

## LINKING RULE 9(b) PLEADING AND THE FIRST-TO-FILE RULE TO ADVANCE THE GOALS OF THE FALSE CLAIMS ACT

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**ABSTRACT**—Under the False Claims Act, do whistleblowers need details from invoice and billing documents to survive a motion to dismiss? And if a first whistleblower’s complaint does not survive the pleading stage, may a second whistleblower make a similar claim to “blow the whistle” on the same fraud that the first whistleblower sought to expose? This Note outlines the contours of these two separate but related issues, urges consideration of the issues in tandem, and argues for an optimal combination of standards to both protect legitimate whistleblower claims and deter frivolous lawsuits.

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INTRODUCTION

The False Claims Act<sup>1</sup> (FCA) allows a private person (known as a qui tam relator) to bring an action on behalf of the federal government.<sup>2</sup> Most commonly, relators bring claims against persons who “knowingly” present false claims for government payment,<sup>3</sup> such as government contractors who seek payment for work they did not actually do, or against persons who “knowingly” make false statements “material to” a false claim against the

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<sup>1</sup> 31 U.S.C. §§ 3729–3733 (2012).

<sup>2</sup> *See id.* § 3730(b).

<sup>3</sup> *See id.* § 3729(a)(1)(A) (making any person liable who “knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval”). This section of the FCA was renumbered and amended in 2009, and is referred to in earlier cases as “subsection (a)(1).” Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 4(a)(1), 123 Stat. 1617, 1621–22.

government,<sup>4</sup> such as employees who create fraudulent records of services that were never actually delivered. When successful, these “whistleblower claims” allow the relator to recover a portion of the proceeds of the action subject to requirements of the statute.<sup>5</sup>

The FCA has been used to combat fraud against the government in a variety of industries from health care<sup>6</sup> to mortgage lending<sup>7</sup> to environmental services and energy production.<sup>8</sup> Whistleblower claims under the FCA have increased in recent years, with strengthened whistleblower protections and incentives, coupled with aggressive government enforcement actions.<sup>9</sup> Minimizing government fraud and waste has been a priority for recent administrations,<sup>10</sup> which have overseen an unprecedented number of FCA claims and successful prosecutions with record-breaking recovery sums.<sup>11</sup> The proliferation of such cases has produced creative arguments about what standards apply at each stage of FCA litigation, and with little guidance from the Supreme Court, the judicial landscape continues to evolve in this arena.

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<sup>4</sup> See 31 U.S.C. § 3729(a)(1)(B) (making any person liable who “knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim”). This section of the FCA was renumbered and amended in 2009, and is referred to in earlier cases as “subsection (a)(2).” Fraud Enforcement and Recovery Act of 2009 § 4(a)(1).

<sup>5</sup> 31 U.S.C. § 3730(d) (offering whistleblower bounties of as much as 30% of the recovery and calibrating the exact amounts based on significance of information and whether government intervenes).

<sup>6</sup> See Press Release, U.S. Dep’t of Justice, GlaxoSmithKline to Plead Guilty and Pay \$3 Billion to Resolve Fraud Allegations and Failure to Report Safety Data: Largest Health Care Fraud Settlement in U.S. History (July 2, 2012) (*available at* <http://www.justice.gov/opa/pr/2012/July/12-civ-842.html>); Press Release, U.S. Dep’t of Justice, Maxim Healthcare Services Charged with Fraud, Agrees to Pay Approximately \$150 Million, Enact Reforms After False Billings Revealed as Common Practice (Sept. 12, 2011) (*available at* <http://www.justice.gov/opa/pr/2011/September/11-civ-1169.html>).

<sup>7</sup> See Press Release, U.S. Attorney’s Office, E. Dist. of N.Y., \$1 Billion to be Paid by the Bank of America to the United States: Largest False Claims Act Settlement Relating to Mortgage Fraud (Feb. 9, 2012) (*available at* <http://www.justice.gov/usao/nye/pr/2012/2012feb09.html>).

<sup>8</sup> See Press Release, U.S. Dep’t of Justice, BP Amoco to Pay U.S. \$20.5 Million to Resolve Allegations of Royalty Underpayments from Indian and Federal Lands (Sept. 16, 2011) (*available at* <http://www.justice.gov/opa/pr/2011/September/11-civ-1201.html>).

<sup>9</sup> See Civil Div., U.S. Dep’t of Justice, *Fraud Statistics—Overview: October 1, 1987 to September 30, 2013* (Dec. 23, 2013), [http://www.justice.gov/civil/docs\\_forms/C-FRAUDS\\_FCA\\_Statistics.pdf](http://www.justice.gov/civil/docs_forms/C-FRAUDS_FCA_Statistics.pdf) [hereinafter *Fraud Statistics*] (documenting the number of qui tam claims pursued since the 1986 amendments to the FCA, and the amount recovered in settlements, judgments, and relator share awards); Press Release, U.S. Dep’t of Justice, Justice Department Celebrates 25th Anniversary of False Claims Act Amendments of 1986 (Jan. 31, 2012) (*available at* <http://www.justice.gov/opa/pr/2012/January/12-ag-142.html>) (noting that the 1986 amendments “increase[d] the incentives for whistleblowers to come forward with allegations of fraud”).

<sup>10</sup> See Delivering an Efficient, Effective, and Accountable Government, Exec. Order No. 13,576, 76 Fed. Reg. 35,297 (June 13, 2011).

<sup>11</sup> See *Fraud Statistics*, *supra* note 9.

To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6),<sup>12</sup> FCA claims, which by definition allege fraud, must satisfy Rule 9(b)'s heightened pleading standard. Rule 9(b) requires that: "In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally."<sup>13</sup> The federal courts of appeals have been inconsistent in setting forth what a relator must allege in FCA qui tam claims to satisfy Rule 9(b), and the Supreme Court has thus far declined to resolve this issue.<sup>14</sup> Some circuits have embraced a relatively permissive 9(b) standard and have not required relators to allege details of an actually submitted false claim, such as the date and billed amount from a fraudulent invoice.<sup>15</sup> Other circuits have set a higher bar, requiring relators to allege very specific false claims to satisfy 9(b).<sup>16</sup>

Relatedly, the circuit courts have recently split over the issue of whether a second FCA qui tam relator is barred by the FCA's "first-to-file" rule<sup>17</sup> from making essentially the same qui tam claim, if a prior claimant failed to plead enough specific information to satisfy 9(b).<sup>18</sup> Some circuits have required an initial claimant to satisfy 9(b) in order to use the first-to-file rule to preclude subsequent claims.<sup>19</sup> Other circuits have determined that a first claim does not need to survive a 9(b) challenge to apply the first-to-file rule in preventing similar, later-filed claims.<sup>20</sup>

Uniform standards in these two evolving issues could significantly alter the success rate of whistleblower claims under the FCA. The two related issues should be considered together to ensure optimal outcomes from the FCA litigation process. As this Note shows, a more permissive 9(b) standard is necessary to protect legitimate whistleblowers who have intimate knowledge of fraud but who do not have access to a defendant's

<sup>12</sup> FED. R. CIV. P. 12(b)(6) (allowing motions to dismiss claims for "failure to state a claim upon which relief can be granted").

<sup>13</sup> *Id.* 9(b).

<sup>14</sup> Compare *United States ex rel. Duxbury v. Ortho Biotech Prods., L.P.*, 579 F.3d 13, 29–30 (1st Cir. 2009) (not requiring relators to allege details of an actually submitted false claim), *cert. denied*, 130 S. Ct. 3454 (2010), with *Hopper v. Solvay Pharm., Inc.*, 588 F.3d 1318, 1327 (11th Cir. 2009) (requiring relators to allege very specific false claims to satisfy 9(b)), *cert. denied*, 130 S. Ct. 3465 (2010).

<sup>15</sup> See *Duxbury*, 579 F.3d at 29–30.

<sup>16</sup> See *Hopper*, 588 F.3d at 1327.

<sup>17</sup> See 31 U.S.C. § 3730(b)(5) (2012) ("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.").

<sup>18</sup> Compare *Walburn v. Lockheed Martin Corp.*, 431 F.3d 966, 972 (6th Cir. 2005) (requiring initial claimant to satisfy 9(b) in order to use the first-to-file rule), with *United States ex rel. Batiste v. SLM Corp.*, 659 F.3d 1204, 1210 (D.C. Cir. 2011) (not requiring first claim to survive a 9(b) challenge to apply the first-to-file rule).

<sup>19</sup> See, e.g., *Walburn*, 431 F.3d at 972.

<sup>20</sup> See, e.g., *Batiste*, 659 F.3d at 1210.

actual bills or invoices. To properly fulfill the purpose of both 9(b) and the first-to-file rule, such a permissive 9(b) standard must be linked to the first-to-file rule. Under this type of linked system, the more claims that are allowed to survive 9(b), the bigger the pool of claims defendants can draw from to bar later-filed claims. By requiring a claim to satisfy a permissive 9(b) standard before it can be used to bar later claims, courts will be able to proportionally calibrate the relative advantages of defendants and whistleblowers in the FCA context.

Part I of this Note outlines the positions circuit courts have taken on the level of specificity required for whistleblowers to survive 9(b)'s heightened pleading requirements. Part II details the divergence in circuit courts over the issue of whether a complaint that does not satisfy 9(b) can nevertheless be used to prevent related later-filed claims. Part III analyzes four combinations of the positions the circuit courts have taken on the two issues, and discerns the optimal balance of policies to best fulfill the purposes of the FCA.

#### I. WHAT WHISTLEBLOWERS MUST ALLEGE TO SATISFY 9(b)— DIFFERING CIRCUIT INTERPRETATIONS

FCA claims are fraud claims that must satisfy Federal Rule of Civil Procedure 9(b)'s heightened pleading requirements.<sup>21</sup> The courts of appeals have not been consistent in interpreting 9(b)'s requirements in the whistleblower context, with little guidance from the Supreme Court on how specific an FCA claim must be to satisfy 9(b).<sup>22</sup> What has been described as a circuit split<sup>23</sup> in this arena may be more accurately characterized as a circuit splinter—two main jurisprudential branches, each with some cracks that have yet to be resolved in this evolving area of law. The primary disagreement centers around whether 9(b) constitutes an absolute requirement to allege details of an actually submitted false claim, such as dates and billed amounts from a particular fraudulent invoice, and if not, what level of specificity is enough to satisfy 9(b).

On the more permissive side of the spectrum, the Fifth, Seventh, and Ninth Circuits do not require details of a specific, actually submitted false

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<sup>21</sup> See FED. R. CIV. P. 9(b) (“In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person’s mind may be alleged generally.”).

<sup>22</sup> Compare *United States ex rel. Duxbury v. Ortho Biotech Prods., L.P.*, 579 F.3d 13, 29–30 (1st Cir. 2009) (not requiring relators to allege details of an actually submitted false claim), *cert. denied*, 130 S. Ct. 3454 (2010), with *Hopper v. Solvay Pharm., Inc.*, 588 F.3d 1318, 1327 (11th Cir. 2009) (requiring relators to allege very specific false claims to satisfy 9(b)), *cert. denied*, 130 S. Ct. 3465 (2010).

<sup>23</sup> 2010 *Mid-Year False Claims Act Update*, GIBSON DUNN, § V(A)(3) (July 9, 2010), <http://www.gibsondunn.com/publications/Pages/2010Mid-YearFalseClaimsActUpdate.aspx> (“[T]here is a circuit split as to whether a relator must identify specific false claims in his or her complaint.”).

claim.<sup>24</sup> The First Circuit, generally grouped with the Fifth, Seventh, and Ninth Circuits, requires specific claims, but allows for a more “flexible” approach for qui tam relators who allege that a defendant “induced *third parties* to file false claims with the government.”<sup>25</sup> The Fourth, Sixth, Eighth, and Eleventh Circuits have required factually specific claims,<sup>26</sup> though some of these circuits have hinted at the possibility of allowing exceptions in certain types of cases.<sup>27</sup> Finally, the Tenth Circuit is somewhere in the middle because it has embraced the more permissive standard of not requiring an allegation about a specific false claim, without explicitly disavowing its more stringent precedents.<sup>28</sup>

#### A. *Most Permissive: Fifth, Seventh, and Ninth Circuits*

The Fifth, Seventh, and Ninth Circuits have not required a relator to provide details of an “actually submitted false claim” at the outset of FCA litigation, like the particulars of a specific fraudulent invoice.<sup>29</sup> Instead, to satisfy Rule 9(b)’s heightened pleading requirement for claims of fraud, they have allowed relators to allege just enough details of the allegedly fraudulent actions to “lead to a strong inference,”<sup>30</sup> or at least a “plausible” inference,<sup>31</sup> that false claims “were actually submitted.”<sup>32</sup>

These courts conclude that to require details of specific fraudulent documents would preclude qui tam relators who do not have access to a defendant’s billing or accounting department from bringing forth legitimate claims. In *United States ex rel. Lusby v. Rolls-Royce Corp.*, the relator was an engineer,<sup>33</sup> and in *United States ex rel. Grubbs v. Kanneganti and Ebeid ex rel. United States v. Lungwitz*, the relators were physicians,<sup>34</sup> all of whom claimed intimate knowledge of alleged fraudulent acts of their

<sup>24</sup> See *Ebeid ex rel. United States v. Lungwitz*, 616 F.3d 993, 999 (9th Cir. 2010); *United States ex rel. Lusby v. Rolls-Royce Corp.*, 570 F.3d 849, 854–55 (7th Cir. 2009); *United States ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 190 (5th Cir. 2009).

<sup>25</sup> *Duxbury*, 579 F.3d at 29.

<sup>26</sup> See *United States ex rel. Nathan v. Takeda Pharm. N. Am., Inc.*, 707 F.3d 451, 457 (4th Cir. 2013); *United States ex rel. Vigil v. Nelnnet, Inc.*, 639 F.3d 791, 799–800 (8th Cir. 2011); *Hopper*, 588 F.3d at 1327–29; *United States ex rel. Bledsoe v. Cmty. Health Sys., Inc.*, 501 F.3d 493, 504–05 (6th Cir. 2007).

<sup>27</sup> *Hopper*, 588 F.3d at 1327–29; *Bledsoe*, 501 F.3d at 504–05.

<sup>28</sup> See *United States ex rel. Lemmon v. Envirocare of Utah, Inc.*, 614 F.3d 1163, 1172–73 (10th Cir. 2010).

<sup>29</sup> *Ebeid*, 616 F.3d at 999; *Lusby*, 570 F.3d at 854; *Grubbs*, 565 F.3d at 190.

<sup>30</sup> *Ebeid*, 616 F.3d at 998–99 (quoting *Grubbs*, 565 F.3d at 190) (choosing to follow the Fifth Circuit’s reasoning and holding on requirements to satisfy 9(b)); *Grubbs*, 565 F.3d at 190 (requiring FCA claimants to at least allege “particular details of a scheme to submit false claims” with “reliable indicia that lead to a strong inference that claims were actually submitted”).

<sup>31</sup> *Lusby*, 570 F.3d at 854.

<sup>32</sup> *Grubbs*, 565 F.3d at 190.

<sup>33</sup> 570 F.3d at 850–51.

<sup>34</sup> *Ebeid*, 616 F.3d at 995–96; *Grubbs*, 565 F.3d at 183–85.

employers but lacked direct access to actual bills or invoices submitted to the government. The courts in these cases feared a more restrictive standard would foreclose the potential relators from “legitimate efforts to expose fraud,” in contravention of the “remedial purpose” of the FCA.<sup>35</sup>

1. *The Fifth Circuit Billing Example.*—*Grubbs* illustrates the courts’ concern about frustrating the purpose of the FCA.<sup>36</sup> The relator, Dr. James H. Grubbs, claimed that fellow doctors and nurses at his employer hospital attempted to co-opt him into an ongoing fraudulent scheme of billing the government’s Medicare and Medicaid programs for patient visits and other services that the doctors had not actually provided.<sup>37</sup> In his complaint, Grubbs described his meetings with the doctors and nurses in detail, during which they tried to educate and assist him in the making of fraudulent medical records.<sup>38</sup> He pointed to specific dates on which some of the other doctors had falsely recorded patient services, as well as the types of medical services claimed that were not actually performed.<sup>39</sup> However, as a doctor, Grubbs only had access to the allegedly false medical records and not to the actual bills submitted to the government by the hospital’s billing system.<sup>40</sup>

The hospital moved to dismiss Grubbs’s case. The Fifth Circuit noted that, taking the relator’s allegations to be true, any fraudulent medical records would almost certainly be billed to the government. It thus did not require Grubbs to allege details of the actual bills.<sup>41</sup> If Grubbs’s allegations were true, an absolute requirement for details of the actual billed claims would prevent him, a valuable insider, from coming forward, despite his intimate knowledge of the fraud. Further, and perhaps more importantly, billing department employees with access to the actual invoices would have no reason to suspect fraud in processing the false medical records. This double insulation from potential whistleblowers on both the service and billing ends could protect this type of fraudulent scheme from discovery.

2. *The Issue of Proof in Pleadings.*—The Fifth and Seventh Circuits have emphasized that proof is not required at the pleading stage, even under Rule 9(b)’s heightened standard, and that requiring details of specific fraudulent documents would be too similar to requiring proof at the

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<sup>35</sup> *Grubbs*, 565 F.3d at 190; *see also Lusby*, 570 F.3d at 854 (noting that requiring relators to have access to billing documents would “take[] a big bite out of *qui tam* litigation”).

<sup>36</sup> *See* 565 F.3d at 184–85.

<sup>37</sup> *Id.* at 192.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *See id.*

<sup>41</sup> *Id.* (finding that it would “stretch the imagination” to infer that “recorded, but unprovided, services never get billed”).

pleading stage.<sup>42</sup> The courts have found that Rule 9(b)'s purpose is still preserved under their interpretation in adequately protecting defendants from "strike suits" and "fishing expedition[s]" by predatory plaintiffs seeking to exact undeserved settlements with "baseless claims."<sup>43</sup> Indeed, the Seventh Circuit defended its interpretation of 9(b) as requiring enough details to prevent "vague and unsubstantiated accusations of fraud" from leading to "costly discovery and public obloquy."<sup>44</sup>

*B. Mostly Restrictive, with Permissive Exception: First Circuit*

Until 2009, the First Circuit appeared to embrace a more restrictive approach to 9(b)<sup>45</sup> than the Fifth, Seventh, and Ninth Circuits. It required relators to "provide details that identify particular false claims for payment" from the government.<sup>46</sup> Then, in *United States ex rel. Duxbury v. Ortho Biotech Products, L.P.*, the court distinguished its prior holdings by noting that the restrictive approach applied to allegations that the defendant directly made false claims to the government.<sup>47</sup> The court carved out a more permissive exception for relators alleging that a defendant "induced *third parties* to file false claims with the government."<sup>48</sup> For claims of third-party inducement, the court held that a relator would be required to provide only enough evidence to "strengthen the inference of fraud beyond possibility," and would not need to provide details of individual false claims.<sup>49</sup> In applying this "more flexible standard," the First Circuit noted that relators are still required to allege the "who, what, where, and when" of the allegedly false representation.<sup>50</sup>

In *Duxbury*, the relator worked for a drug distributor as a sales representative responsible for promoting his company's drugs to medical providers.<sup>51</sup> He alleged that his employer gave its clients illegal kickbacks for their business, in the form of free drugs, which the medical providers used to file fraudulent Medicare reimbursement claims.<sup>52</sup> Though he did not have access to the allegedly fraudulent bills submitted to the government, Duxbury named eight individual medical providers that he

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<sup>42</sup> *United States ex rel. Lusby v. Rolls-Royce Corp.*, 570 F.3d 849, 855 (7th Cir. 2009); *Grubbs*, 565 F.3d at 189–90.

<sup>43</sup> *Grubbs*, 565 F.3d at 190, 191 (internal quotation marks omitted).

<sup>44</sup> *Lusby*, 570 F.3d at 854–55.

<sup>45</sup> See *United States ex rel. Duxbury v. Ortho Biotech Prods., L.P.*, 579 F.3d 13, 29 (1st Cir. 2009).

<sup>46</sup> *United States ex rel. Rost v. Pfizer, Inc.*, 507 F.3d 720, 731 (1st Cir. 2007) (quoting *United States ex rel. Karvelas v. Melrose-Wakefield Hosp.*, 360 F.3d 220, 232 (1st Cir. 2004)).

<sup>47</sup> 579 F.3d at 29.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* (quoting *Rost*, 507 F.3d at 733) (citing *United States ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 190 (5th Cir. 2009)).

<sup>50</sup> *Id.* at 30.

<sup>51</sup> *Id.* at 16.

<sup>52</sup> *Id.* at 29–30.



claimed received kickbacks, and provided general dates and amounts of money the providers claimed for Medicare reimbursement.<sup>53</sup> The court noted that Duxbury fell under a third-party inducement exception because the defendant employer's alleged actions induced third-party medical providers to submit fraudulent claims to the government.<sup>54</sup> Thus, the court found that Duxbury satisfied 9(b)'s requirements without pointing to exact dates and amounts of fraudulent bills submitted to the government, to which he did not have access.<sup>55</sup>

*1. The Issue of Presentment.*—In distinguishing 9(b) requirements for allegations of direct false claims from third-party inducement claims, the First Circuit took care to note that its approach applied equally to claims brought against persons who allegedly “present[ed]” false claims (“subsection (a)(1)” claims),<sup>56</sup> such as government contractors who seek payment for work they did not do, as well as persons who made or used false statements “material to” a false claim (“subsection (a)(2)” claims),<sup>57</sup> such as employees who create fraudulent records of services that were never actually delivered.<sup>58</sup> The court noted that the distinction between subsection (a)(1) claims and subsection (a)(2) claims was not relevant to the analysis of which Rule 9(b) pleading standard should apply, despite the presentment requirement in subsection (a)(1) claims.<sup>59</sup>

*C. Most Restrictive, with Some Possibility of Future Exception:  
Sixth, Eighth, and Eleventh Circuits*

On the most restrictive end of the spectrum, the Fourth, Sixth, Eighth, and Eleventh Circuits have required FCA relators to identify specific false claims to meet Rule 9(b)'s particularity requirements.<sup>60</sup> These circuits have cited favorably to the same language as the First Circuit<sup>61</sup> in requiring

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<sup>53</sup> *Id.* at 30.

<sup>54</sup> *See id.* at 29–30.

<sup>55</sup> *Id.* at 30.

<sup>56</sup> Subsection (a)(1) claims now fall under 31 U.S.C. § 3729(a)(1)(A). *See supra* note 3.

<sup>57</sup> Subsection (a)(2) claims now fall under 31 U.S.C. § 3729(a)(1)(B). *See supra* note 4.

<sup>58</sup> *Duxbury*, 579 F.3d at 29 n.6.

<sup>59</sup> *Id.*

<sup>60</sup> *See United States ex rel. Nathan v. Takeda Pharm. N. Am., Inc.*, 707 F.3d 451, 457 (4th Cir. 2013); *United States ex rel. Vigil v. Nelnet, Inc.*, 639 F.3d 791, 799–800 (8th Cir. 2011); *Hopper v. Solvay Pharm., Inc.*, 588 F.3d 1318, 1327 (11th Cir. 2009); *United States ex rel. Bledsoe v. Cmty. Health Sys., Inc.*, 501 F.3d 493, 504–05 (6th Cir. 2007). The Eleventh Circuit has used language similar to the more permissive Fifth Circuit in articulating 9(b)'s requirement of “some indicia of reliability,” but has required relators to allege specific false claims. *Compare United States ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 190 (5th Cir. 2009) (requiring “reliable indicia that lead to a strong inference that claims were actually submitted”), *with Hopper*, 588 F.3d at 1326 (quoting *United States ex rel. Clausen v. Lab. Corp. of Am.*, 290 F.3d 1301, 1311 (11th Cir. 2002)) (requiring “some indicia of reliability . . . of an actual false claim for payment being made to the Government”).

<sup>61</sup> *See supra* Part I.B.

relators to specify the “who, what, where, when, and how” of alleged fraud, but have gone a step further in requiring allegations of specific false claims,<sup>62</sup> such as dates and billed amounts for individual fraudulent invoices. Interestingly, post-*Duxbury*, some of the cases within these circuits have begun to acknowledge the possibility of exceptions that may merit a departure from the strict requirement to allege details of specific false claims.

1. *The Sixth Circuit’s Potential Exception for Whistleblowers with “Specialized Knowledge.”*—The Sixth Circuit has noted that Rule 9(b)’s requirements might be “relaxed” in situations where relators are unable to produce details from “actual false claims” but have firsthand, “personal knowledge” that false claims were indeed submitted to the government for payment.<sup>63</sup> The court has suggested, without affirmatively deciding, that in these circumstances, allegations of “facts which support a strong inference that a claim was submitted” may be sufficient.<sup>64</sup> The court favorably discussed a district court case in which a relator’s former position as a billing specialist for the defendant afforded her “specialized knowledge” of the defendant’s billing practices.<sup>65</sup> The district court allowed her to proceed with her qui tam claim, even though she was unable to point to specific claims because she was no longer employed by the defendant.<sup>66</sup>

2. *The Eleventh Circuit’s Potential Exception for Nonpresentment Claims.*—The Eleventh Circuit has taken a different approach from the Sixth Circuit. In *Hopper v. Solvay Pharmaceuticals, Inc.*, it stated unequivocally that qui tam claims under subsection (a)(1) center around whether a defendant ever presented false claims for payment to the government, and require the “actual presentment of a claim be pled with particularity” to meet the court’s restrictive Rule 9(b) standard.<sup>67</sup> However, the court distinguished claims under subsection (a)(2), noting that these claims only required the qui tam relator to show that the defendant had

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<sup>62</sup> *Vigil*, 639 F.3d at 798; *Hopper*, 588 F.3d at 1327–29; *Bledsoe*, 501 F.3d at 510.

<sup>63</sup> *Chesbrough v. VPA, P.C.*, 655 F.3d 461, 470–72 (6th Cir. 2011) (citing *Bledsoe*, 501 F.3d at 504 n.12). *Chesbrough* also cites an unpublished Eleventh Circuit case in its discussion of a possible “relaxed” standard. See *Hill v. Morehouse Med. Assocs., Inc.*, No. 02-14429, 2003 WL 22019936, at \*3 (11th Cir. Aug. 15, 2003) (per curiam) (internal quotation marks omitted) (stating “Rule 9(b)’s heightened pleading standard may be applied less stringently” where “specific factual information about the fraud is peculiarly within the defendant’s knowledge or control”).

<sup>64</sup> *Chesbrough*, 655 F.3d at 471–72 (“Although we do not foreclose the possibility that this court may apply a ‘relaxed’ version of Rule 9(b) in certain situations, we do not find it appropriate to do so here.”).

<sup>65</sup> *Id.* at 471 (citing *United States ex rel. Lane v. Murfreesboro Dermatology Clinic, PLC*, No. 4:07-cv-4, 2010 WL 1926131, at \*4 (E.D. Tenn. May 12, 2010)).

<sup>66</sup> *Id.* (citing *Lane*, 2010 WL 1926131, at \*4).

<sup>67</sup> 588 F.3d at 1326–27.

“made false statements to get a false claim paid,” without having to show that the defendant actually submitted the claim herself.<sup>68</sup>

In dicta, the court left open the possibility that subsection (a)(2) claims against those who simply *make* false statements or records may be subject to a “more relaxed” 9(b) standard than subsection (a)(1) claims against those who *present* false claims.<sup>69</sup> Somewhat ironically, the court cited favorably to the First Circuit’s reasoning in *Duxbury* regarding a relaxed standard for claims of third-party inducement,<sup>70</sup> despite the fact that *Duxbury* explicitly disavowed treating (a)(1) and (a)(2) claims differently under its 9(b) analysis.<sup>71</sup>

3. *The Fourth and Eighth Circuits’ Inflexibility.*—The Fourth and Eighth Circuits have shown the least flexibility in their interpretations of Rule 9(b). The Eighth Circuit applies the same restrictive 9(b) standard to both subsection (a)(1) and subsection (a)(2) claims, effectively requiring a qui tam relator to plead details of specific fraudulent claims that were made.<sup>72</sup> Similarly, the Fourth Circuit has distanced itself from the more permissive standards.<sup>73</sup> It requires details of specific claims where alleged behavior “*could* have led, but *need not necessarily* have led” to actually submitted false claims.<sup>74</sup>

#### D. Restrictive with Hints of a Permissive Future: Tenth Circuit

Prior to *Bell Atlantic Corp. v. Twombly*<sup>75</sup> and *Ashcroft v. Iqbal*,<sup>76</sup> the Tenth Circuit embraced the more restrictive 9(b) standard of requiring relators in FCA qui tam cases to provide information “identify[ing] particular false claims” submitted for government payment.<sup>77</sup> *Twombly* and *Iqbal* created a storm of controversy over proper pleading requirements and have forced courts to reconsider pleading standards in a variety of

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<sup>68</sup> *Id.* at 1329.

<sup>69</sup> *Id.* at 1329–30 (“[We] do not necessarily foreclose the possibility that, for claims under subsection (a)(2), general allegations of improper government payments to third parties, supported by factual or statistical evidence to strengthen the inference of fraud . . . could satisfy the particularity requirements of Rule 9(b).”).

<sup>70</sup> *Id.* at 1329 (citing United States *ex rel.* *Duxbury v. Ortho Biotech Prods., L.P.*, 579 F.3d 13, 29 (1st Cir. 2009)).

<sup>71</sup> *Duxbury*, 579 F.3d at 29 n.6.

<sup>72</sup> United States *ex rel.* *Vigil v. Nelnet, Inc.*, 639 F.3d 791, 799 (8th Cir. 2011) (citing United States *ex rel.* *Joshi v. St. Luke’s Hosp., Inc.*, 441 F.3d 552, 556 (8th Cir. 2006)).

<sup>73</sup> See United States *ex rel.* *Nathan v. Takeda Pharm. N. Am., Inc.*, 707 F.3d 451, 456–58 (4th Cir. 2013).

<sup>74</sup> *Id.* at 457.

<sup>75</sup> 550 U.S. 544 (2007).

<sup>76</sup> 556 U.S. 662 (2009).

<sup>77</sup> United States *ex rel.* *Sikkenga v. Regence BlueCross BlueShield of Utah*, 472 F.3d 702, 727 (10th Cir. 2006).

contexts.<sup>78</sup> In 2010, after *Twombly* and *Iqbal* were decided, the Tenth Circuit hinted in *United States ex rel. Lemmon v. Envirocare of Utah, Inc.* at a more permissive standard for FCA qui tam relators, citing to First, Fifth, and Seventh Circuit cases for support.<sup>79</sup> There, the Tenth Circuit emphasized that “[t]hrough *Twombly* and *Iqbal* clarified 9(b)’s requirements,” the purpose of Rule 9(b) remained the same—to provide defendants with “fair notice of plaintiff’s claims” and the “factual ground upon which [the claims] are based.”<sup>80</sup> It did not explicitly disavow its prior precedents and in fact cited much of the same restrictive language used in its prior cases, requiring FCA qui tam relators to plead the “who, what, when, where and how” of alleged fraudulent conduct.<sup>81</sup>

1. *Lemmon’s Mixed Approach to 9(b).*—In *Lemmon*, the relators were a former employee of the defendant’s hazardous waste disposal company and two former employees of the defendant’s subcontractors.<sup>82</sup> The relators claimed that the defendant had improperly disposed of waste the government had contracted it to dispose of, and had falsely certified fulfillment of its duties to receive payment from the government.<sup>83</sup> The relators alleged the names and positions of the employees and supervisors involved in the fraud, the specific obligations that were breached, and the dates and amounts of payment requests that were submitted. They also alleged intimate, extensive details regarding how and where the violations occurred at specific waste disposal sites, including unreported waste spills, improper mixing of waste, and other safety violations that breached the defendant’s contractual obligations to the government.<sup>84</sup>

Perhaps because the allegations were already quite detailed, including some information regarding actual payment requests, the court did not appear to rely upon the more permissive 9(b) standard it had hinted at with its citations to more permissive circuits. The court instead fell back upon the more restrictive 9(b) analysis it had previously espoused.<sup>85</sup> Applying its “who, what, when, where and how” standard, the court did not require the relators to point out which alleged violations resulted in which specific

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<sup>78</sup> See Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1 (2010); Martin H. Redish, *Pleading, Discovery, and the Federal Rules: Exploring the Foundations of Modern Procedure*, 64 FLA. L. REV. 845, 854–70 (2012).

<sup>79</sup> 614 F.3d 1163, 1172 (10th Cir. 2010) (citing *United States ex rel. Duxbury v. Ortho Biotech Prods., L.P.*, 579 F.3d 13, 29 (1st Cir. 2009); *United States ex rel. Lusby v. Rolls-Royce Corp.*, 570 F.3d 849, 854–55 (7th Cir. 2009); *United States ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 190 (5th Cir. 2009)) (“[C]laims under the FCA need only show the specifics of a fraudulent scheme and provide an adequate basis for a reasonable inference that false claims were submitted as part of that scheme.”).

<sup>80</sup> *Lemmon*, 614 F.3d at 1172.

<sup>81</sup> *Id.* at 1171–72 (quoting *Sikkenga*, 472 F.3d at 727).

<sup>82</sup> *Id.* at 1165–66.

<sup>83</sup> *Id.* at 1166.

<sup>84</sup> *Id.* at 1166, 1172.

<sup>85</sup> *Id.* at 1171–72.

false certification claims, and found that the allegations were sufficient to satisfy 9(b).<sup>86</sup> It remains unclear how permissive the Tenth Circuit will be and what information about actual false claims it will require to survive 12(b)(6) challenges to FCA claims in the future.

*E. Rule 9(b) Requirements: Continued Evolution in the FCA Context*

The losing parties in both *Duxbury* and *Hopper* petitioned the Supreme Court to reconsider their cases, providing the Court an opportunity to resolve the issue of whether a relator must allege details from specific false claims to meet Rule 9(b)'s requirements.<sup>87</sup> At the invitation of the Court, the Solicitor General weighed in on behalf of the United States on the *Duxbury* petition.<sup>88</sup>

*1. The Government's Interest in a More Permissive 9(b) Standard.*—Though the Solicitor General advised the Court not to review *Duxbury* on other grounds, the Solicitor General encouraged the Court to address the issue of the level of specificity required for 9(b) in the FCA context. Noting the “substantial uncertainty” in the courts of appeals on this issue, the Solicitor General urged the Court to resolve it in favor of the circuits adhering to the more permissive 9(b) standard.<sup>89</sup> The Solicitor General highlighted the importance of whistleblowers in the “detection and remediation of fraud against the United States,” and detailed its concern that legitimate whistleblowers would not be able to pursue FCA qui tam claims if courts required them to be “familiar with the minutiae of their employers’ billing practices.”<sup>90</sup> The Solicitor General argued that a restrictive 9(b) standard requiring details of specific false claims would not “meaningfully assist” the government’s enforcement efforts, and would only serve to discourage potential relators from coming forward with valuable information.<sup>91</sup> Despite these considerations, the Court ultimately declined to address the issue, denying certiorari in both appeals from *Duxbury* and *Hopper*.<sup>92</sup>

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<sup>86</sup> *Id.* at 1172–73.

<sup>87</sup> Petition for a Writ of Certiorari, *Ortho Biotech Prods., L.P. v. United States ex rel. Duxbury* (2010) (No. 09-654), 2009 WL 4610708; Petition for Writ of Certiorari, *United States ex rel. Hopper v. Solvay Pharm., Inc.* (2010) (No. 09-091065), 2010 WL 2771705.

<sup>88</sup> Brief for the United States as Amicus Curiae at 1, *Duxbury*, 130 S. Ct. 3454 (No. 09-654), 2010 WL 2007742, at \*1.

<sup>89</sup> *Id.* at 16–17.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 17 (“The government rarely if ever needs a relator’s assistance to identify claims for payment . . . . [R]elators . . . make valuable contributions to the government’s enforcement efforts . . . by bringing to light information, outside the four corners of the claims for payment, that shows those claims to be false.”).

<sup>92</sup> *Hopper v. Solvay Pharm., Inc.*, 588 F.3d 1318, 1327 (11th Cir. 2009), *cert. denied*, 130 S. Ct. 3465 (2010); *United States ex rel. Duxbury v. Ortho Biotech Prods., L.P.*, 579 F.3d 13, 29 (1st Cir. 2009), *cert. denied*, 130 S. Ct. 3454 (2010).

2. *Potential for Natural Realignment Favoring a More Permissive 9(b) Standard.*—Even without Supreme Court resolution, the circuits may independently be in the process of reconsidering and adjusting their interpretations of Rule 9(b) requirements in the FCA qui tam litigation context. Though the case law is still in flux, recent opinions have pointed to the possibility of a natural realignment in favor of a more permissive standard, or at the very least, exceptions that may allow for a relaxing of the more restrictive standard.<sup>93</sup>

Some of the adjustments have already produced an uneasy mixing of standards, like the Tenth Circuit's embrace of the permissive standard in *Lemmon* and citations to more permissive circuits, coupled with its retention of restrictive language and elements preserved from its prior precedents.<sup>94</sup> Others have resulted in categories of cases carved out from otherwise restrictive standards, such as the exception for claims of third-party inducement formally adopted by the First Circuit in *Duxbury*.<sup>95</sup> Similarly, despite the restrictive standard they have thus far applied, both the Sixth and Eleventh Circuits have left the door open to possible future exceptions.<sup>96</sup>

3. *Unresolved: How Circuits May Shape Permissive Exceptions to 9(b).*—Several fault lines remain for circuits considering more permissive exceptions to their restrictive Rule 9(b) standards, involving whether and in what circumstances to allow these exceptions, as well as the degree of permissiveness for any exceptions. The Eleventh Circuit appeared to appreciate the First Circuit's carve-out of third-party inducement claims in *Duxbury*. At the same time, it favored grouping cases based on the statutory subsection they fall under, noting the possibility of different standards for subsection (a)(1) and subsection (a)(2) claims, an approach the First Circuit had rejected.<sup>97</sup> Taking a different categorical approach, the Sixth Circuit in *Chesbrough* signaled the possibility of applying a more permissive standard for qui tam claimants with "personal knowledge" of fraudulent claim submissions, though it remains unclear what the parameters of that exception may be.<sup>98</sup>

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<sup>93</sup> See, e.g., *Chesbrough v. VPA, P.C.*, 655 F.3d 461, 470–72 (6th Cir. 2011); *Hopper*, 588 F.3d at 1329–30; see also *supra* Part I.C.

<sup>94</sup> *United States ex rel. Lemmon v. Envirocare of Utah, Inc.*, 614 F.3d 1163, 1171–72 (10th Cir. 2010) (quoting *United States ex rel. Sikkenga v. Regence BlueCross BlueShield of Utah*, 472 F.3d 702, 727 (10th Cir. 2006)) (citing *Duxbury*, 579 F.3d at 29 (1st Cir. 2009); *United States ex rel. Lusby v. Rolls-Royce Corp.*, 570 F.3d 849, 854–55 (7th Cir. 2009); *United States ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 190 (5th Cir. 2009)); see also *supra* Part I.D.

<sup>95</sup> *Duxbury*, 579 F.3d at 29–30; see also *supra* Part I.B.

<sup>96</sup> *Chesbrough*, 655 F.3d at 470–72; *Hopper*, 588 F.3d at 1329–30; see also *supra* Part I.C.

<sup>97</sup> *Hopper*, 588 F.3d at 1329 (citing *Duxbury*, 579 F.3d at 29); *Duxbury*, 579 F.3d at 29 n.6.

<sup>98</sup> *Chesbrough*, 655 F.3d at 471.

While the circuits may not naturally conform to a single standard without Supreme Court guidance, it appears that their differences are narrowing and will be further clarified as the courts of appeals continue to ruminate upon and adjust their approaches to this issue. Many if not most circuits have acknowledged at least the possibility of allowing certain claims to survive 9(b) without pointing to specific false documents. These courts have recognized the importance of protecting legitimate whistleblowers with valuable information who do not have access to a defendant's actual bills or invoices.

A key hesitation for courts considering a relaxation of 9(b) is the desire to avoid opening the floodgates to frivolous suits.<sup>99</sup> Such concerns can and should be allayed with proper 9(b) calibration via the first-to-file rule, as discussed in Part II. By linking 9(b) to the first-to-file rule, courts can ensure that any advantage potential whistleblowers gain from a permissive 9(b) standard will be tempered by a proportionate increase in the number of claims defendants may use to block later claims.

## II. WHETHER A SECOND WHISTLEBLOWER IS BARRED FROM THE SAME QUI TAM CLAIM IF A PRIOR CLAIMANT FAILED TO SATISFY 9(b)

The 1986 amendments to the FCA introduced the current version of the statutory provision that governs first-to-file claim preclusion, which bars subsequent claims based on the same facts as a pending action.<sup>100</sup> Through the 1986 amendments, Congress attempted to properly balance two main purposes: (1) to provide "adequate incentives"<sup>101</sup> for true whistleblowers with useful information to come forward, and (2) to discourage "opportunistic plaintiffs"<sup>102</sup> from filing "copycat actions"<sup>103</sup> that do not provide useful information to the government.<sup>104</sup>

The courts of appeals are struggling with the level of specificity an initial complaint must include in order to preclude subsequent claims. The Sixth and Ninth Circuits have generally found the first-to-file bar to apply

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<sup>99</sup> See *United States ex rel. Nathan v. Takeda Pharm. N. Am., Inc.*, 707 F.3d 451, 456 (4th Cir. 2013).

<sup>100</sup> 31 U.S.C. § 3730(b)(5) (2012) ("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. LaCorte v. SmithKline Beecham Clinical Labs., Inc.*, 149 F.3d 227, 234 (3d Cir. 1998).

<sup>101</sup> *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 649 (D.C. Cir. 1994).

<sup>102</sup> *Id.*

<sup>103</sup> *United States ex rel. Batiste v. SLM Corp.*, 659 F.3d 1204, 1210 (D.C. Cir. 2011).

<sup>104</sup> See *Campbell v. Redding Med. Ctr.*, 421 F.3d 817, 821 (9th Cir. 2005) (explaining the "dual purposes of the 1986 amendments: to promote incentives for whistle-blowing insiders and prevent opportunistic successive plaintiffs" (quoting *United States ex rel. Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181, 1187 (9th Cir. 2001))).

only when a complaint has satisfied Rule 9(b)'s requirements.<sup>105</sup> In 2011, the D.C. Circuit explicitly disavowed this rule, finding that a complaint need not meet 9(b)'s requirements for the first-to-file bar to apply.<sup>106</sup> The resulting circuit split remains in the early stages of development, with implications for the 9(b) standard as discussed in Part I of this Note.<sup>107</sup>

*A. First Complaint Must Satisfy 9(b) to Preclude Subsequent Complaints:  
Sixth and Ninth Circuits*

The Sixth Circuit stated in *Walburn v. Lockheed Martin Corp.* that the purpose of the first-to-file bar is to prevent “repetitive claims” once a first-filed claimant has given the government adequate notice of “essential facts” of the alleged fraud at issue.<sup>108</sup> The court found that the complaint failed to comply with Rule 9(b)'s heightened pleading requirements. The complaint was therefore “legally infirm” and unable to bar similar subsequent actions via the first-to-file rule.<sup>109</sup> The court noted that a complaint that fails to satisfy 9(b) by definition “fails to provide adequate notice to a defendant,” and thus also the government, of the “essential facts” of a fraudulent scheme.<sup>110</sup> A rule allowing “fatally-broad” complaints to preempt similar, later complaints would prevent the government from obtaining more specific, useful information, and contravene the purpose of the FCA: to encourage whistleblowers to come forward and alert the government of fraud.<sup>111</sup>

Similarly, the Ninth Circuit decided that a first complaint had to satisfy 9(b) before it could bar subsequent complaints under the first-to-file rule.<sup>112</sup> The court was particularly concerned about situations where allegations of FCA violations had already been publicly disclosed, such as in media or government reports on the issue.<sup>113</sup> In these public disclosure cases, a qui tam relator must be an “original source” of the allegations to pursue his or her claim, defined by the statute as:

[A]n individual who either (i) prior to a public disclosure under subsection (e)(4)(a), has voluntarily disclosed to the Government the information on which allegations or transactions in a claim are based, or (2) who has

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<sup>105</sup> *Walburn v. Lockheed Martin Corp.*, 431 F.3d 966, 972–73 (6th Cir. 2005); *Campbell*, 421 F.3d at 825.

<sup>106</sup> *Batiste*, 659 F.3d at 1210.

<sup>107</sup> See *United States ex rel. Wickliffe v. EMC Corp.*, 473 F. App'x 849, 851–52 (10th Cir. 2012).

<sup>108</sup> 431 F.3d at 971 (quoting *Lujan*, 243 F.3d at 1187).

<sup>109</sup> *Id.* at 972–73.

<sup>110</sup> *Id.* at 973.

<sup>111</sup> *Id.*

<sup>112</sup> *Campbell v. Redding Med. Ctr.*, 421 F.3d 817, 825 (9th Cir. 2005).

<sup>113</sup> 31 U.S.C. § 3730(e)(4) (2012) (requiring courts to dismiss a relators claims if “substantially the same allegations” were “publicly disclosed” unless the relator is an “original source” of relevant information); *Campbell*, 421 F.3d at 824.



knowledge that is *independent of and materially adds to* the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the Government before filing an action under this section.<sup>114</sup>

The court feared that without its requirement that a first-filed claim satisfy Rule 9(b), once allegations had been publicly disclosed, an “opportunistic plaintiff[]” with no useful “inside information” could simply file a “sham complaint” based on public information, and “displace actual insiders” from filing legitimate subsequent claims.<sup>115</sup>

*B. First Complaint Need Not Survive 9(b) to Have a Preclusive Effect:  
D.C. and Tenth Circuits*

In 2011, the D.C. Circuit unequivocally rejected the rule laid out by the Sixth Circuit in *Walburn*, and held in *United States ex rel. Batiste v. SLM Corp.* that a complaint need not meet Rule 9(b)'s requirements to bar subsequent complaints under the FCA.<sup>116</sup> Under the D.C. Circuit's formulation, to bar later-filed complaints, a first-filed complaint need only provide “sufficient notice” of the alleged fraud for the government to be able to investigate the matter.<sup>117</sup>

*1. The D.C. Circuit's Reasons for Decoupling 9(b) from the First-to-File Rule.*—In articulating its rule, the D.C. Circuit relied on three main reasons. First, it looked to the plain language of the statutory provision governing first-to-file claim preclusion.<sup>118</sup> The court noted that “nothing” in the statute itself requires a first claim to meet 9(b)'s heightened pleading requirements to preclude subsequent related claims.<sup>119</sup> Second, the court discussed the dual purposes of the first-to-file bar: to reward those who give the government enough information to investigate fraudulent schemes, and to prevent “copycat actions” that do not provide additional useful information to the government.<sup>120</sup>

The court noted that a complaint that did not meet 9(b)'s requirements could still provide the government with “sufficient information” to launch an investigation into the alleged fraud at issue, obviating the need for additional claims to point out the same fraud.<sup>121</sup> Compared to the complaint in *Batiste*, the first-filed complaint named the same defendant company,

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<sup>114</sup> § 3730(e)(4)(B) (emphasis added).

<sup>115</sup> *Campbell*, 421 F.3d at 824.

<sup>116</sup> 659 F.3d 1204, 1210 (D.C. Cir. 2011) (disavowing the rule articulated in *Walburn*, 431 F.3d at 972).

<sup>117</sup> *Id.*

<sup>118</sup> See § 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.”).

<sup>119</sup> *Batiste*, 659 F.3d at 1210.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

alleged that the same type of fraudulent activity was taking place nationwide, and described similar corporate policies that promoted the fraudulent behavior.<sup>122</sup> The court found that the prior complaint had included enough information to give the government “grounds to investigate” all the claims alleged in the second complaint, should the government so choose.<sup>123</sup> Thus, the court dismissed the case because it found that the FCA’s first-to-file rule barred the second complaint.

As the third and final part of its analysis, the court raised a practical concern with requiring a claim to meet 9(b) standards to preclude subsequent related suits. It noted that such a rule could require a district court with a second complaint before it to determine whether a first complaint pending in another district court satisfied 9(b).<sup>124</sup> Such a “strange judicial dynamic” could lead to a problematic outcome, with the potential for the two courts to differ on the sufficiency of the same complaint under 9(b).<sup>125</sup>

2. *Adherents and Potential Followers of the D.C. Circuit’s First-to-File Rule.*—The First Circuit has embraced the D.C. Circuit’s first-to-file rule in holding that “for the purposes of the first-to-file rule, the earlier-filed complaint need not meet the heightened pleading standard of Rule 9(b).”<sup>126</sup>

The Tenth Circuit has acknowledged the split created by the D.C. Circuit in *Batiste*.<sup>127</sup> Though it has avoided deciding which interpretation to adopt, it has echoed the D.C. Circuit’s concern regarding the “strange judicial dynamic” that could result should 9(b)’s requirements be incorporated into the first-to-file analysis.<sup>128</sup> Similarly, the Eighth Circuit has also cited *Batiste* favorably on this issue.<sup>129</sup>

3. *Uncertainty in the Growing First-to-File Divide.*—It is still too early to tell how the circuits will align in this divide without further guidance from the Supreme Court. For courts following the D.C. Circuit’s *Batiste* reasoning, it is also unclear what would be enough for a 9(b)-deficient, first-filed complaint to give the government “sufficient notice” so as to bar later related complaints.<sup>130</sup> *Batiste* itself did not articulate specific

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<sup>122</sup> *Id.* at 1209.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 1210.

<sup>125</sup> *Id.*

<sup>126</sup> *United States ex rel. Heineman-Guta v. Guidant Corp.*, 718 F.3d 28, 36 (1st Cir. 2013); *see also id.* at 37 & n.10.

<sup>127</sup> *United States ex rel. Wickliffe v. EMC Corp.*, 473 F. App’x 849, 851 (10th Cir. 2012).

<sup>128</sup> *Id.* at 851 (“We admit to being uneasy with the parties’ suggestion that Rule 9(b)’s particularity requirement should be applied to the first-to-file bar.”).

<sup>129</sup> *Roberts v. Accenture, LLP*, 707 F.3d 1011, 1018–19 (8th Cir. 2013).

<sup>130</sup> 2011 *Year-End False Claims Act Update*, GIBSON DUNN 14 (Jan. 5, 2012), <http://www.gibsondunn.com/publications/Pages/2011YearEndFalseClaimsActUpdate.aspx> (“But *Batiste* notably

criteria for sufficiency and simply declared that the first complaint had provided enough information to put the government on notice of the fraudulent scheme alleged in the second case.<sup>131</sup> Without more, the court determined it could bar Batiste's claim, as the first claim was still pending at the time Batiste's claim was filed.<sup>132</sup>

4. *Potential Workarounds for Later Relators Awaiting Resolution of a Pending First Claim.*—Commentators have noted several possible loopholes for later relators who wish to file a claim while a similar first claim is still pending. First, the later relators could simply wait for the pending first claim to be dismissed before filing, thus avoiding the first-to-file bar altogether because there would presumably be no pending claim at the time of the later claim's filing.<sup>133</sup> Second, if later relators have already filed, they may also seek to voluntarily dismiss their claims without prejudice and refile them after the first claim has been dismissed.<sup>134</sup> Third, later relators who have already filed could also try to amend their complaints after the first case's dismissal, and then argue that the first claim was not pending at the time of the amended filing.<sup>135</sup>

Indeed, the relator in *Batiste* attempted to take the second route, and requested dismissal of his complaint without prejudice.<sup>136</sup> However, the court determined that Batiste had waived this argument because he had not sought to amend his complaint in the district court.<sup>137</sup> Although waiting, refile, and amending might seem to be straightforward workarounds for later relators, they may not be able to discern whether their claims will be deemed sufficiently related to the first claims to be precluded under the first-to-file bar. By delaying, they may risk losing the opportunity to be a first-filed claim in their own right.<sup>138</sup>

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leaves unanswered the question of what standard governs whether an earlier-filed complaint constitutes 'sufficient notice for the government.'").

<sup>131</sup> *United States ex rel. Batiste v. SLM Corp.*, 659 F.3d 1204, 1209–10 (D.C. Cir. 2011).

<sup>132</sup> *Id.*

<sup>133</sup> *Circuits Split on First-to-File Rule for Whistleblower Suits*, D.C. CIRCUIT REVIEW (Nov. 7, 2011), <http://dccircuitreview.com/2011/11/07/circuits-split-on-first-to-file-rule-for-whistleblower-suits/>.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*; Ben Vernia, *DC Circuit: First-to-File Qui Tam, Even If Inadequate Under Rule 9(b), Barred Later Suit*, FALSE CLAIMS COUNSEL (Dec. 5, 2011), <http://www.falseclaimscounsel.com/wordpress/?p=1576>.

<sup>136</sup> *Batiste*, 659 F.3d at 1211.

<sup>137</sup> *Id.*

<sup>138</sup> For example, if Relator *B* is uncertain whether her claim is too similar to a pending claim by Relator *A*, Relator *B* may choose to wait for Relator *A*'s case to be resolved before filing her claim. While Relator *B* waits, Relator *C* may decide to try his luck and file the same claim Relator *B* was waiting to file. If Relator *C*'s claim is accepted by the court as not too similar to Relator *A*'s case, Relator *B* will have lost her chance to file her claim by waiting for Relator *A*'s case to resolve. See Vernia, *supra* note 135.

### III. HOW THE 9(b) STANDARD SHOULD INFORM WHETHER A SECOND WHISTLEBLOWER IS PRECLUDED: AN ANALYSIS OF FOUR COMBINATIONS

As the courts of appeals continue to redefine the contours of this area of law, it is critical to consider how interpretations of Rule 9(b) in the FCA context interact with different thresholds for triggering the first-to-file rule. In doing so, courts must weigh the overlap and differences between the purposes of Rule 9(b) and the first-to-file rule.

Rule 9(b)'s heightened pleading standard requires claims of fraud to be pled with particularity.<sup>139</sup> It is designed to protect defendants from meritless, harassing accusations of fraud, given the potential for unwarranted harm to a defendant's reputation from such claims and costly settlements that undeserving claimants could exact.<sup>140</sup> It is also meant to provide defendants with enough detailed information about the alleged fraud to be able to properly respond.<sup>141</sup>

Similarly, one of the two main purposes of the first-to-file rule is to prevent "copycat actions"<sup>142</sup> to protect defendants from "opportunistic successive plaintiffs" who do not provide the government with useful new information.<sup>143</sup> The second main purpose of the first-to-file rule is to incentivize plaintiffs with useful information to come forward, and to do so quickly, so that the government can stop the fraud as soon as possible.<sup>144</sup>

In light of these purposes, an optimal balance of the 9(b) and first-to-file requirements should achieve two main goals. First, it should encourage and allow plaintiffs to bring legitimate claims that provide the government with useful information about fraudulent schemes.<sup>145</sup> Second, it should protect defendants from unnecessarily costly, frivolous, and redundant suits.<sup>146</sup>

What follows is an analysis of different combinations of the circuit court standards for the 9(b) and first-to-file issues, and how each impacts the interests of both plaintiffs and defendants in the FCA context. As this Part shows, a more permissive 9(b) standard coupled with a first-to-file rule that is linked to 9(b) best balances the interests of all parties and fulfills the purposes of both 9(b) and the FCA.

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<sup>139</sup> See FED. R. CIV. P. 9(b) ("In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.").

<sup>140</sup> United States *ex rel.* Nathan v. Takeda Pharm. N. Am., Inc., 707 F.3d 451, 456 (4th Cir. 2013); United States *ex rel.* Clausen v. Lab. Corp. of Am., Inc., 290 F.3d 1301, 1310 (11th Cir. 2002).

<sup>141</sup> United States *ex rel.* Joshi v. St. Luke's Hosp., Inc., 441 F.3d 552, 556 (8th Cir. 2006).

<sup>142</sup> *Batiste*, 659 F.3d at 1210.

<sup>143</sup> United States *ex rel.* Lujan v. Hughes Aircraft Co., 243 F.3d 1181, 1187 (9th Cir. 2001).

<sup>144</sup> See *Batiste*, 659 F.3d at 1210; *Lujan*, 243 F.3d at 1187.

<sup>145</sup> See *Batiste*, 659 F.3d at 1208.

<sup>146</sup> See *id.*

A more permissive 9(b) standard will protect valuable classes of whistleblowers who have intimate knowledge of fraud, but who do not have access to a defendant's actually submitted bills or invoices. By linking a lenient 9(b) standard to the first-to-file rule, courts will most efficiently calibrate the relevant interests of all parties, tempering any 9(b) expansion with a corresponding increase in the pool of claims that defendants can use to deter later-filed claims.

For purposes of this analysis, "more permissive 9(b) standard" refers to allowing FCA qui tam complaints that do not allege details of specific submitted fraudulent claims, such as invoice billing amounts and dates.<sup>147</sup> A "more restrictive 9(b) standard," on the other hand, refers to requiring FCA complaints to allege details of specific submitted fraudulent claims. Table 1 describes the different 9(b) standards and the circuits that have embraced each standard.

**TABLE 1:**

<b>9(b) Standard</b>	<b>Effect</b>	<b>Circuits</b>
"more permissive 9(b) standard"	FCA qui tam complaints do not have to allege details of specific submitted fraudulent claims, such as invoice dates and amounts.	Fifth Circuit <sup>148</sup> Seventh Circuit <sup>149</sup> Ninth Circuit <sup>150</sup>
"more permissive 9(b) standard" with restrictive elements	Some FCA qui tam complaints do not have to allege details of specific submitted fraudulent claims, but more scrutiny is applied.	First Circuit <sup>151</sup> Tenth Circuit <sup>152</sup>
"more restrictive 9(b) standard"	FCA qui tam complaints must allege details of specific submitted fraudulent claims.	Fourth Circuit <sup>153</sup> Sixth Circuit <sup>154</sup> Eight Circuit <sup>155</sup> Eleventh Circuit <sup>156</sup>

<sup>147</sup> As discussed above, some circuits that identify with this more permissive standard also have restrictive elements to their analysis, but for the most part this section will focus on their more permissive elements. See *United States ex rel. Lemmon v. Envirocare of Utah, Inc.*, 614 F.3d 1163, 1172 (10th Cir. 2010); *United States ex rel. Duxbury v. Ortho Biotech Prods., L.P.*, 579 F.3d 13, 29 (1st Cir. 2009); see also *supra* Part I.D–E.

<sup>148</sup> See *United States ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 190 (5th Cir. 2009).

<sup>149</sup> See *United States ex rel. Lusby v. Rolls-Royce Corp.*, 570 F.3d 849, 854–55 (7th Cir. 2009).

<sup>150</sup> See *Ebeid ex rel. United States v. Lungwitz*, 616 F.3d 993, 999 (9th Cir. 2010).

<sup>151</sup> See *Duxbury*, 579 F.3d at 29–30.

<sup>152</sup> See *Lemmon*, 614 F.3d at 1172.

<sup>153</sup> See *United States ex rel. Nathan v. Takeda Pharm. N. Am., Inc.*, 707 F.3d 451, 457–58 (4th Cir. 2013).

<sup>154</sup> See *Chesbrough v. VPA, P.C.*, 655 F.3d 461, 471 (6th Cir. 2011).

<sup>155</sup> See *United States ex rel. Vigil v. Nelnet, Inc.*, 639 F.3d 791, 799–800 (8th Cir. 2011).

In the same vein, Table 2 describes the different first-to-file standards as they relate to 9(b), and the circuits that have embraced each standard. “Bars fewer claims via first-to-file rule” refers to requiring a first complaint to satisfy 9(b) before it can bar related later-filed complaints. Conversely, “bars more claims via first-to-file” refers to allowing certain first complaints to bar related later-filed complaints even if the first complaint does not satisfy 9(b)’s particularity requirements.

**TABLE 2:**

First-to-File Standard	Effect	Circuits
“bars fewer claims via first-to-file rule”	First complaint must satisfy 9(b) before it can bar related later-filed complaints.	Sixth Circuit <sup>157</sup> Ninth Circuit <sup>158</sup>
“bars more claims via first-to-file”	First complaint need not satisfy 9(b) to bar related later-filed complaints (D.C. Circuit’s <i>Batiste</i> standard).	D.C. Circuit <sup>159</sup> First Circuit <sup>160</sup>
Leaning toward D.C.’s <i>Batiste</i> standard	Favorable citation to the D.C. Circuit’s <i>Batiste</i> standard, but no definitive standard articulated or embraced yet.	Tenth Circuit <sup>161</sup> Eight Circuit <sup>162</sup>

*A. One Checks the Other: More 9(b) Survivors, and Each Can Be Used to Block Future Claims*

Combining the more permissive 9(b) standard and the interpretation of the first-to-file rule that bars fewer claims would not require details of specific fraudulent claims for a complaint to satisfy 9(b), and would require a first complaint to satisfy 9(b) before it can bar related later-filed complaints.<sup>163</sup> This combination successfully promotes the purposes of both

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<sup>156</sup> See *Hopper v. Solvay Pharm., Inc.*, 588 F.3d 1318, 1327 (11th Cir. 2009).

<sup>157</sup> See *Walburn v. Lockheed Martin Corp.*, 431 F.3d 966, 972 (6th Cir. 2005).

<sup>158</sup> See *Campbell v. Redding Med. Ctr.*, 421 F.3d 817, 825 (9th Cir. 2005).

<sup>159</sup> See *United States ex rel. Batiste v. SLM Corp.*, 659 F.3d 1204, 1210 (D.C. Cir. 2011).

<sup>160</sup> *United States ex rel. Heineman-Guta v. Guidant Corp.*, 718 F.3d 28, 36–37 & n.10 (1st Cir. 2013).

<sup>161</sup> See *United States ex rel. Wickliffe v. EMC Corp.*, 473 F. App’x 849, 851 (10th Cir. 2012).

<sup>162</sup> See *Roberts v. Accenture, LLP*, 707 F.3d 1011, 1017–19 (8th Cir. 2013).

<sup>163</sup> The Ninth Circuit currently fits this category given its permissive 9(b) standard as articulated in *Ebeid* and its 9(b) requirement for first-to-file preclusion as discussed in *Campbell*. *Ebeid ex rel. United States v. Lungwitz*, 616 F.3d 993, 999 (9th Cir. 2010); *Campbell* 421 F.3d at 825.

9(b) and the first-to-file rule. A permissive 9(b) standard will allow plaintiffs to bring legitimate claims, while the ability to use each surviving claim as a bar on future claims serves as a natural check to protect defendants from redundant copycat suits.

At first glance, this standard might make defendants nervous, because each independently would appear to favor plaintiffs and grant more of them access to the courts. For example, a defendant might be concerned about the increased number of claims that are allowed to survive 9(b) under a more permissive standard.<sup>164</sup> Separately, defendants may also fear that they will not be able to use failed (but still costly) claims that did not survive 9(b) to bar future redundant suits.<sup>165</sup>

However, the more complaints that satisfy 9(b), the more ammunition defendants have to block related claims using the first-to-file bar. When the two rules are combined, the more permissive 9(b) rule actually tempers the benefit that plaintiffs might otherwise get from a rule requiring 9(b) compliance for precluding later-filed claims. Though this standard would allow more plaintiffs to survive a 12(b)(6) challenge initially, each of those complaints could then be used to preclude later related claims, per the first-to-file rule.

This may be cold comfort to defendants who would prefer both spigots for relator access to be tightened, but this standard does justice to the purposes behind 9(b) and the first-to-file rule. This balanced approach does not prematurely block potential claimants who have valuable information to share with the government, even if they are not privy to a defendant's specific fraudulent invoices or bills.<sup>166</sup> At the same time, the clearly defined set of 9(b)-satisfactory claims that defendants can use to block future related claims will serve as a check on the increased pool of potential plaintiffs. This standard provides certainty and efficiency to both parties in resolving FCA claims, by eliminating the question of what counts as "sufficient notice" to bar future claims.<sup>167</sup>

Defendants may rightly be concerned should courts that adopt this standard read "related" narrowly and allow only very similar or near-identical claims to be barred. Such an interpretation would severely limit the natural check on claims that this standard would otherwise provide. This combination would then perhaps favor plaintiffs without adequately protecting defendants, as both Rule 9(b) and the first-to-file rule are designed to do. Thus, a court's permissiveness in determining which claims are "related" for preclusion purposes should also be calibrated to ensure an optimal balance is maintained in the relative advantages each party enjoys.

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<sup>164</sup> See *supra* Part I.A.

<sup>165</sup> See *supra* Part II.A.

<sup>166</sup> See *supra* Part I.A.

<sup>167</sup> See *supra* text accompanying note 130.

*B. The Other Checks the One: Fewer Claims Squeak Past 9(b), and Only Survivors Can Block Future Claims*

Combining the more restrictive 9(b) standard and the interpretation of the first-to-file rule that bars fewer claims would require details of specific allegedly fraudulent claims for a complaint to satisfy 9(b), and would require a first complaint to satisfy 9(b) before it can bar related later-filed complaints.<sup>168</sup>

In jurisdictions applying this combination, though plaintiffs may be concerned by the restrictiveness of 9(b), they can at least take comfort in the fact that fewer surviving complaints means fewer claims that can be used by defendants to bar subsequent related claims. With the standards linked in this way, any advantage one side may garner in a given standard could presumably be mitigated by its corresponding check in the other standard.

However, the more restrictive 9(b) standard would also result in elimination at the outset of entire classes of plaintiffs with useful knowledge of fraud against the government but who do not have access to billing or accounting information.<sup>169</sup> To prevent all such claimants from bringing whistleblower claims seems to cut too far against one of the main goals of the FCA: to encourage relators with valuable information to come forward.

The Sixth Circuit's *Walburn* case illustrates this point. In *Walburn*, the Sixth Circuit considered a first-filed complaint that was pending in a Maryland district court at the time the action before the court was filed.<sup>170</sup> The Sixth Circuit determined that the first complaint failed to satisfy 9(b) under the more restrictive 9(b) standard because it did not allege details of actually submitted fraudulent documents and records.<sup>171</sup> While the failed claim could not be used to bar similar future claims, that is no comfort to

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<sup>168</sup> The Sixth Circuit fits into this category, with its restrictive 9(b) standard as articulated in *Chesbrough* and *Bledsoe*, and its 9(b) requirement for first-to-file preclusion as discussed in *Walburn*. *Chesbrough v. VPA, P.C.*, 655 F.3d 461, 471 (6th Cir. 2011); *United States ex rel. Bledsoe v. Cmty. Health Sys., Inc.*, 501 F.3d 493, 504–05 (6th Cir. 2007); *Walburn v. Lockheed Martin Corp.*, 431 F.3d 966, 972 (6th Cir. 2005).

<sup>169</sup> See *supra* text accompanying note 91.

<sup>170</sup> 431 F.3d at 969.

<sup>171</sup> *Id.* at 972. Notably, the Sixth Circuit did not have the same qualms as the D.C. Circuit about the “strange judicial dynamic” of one court assessing the sufficiency of a first complaint pending in another court. See *United States ex rel. Batiste v. SLM Corp.*, 659 F.3d 1204, 1210 (D.C. Cir. 2011). Instead, it decided that while it could “take judicial notice” of the other court’s proceedings, the “ultimate fate” of the first complaint in the other court was immaterial to the Sixth Circuit’s determination of whether the first complaint could bar the later-filed case before the court. *Walburn* 431 F.3d at 973 n.5 (internal quotation marks omitted) (noting that the court was only concerned with “whether the earlier action was ‘pending’ at the time the later action was filed”). Perhaps this was less of a concern because the first action was in a district court, whereas the second action was being considered in an appellate court. However, the court’s reasoning appears to suggest that its analysis would apply even at the district court level.



plaintiffs without specific invoice or billing information who cannot survive 9(b) in the first place. Thus, where no such claims will be allowed at all, the first-to-file rule has nothing to “check.”

*C. Something for Each Side: More Claims Allowed, and Even Deficient Claims Can Be Used to Block Future Claims*

Combining the more permissive 9(b) standard and the interpretation of the first-to-file rule that bars more claims would not require details of specific fraudulent claims for a complaint to satisfy 9(b), and would not require a first complaint to satisfy 9(b) before it can bar related later-filed complaints.<sup>172</sup>

In this combination, the two rules may counteract each other. The more permissive 9(b) standard would expand the pool of potential claimants to include those who have detailed knowledge of fraud but lack direct access to a defendant's billing and accounting departments. On the other hand, the first-to-file rule would be unrestricted by 9(b). This would allow defendants to more freely exercise the first-to-file bar to preclude related claims, even where a first complaint cannot survive 9(b) scrutiny.

This standard may seem to give a comparable advantage to each side by allowing more claims to survive 9(b) and allowing even more of them to be used to bar future related claims. However, a central flaw in this approach is the decoupling of the 9(b) standard from the first-to-file rule. Although initially this standard may appear to provide balance between plaintiffs and defendants, in practice, without a direct relationship between the 9(b) and first-to-file standards, the system may tip in one side's favor. It is hard to predict how many more claims will be allowed to survive 9(b) under the more permissive standard, and how many more claims can be used to preclude under the “bars more claims” first-to-file rule. These uncertainties may vary court to court, and perhaps even judge to judge. Without one standard tethered to the other, there is no effective, self-enforcing check on either standard, which, taken to the extreme, could overwhelm any potentially balancing effects of the other standard.

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<sup>172</sup> With its newly permissive 9(b) interpretation in *Lemmon*, the Tenth Circuit may soon fit this category, assuming that it officially confirms its approval of the D.C. Circuit's first-to-file rule, as it hinted at in *Wickliffe*. *United States ex rel. Wickliffe v. EMC Corp.*, 473 F. App'x 849, 851 (10th Cir. 2012) (citing favorably to *Batiste*, 659 F.3d at 1210); *United States ex rel. Lemmon v. Envirocare of Utah, Inc.*, 614 F.3d 1163, 1172 (10th Cir. 2010). Of course, it may still be too early to tell just how permissive the Tenth Circuit's 9(b) jurisprudence will become, given that it continues to cite to and apply restrictive elements of its prior, more restrictive 9(b) standard. *Lemmon*, 614 F.3d at 1171–72 (quoting *United States ex rel. Sikkenga v. Regence BlueCross BlueShield of Utah*, 472 F.3d 702, 727 (10th Cir. 2006)). Similarly, with the First Circuit's embrace of the D.C. Circuit's first-to-file rule, it falls into this category as well, at least for claims that qualify for *Duxbury's* permissive 9(b) exception for third-party inducement. *United States ex rel. Heineman-Guta v. Guidant Corp.*, 718 F.3d 28, 37 & n.10 (1st Cir. 2013); *United States ex rel. Duxbury v. Ortho Biotech Prods., L.P.*, 579 F.3d 13, 29 (1st Cir. 2009).

*D. Tightening Both Spigots: Fewer Claims Survive 9(b), Yet Even Deficient Claims Can Be Used to Block Future Claims*

Combining the more restrictive 9(b) standard and the interpretation of the first-to-file rule that bars more claims would require details of specific fraudulent claims for a complaint to satisfy 9(b), and would not require a first complaint to satisfy 9(b) before it could bar related later-filed complaints under the first-to-file rule.<sup>173</sup>

Defendants would be at a great advantage in jurisdictions using these two standards. They would benefit from the restrictive 9(b) standard at the outset, shutting the door to all potential plaintiffs without access to actual documentation of allegedly fraudulent claims. Defendants would also be able to draw from the full pool of pending complaints to bar subsequent related complaints regardless of the first-filed complaint's ability to satisfy 9(b). They would benefit from both standards, essentially tightening both spigots to whistleblower plaintiffs' access to the courts. While the combination of a stringent 9(b) standard and a liberal first-to-file bar would certainly fulfill the rules' goal of protecting fraud defendants from frivolous, redundant suits, it goes too far in contravening the overarching purpose of the FCA—to encourage legitimate plaintiffs to come forward with useful information.

This standard cuts out a large swath of plaintiffs at the outset: those who have valuable information on fraud committed against the government, but who do not have access to individual bills or invoices. Untethered to the 9(b) standard, the first-to-file rule is at risk of uneven and unprincipled application, based on what individual judges deem to be enough information to put the government and defendants “on notice” of a particular set of claims.<sup>174</sup> This combination is both overly restrictive and lacking in certainty, creating a procedural imbalance that heavily favors defendants.

#### CONCLUSION

The courts of appeals continue to grapple with striking the right balance between encouraging legitimate whistleblowers to come forward and deterring redundant, frivolous suits. With the ever-increasing number of FCA qui tam claims,<sup>175</sup> it is more important than ever for courts to

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<sup>173</sup> With its restrictive 9(b) standard as articulated in *Vigil* and *Joshi*, and approval of the D.C. Circuit's first-to-file rule in *Roberts*, the Eighth Circuit falls within this category. *Roberts v. Accenture, LLP*, 707 F.3d 1011, 1017–19 (8th Cir. 2013); *United States ex rel. Vigil v. Nelnet, Inc.*, 639 F.3d 791, 799–800 (8th Cir. 2011); *United States ex rel. Joshi v. St. Luke's Hosp., Inc.*, 441 F.3d 552, 556 (8th Cir. 2006). Similarly, with the First Circuit's embrace of the D.C. Circuit's first-to-file rule, FCA cases that do not qualify for the *Duxbury* third-party inducement 9(b) exception could also fall into this category. *Heineman-Guta*, 718 F.3d at 36, 37 & n.10; *Duxbury*, 579 F.3d at 29.

<sup>174</sup> See *United States ex rel. Batiste v. SLM Corp.*, 659 F.3d 1204, 1210 (D.C. Cir. 2011).

<sup>175</sup> See *Fraud Statistics*, *supra* note 9.

consider how their interpretations of Rule 9(b) and the first-to-file rule interact, and whether the combined effects of their interpretations serve to further the underlying purposes of the FCA and Rule 9(b).

At the outset, courts should embrace a more permissive 9(b) standard to ensure that valuable whistleblower claims are not prematurely dismissed because of a claimant's lack of access to particular bills or invoices. This will prevent defendants from escaping liability by simply separating out their billing departments from their production and service departments.

Coupled with an expanded interpretation of permissible claims under 9(b), courts should require claims to survive a 12(b)(6) motion to dismiss (i.e., satisfy 9(b)) before they can be used to preclude related later-filed complaints. A direct relationship between the two standards is vital to maintaining the appropriate balance between the relative advantages of whistleblower plaintiffs and defendants, and fulfilling the purposes of both 9(b) and the FCA. By linking the first-to-file bar to Rule 9(b), courts can ensure a self-checking procedural system. Any increase in permissible claims will be tempered by the same amount of increase in claims that can be used to preclude related later-filed claims.

As courts continue to shape the contours of each of the two standards, considering their connection will be vital to both encouraging legitimate whistleblowers to bring claims and protecting defendants from redundant lawsuits.

