could not be stayed pending the dismissal of a first-filed case, according to the plain terms of the rule.[69] In its 2005 *United States ex rel. Chovanec v. Apria Healthcare Group Inc.* decision, the District Court of the Northern District of Illinois initially dismissed the relator's case after the court found that it was related to two

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[65] 791 F.3d 112, 120–21 (D.C. Cir. 2015), *cert. denied*, AT&T, Inc. v. United States *ex rel.* Heath, 136 S. Ct. 2505 (2016).

[66] *Id.* at 121. After concluding that first-to-file was nonjurisdictional, the court gave the rule a default characterization as bearing on the statement of a claim under Federal Rule of Civil Procedure 12(b)(6). *Id.* at 120–21. The U.S. Court of Appeals for the Tenth Circuit in *Grynberg v. Koch Gateway Pipeline Co.* provided an explanation for this characterization of first-to-file. 390 F.3d 1276, 1278 n.1 (10th Cir. 2004). In choosing to dismiss a follow-on *qui tam* claim under Rule 12(b)(6), that court eschewed the characterization of a motion invoking the first-to-file bar as one for summary judgment under Rule 56 or, alternatively, as one for jurisdictional dismissal under Rule 12(b)(1). *Id.* The court concluded that Rule 12(b)(1) was improper after determining that first-to-file operated to bar a claim based on lack of jurisdiction and lack of merit. *Id.* The court concluded that Rule 56 was improper because first-to-file required dismissal based purely on the allegations initially set forth in a *qui tam* claim. *Id.*

[67] *Heath*, 791 F.3d at 119–20; *see, e.g.*, United States v. Kwai Fun Wong, 135 S. Ct. 1625, 1632 (2015) (declining to construe a procedural requirement in a statute as jurisdictional when there was no clear congressional intent to that effect); Sebelius v. Auburn Reg'l Med. Ctr., 133 S. Ct. 817, 824 (2013) (same); Gonzalez v. Thaler, 565 U.S. 134, 140 (2012) (same); Arbaugh v. Y & H Corp., 546 U.S. 500, 514–15 (2006) (same). Chief among these ramifications is the obligation on the part of the court to dismiss a claim whenever a jurisdictional defect is discovered. Recent Case, *supra* note 29, at 577–78.

[68] *Heath*, 791 F.3d at 120–21; *see also* Rockwell Int'l Corp. v. United States, 549 U.S. 457, 467–68 (2007) (concluding that the FCA's pre-2010 amendment public disclosure bar was jurisdictional because it expressly deprived courts of jurisdiction). *Compare* 31 U.S.C. § 3730(b)(5) ("When a person brings an action under this subsection, no person other than the government may intervene or bring a related action based on the facts underlying the pending action."), *with id.* § 3730(e)(1) (employing jurisdictional language to create a bar against certain actions by members of the armed services), *and id.* § 3730(e)(2)(A) (using the language "no court shall have jurisdiction" when creating a bar to actions against certain government and judicial officials when the government has knowledge of the information upon which those actions are based).

[69] *Chovanec II*, 606 F.3d at 362–63.

pending cases.[70] Following the combined settlement of both earlier-filed cases shortly thereafter, the relator unsuccessfully moved for reconsideration of the dismissal on grounds that the settlement had lifted the first-to-file bar.[71]

On appeal, the Seventh Circuit found that bringing a first-filed case was a "condition precedent" to proceeding with *qui tam* litigation because of the rule's unambiguous prohibition on "bring[ing] a related action" during the pendency of a related predecessor.[72] The court reasoned that any follow-on action was perpetually defective because it had not satisfied this condition.[73] The court further indicated that permitting follow-on relators to wait on the docket would frustrate the rule's goal of impeding duplicative cases.[74] Accordingly, the court construed first-to-file as a rule designed to create a one-person entryway for private relators to sue, without room for follow-on relators to stand by.[75]

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[70] *Id.* at 362; United States *ex rel.* Chovanec v. Apria Healthcare Grp. Inc., No. 04-4543, at 4–5 (N.D. Ill. Sept. 26, 2005) (*Chovanec I*).

[71] *Chovanec II*, 606 F.3d at 362–63; Order on Motion for Reconsideration at 1–2, *Chovanec I*, No. 04–4543 (N.D. Ill. Jan. 24, 2006).

[72] *Chovanec II*, 606 F.3d at 362–63 (citing 31 U.S.C. § 3730(b)(5)). In 1989, in *Hallstrom v. Tillamook County*, the Supreme Court defined a similar bar to lawsuits in an environmental statute's administrative exhaustion requirement. 493 U.S. 20, 32–33 (1989). Referencing language of the statute stating "[n]o action may be commenced," as well as Federal Rule of Civil Procedure 3 that defines an action as beginning with a complaint, the Court reasoned that permitting a stay would plainly contravene the intent of the statutory bar. FED. R. CIV. P. 3; *Hallstrom*, 493 U.S. at 25–26. Moreover, *Hallstrom* referred to the complaint as barred in perpetuity by virtue of the fact that it had not met a "condition precedent" contained in the statute. 493 U.S. at 25–26. The Court determined that the question whether the administrative exhaustion defect at issue was jurisdictional or nonjurisdictional raised a distinction without a difference to its analysis after it concluded that the mandatory requirement barred a defective action from ever proceeding. *Id.* at 30–31. Accordingly, the Court declined to define the requirement as jurisdictional or nonjurisdictional. *Id.* The Seventh Circuit in *Chovanec II* relied directly on *Hallstrom*'s administrative exhaustion analysis, whereas the District Court of the Eastern District of Virginia in *United States ex rel. Soodavar v. Unisys Corp.* distinguished first-to-file's purpose from that of an administrative exhaustion requirement. *Hallstrom*, 493 U.S. at 25–26; *Chovanec II*, 606 F.3d at 362–63; United States *ex rel.* Soodavar v. Unisys Corp., 178 F. Supp. 3d 358, 373 (E.D. Va. 2016). The Eastern District of Virginia concluded that a rule allowing a plaintiff to overcome an administrative exhaustion bar did not suggest by analogy that a relator should be allowed to overcome the first-to-file bar. *Unisys Corp.*, 178 F. Supp. 3d at 373. The court reasoned that, whereas exhaustion bars were intended to further the efficient resolution of suits—a purpose that might be served by allowing a once-barred case to proceed—the first-to-file bar could not be similarly bypassed because the rule was specifically intended to block duplicative suits. *Id.* at 373–74.

[73] *Chovanec II*, 606 F.3d at 362. Following *Heath*, the District Court of the District of Columbia in *United States ex rel. Shea v. Verizon Communications, Inc.* proceeded under the premise that the first-to-file rule was nonjurisdictional and expanded on *Chovanec II* when it determined that a related action could not proceed, irrespective of whether pleadings within that action had been updated with new facts, because the pleadings would still be part of a prohibited action. 160 F. Supp. 3d 16, 28–30 (D.D.C. 2015).

[74] *See Chovanec II*, 606 F.3d at 362 (noting the potential for endless cascading of follow-on cases).

[75] *Id.* The Fourth and Tenth Circuits similarly concluded that an action, once barred by first-to-file, cannot proceed until it is refiled. United States *ex rel*. Carter v. Halliburton Co., 710 F.3d 171,

III. The False Claims Act's First-to-File Bar Is a Nonjurisdictional Defect That Cannot Be Cured

The U.S. Court of Appeals for the First Circuit's 2015 decision in *United States ex rel. Gadbois v. PharMerica Corp.* ("*Gadbois II*") erroneously held that the FCA's first-to-file rule imposed a jurisdictional bar that could be lifted through supplemental pleading.[76] First, this Part argues that the text of first-to-file and the structure of the *qui tam* provisions demonstrate that the rule is nonjurisdictional.[77] Next, this Part argues that the text of first-to-file plainly creates a perpetual bar on an action that can only be lifted by way of refiling.[78] Finally, this Part argues that a refiling requirement best serves the FCA's purpose of increasing government recoveries.[79]

The U.S. Court of Appeals for the D.C. Circuit correctly interpreted first-to-file in its 2015 *United States ex rel. Heath v. AT & T, Inc.* decision when it concluded that suits barred by the rule fail to state a claim, as opposed to lacking subject matter jurisdiction.[80] Containing no reference to jurisdiction, the

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183 (4th Cir. 2013) (*Carter I*), *aff'd in part, rev'd in part, and remanded* Kellogg Brown & Root Servs., Inc. v. United States *ex rel.* Carter, 135 S. Ct. 1970 (2015) (*Carter II*); *Grynberg*, 390 F.3d at 1278–79. Both courts reached this conclusion after determining—without detailed analysis—that the first-to-file inquiry is confined to the facts in existence when a related action was filed. *Carter I*, 710 F.3d at 183; *Grynberg*, 390 F.3d at 1278–79.

[76] *See* 809 F.3d 1, 6–7, 6 n.2 (1st Cir. 2015) (*Gadbois II*) (declining to examine the jurisdictional or plain language issues), *cert. denied*, 136 S. Ct. 2517 (2016).

[77] *See* United States *ex rel.* Heath v. AT & T, Inc., 791 F.3d 112, 119–21 (D.C. Cir. 2015) (concluding that first-to-file is nonjurisdictional based on terms of the rule and its context within the FCA), *cert. denied*, AT&T, Inc. v. United States *ex rel.* Heath, 136 S. Ct. 2505 (2016); Recent Case, *supra* note 29, at 576 (indicating *Heath*'s logical consistency and coherence to recent Supreme Court precedent regarding overuse of jurisdictional characterizations); *infra* notes 80–83 and accompanying text.

[78] *See* United States *ex rel.* Chovanec v. Apria Healthcare Grp. Inc., 606 F.3d 361, 362–63 (7th Cir. 2010) (*Chovanec II*) (concluding based on the terms of first-to-file that bringing an action while no related action is pending is a pre-condition for relators to proceed with suits); United States *ex rel.* Soodavar v. Unisys Corp., 178 F. Supp. 3d 358, 373 (E.D. Va. 2016) (concluding that the language of first-to-file as well as the congressional purpose behind the rule mandate the dismissal of a related action); United States *ex rel.* Shea v. Verizon Commc'ns, Inc., 160 F. Supp. 3d 16, 29–30 (D.D.C. 2015) (finding that a follow-on action will always have been brought while a related action was pending such that later-filed supplemental pleadings cannot remove the first-to-file bar); *infra* notes 84–92 and accompanying text.

[79] *See Carter II*, 135 S. Ct. at 1979 (noting defendant disinclination to settle when faced with the possibility of follow-on *qui tam* actions); *Chovanec II*, 606 F.3d at 362, 364 (noting that staying actions pending the dismissal of their first-filed counterparts would controvert the purpose of the rule by incentivizing relators to ceaselessly file follow-on actions); Elameto, *supra* note 19, at 826 (noting the historically low success rate of *qui tam* cases in which the government did not intervene); *infra* notes 93–97 and accompanying text.

[80] *See* 791 F.3d at 120–21. As a means of avoiding the traditional time-of-filing rule that applies to jurisdictional requirements, Gadbois argued that under *Heath*, the first-to-file rule was nonjurisdictional. *Gadbois II,* 809 F.3d at 6 n.2. In response, the First Circuit noted the holding in *Heath* but explicitly did not reach the question of whether first-to-file was jurisdictional, although it treated the rule as such. *Id.* In 2015, in *Kellogg Brown & Root Services, Inc. v. United States ex rel. Carter* ("*Carter II*"), the Supreme Court also did not reach the jurisdictional question, but the manner in

text of the rule supports the D.C. Circuit's decision in *Heath* rather than the First Circuit's contrary assumption in *Gadbois II*.[81] Additionally, the FCA contains restrictions other than first-to-file that speak in jurisdictional terms, indicating that Congress made its intent to create jurisdictional rules explicit in the FCA.[82] Lastly, this characterization of first-to-file follows the Supreme Court's repeated directives against treating statutory rules as jurisdictional absent unambiguous congressional intent.[83]

Proceeding under the premise that first-to-file is nonjurisdictional, the statutory restriction that the rule articulates determines whether a follow-on relator is eligible to proceed by way of supplementation.[84] Under the plain language of first-to-file, a relator is barred from "bring[ing] a related action."[85] The fact of the related action having been brought constitutes a violation of the

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which the Court raised first-to-file and the fact that it never described the rule in jurisdictional terms suggest that it did not treat first-to-file as jurisdictional. *See* 135 S. Ct. at 1978–79 (referring to the first-to-file bar without using jurisdictional language or implying a court's lack of power to hear a barred case); *Heath*, 791 F.3d at 121 n.4 (noting that *Carter II* addressed first-to-file after addressing a separate nonjurisdictional issue).

[81] False Claims Act, 31 U.S.C. § 3730(b)(5) (2012). *Compare Gadbois II,* 809 F.3d at 6–7, 6 n.2 (deeming first-to-file's jurisdictional or nonjurisdictional character irrelevant to the court's disposition after holding that a relator cured a jurisdictional defect through supplementation and implying that relator thereby cured any nonjurisdictional defect), *with Heath*, 791 F.3d at 120, 123 (examining the text of first-to-file in the context of the FCA and reaching the conclusion that the rule was nonjurisdictional although this conclusion was not necessary to the court's disposition that first-to-file did not apply because a putative-related action was materially distinct from its earlier-filed counterpart).

[82] *Heath*, 791 F.3d at 120–21; *see* 31 U.S.C. § 3730(e)(2)(A) (using jurisdictional terms).

[83] *See, e.g.*, United States v. Kwai Fun Wong, 135 S. Ct. 1625, 1638 (2015) (holding that a statute of limitations bar was nonjurisdictional where the relevant statutory provision used the language "shall be forever barred"); Sebelius v. Auburn Reg'l Med. Ctr., 133 S. Ct. 817, 828–29 (2013) (holding that a statutory deadline for administrative appeals was nonjurisdictional); Gonzalez v. Thaler, 565 U.S. 134, 154 (2012) (holding that a federal habeas appeal requirement was compulsory in nature but nonjurisdictional); Arbaugh v. Y&H Corp., 546 U.S. 500, 514–16 (2006) (holding that a Title VII requirement for threshold numbers of employees was nonjurisdictional after comparing it to explicitly jurisdictional amount-in-controversy and diversity-of-citizenship rules); *see also* Recent Case, *supra* note 29, at 579–80 (indicating that a nonjurisdictional first-to-file rule limits opportunities for defendants to dismiss *qui tam* suits, may allow for equitable relief, and could generally benefit relators by limiting first-to-file's application).

[84] *See Chovanec II*, 606 F.3d at 362 (beginning analysis into question of whether action must be dismissed under first-to-file by addressing plain language of the rule); *see also* Hallstrom v. Tillamook Cty., 493 U.S. 20, 25, 31 (1989) (noting established principle that interpretation of a statute properly begins with its plain terms and then adhering to the conventional practice of dismissing actions that are plainly barred by statute); Scott Dodson, *Mandatory Rules*, 61 STAN. L. REV. 1, 6, 9 (2008) (noting that the terms of nonjurisdictional rules can make them operate with the force of jurisdictional rules in many respects, such as by foreclosing equitable exceptions).

[85] 31 U.S.C. § 3730(b)(5).

rule.[86] Accordingly, a related action is forever prohibited, because it will always have been brought impermissibly.[87]

When the First Circuit in *Gadbois II* held that a once-barred relator could proceed by way of supplementation, the court glossed over first-to-file's terms and implicitly treated the rule as bearing on pleadings as opposed to actions.[88] By definition, the term "action" refers to an entire case, of which a pleading is a part.[89] If first-to-file barred a related pleading within an action, then supplementation of newly-pleaded facts could serve to cure the defective pleading and allow the action to proceed.[90] First-to-file, however, plainly places a bar on actions.[91] The First Circuit's holding failed to acknowledge that a relator cannot overcome first-to-file by supplementing the pleadings within an action that is prohibited *in toto* for not having satisfied the rule.[92]

Whereas the First Circuit's approach streamlined litigation for follow-on relators, a refiling requirement promotes the resolution of cases that are likely to be most valuable to the government—the plaintiff in *qui tam* litigation.[93] When the government does not intervene in follow-on *qui tam* actions—thereby subjecting them to first-to-file—settlements are far less likely.[94] More-

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[86] *Chovanec II*, 606 F.3d at 362; *Shea*, 160 F. Supp. 3d at 30.

[87] *Chovanec II*, 606 F.3d at 362; *Shea*, 160 F. Supp. 3d at 30; *see* Ciralsky v. CIA, 355 F.3d 661, 666 (D.C. Cir. 2004) (noting that, by definition, the dismissal of an action is final whereas the dismissal of a complaint can be remedied by way of supplementation or amendment).

[88] *See Gadbois II,* 809 F.3d at 5–6 (treating first-to-file as a rule that renders pleadings defective without addressing statutory language or explaining the mechanism through which a supplemented pleading can overcome the rule's prohibition on actions); *Shea*, 160 F. Supp. 3d at 30 (noting that post-filing changes made to pleadings are not capable of addressing the barrier that first-to-file erects against entire actions).

[89] *See* FED. R. CIV. P. 3 (providing that actions begin with complaints); *Shea*, 160 F. Supp. 3d at 30 (explaining that changes to complaints occur within the context of an action as it proceeds through litigation whereas a prohibition on an action works to stop litigation altogether).

[90] *See* FED. R. CIV. P. 15(d) (providing that supplementation can incorporate new facts to cure defective pleadings); FED. R. CIV. P. 15 advisory committee's note to 1963 amendment (noting that Rule 15(d) works to promote fairness and efficiency by preventing parties from being held to their original, defective pleadings). *But see* Harris v. Garner, 216 F.3d 970, 983 (11th Cir. 2000) (noting that Rule 15(d) should not allow a pleading defect to be cured if doing so would contravene the purpose of a statutory restriction).

[91] 31 U.S.C. § 3730(b)(5); *Chovanec II*, 606 F.3d at 362; *Shea*, 160 F. Supp. 3d at 30.

[92] 31 U.S.C. § 3730(b)(5); *Chovanec II*, 606 F.3d at 362; *Shea*, 160 F. Supp. 3d at 30; *see Gadbois II,* 809 F.3d at 6 (holding that a first-to-file defect can be cured by supplementing facts in pleadings).

[93] *See* Engstrom, *supra* note 13, at 1274 (noting that the *qui tam* provisions specifically aim to limit duplicative cases with no new information to offer to the government); Alexion, *supra* note 8, at 405–06 (explaining that rewards for relators under *qui tam* are meant to hinge on the revelation of information that uncovers new instances of fraud).

[94] *See* 31 U.S.C. § 3730(b)(5), (c)(3) (allowing the government to bring related action and allowing a private party to proceed if the government declines to intervene, at which point the first-to-file bar applies); FRAUD STATISTICS, *supra* note 21 (collecting data from 1987 through 2015 showing that total recoveries from government-intervention actions are roughly fifteen times greater than those from private actions, although private recoveries saw a large, unprecedented spike in 2015); David

over, incentivizing these follow-on cases to stay on the docket has the potential to reduce government recoveries, hamper DOJ prosecutions, and make defendants less willing to settle first-filed cases out of lack of finality concerns.[95] In contrast, a mandatory first-to-file dismissal would clear the docket of follow-on suits while a first-filed case is litigated and then would give the government a second opportunity to intervene upon refiling.[96] Finally, the requirement incentivizes prompt reporting on fraud because it increases the putative value of a first-filed claim.[97]

Freeman Engstrom, *Public Regulation of Private Enforcement: Empirical Analysis of DOJ Oversight of Qui Tam Litigation Under the False Claims Act*, 107 NW. U. L. REV. 1689, 1719–20 (2013) (collecting data from 1986 through 2011 showing that recoveries resulted in ninety percent of government-intervention cases but the inverse was true of private *qui tam* actions). Government-intervention cases produced ninety-seven percent of *qui tam* recoveries from 1987 through 2010. Elameto, *supra* note 19, at 826. During that time, the government intervened in roughly one-fifth of all *qui tam* cases, with a five percent dismissal rate, as compared to an eighty-five percent dismissal rate for *qui tam* suits in which the government declined to intervene. *Id.*

[95] *See Chovanec II*, 606 F.3d at 362, 364 (determining that allowing a stay pending a first-to-file dismissal creates the potential for follow-on relators to queue up endlessly on the docket, and noting potential for duplicative suits to siphon government recoveries to relators); H.R. REP. NO. 111-97, at 28 (2009) (arguing that private *qui tam* actions generally hinder DOJ prosecution efforts in light the fact that the greatly-increased volume of private *qui tam* actions had only accounted for three percent of total government recoveries between 1986 and 2009); Petition for a Writ of Certiorari at 4, 18, PharMerica Corp. v. United States *ex rel.* Gadbois, No. 15-1309 (U.S. Apr. 22, 2016) (noting lowered settlement prospects when follow-on relators are able to re-litigate issues resolved in first-filed cases and capture crucial time in allegations that would be barred by the statute of limitations upon refiling); Beck, *supra* note 14, at 562 n.103 (discussing how the DOJ generally supported the 1986 amendments to the FCA and therefore did not publicly take issue with the expanded *qui tam* provisions that it viewed as potentially disruptive to its prosecution efforts); *cf. Carter II*, 135 S. Ct. at 1979 (discussing reluctance of defendants to settle a first-filed case when facing the prospect of later having to litigate the same allegations of fraud). *See generally* Elameto *supra* note 19, at 826–27 (discussing *qui tam*'s potential to hinder government contracting and waste judicial resources); Christina Orsini Broderick, Note, *Qui Tam Provisions and the Public Interest: An Empirical Analysis*, 107 COLUM. L. REV. 949, 965 (2007) (finding that low government intervention rates may signal that many private *qui tam* suits are frivolous).

[96] *See* 31 U.S.C. § 3730(a), (b)(2)(3), (c)(3) (requiring that DOJ investigate FCA violations, and setting a sixty-day period—subject to extension—in which the government may intervene); *Chovanec II*, 606 F.3d at 362–63 (describing procedural implications of dismissal and refiling).

[97] *Cf.* United States *ex rel.* LaCorte v. SmithKline Beecham Clinical Labs., Inc., 149 F.3d 227, 234 (3d Cir. 1998) (concluding that a broader definition of relatedness under first-to-file would block duplicative suits and incentivize swift reporting by relators because of the diminished prospects for follow-on actions and the corresponding increase in value of a first-filed case); United States *ex rel.* Batiste v. SLM Corp., 740 F. Supp. 2d 98, 105 n.3 (D.D.C. 2010) (noting first-to-file's purpose of encouraging relators to expeditiously notify the government of fraud by precluding *qui tam* awards for latecomers), *aff'd*, 659 F.3d 1204 (D.C. Cir. 2011). Although a follow-on case could be barred by the statute of limitations because of the delay before refiling, a three-year tolling provision in the FCA helps to prevent this outcome. 31 U.S.C. § 3731(b); *see* S. REP. NO. 99-345, at 15, *as reprinted in* 1986 U.S.C.C.A.N. 5266, 5280 (discussing tolling provision's purpose of allowing FCA actions to proceed when fraud had been intentionally concealed from the government). If the government elects to intervene at any point in a private *qui tam* action, the FCA provides that any amended pleadings it files are to relate back to the original complaint, thereby insulating government intervention suits from the statute of limitations. 31 U.S.C. § 3731(c).

CONCLUSION

Once a *qui tam* action is barred by the FCA's first-to-file rule, the plain terms of the rule prohibit that action from proceeding. In 2015, in *United States ex rel. Gadbois v. PharMerica Corp.*, the U.S. Court of Appeals for the First Circuit misconstrued first-to-file when it held that a follow-on relator could proceed by way of supplementation after a first-filed case had been dismissed. A statutorily-grounded approach incorporates the D.C. Circuit's characterization of first-to-file as nonjurisdictional and the Seventh Circuit's refiling requirement. This approach best effectuates the FCA's purpose because it limits duplicative suits and promotes the resolution of cases likely to yield government recoveries.

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