

Who's On First: 31 U.S.C. § 3730(b)(5)

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Abbott: Let's see, we have on the bags ... Who's on first, What's on second,
I Don't Know is on third.
Costello: That's what I want to find out.¹

Title 31 U.S.C. § 3730(b)(5) in the federal False Claims Act provides that a qui tam whistleblower cannot “intervene or bring a related action based on the facts underlying” a pending action. This generally means that when two or more qui tam cases are filed based on similar facts, only the first-filed case will survive. Accordingly, § 3730(b)(5) has come to be known as the “first-to-file rule” and is regarded by the courts as a jurisdictional bar.²

The first-to-file rule has been described as a “race to the courthouse.”³ A “race,” however, implies that the contestants know of one another’s existence. Typically, multiple qui tam plaintiffs, or relators, do not know there are other relators until well after they have paid their respective visits to the courthouse, complaints in hand. Frequently, they do not receive that unwelcome news until late in the evolution of the case. When that happens, one option is to agree amongst themselves on how to divide up the relator share and, in appropriate cases, how to work together to make their cases better and stronger.

For those unable or unwilling to craft such an agreement, the future is uncertain. This is not just because a consistent approach to “based on the facts underlying the pending action” has yet to emerge from the caselaw. It also is because there rarely will be two identical cases. Each will possess, to a greater or lesser degree, its own unique circumstances and perspectives on the alleged wrongdoing, as well as its own particular legal context. Nevertheless, we have done our best to extract from the cases as much guidance for the practitioner as we can in an inherently uncertain and evolving area. Part I of this paper explores the efforts of courts to parse out the meaning of “based on the facts underlying,”

¹ Abbott & Costello, Who’s on First, available at www.abbottandcostello.net (last visited August 30, 2006).

² “While § 3730(b)(5) is not one of the express ‘jurisdictional bars’ set forth at §§ 3730(e)(1)-(4), the practical effect of § 3730(b)(5)’s ‘bar’ is that a court lacks jurisdiction to hear, and must dismiss, an action that is a ‘related action based on the facts underlying the pending action.’” United States ex rel. Merena v. Smithkline Beecham Clinical Labs, Inc., 1997 U.S. Dist. LEXIS 19896, 48, n. 21 (D. Pa. 1997) (citing Hyatt v. Northrop Corp., 1989 U.S. Dist. LEXIS 18941 (C.D. Cal. Dec. 27, 1989)).

³ Campbell, ex rel. United States v. Redding Med. Ctr., 421 F.3d 817, 821 (9th Cir. 2005).

and the attached chart provides a circuit-by-circuit summary of the caselaw. Part II discusses the meaning of “pending action” and two recent Circuit Court decisions that have allowed a second-filed case to survive where the first was subsequently dismissed. Part III discusses policy reasons articulated by the courts in first-to-file cases and Part IV contains some concluding observations.

I. “Based On The Facts Underlying”

The first-to-file rule frequently is described by courts as an absolute, unambiguous “exception-free” rule.⁴ This view is based on a plain language reading of § 3730(b)(5), which itself does not provide for any exceptions. Thus, for example, there is no exception for a second-filing relator who reported the allegations to the government before the filing of the first action.⁵ Note however that two recent Circuit Court decisions have made inroads into the “absolute bar” rule. These are discussed in Part II.

A plain language reading of the statute also has led to universal agreement that the first-to-file rule does not mean that relators are only barred from pursuing subsequent suits if they are *identical* to earlier filed actions -- because the statute refers to a “related action,” not an identical one.⁶

Beyond that, the courts have articulated a variety of tests for deciding whether a second filed case is sufficiently similar to the first to be caught by the § 3730(b)(5) bar. Collectively, these tests fall into two groups: those that rely on a “same material elements/essential facts/core facts” analysis, and those that take a hybrid approach, adding to this analysis a “separate and distinct recovery” element. Either way, the courts agree that differences in detail, such as different times or places, or additional factual support, will not save a second-filed case.⁷

A. Rejecting the Identical Facts Theory

The identical facts test has been rejected by the courts despite this statement in the FCA’s legislative history:

⁴ United States ex rel. Lujan v. Hughes Aircraft Co., 243 F.3d 1181, 1183 (9th Cir. 2001), cert. denied, 534 U.S. 1040, 151 L. Ed. 2d 538, 122 S. Ct. 615 (2001); United States ex rel. LaCorte v. Wagner, 185 F.3d 188, 191 (4th Cir. 1999); United States ex rel. Fry v. Guidant Corp., 2006 U.S. Dist. LEXIS 29862, 18-20 (D. Tenn. 2006); Smith, 411 F. Supp. 2d at 75; United States ex rel. Tillson v. Lockheed Martin Energy Sys., 2004 U.S. Dist. LEXIS 22246, 17 (D. Ky. 2004); United States ex rel. Ortega v. Columbia Healthcare, 240 F. Supp. 2d 8, 12 (D.D.C. 2003); United States ex rel. Goodnight v. Texaco Exploration & Prod., Inc. (In re Natural Gas Royalties Quitam Litig.), 2002 U.S. Dist. LEXIS 27844, 9 (D. Wyo. 2002).

⁵ Lujan, for example, argued that “§ 3730(b)(5) should not bar her case because (1) her action could benefit the U.S. Treasury, (2) she was an original source, (3) she had personal knowledge of specific mischarging, and (4) she informed the government of her allegations and facts before the [first] action. We reject each contention, holding that § 3730(b)(5) does not provide for such exceptions.” Lujan, 243 F. 3d 1181, 1187.

⁶ See infra, footnotes 12-19 and accompanying text.

⁷ See infra, footnotes 20-26 and accompanying text.

Subsection (b)(5) of section 3730 further clarifies that only the Government may intervene in a qui tam action. While there are few known instances of multiple parties intervening in past qui tam cases, *United States v. Baker-Lockwood Manufacturing Co.*, 138 F.2d 48 (8th Cir. 1943), the Committee wishes to clarify in the statute that private enforcement under the civil False Claims Act is not meant to produce class actions or multiple separate suits based on identical facts and circumstances.⁸

Other than one subsequently overruled District Court decision in 1997, no reported decisions have adopted an identical facts test.⁹ Courts have taken the position that since the plain language of § 3730(b)(5) refers unambiguously to a “related” and not an “identical” action, there is no need to consult the legislative history.¹⁰ “Giving each word its ordinary meaning, the phrase ‘related action based on the facts underlying the pending action,’ clearly bars claims arising from events that are already the subject of existing suits. A later case need not rest on precisely the same facts as a previous claim to run afoul of this statutory bar.”¹¹

⁸ S. Rep. No. 99-345, at 25 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5290; see also, *Lujan*, 243 F.3d at 1188.

⁹ *United States ex rel. Dorsey v. Dr. Warren E. Smith Community Mental Health/Mental Retardation and Substance Abuse Ctrs.*, 1997 U.S. Dist. LEXIS 9424 (E.D. Pa. June 25, 1997) (an unpublished decision which employed the identical facts test); implicitly overruled by *United States ex rel. St. John LaCorte v. Smith-Kline Beecham Clinical Labs., Inc.* 149 F.3d 227, 232-34 (3d Cir. 1998).

¹⁰ *Lujan*, 243 F.3d at 1189; see also, *Grynberg v. Koch Gateway Pipeline Co.*, 390 F.3d 1276, 1279-1280 (10th Cir. 2004) (“An identical facts test would be contrary to the plain meaning of the statute, which speaks of ‘related’ qui tam actions, not identical ones”); see also, *United States ex rel. Hampton v. Columbia/HCA Healthcare Corp.*, 318 F.3d 214, 218 (D.C. Cir. 2003) (“It might be argued that a single sentence from the legislative history, which states that ‘private enforcement under the civil False Claims Act is not meant to produce class actions or multiple separate suits based on identical facts and circumstances,’ S. REP. NO. 99-345, at 25 (1986), supports such a test. But § 3730(b)(5) does not say that the later action must rest on identical facts, and the purposes of the qui tam provisions are against such a reading”).

¹¹ *LaCorte*, 149 F.3d at 232-233 (quoting *Hyatt*, 883 F. Supp. at 485 n.3 (C.D. Cal. 1995) (“§ 3730(b)(5) ‘bars qui tam actions based on matters subject to earlier filed actions’”). “Moreover an identical facts test might decrease incentives for relators to report fraud promptly, while encouraging duplicative lawsuits which are unlikely to increase total recovery.” *United States ex rel. Capella v. United Techs. Corp.*, 1999 U.S. Dist. LEXIS 10520, 23-24 (D. Conn. 1999) (citing *LaCorte*, 149 F.3d at 232 (3d Cir. 1998)).

B. Same Material Elements/Essential Facts/Core Facts

The Third,¹² Ninth,¹³ and DC¹⁴ Circuit Courts of Appeal have adopted a “same material elements” test which would bar any qui tam complaint which is based upon the “same material elements of fraud” as an earlier suit, even if the allegations “incorporate somewhat different details.”¹⁵ The same material elements test had been earlier articulated in United States ex rel. Merena v. Smithkline Beecham Corp., 1997 U.S. Dist. LEXIS 19896 (D. Pa. 1997), which found that “[t]he ‘facts underlying’ a qui tam action (or any action for that matter) are not merely the details regarding the time and place of the alleged fraud...; they are, as the plain meaning of ‘facts underlying’ more broadly suggests, the allegations regarding the material elements of a fraudulent transaction which will support a claim for relief under the FCA[.]”¹⁶

Similarly, in Grynberg v. Koch Gateway Pipeline Co., 390 F.3d 1276, 1279-1280 (10th Cir. 2004), the Tenth Circuit held that “so long as a subsequent complaint raises the same or a related claim based in significant measure on the core facts or general conduct relied upon in the first qui tam action, the § 3730(b)(5)'s first-to-file bar applies.”¹⁷ The Grynberg court used the “same material elements” language in its decision:

The pendency of the initial qui tam action consequently blocks other private relators from filing copycat suits that do no more than assert the *same material elements* of fraud, *regardless of whether those later complaints are able to marshal additional factual support* for the claim.¹⁸

The Sixth Circuit, in Walburn v. Lockheed Martin Corp., 431 F.3d 966 (6th Cir. 2005), cited the above decisions of the Third, Ninth, D.C. and Tenth Circuits in holding that a complaint which alleges “all the essential facts of the underlying fraud” will be barred even if it incorporates slightly different details.¹⁹

¹² LaCorte, 149 F.3d at 232-34.

¹³ Lujan, 243 F.3d at 1189.

¹⁴ Hampton, 318 F.3d at 217-218.

¹⁵ Hampton, 318 F.3d at 217 (D.C. Cir.) (quoting Lujan, 243 F.3d at 1189; citing LaCorte, 149 F.3d at 232-34 (3d Cir. 1998)).

¹⁶ Merena, 1997 U.S. Dist. LEXIS 19896, 54 (citing Wilkins ex rel. United States v. State of Ohio, 885 F. Supp. 1055, 1059-60 (S.D. Ohio 1995)).

¹⁷ Grynberg, 390 F.3d at 1279.

¹⁸ Id. (emphasis added).

¹⁹ Walburn v. Lockheed Martin Corp., 431 F.3d 966, 971 (6th Cir. 2005), rehearing, en banc, denied by Walburn v. Lockheed Martin Corp., 2006 U.S. App. LEXIS 9228 (6th Cir. 2006).

C. The Hybrid Test: Different Material Facts and Separate and Distinct Recovery by the Government

In Erickson ex rel. United States v. American Inst. of Biological Sciences, 716 F. Supp. 908 (E.D. Va. 1989), the court held that “[a] subsequently filed qui tam suit may continue only to the extent that it (a) is based on facts different from those alleged in the prior suit and (b) gives rise to separate and distinct recovery by the government.”²⁰ This “hybrid” test has been followed twice in the District of Connecticut but specifically rejected in the Eastern District of Pennsylvania.

In United States ex rel. Capella v. United Techs. Corp., 1999 U.S. Dist. LEXIS 10520 (D. Conn. 1999), the District of Connecticut concluded “that section 3730(b)(5) bars a later claim unless: (1) it alleges a different type of wrongdoing, based on different material facts than those alleged in the earlier suit; and (2) it gives rise to a separate recovery of actual damages by the government. In applying this standard, the court asked whether the earlier and later actions possess the typical qualities of a parasitic relationship, such that the subsequent suit receives support or advantage without offering any useful or proper return.”²¹

The Capella approach -- minus the “parasitic relationship” part of the analysis -- was followed in that District in 2003, in United States ex rel. Smith v. Yale-New Haven Hosp., Inc., 411 F. Supp. 2d 64 (D. Conn. 2005): “This Court agrees that the hybrid approach is helpful looking to whether the complaints allege the same material facts, i.e. whether they involve the same core conduct, and would give rise to separate recovery.”²²

²⁰ Erickson ex rel. United States v. American Inst. of Biological Sciences, 716 F. Supp. 908, 918 (E.D. Va. 1989).

²¹ Capella, 1999 U.S. Dist. LEXIS 10520, 27. “[A] court should look first to whether the two cases can properly be viewed as having the qualities of a host/parasite relationship. In answering this question, we think it would be useful for the court to be guided by the definition of the word ‘parasite,’ and ask whether the qui tam case is receiving ‘support, advantage, or the like’ from the ‘host’ case (in which the government is a party) ‘without giving any useful or proper return’ to the government (or at least having the potential to do so).” United States ex rel. S. Praver & Co. v. Fleet Bank, 24 F.3d 320, 328 (1st Cir. 1994) (citing Random House Dictionary of the English Language 1409 (2d ed. unabridged 1987)). In Ortega, 240 F. Supp. 2d 8, the District of Columbia adopted the hybrid test (but see supra, footnote 22) but disagreed that “actual damages” were the appropriate measure of a separate recovery: The “use of the phrase ‘actual damages’ clouds rather than clarifies the issue.” According to the Ortega court, “actual damages are only one element of the government’s recovery, and an examination of whether the government will have a separate recovery under a later-filed suit should take all possible forms of recovery into account.” Id. at 13.

²² United States ex rel. Smith v. Yale-New Haven Hosp., Inc., 411 F. Supp. 2d 64, 76 (D. Conn. 2005), vacated in part by, United States ex rel. Smith v. Yale Univ., 2006 U.S. Dist. LEXIS 24847 (D. Conn. 2006). In Ortega, 240 F. Supp. 2d 8, the District of Columbia also adopted the hybrid standard. The Ortega decision came down on January 15, 2003 (decided and filed). The appeal in Hampton, 318 F.3d at 214 (D.C. Cir. 2003) was argued on November 1, 2002, and decided on February 7, 2003. The Court of Appeals in Hampton adopted a simple “same material elements” test without any reference to Ortega. Therefore, it is doubtful whether the hybrid test in Ortega would be followed in the District of Columbia.

The hybrid analysis, however, has its critics. The Eastern District of Pennsylvania rejected it “because it seems to further complicate the already difficult task of applying § 3730(b)(5).”²³ In the court’s view, “Erickson impermissibly reads into § 3730(b)(5) the requirement that a qui tam claim ‘give rise to a separate and distinct recovery’ when there is no such language or requirement in § 3730(b)(5); that section only requires that a court determine whether an action is barred because it is a ‘related action based on the facts underlying the pending action.’ Moreover, it is unclear what meaning should be given to ‘gives rise to a separate and distinct recovery for the government.’”²⁴

II. “Pending Action” and Subsequent Dismissal of the First-Filed Case

An action is “pending” when it is filed.²⁵ Accordingly, in Lujan, the 9th Circuit held that an action that is dismissed after the filing of a later case is still a “pending action” for the purpose of § 3730(b)(5). “To hold that a later dismissed action was not a then-pending action would be contrary to the plain language of the statute and the legislative intent.”²⁶

In Lujan, the first filed case was dismissed on the merits. Recently, courts have allowed second-filed cases to survive where the original case was dismissed for other reasons. The Ninth Circuit, distinguishing Lujan, held in 2005 that a complaint that is jurisdictionally barred by reason of public disclosure does not bar a later filed case.²⁷ The Sixth Circuit, also in 2005, held that if the first complaint is legally infirm under Fed. R. Civ. P. 9(b), the second complaint will survive, not because it is not a “pending action,” but because according preemptive effect to an overly-broad complaint would discourage whistleblowers from notifying the government of potential frauds.²⁸

To that extent, these two recent decisions represent a challenge to the “absolute, exception-free” rule so often articulated by the courts.

A. First Complaint Barred by Public Disclosure

In Campbell ex rel. United States v. Redding Medical Center, et al., 421 F.3d 817 (9th Cir. 2005), the Ninth Circuit held that a second-filed case is not barred by a first-filed case that is itself barred by public disclosure. In that case, the first case was filed five days after

²³ Merena, 1997 U.S. Dist. LEXIS 19896, note 22.

²⁴ Id.

²⁵ “Section 3730(b)(5) prohibition attaches when a party ‘brings an action.’ A party brings or commences an action by filing a complaint (or counterclaim).” United States v. Kinder Morgan Co2 Co., L.P., 2005 U.S. Dist. LEXIS 31103, 6 (D. Colo. 2005) (citing Fed. R. Civ. P. 3).

²⁶ Lujan, 243 F.3d 1181, 1187.

²⁷ Campbell, 421 F.3d at 822-825.

²⁸ Walburn, 431 F.3d at 973.

the publication of a search warrant authorizing the FBI to investigate the defendant. Campbell's case was filed three days later. The District Court granted the government's motion to dismiss Campbell's suit on the basis that it was barred by § 3730(b)(5). Campbell appealed, arguing that since the relators in the first case were not "original sources" under § 3730(e)(4)(b), their case was barred by public disclosure and it was not a "pending action" under § 3730(b)(5). The appellate court agreed that § 3730(b)(5) does not create an absolute bar when the first complaint is jurisdictionally defective:

Construing § 3730(b)(5) to create an absolute bar would permit opportunistic plaintiffs with no inside information to displace actual insiders with knowledge of the fraud. The government conceded at oral argument that under its interpretation of § 3730(b)(5), a purely frivolous sham complaint filed in an instance where the allegations had been publicly disclosed would bar a subsequently filed action by an original source. This cannot be what Congress intended.²⁹

Distinguishing Lujan on the basis that the first-filed case was dismissed on the merits, the court summed up its decision by holding that, "in a public disclosure case, the first-to-file rule of § 3730(b)(5) bars only subsequent complaints filed after a complaint that fulfills the jurisdictional prerequisites of § 3730(e)(4)."³⁰

B. First Complaint Overly Broad and Legally Infirm Under 9(b)

In Walburn v. Lockheed Martin Corp., 431 F.3d 966 (6th Cir. 2005), the Sixth Circuit held that a second-filed case was not barred by a prior complaint containing "broad and conclusory allegations" that were "legally insufficient under Rule 9(b) because they fail to provide 'the time, place, and content' of any allegedly fraudulent claim submitted to the government."³¹

The court held that "[o]nly a complaint that complies with Rule 9(b) can have preemptive effect under § 3730(b)(5)."³²

²⁹ Campbell, 421 F.3d at 823.

³⁰ Campbell, 421 F.3d at 822-825 (Distinguishing itself from Lujan where the first-filed case was dismissed on the merits, the court said "we do not believe the reasoning behind Lujan extends to a situation not presented in that case, where the first complaint filed does not fulfill the jurisdictional prerequisites established by 31 U.S.C. § 3730(e)").

³¹ Walburn, 431 F.3d at 972. The first relator's "allegations merely set forth that 'documents' and 'records' relating to the management and operation of the plant were falsified, without specifying the nature of the alleged falsifications." Id. In contrast, Walburn had given specific details about the falsification of dosage readings obtained from thermoluminescent dosimeters in order to maintain Department of Energy accreditation and to receive payments from the government under its contract to operate a uranium enrichment plant. Id.

³² Id. at 971.

Lockheed argues that, notwithstanding the breadth of the *Brooks* allegations, a holding that only a complaint that complies with Rule 9(b) can have preemptive effect under § 3730(b)(5) carves out an exception from the "exception-free" first-to-file bar that undermines its policy of discouraging parasitic suits. *See Lujan*, 243 F.3d at 1187. However, we fail to see how according preemptive effect to a fatally-broad complaint furthers the policy of encouraging whistleblowers to notify the government of potential frauds. *See id.* A complaint that is insufficient under Rule 9(b) is dismissed precisely because it fails to provide adequate notice to the defendant of the fraud it alleges.³³

Accordingly, “[i]f the first complaint filed is legally infirm under 9(b), the there will be no bar.”³⁴ This position is supported by dicta in two prior cases. In *Ortega*, the District of Columbia, in finding that a complaint broadly alleging the time and location of a fraud would preempt a later-filed complaint containing more detailed allegations, observed that “[t]he strictures of Rule 9(b) limit the preclusive effect of the first-filed complaint to claims that can be pleaded with particularity, thus obviating the danger of opportunistic relators filing unsupported placeholder complaints for the sole purpose of preemption.”³⁵ The court in that case cited *United States ex rel. St. John LaCorte v. Smith-Kline Beecham Clinical Labs., Inc.* 149 F.3d 227 (3d Cir. 1998), in which the Third Circuit rejected the argument that failing to adopt an “identical facts” test would allow a relator to file a broadly pled complaint in order to preempt later claims. The court noted that: “*Federal Rule of Civil Procedure 9(b)* requires plaintiffs to plead fraud with particularity, specifying the time, place and substance of the defendant's alleged conduct.”³⁶

III. Policies Served by the First-to-File Rule

“Both the history of the FCA and the legislative history of the 1986 Amendments demonstrate the effort to achieve ‘the golden mean between adequate incentives for whistleblowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant information to contribute of their own.’”³⁷ The first-to-file

³³ *Id.* at 973.

³⁴ *Walburn*, at 971 (6th Cir. 2005).

³⁵ *Ortega*, 240 F. Supp. 2d at 13.

³⁶ *LaCorte*, 149 F.3d at 234.

³⁷ *Campbell*, 421 F.3d at 823 (quoting *United States ex rel. Devlin v. California*, 84 F.3d 358, 362 (9th Cir. 1996)); *see also*, *LaCorte*, 149 F.3d at 233-34 (discussing legislative history).

provision under § 3730(b)(5) aims to address both of these concerns.³⁸ First, § 3730(b)(5) aims to encourage whistle-blowing by motivating potential relators to alert the government to fraud as soon as possible.³⁹

A strict first-to-file interpretation... serves Congress' goal of encouraging relators to file qui tam actions as soon as they learn of a fraud on the government. If relators feel compelled to file suit promptly, the government will be able to investigate promptly and bring about a speedy recovery of the money that has been stolen from the federal fisc. The basic objective of the qui tam provisions is, after all, to enable the government, through private enforcement, to restore stolen money to the federal fisc.⁴⁰

Moreover, an “original qui tam relator would be less likely to act on the government's behalf if they had to share in their recovery with third parties who do no more than tack on additional factual allegations to the same essential claim.”⁴¹ Or, as the District of Columbia put it: “[P]ermitting infinitely fine distinctions among complaints has the practical effect of dividing the bounty among more and more relators, thereby reducing the incentive to come forward with information on wrongdoing. This is inconsistent with the FCA's purpose of encouraging whistleblowers to approach the government and file suit as early as possible.”⁴²

Title 31 U.S.C. § 3730(b)(5) also seeks to prevent opportunistic plaintiffs from draining public funds by preventing double recovery.⁴³ “Duplicative claims do not help reduce fraud

³⁸ The objectives of § 3730(b)(5) are to encourage whistle-blowing and to discourage opportunistic behavior. Hampton, 318 F.3d at 217; see also, Lujan, 243 F.3d at 1187 (“The first-filed claim provides the government notice of the essential facts of an alleged fraud, while the first-to-file bar stops repetitive claims”).

³⁹ Campbell, 421 F.3d at 821 (stating that “the first-to-file bar... encourages prompt disclosure of fraud by creating a race to the courthouse among those with knowledge of fraud”).

⁴⁰ Merena, 1997 U.S. Dist. LEXIS 19896 (citing S. Rep. No. 99-345, at 1 (1986), reprinted in 1986 U.S.C.C.A.N. 5266); see also, Grynberg, 390 F.3d at 1279 (“Once the government is put on notice of its potential fraud claim, the purpose behind allowing qui tam litigation is satisfied. Further, original qui tam relators would be less likely to act on the government's behalf if they had to share in their recovery with third parties who do no more than tack on additional factual allegations to the same essential claim”).

⁴¹ Grynberg, 390 F.3d at 1279-1280; see also, Ortega, 240 F. Supp. 2d at 12 (citing LaCorte, 149 F.3d at 234) (“Further, permitting infinitely fine distinctions among complaints has the practical effect of dividing the bounty among more and more relators, thereby reducing the incentive to come forward with information on wrongdoing. This is inconsistent with the FCA's purpose of encouraging whistleblowers to approach the government and file suit as early as possible.”).

⁴² Ortega, 240 F.Supp. at 12.

⁴³ Erickson, 716 F. Supp. at 918 (“The qui tam complaint filed first blocks subsequent qui tam suits based on the same underlying facts. In so doing, the statute prevents a double recovery”); see also, Kinder Morgan, 2005 U.S. Dist. LEXIS 31103 (“Certainly avoiding duplicative consumption of scarce judicial resources in resolving essentially the same issue is sound policy”).

or return funds to the federal fisc, since once the government knows the essential facts of a fraudulent scheme, it has enough information to discover related frauds.”⁴⁴ Therefore, § 3730(b)(5) is a key tool in balancing the False Claims Act’s twin aims of incentivizing legitimate whistle-blowers and discouraging opportunistic plaintiffs.

IV. Conclusion

For the most part, courts have taken a hard line approach to § 3730(b)(5). With the early rejection of the “identical facts” theory, the courts have proceeded to eliminate second-filed cases based on a plain language reading of the statute and a conviction that the Congressional intent to encourage the prompt reporting of fraud and discourage opportunistic and duplicative suits is thereby served. Taking a broad view, the courts have not allowed later filed cases to survive just because they describe a different time period or geographic location⁴⁵ or involve different corporate subsidiaries.⁴⁶ The courts generally have construed § 3730(b)(5) as an “absolute, unambiguous, exception-free” rule.⁴⁷

The Sixth and Ninth Circuit recently signaled a possible departure from this hard line approach in circumstances in which it would not promote the policy objectives of the qui tam law. Specifically, the courts refused to allow overly-broad or jurisdictionally barred cases to preempt later filed cases. It remains to be seen whether this approach will continue to gain support and strength as more first-to-file cases emerge.

As arbitrary the first-to-file rule often seems, it is instructive to speculate on the possible alternatives. Allowing multiple relators to slug it out for their share of the recovery in a free-for-all certainly does not encourage the filing of qui tam cases. And if the courts are to be left to decide who should share in the bounty, what criteria should they use? And what

⁴⁴ LaCorte, 149 F.3d at 234.

⁴⁵ Ortega, 240 F. Supp. 2d at 13 (quoting United States ex rel. Palladino v. VNA of S. New Jersey, Inc., 68 F. Supp.2d 455, 478-79 (D.N.J. 1999) (finding a broad allegation in a complaint describing misconduct in Philadelphia sufficient to preempt a later complaint focusing on Runnemede, New Jersey)); see also, Hampton, 318 F.3d at 219; see also, Capella, 1999 U.S. Dist. LEXIS 10520 (“Although these related standards are worded differently, they contain one common principle -- section 3730(b)(5) precludes a subsequent relator’s claim that alleges the defendant engaged in the same type of wrongdoing as that claimed in a prior action, even if the allegations cover a different time period or location within a company”). Ortega, 240 F. Supp. 2d at 17 (finding that “a variation in geographic location is not the type of “material fact” that will protect a complaint from § 3730(b)(5)’s first-to-file bar”)(quoting Palladino, 68 F. Supp.2d at 478-79); see also, LaCorte, 149 F.3d 227 (barring subsequent qui tam actions alleging FCA violations in different corporate offices and in different regions of the country).

⁴⁶ Hampton, 318 F.3d 214 (the first relator’s complaint did not explicitly specify a Georgia-based subsidiary, but allegations against the subsidiary were considered to be encompassed by the first relator’s allegations against the company”); see also, LaCorte, 149 F.3d 227 (barring subsequent qui tam actions alleging FCA violations in different corporate offices and in different regions of the country).

⁴⁷ See supra, footnote 4.

would the government's role in this contest be? It may well be that the first-to-file rule, like democracy, is the worst possible system, except for all the others.⁴⁸

⁴⁸ "It has been said that democracy is the worst form of government except all the others that have been tried from time to time." Winston S. Churchill, Speech Before the House of Commons (Nov. 11, 1947), in 7 Winston S. Churchill: His Complete Speeches, 1897-1963 at 7566 (Robert Rhodes ed., 1974).

FIRST-TO-FILE
CIRCUIT-BY-CIRCUIT SUMMARY
September 2006

COURT	DATE	CASE	3730(b)(5) TEST	EXCEPTIONS
First Circuit				
NO CASES OF SIGNIFICANCE				
Second Circuit				
Second Circuit	1999	<u>United States ex rel. Pentagen Techs. Int'l, Ltd. v. CACI Int'l, et al.</u> , 172 F.3d 39 (2d Cir. 1999)(affirmed without opinion); 1999 U.S. App. LEXIS 1728 (2d Cir. 1999)(reported in full)	Same facts	None
District of Connecticut	2005	<u>United States ex rel. Smith v. Yale-New Haven Hosp., Inc.</u> , 411 F. Supp. 2d 64 (D. Conn. 2005),vacated in part by, <u>United States ex rel. Smith v. Yale Univ.</u> , 2006 U.S. Dist. LEXIS 24847 (D. Conn. 2006).	Different type of wrongdoing based on different material facts alleged in prior suit and gives rise to a separate recovery of actual damages by the government	None
District of Connecticut	1999	<u>United States ex rel. Capella v. United Techs. Corp.</u> , 1999 U.S. Dist. LEXIS 10520 (D. Conn. 1999)	Different type of wrongdoing based on different material facts alleged in prior suit and gives rise to a separate recovery of actual damages by the government (whether the allegations involve different time periods or locations within company is irrelevant)	None
Third Circuit				
Third Circuit	1998	<u>United States ex rel. LaCorte v. Smith-Kline Beecham Clinical Labs., Inc.</u> , 149 F.3d 227 (3d Cir. 1998)	Same material elements; Implicitly overruled identical facts test (whether allegations include different corporate offices or geographic locations is irrelevant)	None
Eastern District of Pennsylvania	2001	<u>United States ex rel. Friedman v. Eckerd Corp.</u> , 183 F. Supp. 2d 724 (E.D. Pa. 2001)	No test articulated	None
District of New Jersey	1999	<u>Palladino ex rel. United States v. VNA of S. N.J., Inc.</u> , 68 F. Supp. 2d 455 (D.N.J. 1999)	Same material elements (whether allegations involve different geographic areas is irrelevant)	None

FIRST-TO-FILE
CIRCUIT-BY-CIRCUIT SUMMARY
September 2006

COURT	DATE	CASE	3730(b)(5) TEST	EXCEPTIONS
Eastern District of Pennsylvania	1997	<u>United States ex rel. Merena v. Smithkline Beecham Corp.</u> , 1997 U.S. Dist. LEXIS 19896 (E.D. Pa. 1997)	Same material elements	None
Eastern District of Pennsylvania	1997	<u>United States ex rel. Dorsey v. Dr. Warren E. Smith Community Mental Health/Mental Retardation and Substance Abuse Ctrs.</u> , 1997 U.S. Dist. LEXIS 9424 (E.D. Pa. June 25, 1997) (an unpublished decision).	Identical facts test; Implicitly overruled by <u>United States ex rel. LaCorte v. Smith-Kline Beecham Clinical Labs., Inc.</u> 149 F.3d 227, 232-34 (3d Cir. 1998)	None
Fourth Circuit				
Fourth Circuit	2000	<u>Webster v. United States</u> , 2000 U.S. App. LEXIS 16006 (4th Cir. 2000)	No test articulated	None; 3730(b)(5) will apply to relators who initially brought an action which was dismissed (voluntarily) and subsequently seek to join a separate action brought by the government.
Eastern District of Virginia	1989	<u>Erickson ex rel. United States v. American Inst. of Biological Sciences</u> , 716 F. Supp. 908 (E.D. Va. 1989)	Facts different from those alleged in a prior suit <i>and</i> separate and distinct recovery by the government	None
Fifth Circuit				
NO CASES OF SIGNIFICANCE				
Sixth Circuit				
Sixth Circuit	2005	<u>Walburn v. Lockheed Martin Corp.</u> , 431 F.3d 966 (6th Cir. 2005)	Same essential facts	Yes; A complaint that is legally insufficient under Rule 9(b) will not bar a subsequent case under 3730(b)(5).
Middle District of Tennessee	2006	<u>United States ex rel. Fry v. Guidant Corp.</u> , 2006 U.S. Dist. LEXIS 29862 (M.D. Tenn. 2006)	No test articulated	None
Western District of Kentucky	2004	<u>United States ex rel. Tillson v. Lockheed Martin Energy Sys.</u> , 2004 U.S. Dist. LEXIS 22246 (W.D. Ky. 2004)	Same material elements	None
Seventh Circuit				

FIRST-TO-FILE
CIRCUIT-BY-CIRCUIT SUMMARY
September 2006

COURT	DATE	CASE	3730(b)(5) TEST	EXCEPTIONS
Northern District of Illinois	2003	<u>United States ex rel. Wilson v. Emergency Med. Assocs. of Ind., Inc.</u> , 2003 U.S. Dist. LEXIS 16734 (N.D. Ill. 2003)	Same material elements; Same essential facts (whether the allegations name additional parties is irrelevant)	None
Eighth Circuit				
NO CASES OF SIGNIFICANCE				
Ninth Circuit				
Ninth Circuit	2005	<u>Campbell v. Redding Med. Ctr.</u> , 421 F.3d 817 (9th Cir. 2005)	No test articulated	Yes; A complaint which does not satisfy the jurisdictional requirements of § 3730(e)(4) § will not bar subsequent complaints under § 3730(b)(5)
Ninth Circuit	2001	<u>United States ex rel. Lujan v. Hughes Aircraft Co.</u> , 243 F.3d 1181 (9th Cir. 2001)	Same material elements	None; Established "exception-free rule" language.
District of Nevada	1990	<u>United States ex rel. Lawyers Title Ins. Corp. v. Mortgages, Inc.</u> , 1990 U.S. Dist. LEXIS 20939 (D. Nev. 1990)	Facts different from those alleged in a prior suit <i>and</i> separate and distinct recovery by the government	None
Central District of California	1989	<u>Hyatt v. Northrop Corp.</u> , 1989 U.S. Dist. LEXIS 18941 (C.D. Cal. 1989)	Issues which are the subject of a pre-existing suit	None
Tenth Circuit				
Tenth Circuit	2004	<u>Grynberg v. Koch Gateway Pipeline Co.</u> , 390 F.3d 1276 (10th Cir. 2004)	Same or related claim based in significant measure on the core facts or general conduct	None
Tenth Circuit	2005	<u>United States v. Kinder Morgan Co2 Co., L.P.</u> , 2005 U.S. Dist. LEXIS 31103 (D. Colo. 2005)	Resolving essentially the same issue (whether the allegations include different time periods is irrelevant)	None
Tenth Circuit	1994	<u>United States ex rel. Precision Co. v. Koch</u> , 31 F.3d 1015 (10th Cir. 1994):	No test articulated	Yes; Parties that are sufficiently related to the original filer that they would not be considered "intervenor" are allowed to join pre-existing qui tam suits.

FIRST-TO-FILE
CIRCUIT-BY-CIRCUIT SUMMARY
September 2006

COURT	DATE	CASE	3730(b)(5) TEST	EXCEPTIONS
District Wyoming	2002	<u>United States ex rel. Goodnight v. Texaco Exploration & Prod., Inc.</u> (In re Natural Gas Royalties Quitam Litig.), 2002 U.S. Dist. LEXIS 27844 (D. Wyo. 2002)	Same essential facts; Same type of wrongdoing (whether the allegations involve different geographic areas is irrelevant)	None
District of Wyoming	2002	<u>In re Natural Gas Royalties Quitam Litig.</u> , 2002 U.S. Dist. LEXIS 27843 (D. Wyo. 2002)	Same essential facts; Same type of wrongdoing	None
Eleventh Circuit				
Eleventh Circuit	1994	<u>Cooper v. Blue Cross & Blue Shield</u> , 19 F.3d 562 (11th Cir. 1994)	Against same defendant based on same kind of conduct	None
Middle District of Alabama	1996	<u>United States ex rel. Sanders v. East Ala. Healthcare Auth.</u> , 953 F. Supp. 1404 (M.D. Ala. 1996)	No test articulated	Yes; Allowed parties related to, or original plaintiff or sharing a common question of law or fact with, the original plaintiff to join suit under a <u>Precision</u> analysis.
D.C. Circuit				
D.C. Circuit	2003	<u>United States ex rel. Hampton v. Columbia/HCA Healthcare Corp.</u> , 318 F.3d 214 (D.C. Cir. 2003)	Same material elements (whether allegations involve different corporate subsidiaries is irrelevant)	None
D.C. Circuit	2003	<u>United States ex rel. Ortega v. Columbia Healthcare</u> , 240 F. Supp. 2d 8 (D.D.C. 2003).	Different type of wrongdoing based on different material facts alleged in prior suit and gives rise to a separate recovery by the government (whether allegations involve different geographic areas is irrelevant)	None