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The "Pending" Circuit Split on Whether the False Claims Act's First-to-File Bar Has a Time Limit



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I. Introduction

In recent years, the U.S. Department of Justice ("DOJ") has trumpeted its historic monetary recoveries in healthcare cases brought under the False Claims Act ("FCA").[1] DOJ recently reported $2.6 billion in healthcare fraud judgments and settlements and total recoveries of $4.3 billion in 2013—with whistleblowers and their attorneys receiving almost $325 million from settlements in addition to legal fees.[2]

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As the potential recoveries increase, so do the number of *qui tam* suits brought by relators enticed by the prospects of receiving a significant percentage of any settlement.

The prominence of FCA litigation in the government's efforts to combat healthcare fraud may have the side effect of distorting the very purpose of such suits, because the prospect of enormous payouts gives relators strong incentives to bring highly questionable or specious claims.

Because DOJ must investigate every *qui tam* complaint as a matter of law, even those that lack merit, bad claims place significant burdens on the government as well as the defendants.

Health-care companies with significant Medicare and Medicaid program revenue are especially attractive targets for relators—especially companies with conspicuous brick-and-mortar facilities or affiliates, such as hospitals and pharmacies. Every day of patient billing or product sales is one more day that could become the subject of a future FCA action, even for technical violations of the Stark law.[3]

For health-care companies that find themselves in repetitive FCA cases with similar allegations, a recent decision by the U.S. Court of Appeals for the District of

[1] 31 U.S.C. §§ 3729-3733.

[2] *Health Care Fraud and Abuse Control Program Annual Report for Fiscal Year 2013* (Feb. 2014) (2013 HCFAC Report), *available at* http://oig.hhs.gov/publications/docs/hcfac/FY2013-hcfac.pdf (reporting that $4,333,555,846 was collected, broken down as follows: (a) $2,855,836,718 to the Medicare Trust Fund, (b) $1,153,525,089 to other government programs and agencies, and (c) $324,194,039 to whistleblowers); *see* also U.S. Dep't of Justice, Press Release, *Justice Department Recovers $3.8 Billion from False Claims Act Cases in Fiscal Year 2013: Second Largest Annual Recovery in History Whistleblower Lawsuits Soar to 752* (Dec. 20, 2013), *available at* http://www.justice.gov/opa/pr/2013/December/13-civ-1352.html.

[3] Section 1877 of the Social Security Act, 42 U.S.C. § 1395nn (also known as the physician self-referral law).

Columbia Circuit could provide an important extension of the FCA's first-to-file bar.

This important defense could provide more predictability in future litigation. On April 11, 2014, the D.C. Circuit held in *U.S. ex rel. Shea v. Cellco Partnership d/b/a Verizon Wireless* that the FCA's ''first-to-file'' bar has no temporal limitation.[4] In other words, once a *qui tam* is filed, it bars later related *qui tams*, even if the first one is dismissed before the later one is filed.

Importantly, the D.C. Circuit split with the Fourth Circuit, which reached the opposite conclusion last year in *U.S. ex rel. Carter v. Halliburton Co.* There, the Fourth Circuit held that a *qui tam* stops having preclusive effect under the first-to-file bar once it is dismissed.[5]

The defendants in *Carter* had already filed a petition for *certiorari* with the U.S. Supreme Court before the D.C. Circuit decided *Shea*. With *Shea* creating a clear circuit split, it may give the Supreme Court a compelling reason to take up the issue.

II. Overview of Qui Tam Actions and the First-To-File Bar

When a relator files a *qui tam* complaint under the FCA, he or she must file under seal and disclose all material evidence to DOJ.[6] The complaint remains under seal for 60 days,[7] and DOJ is required to ''diligently . . . investigate'' the allegations during that period so it can decide whether to intervene and take over the litigation.[8] At the end of the 60 days, if the government is not ready to decide whether to intervene, it seeks an extension of the seal ''for good cause shown,''[9] as well as a concurrent extension of its deadline to make an intervention decision.[10]

In health-care cases, courts typically authorize multiple extensions, which can prolong the government's investigation for years. As a result, *qui tams* can remain under seal, hidden from public view—and the defendant itself—for years, as the government's investigation unfolds far beyond the scope of the original *qui tam*.

Ultimately, at some point, courts will give the parties their day in court and refuse to grant any further seal extensions. The government will then be forced to make an intervention decision. If the government *declines* to intervene, the matter is unsealed and the relator becomes responsible for litigating the case.[11]

At that time, the complaint becomes vulnerable to dismissal under various FCA procedural bars, including the first-to-file bar.[12]

The first-to-file bar provides that ''[w]hen a person brings an action under [the FCA], no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.''[13] The majority of circuits have defined ''related'' cases as ones that allege ''the same material elements of fraud.''[14]

This means that the earlier case must have given the government enough reason to launch an investigation that could have uncovered the fraudulent practices alleged in the later-filed *qui tam*—even if the government *never* launched a formal investigation, or even if it did but without actually uncovering the later-alleged fraud.[15]

III. The D.C. Circuit's Decision in Shea

A. The District Court Proceedings

In *Shea*, the D.C. Circuit reviewed the dismissal of a *qui tam* under the first-to-file bar. In 2007, relator Stephen M. Shea filed a *qui tam* complaint in the U.S. District Court for the District of Columbia, claiming that Verizon Communications, Inc. and its predecessor MCI had violated the FCA (the *Verizon I* suit).[16]

The relator alleged that the defendants had two telecommunication contracts with the General Services Administration (GSA), and that they knowingly overbilled the government by adding improper surcharges to GSA's bills.[17]

In 2009, while Shea was helping the government assess the strength of the case in *Verizon I*, he filed a second *qui tam* against Verizon and related entities (the *Verizon II* lawsuit). This second action featured similar

[4] No. 12-7133, 2014 WL 1394687 (D.C. Cir. Apr. 11, 2014).
[5] 710 F.3d 171 (4th Cir. 2013).
[6] *See* 31 U.S.C. § 3730(b)(2).
[7] *Id.*
[8] *Id.* § 3730(a) (''The Attorney General diligently shall investigate a violation [of the FCA]. If the Attorney General finds that a person has violated or is violating [the FCA], the Attorney General may bring a civil action under this section against the person.'').
[9] *Id.* § 3730(b)(3).
[10] *But see U.S. ex rel. Law v. Spurlock*, 582 F. Supp. 2d 1350, 1353 (N.D. Ala. 2008) (analyzing 31 U.S.C. § 3730(b)(3) and holding that ''there is no statutory basis for the granting of an extension of the 60-day period within which the United States must elect to intervene'').
[11] *See* 31 U.S.C. § 3730(b)(2), (b)(4).
[12] *See id.* § 3730(b)(5)
[13] *Id.*
[14] *U.S. ex rel. Hampton v. Columbia/HCA Healthcare Corp.*, 318 F.3d 214, 217 (D. C. Cir. 2003) The majority of circuits have adopted the ''material elements'' test. *See U.S. ex rel. Carter v. Halliburton Co.*, 710 F.3d 171, 181-82 (4th Cir. 2013) (adopting ''same material elements test'' used by the Third, Fifth, Sixth, Ninth, Tenth, and D.C. Circuits).
[15] *See, e.g., U.S. ex rel. Heineman-Guta v. Guidant Corp.*, 718 F.3d 28, 36-37 (1st Cir. 2013) (''[E]arlier-filed complaints must provide only the essential facts to give the government sufficient notice to initiate an investigation into allegedly fraudulent practices.''); *U.S. ex rel. Batiste v. SLM Corp.*, 659 F.3d 1204, 1210 (D.C. Cir. 2011) (''[First-filed complaints] must provide only sufficient notice for the government to initiate an investigation into the allegedly fraudulent practices, should it choose to do so.''); *Chovanec*, 606 F. 3d at 364-65 (interpreting § 3730(b)(5) as barring allegations of conduct that ''investigations launched in direct consequence of [the first-filed] complaint[] would have revealed,'' regardless of ''whether the United States put . . . those facts to their best use''); *see also Carter*, 710 F.3d at 181-82 (noting that ''material elements'' test ''prevents the less vigilant whistle-blower from using insignificant factual variations to allege what is essentially the same fraudulent scheme already made known to the government'' (quotation marks omitted)).
[16] *See U.S. ex rel. Shea v. Verizon Comm'ns, Inc.* (''*Verizon I*''), 844 F. Supp. 2d 78 (D.D.C. 2012) (awarding relator percentage of FCA settlement).
[17] *Id.* at 80.

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allegations of overbilling, except it involved different contracts and government agencies.[18]

In February 2011, the United States intervened in *Verizon I*, settled the case with Verizon, dismissed the suit, and paid Shea a court-ordered portion of the settlement.[19] By contrast, in November 2011, the United States *declined* to intervene in *Verizon II.*[20] Eventually, Shea amended his pleadings in *Verizon II*, and the defendants moved to dismiss the complaint.[21]

They argued, among other things, that the *Verizon II* action was jurisdictionally barred under the FCA's first-to-file rule because it was ''based on the facts underlying'' *Verizon I*, and, therefore, the two lawsuits were ''related'' actions within the meaning of § 3730(b)(5).[22]

Shea responded, in part, that the first-to-file rule should not apply where, as in that case, the same relator had brought both the first-filed and later actions. He also contended that *Verizon I* and *Verizon II* were not ''related'' because *Verizon II* addressed different contracts and government agencies.[23]

The district court granted the motion to dismiss under the first-to-file bar. It emphasized that the crucial question under that FCA provision is whether the first-filed action gives the government notice of the fraud alleged in the later action.[24]

The district court concluded that *Verizon II* was barred because its allegations described ''a fraudulent scheme [that] the government already would be equipped to investigate,'' based on the notice provided by the *Verizon I* allegations.[25]

Importantly, the district court dismissed the relator's FCA claims ''with prejudice,'' meaning that he could not file another amended complaint or even a separate lawsuit based on the same facts.[26]

B. The D.C. Circuit Appeal

On appeal, the D.C. Circuit held that the district court correctly dismissed *Verizon II* under the first-to-file bar, because *Verizon I* gave the government notice of the fraud alleged in the later suit.

The Court of Appeals explained that the two actions alleged the same fraudulent scheme: the Verizon defendants supposedly employed the same billing practices for their federal contracts that they used for their private corporate clients, and they supposedly billed prohibited surcharges to their federal and corporate clients alike.[27]

Even though the two actions concerned different contracts and agencies, the different ''scope'' of the alleged frauds did not affect the two actions' ''relatedness.''[28]

The D.C. Circuit further noted that ''the first-to-file rule serves two purposes: 'rejecting suits which the government is capable of pursuing itself,' and 'promoting those which the government is not equipped to bring on its own.' ''[29]

The two actions were ''related'' because ''the allegations and legal theory of *Verizon I* would alert the government to the possibility of a fraudulent scheme that went beyond the specifics of *Verizon I*,'' and because ''*Verizon I* would suffice to equip the government to investigate Shea's expanded allegations in *Verizon II*.''[30]

The D.C. Circuit also declined to create an exception to the first-to-file rule simply because the same relator filed both actions. It explained that § 3730(b)(5) ''clearly directs that 'no person' is allowed to bring a related suit,'' and that where, as here, the relator's first suit gives the government notice of the fraud alleged in the second, the first-to-file rule properly '' 'reject[s] suits which the government is capable of pursuing itself.' ''[31]

The D.C. Circuit also affirmed, over a dissenting opinion, the district court's dismissal of the second action *with prejudice*. The majority opinion concluded that the relator could not re-file his FCA claims even though the first-filed action had since been dismissed upon settlement in early 2011.

The D.C. Circuit thus held ''that the first-to-file bar applies even if the initial action is no longer pending, because we read the term 'pending' in the statutory phrase 'pending action' to distinguish the earlier-filed action from the later-filed action.''[32] In other words, the word ''pending'' in the FCA was merely a ''referential'' word that served to ''identify which action bars the other.''[33]

The Court of Appeals emphasized that this construction of § 3730(b)(5) best reinforced the first-to-file bar's underlying policy goal: to provide strong incentives to relators to give the government notice as early as possible of potential billing fraud that the government could not have discovered on its own. The court reasoned that ''[t]he resolution of a first-filed action does not somehow put the government off notice of its contents.''[34]

It would poorly serve the government-notice policy to ''read[] the bar temporally,'' because this ''would allow related *qui tam* suits indefinitely—no matter to what extent the government could have already pursued those claims based on earlier actions. Such duplicative suits would contribute nothing to the government's knowledge of fraud.''[35]

IV. Circuit Split

The D.C. Circuit is the first federal appeals court to interpret the statutory phrase ''pending action'' so that the first-to-file bar applies in perpetuity. In addition,

[18] *See U.S. ex rel. Shea v. Verizon Bus. Network Servs., Inc.* (''*Verizon II*''), 904 F. Supp. 2d 28 (D.D.C. 2012) (dismissing *qui tam* under FCA's first-to-file bar).
[19] *Verizon I*, 844 F. Supp. 2d at 80.
[20] *Verizon II*, 904 F. Supp. 2d at 31.
[21] *Id.*
[22] *See id.* at 33.
[23] *See id.*
[24] *See id.* at 33-37; *id.* at 36 (''[C]omplaints are related where the earlier-filed complaint gives the government sufficient notice to discover the fraud in the later-filed complaint.'').
[25] *Id.* at 36 (quoting *Batiste*, 659 F.3d at 1209).
[26] *See id.* at 37 (dismissing ''without prejudice'' as to United States, but including no such qualifier as to relator).
[27] *See Shea*, , 2014 WL 1394687, at *3.
[28] *Id.*
[29] *Id.* (quoting *Batiste*, 659 F.3d at 1208).
[30] *Id.*
[31] *Id.* at *4 (quoting *Batiste*, 659 F.3d at 1208).
[32] *Id.*
[33] *Id.* at *5.
[34] *Id.*
[35] *Id.*

one district court in the Eleventh Circuit previously adopted the same interpretation of ''pending action.''[36]

Last year, the Fourth Circuit reached the opposite conclusion in *Carter*, holding that ''pending action'' instead means that the bar applies only while the first-filed action remains an active matter on a court's docket.[37]

The D.C. Circuit declined to follow *Carter*, concluding that *Carter* was not persuasive because it did not squarely consider the two possible constructions of § 3730(b)(5).[38] Both the Seventh and Tenth Circuits have previously taken the same view as the Fourth Circuit, albeit in *dicta* or without undertaking a detailed statutory analysis of the relevant terms.[39]

Even before *Shea*, the Supreme Court had been considering whether to hear an appeal in *Carter*, and had asked for the Solicitor General's views on the matter.

Now that the D.C. and Fourth Circuits have adopted diametrically opposed interpretations of the statute, with additional courts on either side of the debate, it is difficult to ignore this circuit split, thus increasing the chances that the Supreme Court might deem the question worthy of review.

V. Implications

As *Shea* explained, Congress drafted the first-to-file bar to give relators strong incentives to provide the government with notice, as soon as possible, of possible fraud that the government is not already equipped to uncover and pursue.

The D.C. Circuit's ruling in *Shea* advances that goal. The notice function of a *qui tam* is fulfilled the moment it is disclosed, under seal, to DOJ, and that never changes, regardless of whether that particular *qui tam* proceeded to judgment, settlement, or outright dismissal.

The D.C. Circuit's application of the first-to-file bar also helps to bring a measure of certainty to healthcare companies that have already litigated or resolved prior *qui tams*. If *Shea*'s interpretation of the first-to-file bar stands, it can help facilitate dismissal of copycat *qui tam* actions.

Prior to *Shea*, many courts had recognized that when multiple *qui tam* actions arise in different parts of the country, the first-filed action can bar later related actions if it alleged that the billing fraud was a company-wide problem or was directed from company headquarters.[40]

Shea's interpretation of the first-to-file rule extends this principle: if a defendant obtains dismissal of a *qui tam* that alleges a company-wide scheme, the defendant may assert that the first-to-file bar precludes *any* later-filed related *qui tam* that alleges it committed a similar type of fraud, regardless of whether the earlier alleged scheme focused on a different locality, and regardless of whether the first-filed suit was resolved in the distant past.

This strategy can be especially helpful to large health-care providers, pharmaceutical manufacturers, and others in the health-care and life sciences industries who may face repeated allegations, years apart, involving similar schemes about company-wide payments of alleged kickbacks to physicians.[41]

Importantly, the first-to-file bar is a pleading-based defense that can be advanced early in litigation, on relatively inexpensive motions to dismiss. Its application merely requires a ''side-by-side comparison'' of the earlier and later complaints, to see whether earlier allegations fairly encompassed the later ones and ''suffice[d] to put the U.S. government on notice of allegedly fraudulent . . . practices'' in the later *qui tam.*[42]

By contrast, even though an unsealed *qui tam* can also support a defense under the FCA's ''public disclosure'' bar,[43] that defense often requires a detailed analysis of information that may fall outside the pleadings: whether the later *qui tam* was filed by an ''original source'' of those allegations, which in turn can require the introduction of evidence about the original source's ''knowledge'' of the allegations.[44]

Given this potentially fact-intensive analysis, courts may be reluctant to dismiss cases on public disclosure grounds based solely on the pleadings, and may instead

[36] *See U.S. ex rel. Powell v. Am. InterContinental Univ., Inc.*, No. 1:08-CV-2277, 2012 WL 2885356, at *4-*6 (N.D. Ga. July 12, 2012).

[37] *See In re Natural Gas Royalties Qui Tam Litig.*, 566 F.3d 956, 963 (10th Cir. 2009); *U.S. ex rel. Chovanec v. Apria Healthcare Grp., Inc.*, 606 F.3d 361, 365 (7th Cir. 2010); *U.S. ex rel. Carter v. Halliburton Co.*, 710 F.3d 171, 182-83 (4th Cir. 2013).

[38] *See Shea*, 2014 WL 1394687, at *5-*6 (majority op.).

[39] *See In re Natural Gas Royalties Qui Tam Litigation*, 566 F.3d 956 (10th Cir. 2009); *U.S. ex rel. Chovanec v. Apria Healthcare Grp., Inc.*, 606 F.3d 361 (7th Cir. 2010).

[40] *See, e.g.*, *Batiste*, 659 F.3d at 1209 (''If the government investigated the facts alleged in [the first-filed] complaint on a nationwide basis, it would discover continuing fraud in the New Jersey offices [referenced in the later complaint], as well as the completed fraud in the Nevada offices [referenced in the earlier complaint], if such fraud existed.''); *Carter*, 710 F.3d at 182 (''The government would likely investigate billing practices across the company, because [the earlier complaint] notes that the official national policy was to bill correctly but that the employees were consistently instructed not to do so.'').

[41] *See, e.g., U.S. ex rel. Hampton v. Columbia/HCA Healthcare Corp.*, 318 F.3d 214, 218 (D.C. Cir. 2003) (earlier complaint alleging Medicare fraud at company's subsidiaries outside Georgia barred later complaint alleging fraud only at company's Georgia subsidiary, because earlier complaint also included broader allegations of ''a corporate-wide problem''); *Chovanec*, 606 F.3d at 365 (*qui tam* alleging Medicare billing fraud in Illinois was barred by earlier suits alleging that similar fraud in other states was ''orchestrated by [the same company's] national staff''); *U.S. ex rel. Ortega v. Columbia Healthcare, Inc.*, 240 F. Supp. 2d 8, 15-17 (D.D.C. 2003) (earlier *qui tam* alleging Medicare billing fraud in company's facility in Corpus Christi, Texas ''as well as elsewhere'' barred later *qui tam* alleging similar fraud in company's El Paso hospital); *U.S. ex rel. Palladino v. VNA of S. N.J.*, 68 F. Supp. 2d 455, 478-79 (D.N.J. 1999) (*qui tam* alleging Medicare and Medicaid fraud that focused on, but was not limited to, company's Philadelphia office barred later-filed *qui tam* alleging Medicare fraud at company's New Jersey office).

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

[43] *See Shea*, 2014 WL 1394687, at *11-*12 (Srinivasan, J., concurring in part and dissenting in part).

[44] *See* 31 U.S.C. § 3730(e)(4); *see, e.g., U.S. ex rel. Osheroff v. Healthspring, Inc.*, 938 F. Supp. 2d 724 (M.D. Tenn. 2013) (granting motion to dismiss *qui tam* on public disclosure grounds, because allegations were based on prior media reports).

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wait until the summary judgment stage to address the issue.[45]

Before *Shea*, a *qui tam* that was dismissed long ago could only support a public disclosure defense that might require just such a protracted and labor-intensive round of motion practice. Now, however, it can also support an early and relatively inexpensive first-to-file argument.

Obviously, *Shea* does not prevent the government from investigating new allegations that are claimed to have occurred after the dismissal of an earlier *qui tam*. The FCA gives the government ample opportunity to investigate these new *qui tam* allegations while the action remains under seal.[46] If the government believes that the new allegations are meritorious, perhaps because it thinks the defendant has recently resumed the alleged misconduct, it can choose to intervene in the litigation.[47]

But if the government does not intervene, the complaint is unsealed and becomes subject to dismissal under the first-to-file bar, because of the previously dismissed *qui tam*.

[45] *See, e.g.*, *U.S. ex rel. Whipple v. Chattanooga-Hamilton County Hosp. Auth.*, No. 3:11-CV-206, 2013 WL 4510801 (M.D. Tenn. Aug. 26, 2013) (granting partial summary judgment for *qui tam* defendant on public disclosure grounds, after previously denying motion to dismiss and permitting limited discovery, because *qui tam* allegations were based on information already disclosed by government audit and investigation).

[46] *See* 31 U.S.C. § 3730(b)(2)-(3).

[47] *See id.* § 3730(b)(5).

Therefore, the government has an added incentive to decide, in a timely fashion, whether to intervene in a *qui tam* that is related to an earlier one, *regardless* of the status of that earlier *qui tam*.

VI. Conclusion

Despite the difference of opinion among courts about the meaning of ''pending action,'' *Shea* remains consistent with an emerging consensus that the first-to-file bar should generally be interpreted by assessing whether the first-filed *qui tam* gave the government enough notice to investigate the fraudulent practices alleged in the later-filed *qui tam*.

Such an interpretation of the first-to-file bar reflects the reality of civil FCA investigations. The government has powerful tools to investigate alleged fraud and abuse in federal programs, such as civil investigative demands and administrative subpoenas,[48] and it often uses them to probe far beyond the four corners of the particular *qui tam* complaint that inspired the investigation.

Accordingly, *Shea* merely acknowledges what the FCA bar has long known: even a *qui tam* complaint that is dismissed can give the government enough information to spark an investigation that needs no other relators to fuel the fire.

[48] *See, e.g.*, *id.* § 3733 (civil investigative demands); 5 U.S.C. app'x 3 § 6 (Inspector General administrative subpoenas).