NOTE

TRENDING TOWARDS LENIENCY: WHAT *MILLENIUM LABORATORIES* & *IN RE PLAVIX MARKETING* TEACH ABOUT THE FUTURE OF THE FALSE CLAIMS ACT'S FIRST-TO-FILE RULE

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INTRODUCTION

In 2019, the First Circuit decided *United States ex rel. McGuire v. Millenium Laboratories., Inc.* (*Millenium Labs*), holding that the "first-to-file" rule of the False Claims Act (FCA) is a nonjurisdictional—rather than a jurisdictional—bar on later-filed actions.[1] And last year, the Third Circuit joined this position with its holding in *In re Plavix Marketing, Sales Practices*

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1 923 F.3d 240, 248 (1st Cir. 2019), *cert. denied*, 140 S. Ct. 851 (2020).

and Products Liability Litigation (No. II).[2] While these decisions might have been against the weight of national authority, this Note argues that they were not against the growing consensus about the rule, the purpose of the FCA, and, most importantly, the First and Third Circuits' own FCA jurisprudence. Instead, this Note argues that the circuits' recent FCA decisions show that they and others have remembered the purpose of the FCA: to encourage private attorneys general to bring claims on behalf of the government.

Part I of this Note will discuss the history and development of the FCA, including its original purpose and modern use, why Congress added the first-to-file rule, and how the provision traditionally operated to bar later-filed claims. Part II will discuss the First and Third Circuits' case law and overall jurisprudence regarding the first-to-file rule. It will also illustrate the First and Third Circuits' FCA jurisprudence as a whole by looking to how the First and Third Circuits decided certain other issues arising under or related to the FCA. Part III will then discuss the factors that led to the circuits' decisions in *Millenium Labs* and *In re Plavix Marketing*. This includes a mix of both external factors—like the rulings of other circuits—and internal factors, like the First and Third Circuits' jurisprudence: their continued leniency in cases involving the FCA and their case law signaling the eventual recharacterization of the rule as nonjurisdictional. Part IV will briefly extract some lessons that these decisions can teach about what to look for in determining how a circuit might interpret the rule going forward, and based on these, predict that the Ninth Circuit will soon join these circuits in holding that the rule is nonjurisdictional. The Note will ultimately conclude that the decisions were simply a product of the First and Third Circuits' FCA case law and the fact that federal courts should be more lenient on plaintiffs bringing claims under the FCA.

I
BACKGROUND AND PURPOSE OF THE FALSE CLAIMS ACT AND THE FIRST-TO-FILE RULE

A. History of the False Claims Act

During the Civil War, the United States government was the victim of widespread fraud from contractors who were hired

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[2] United States *ex rel.* JKJ P'ship 2011 L.P. v. Sanofi-Aventis U.S. L.L.C. (*In re* Plavix Mktg., Sales Practices & Prods. Liab. Litig. (No. II)), 974 F.3d 228, 232 (3d Cir. 2020).

to supply goods to the United States military.[3] In order to combat this fraud, Congress passed the Informer's Act—the predecessor to the False Claims Act—which allowed private citizens to bring "qui tam"[4] claims on behalf of the federal government.[5] Private citizens would act as private attorneys general, filing civil claims under the Act to effectively prosecute instances of fraud on the government's behalf.[6] The rationale for allowing qui tam claims was that citizens who were working for these contractors were in a better position to discover fraud than the federal government.[7] When acting in this capacity, citizens are referred to as "relators" or "whistleblowers."[8] Initially, there was a large amount of support for this mechanism within the government.[9] The Informer's Act even became known as "Lincoln's Law" due to President Abraham Lincoln's fervent support of the Act, and the FCA would later inherit this name.[10]

However, the government quickly came to disfavor qui tam claims because they tended to frustrate the government's ability to regulate conduct.[11] While the purpose behind the Informer's Act was sound, the actual Act's construction was not. The Act did not require that a relator bringing a claim actually

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3 *See* Christopher J. Dellana, Note, *Higher Education: An Appropriate Realm to Impose False Claims Act Liability Under the Post-Formation Implied False Certification Theory*, 78 U. PITT. L. REV. 217, 217–18 (2016).

4 "*Qui tam*" refers to cases that are brought by a private citizen on behalf of the government. It comes from the full phrase "*qui tam pro domino rege quam pro se ipso in hac parte sequitur*," which translates to "who pursues this action on our Lord the King's behalf as well as his own." Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 768 n.1 (2000) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *160).

5 Christopher L. Martin, Jr., Comment, *Reining in Lincoln's Law: A Call to Limit the Implied Certification Theory of Liability Under the False Claims Act*, 101 CALIF. L. REV. 227, 236–37 (2013).

6 31 U.S.C. § 3730(b) (2018); *see also* Fisher K. Law, Note, *Proper Pleading or Premature Proof? Rule 9(B)'s Particularity Requirement and the False Claims Act*, 49 GA. L. REV. 855, 857 n.4 (2015).

7 *See* Sean Hamer, *Lincoln's Law: Constitutional and Policy Issues Posed by the Qui Tam Provisions of the False Claims Act*, 6 KAN. J.L. & PUB. POL'Y 89, 90 (1997).

8 *See, e.g.*, David Freeman Engstrom, *Harnessing the Private Attorney General: Evidence from Qui Tam Litigation*, 112 COLUM. L. REV. 1244, 1246, 1279 (2012) (referring both to "relators" and "whistleblowers" when discussing individuals who bring qui tam claims).

9 *See* Hamer, *supra* note 7, at 90 (stating that Abraham Lincoln "urged Congress to enact legislation that would impose penalties upon defense contractors who defrauded the government").

10 *See* Monica P. Navarro, *A Look at the Constitutional Implications of Retrospective Laws: The Case of the False Claims Act*, 28 T.M. COOLEY L. REV. 95, 99 (2011).

11 Martin, *supra* note 5, at 237.

unearth or present any information that the government did not already know.[12] Unfortunately, this clumsy construction would lead to the Supreme Court's holding in *United States ex rel. Marcus v. Hess*.[13] In *Marcus*, the government not only already knew all of the information regarding the instance of fraud put forth by the relator, but it had even already indicted the defendants.[14] Despite this, the Supreme Court concluded that "[n]either the language of the statute nor its history lends support to the contention made by respondents and the government" that the action was barred,[15] and the action was allowed to proceed.[16]

The reaction to *Marcus* was swift. The Attorney General at the time went as far as calling for an entire repeal of the qui tam provisions of the FCA, and the House of Representatives initially passed an act repealing it.[17] However, the Senate did not support repeal, and Congress instead opted for several amendments that were made to the Act the same year *Marcus* was decided.[18] These amendments both made it harder for plaintiffs to bring qui tam actions and decreased the incentive to do so by lowering the amount of money awarded to the relator.[19]

However, the pendulum swung too far. As part of these amendments, Congress added what became known as the "government knowledge" bar, which barred a qui tam action based on information that the government was already aware of.[20] This and other amendments made it nearly impossible for well-intentioned relators to sustain actions under the new Act.[21]

Once again, the construction of the Act produced an extreme result. In *United States ex rel. Wisconsin v. Dean*, the Seventh Circuit held that the government knowledge bar barred a qui tam action brought by the state of Wisconsin.[22] The problem, however, was that Wisconsin was the *source* of

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12 Tammy Hinshaw, Annotation, *Construction and Application of "Public Disclosure" and "Original Source" Jurisdictional Bars Under 31 U.S.C.A. § 3730(e)(4) (Civil Actions for False Claims)*, 117 A.L.R. Fed. 263 § 2[a] (1994).

13 317 U.S. 537 (1943).

14 *Id.* at 545.

15 *Id.* at 546.

16 *Id.* at 548, 552–53.

17 S. REP. NO. 99-345, at 11 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5276.

18 *See id.*

19 *See* Navarro, *supra* note 10, at 99–100.

20 *See* S. REP. NO. 99-345, at 12, *reprinted in* 1986 U.S.C.C.A.N. at 5277.

21 Martin, *supra* note 5, at 237.

22 729 F.2d 1100, 1103–06 (7th Cir. 1984).

the information the government possessed. The government had only acquired the information due to laws that required Wisconsin to report information relating to Medicare fraud to the federal government.[23] So even though the relator was the source of the information, the court barred suit.[24] Ultimately, the new restrictions on qui tam suits resulted in an over forty-year period where few qui tam actions were brought.[25]

Then, in the 1980s, there was a large increase in fraud against the government; or to be more accurate, the government discovered a larger amount of fraud.[26] In just two years, the amount of fraud investigated by the Department of Defense increased by 30%, and the amount of fraud cases that were referred by the Department of Health and Human Services tripled in only three years.[27] However, the FCA was of little use due to the previous round of amendments and "several restrictive court interpretations" of the Act.[28] This was a troubling prospect given the fact that "most fraud goes undetected."[29] Recognizing that it had gone too far, Congress revived qui tam actions in 1986, and the FCA assumed its modern form.[30] Congress then bolstered the FCA further with the passing of the Fraud Enforcement and Recovery Act of 2009, or "FERA."[31]

In its current form, the FCA makes it illegal to "knowingly present[ ], or cause[ ] to be presented, a false or fraudulent claim for payment or approval" to the government of the United States.[32] The FCA allows relators who are aware of this fraud to sue on behalf of the federal government, at which point the government may choose to intervene or allow the relator to have full control over the case.[33]

The incentive for bringing qui tam actions is now large: if the government intervenes in the case and is awarded damages, the relator is awarded "at least 15 percent but not more

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23 S. REP. NO. 99-345, at 12–13, *reprinted in* 1986 U.S.C.C.A.N. at 5277–78.

24 *Dean*, 729 F.2d at 1106–07.

25 *See* Navarro, *supra* note 10, at 100.

26 S. REP. NO. 99-345, at 2–4, *reprinted in* 1986 U.S.C.C.A.N. at 5266–69.

27 *Id.* at 2, *reprinted in* 1986 U.S.C.C.A.N. at 5267.

28 *Id.* at 4, *reprinted in* 1986 U.S.C.C.A.N. at 5269.

29 *Id.* at 2, *reprinted in* 1986 U.S.C.C.A.N. at 5267 (quoting U.S. GEN. ACCOUNTING OFFICE, AFMD-81-57, FRAUD IN GOVERNMENT PROGRAMS: HOW EXTENSIVE IS IT? HOW CAN IT BE CONTROLLED? iv (1981) (stating that "most fraud remains undetected")).

30 Navarro, *supra* note 10, at 100.

31 Scott Glass, Note, *Is the False Claims Act's First-to-File Rule Jurisdictional?*, 118 COLUM. L. REV. 2361, 2366 (2018).

32 31 U.S.C. § 3729(a)(1)(A) (2018).

33 *Id.* § 3730(b).

than 25 percent" of the money recovered.[34] If the government does not intervene, the relator can receive as much as thirty percent of the award.[35] This can lead to relators recovering an incredibly large amount of money given the fact that the FCA also allows the court to impose treble damages on the defendant.[36]

This series of amendments ultimately proved to be wildly successful in revitalizing qui tam actions and turned the FCA into "the Government's primary litigative tool for combatting fraud."[37] Former Acting Assistant Attorney General Stuart F. Delery described the amended FCA as "the government's most potent civil weapon in addressing fraud against the taxpayers."[38] In fact, between the 1986 revitalization and 2012, the government recovered almost $22 billion through qui tam cases, and after the 2009 amendments, the government saw an almost 50% increase in the amount of qui tam actions brought.[39] Critics of the FCA's qui tam provisions, however, have argued that it encourages lawyers to shop for whistleblowers who will provide information on their company, allowing these lawyers to make a profit on qui tam litigation.[40]

B. Background and Structure of the First-to-File Rule

The critics of the FCA have a point. The FCA originally had to be reined in due to abuse by litigants.[41] And some people now act as "'professional' relators" who "lack the traditional insider status of qui tam whistleblowers,"[42] leading some to raise concerns about the fact that qui tam cases are now being handled by a relatively small amount of attorneys and law firms.[43] In order to combat possible abuse of the FCA, Congress has enacted several bars to qui tam actions, such as the

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34 *Id.* § 3730(d)(1).

35 *Id.* § 3730(d)(2).

36 *Id.* § 3729(a)(1).

37 S. REP. NO. 99-345, at 2 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5266.

38 Stuart F. Delery, Acting Assistant Att'y Gen., U.S. Dep't of Justice, Speech at the American Bar Association's Ninth National Institute on the Civil False Claims Act and Qui Tam Enforcement (June 7, 2012), https://www.justice.gov/opa/speech/acting-assistant-attorney-general-stuart-f-delery-speaks-american-bar-association-s-ninth [https://perma.cc/EEQ7-3ABF].

39 *Id.*

40 *See* Engstrom, *supra* note 8, at 1283. However, some have claimed that this specialization of a small number of lawyers leads to higher-quality legal work. *See id.*

41 *See* Hamer, *supra* note 7, at 90 (describing the "tremendous problem" of parasitic lawsuits which arose under the original act).

42 Engstrom, *supra* note 8, at 1279.

43 *Id.* at 1281–82.

public disclosure of information or the bringing of a qui tam action by a second relator on the same facts as an already-filed case.[44] This latter provision has become known as the "first-to-file bar"[45] (or first-to-file rule), and it provides in full that "[w]hen 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."[46] In adding this provision, Congress looked to "clarif[y] that only the Government may intervene in a *qui tam* action" and that the "False Claims Act is not meant to produce class actions or multiple separate suits based on identical facts and circumstances."[47]

In recent years, the way in which the first-to-file rule operates has become unclear. Prior to 2015, courts viewed the first-to-file rule as a jurisdictional bar on hearing later-filed claims,[48] stripping the federal courts of subject-matter jurisdiction over later-filed claims, and the courts did not even have the power to reach the merits of the case if a claim was a later-filed one.[49] At its peak, this view was taken by six circuits.[50] As such, the proper method of disposing of a later-filed claim was an attack on subject-matter jurisdiction.[51] This holds a unique power because lack of subject-matter jurisdiction may be raised at any point during the litigation, cannot be waived, and can even be raised by the court itself.[52]

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44 Hinshaw, *supra* note 12, § 2[a].

45 *See, e.g.*, Daniel Sorger, *The Cure is Worse: First Circuit Circumvents False Claims Act's First-to-File Rule in* United States ex rel. Gadbois v. PharMerica Corp., 58 B.C. L. REV. ELECTRONIC SUPPLEMENT 43, 44 (2017) (describing the first-to-file rule).

46 31 U.S.C. § 3730(b)(5) (2018).

47 S. REP. NO. 99-345, at 25 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5290.

48 *See, e.g.*, United States *ex rel.* Wilson v. Bristol-Myers Squibb, Inc., 750 F.3d 111, 117 (1st Cir. 2014) ("The FCA first-to-file rule is jurisdictional . . . ."); United States *ex rel.* Branch Consultants v. Allstate Ins. Co., 560 F.3d 371, 378 (5th Cir. 2009) (describing the first-to-file rule as a "jurisdictional bar").

49 13 RICHARD D. FREER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3522 (3d ed. 2019), Westlaw (database updated Oct. 2020) ("A federal court's entertaining a case that is not within its subject matter jurisdiction is no mere technical violation; it is nothing less than an unconstitutional usurpation of state judicial power.").

50 *See* Glass, *supra* note 31, at 2376. These circuits were the First, Fourth, Fifth, Sixth, Ninth, and Tenth Circuits. *Id.*

51 *See* FED. R. CIV. P. 12(b)(1).

52 Gonzalez v. Thaler, 565 U.S. 134, 141 (2012). The court not only *can* raise the issue but *must* do it. *See id.* ("When a requirement goes to subject-matter jurisdiction, courts *are obligated* to consider *sua sponte* issues that the parties have disclaimed or have not presented." (emphasis added)).

Two developments coming from the Supreme Court would then lead some circuits to recharacterize the rule. The first development was the creation of the "clear statement" doctrine, or "clear statement rule."[53] The Supreme Court created this rule due to confusion over which rules were jurisdictional bars, leading courts to characterize many rules as jurisdictional erroneously.[54] Under the clear statement rule, courts must look to whether "the Legislature clearly state[d] that a threshold limitation on a statute's scope shall count as jurisdictional."[55] In doing so, a court must also—of course—take into account how the Supreme Court itself has interpreted similar provisions in the past.[56] The clear statement rule has led to courts recharacterizing certain types of rules. For example, certain time bars originally appeared to be jurisdictional.[57] Now, however, time bars are almost uniformly characterized as nonjurisdictional under this rule.[58]

The second significant development was the Supreme Court's decision in *Kellogg Brown & Root Services, Inc. v. United States ex rel. Carter*.[59] *Carter* was a qui tam case that implicated the first-to-file rule as well as the Wartime Suspension of Limitations Act (WSLA).[60] The WSLA operates to extend the statute of limitations on fraud committed against the United States that occurs in relation to the wartime activities of the United States.[61] In this way, it is somewhat similar to the FCA in that it was created to combat wartime fraud, though in *Carter* the Court held that the WSLA only applies to criminal, and not civil, liability.[62]

In its decision, the Court decided the WSLA issue before it reached the first-to-file rule.[63] The fact that the Court was able

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53 33 RICHARD MURPHY, FEDERAL PRACTICE AND PROCEDURE § 8316 (2d ed. 2019), Westlaw (database updated Oct. 2020).

54 *See, e.g.*, Henderson *ex rel.* Henderson v. Shinseki, 562 U.S. 428, 435 (2011) (stating that the Court has "tried in recent cases to bring some discipline to the use of th[e] term ['jurisdictional']"); Kontrick v. Ryan, 540 U.S. 443, 454 (2004) (noting that the use of the term "jurisdictional" "[had] been less than meticulous").

55 *Thaler*, 565 U.S. at 141–42 (quoting Arbaugh v. Y & H Corp., 546 U.S. 500, 515 (2006)).

56 Sebelius v. Auburn Reg'l Med. Ctr., 568 U.S. 145, 153–54 (2013).

57 *See, e.g.*, United States v. Kwai Fun Wong, 575 U.S. 402, 406 (2015) (discussing lower court determination that the Federal Tort Claims Act's six-month time bar was jurisdictional).

58 *Id.* at 410 ("[I]n applying [the] clear statement rule, we have made plain that most time bars are nonjurisdictional.").

59 575 U.S. 650 (2015).

60 *Id.* at 653.

61 *See* 18 U.S.C. § 3287 (2018).

62 *Carter*, 575 U.S. at 661.

63 *Id.* at 656, 662.

to reach that issue first was telling to some.[64] Under the clear statement rule, the WSLA would not be characterized as a jurisdictional bar. Because a court must satisfy its own jurisdiction before reaching any merits of the claim,[65] many interpreted this opinion as implicitly characterizing the first-to-file bar as nonjurisdictional.[66]

Not long after *Carter*, some federal circuits began to reinterpret the rule. The same year as *Carter*, the D.C. Circuit became the first to hold that the rule was nonjurisdictional.[67] The D.C. Circuit had not explicitly held that the first-to-file rule was a jurisdictional bar before, but only a year earlier it had upheld a decision by the D.C. District Court that dismissed a claim for lack of subject-matter jurisdiction on the basis of the first-to-file rule.[68] This was not the first time that the D.C. Circuit had upheld this type of dismissal.[69] Two years later, the Second Circuit also adopted the view that the rule is nonjurisdictional.[70] As of the writing of this Note, the First Circuit has become the third and the Third Circuit has become the fourth and most recent circuit to adopt the nonjurisdictional characterization of the rule.[71] It seems clear that whether this was the Supreme Court's intention or not, the *Carter* decision

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64 It is interesting to note that while many have interpreted *Carter* as implicitly characterizing the rule as nonjurisdictional, the opinion could also be read as doing the opposite. *Carter* was on appeal from the Fourth Circuit, which characterizes the first-to-file rule as jurisdictional. United States *ex rel.* Carson v. Manor Care, Inc., 851 F.3d 293, 303 (4th Cir. 2017). In the opinion below, the Fourth Circuit had stated that the first-to-file bar was jurisdictional. United States *ex rel.* Carter v. Halliburton Co., 710 F.3d 171, 181 (4th Cir. 2013), *aff'd in part, rev'd in part sub nom. Carter*, 575 U.S. 650 (2015). The Supreme Court then affirmed the part of the decision relating to the first-to-file rule. *See Carter*, 575 U.S. at 664. Despite this, many do not read this as an implicit affirmation of the view taken by the Fourth Circuit. United States *ex rel.* Hayes v. Allstate Ins. Co., 853 F.3d 80, 85 n.1 (2d Cir. 2017) ("[W]e do not read the Supreme Court's decision as implicitly affirming the Fourth Circuit's observation that the first-to-file rule was jurisdictional.").

65 *See* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94 (1998).

66 *See, e.g.*, United States *ex rel.* Heath v. AT&T, Inc., 791 F.3d 112, 121 n.4 (D.C. Cir. 2015) (stating that the Supreme Court in *Carter* "rais[ed] the issue *after* it decided a nonjurisdictional statute of limitations issue").

67 *See id.* at 121.

68 United States *ex rel.* Shea v. Cellco P'ship, 748 F.3d 338, 340, 344 (D.C. Cir. 2014), *vacated*, 575 U.S. 1035 (2015).

69 United States *ex rel.* Batiste v. SLM Corp., 659 F.3d 1204, 1206 (D.C. Cir. 2011).

70 United States *ex rel.* Hayes v. Allstate Ins. Co., 853 F.3d 80, 86 (2d Cir. 2017).

71 United States *ex rel.* JKJ P'ship 2011 L.P. v. Sanofi-Aventis U.S. L.L.C. (*In re* Plavix Mktg., Sales Practices and Prods. Liab. Litig. (*No. II*)), 974 F.3d 228, 232 (3d Cir. 2020); United States *ex rel.* McGuire v. Millenium Labs., Inc., 923 F.3d 240, 251 (1st Cir. 2019), *cert. denied*, 140 S. Ct. 851 (2020).

has led to four circuits rapidly recharacterizing the rule.[72] This was over three decades after Congress added the first-to-file rule to the FCA.[73]

II
THE FIRST AND THIRD CIRCUITS' JURISPRUDENCE

A. The First-to-File Rule in the First and Third Circuits

Before the *Carter* decision, the First Circuit seemed to unequivocally view the first-to-file rule as jurisdictional. The First Circuit first considered the issue in *United States ex rel. Duxbury v. Ortho Biotech Products, L.P.*, where the court stated that the rule "limit[s] a district court's *subject matter jurisdiction* over qui tam actions."[74] The court followed with several other opinions that also treated the rule as jurisdictional.[75]

Post-*Carter*, the First Circuit took the initial steps in changing the rule's characterization. In *United States ex rel. Gadbois v. PharMerica Corp.*, the First Circuit was faced with the first-to-file rule in the post-*Carter* world.[76] However, the court was able to dispose of the case without characterizing the rule by holding that the first-to-file defect in the relator's complaint could be cured through a supplemental pleading.[77] This was against the weight of authority at the time, as many circuits had held that a first-to-file defect required the dismissal and subsequent refiling of the action.[78]

The First Circuit would then continue to avoid explicitly classifying the rule in later cases by not analyzing the merit of the characterization but rather simply "assum[ing]" that the rule was jurisdictional.[79] However, the First Circuit did take notice that the rule's jurisdictional classification was "not with-

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72 *See Millenium Labs.*, 923 F.3d at 251 (holding that the rule is nonjurisdictional four years after *Carter*); *Hayes*, 853 F.3d at 86 (decided two years after *Carter*); United States *ex rel.* Heath v. AT&T, Inc., 791 F.3d 112, 119 (D.C. Cir. 2015) (decided the same year as *Carter*).

73 *See* Sorger, *supra* note 45, at 48 (stating that the first-to-file rule was "[a]dded to the FCA in 1986").

74 579 F.3d 13, 16 (1st Cir. 2009) (emphasis added).

75 *See, e.g.*, United States *ex rel.* Wilson v. Bristol-Myers Squibb, Inc., 750 F.3d 111, 117 (1st Cir. 2014) ("The FCA first-to-file rule is jurisdictional . . . ."); United States *ex rel.* Heineman-Guta v. Guidant Corp., 718 F.3d 28, 30 (1st Cir. 2013) (also describing the first-to-file rule as a "jurisdictional bar[ ]").

76 *See* 809 F.3d 1 (1st Cir. 2015).

77 *Id.* at 6 n.2.

78 *See* Sorger, *supra* note 45, at 44–45.

79 United States *ex rel.* Kelly v. Novartis Pharm. Corp., 827 F.3d 5, 12 n.9 (1st Cir. 2016) ("We assume, but need not decide, that the first-to-file bar remains jurisdictional.").

out doubt."[80] This "doubt" would eventually lead the First Circuit to conclude in *Millenium Labs* that the rule is nonjurisdictional.[81] While the First Circuit did not overturn any case expressly, it seemed to acknowledge that it was changing its previous view more than the D.C. and Second Circuits did.[82]

The Third Circuit had less case law on the issue and had never squarely addressed the provision in terms of whether it was jurisdictional or not. At best, it seems that what little discussion there was from within the Third Circuit on the issue sent a mixed signal. In one case, the Third Circuit described the first-to-file rule as a "threshold issue."[83] However, while a jurisdictional bar would be a threshold issue, it is not necessarily true that anything considered to be a "threshold issue" is jurisdictional. And in another case, the Third Circuit implied that the provision might not be jurisdictional.[84] At best, it appears that the Third Circuit had been unclear until holding that the provision was nonjurisdictional.[85] Similar to the D.C. and Second Circuits, the Third Circuit did not discuss any intracircuit case that had dealt with this issue squarely.

B. Other False Claim Act Issues Within the First and Third Circuits

The decisions of the First and Third Circuits must be interpreted in light of how the circuits have trended on other FCA issues. This Note examines how these circuits trend on FCA issues broadly by recounting the circuits' positions in two other

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80 *Id.*

81 United States *ex rel.* McGuire v. Millenium Labs., Inc., 923 F.3d 240, 251 (1st Cir. 2019), *cert. denied*, 140 S. Ct. 851 (2020).

82 *Compare id.* at 249 ("[T]his court has several times characterized the first-to-file rule as jurisdictional."), *with* United States *ex rel.* Hayes v. Allstate Ins. Co., 853 F.3d 80, 85–86 (2d Cir. 2017) (discussing the first-to-file rule and noting the view of "several circuits" but not discussing its own); United States *ex rel.* Heath v. AT&T, Inc., 791 F.3d 112, 119 (D.C. Cir. 2015) (stating that "numerous courts of appeals have characterized" the rule as jurisdictional but not citing any D.C. Circuit cases).

83 United States *ex rel.* Dhillon v. Endo Pharm., 617 F. App'x 208, 210 (3d Cir. 2015).

84 United States *ex rel.* LaCorte v. SmithKline Beecham Clinical Labs., Inc., 149 F.3d 227, 230 n.2 (3d Cir. 1998) (describing another provision of the FCA as "also creat[ing] certain jurisdictional bars to *qui tam* actions, none of which is at issue in this appeal").

85 United States *ex rel.* JKJ P'ship 2011 L.P. v. Sanofi-Aventis U.S. L.L.C. (*In re* Plavix Mktg., Sales Practices and Prods. Liab. Litig. (*No. II*)), 974 F.3d 228, 232 (3d Cir. 2020).

circuit splits that relate to the FCA: the split on implied certification and the split on Rule 9(b)'s particularity requirement.

Beginning with a somewhat historical example, federal circuits were split over whether to recognize an "implied false certification" theory under the FCA.[86] The distinction first begins between a "factually false" claim and a "legally false" claim.[87] A factually false claim is "an incorrect description of goods or services provided or a request for reimbursement for goods or services never provided" given by a person or entity[88] seeking payment.[89] Initially, courts only recognized factually false claims following the promulgation of the FCA.[90] However, courts then began recognizing legally false claims.[91] These claims, rather than focusing on a false statement of fact or a misrepresentation about the good or service, center on the defendant's false compliance with a law or regulation.[92]

Legally false claims can be further distinguished between claims based on "express" certifications and claims based on "implied" certifications.[93] An express certification occurs when the submission for payment contains an affirmative statement that the person has complied with all relevant regulations when they have not actually done so.[94] However, under the implied certification theory, the simple act of submitting the request for payment is itself an affirmation that the person has complied with the relevant regulations.[95]

Originally, circuits were split on whether a person could be held liable under an implied certification theory.[96] While the idea of an implied certification is seemingly a departure from the intention of the statute, it is more accurately described as

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86 *See* Dellana, *supra* note 3, at 225–26.

87 *Id.* at 220–21.

88 The FCA uses the term "person," but this term usually includes nonhuman entities, such as corporations. *See* Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 780–82 (2000).

89 Mikes v. Straus, 274 F.3d 687, 697 (2d Cir. 2001), *abrogated by* Universal Health Servs, Inc. v. United States *ex rel.* Escobar, 136 S. Ct. 1989 (2016).

90 Martin, *supra* note 5, at 230.

91 Dellana, *supra* note 3, at 225–26.

92 Burke v. Record Press, Inc., 951 F. Supp. 2d 26, 30 (D.D.C. 2013), *aff'd sub nom.* United States *ex rel.* Burke v. Record Press, Inc., 816 F.3d 878 (D.C. Cir. 2016).

93 Dellana, *supra* note 3, at 224.

94 *See* United States v. Toyobo Co., 811 F. Supp. 2d 37, 45 (D.D.C. 2011).

95 *See id.*

96 *See* Richard W. Arnholt & Kaitlin E. Harvie, *Implied Certification in the Crosshairs: 7th Circuit Ruling Increases Likelihood of Supreme Court Review of False Claims Act Case*, WESTLAW J. BANKR., Dec. 17, 2015, at 1, 1.

an application of common-law fraud principles.[97] At common law, fraud could occur when there were "express falsehoods" as well as "omissions."[98] For their part, the First Circuit and Third Circuit maintained that an implied certification theory could sustain a claim under the FCA.[99]

However, the First Circuit has taken it even further and created an additional split. Many circuits that have adopted the implied certification theory only allow it to sustain a claim when the payment from the government was expressly conditioned on compliance with regulations.[100] But in *United States ex rel. Hutcheson v. Blackstone Medical, Inc.*, the First Circuit became the first to adopt a radically broad approach to the implied certification theory.[101] Under the *Blackstone* rule, the agreement between the government and the person does not have to explicitly condition payment on compliance with the regulations.[102] A person could be liable under the FCA when the person presented a request for payment, the person made no affirmative statement that regulations were complied with, and payment was not even conditioned on these regulations being followed. Both the D.C. and Federal Circuits would later adopt the *Blackstone* rule.[103] The Supreme Court eventually settled this split—to an extent—by endorsing both the implied certification rule as well as the First Circuit's interpretation of the rule, though in a limited manner.[104]

Another FCA circuit split that the First and Third Circuits find themselves in is the split over what will satisfy the Rule 9(b) pleading standard. Federal Rule of Civil Procedure 9(b) governs the pleading standard in cases of fraud and states that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake."[105] It has been recognized, however, that this particularity requirement cannot be read on its own, which otherwise

97 *See* Universal Health Servs., Inc. v. United States *ex rel.* Escobar., 136 S. Ct. 1989, 1999 (2016).

98 *Id.*

99 United States *ex rel.* Hutcheson v. Blackstone Med. Inc., 647 F.3d 377, 385–86 (1st Cir. 2011); Martin, *supra* note 5, at 242–46.

100 *See Blackstone*, 647 F.3d at 384–86.

101 *See* Lonie Kim, Note and Comment, *Am I Liable? The Problem of Defining Falsity Under the False Claims* Act, 39 AM. J.L. & MED. 160, 170–73 (2013); Martin *supra* note 5, at 232.

102 Latoya C. Dawkins, *Not So Fast: Proving Implied False Certification Theory Post*-Escobar, 42 SETON HALL LEGIS. J. 163, 169–70 (2017).

103 Martin, *supra* note 5, at 241.

104 Universal Health Servs., Inc. v. United States *ex rel.* Escobar., 136 S. Ct. 1989, 1999, 2001 (2016).

105 FED. R. CIV. P. 9(b).

may lead to the conclusion that a relator must state with absolute particularity the fraudulent behavior alleged.[106]

Instead, the Federal Rules provide two separate provisions that help to guide the interpretation of Rule 9(b). Rule 1 mandates that all rules are to "be construed, administered, and employed . . . to secure the just, speedy, and inexpensive determination of every action and proceeding."[107] And Rule 8 contains the general standard for pleadings in federal cases.[108] Under that rule, a plaintiff need only provide a "short and plain statement of the claim."[109] This standard might be helpful when interpreting Rule 9 to avoid an application of the rule that would be too preclusive.[110] In fact, requiring a large degree of particularity may frustrate the purpose of the FCA while not meaningfully furthering the goals of Rule 9. As noted by the United States in an amicus brief in *Duxbury*, an inflexible pleading standard is "unwarranted because it attaches elevated significance to the relator's awareness of facts that in most instances are already known to the government," does "not meaningfully assist the government's enforcement efforts," and would "discourage the filing of *qui tam* suits."[111]

However, the circuits are split over how much detail regarding the alleged fraud a plaintiff needs to include in the complaint to survive the pleading stage.[112] The strictest standard is the "representative samples" approach,[113] which requires a plaintiff to identify and allege a "representative sample[ ]" of each act alleged in order to survive a motion to dismiss.[114] The First Circuit, rejecting an overly strict approach, has instead endorsed a more lenient standard,[115] al-

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106 5A ARTHUR R. MILLER, MARY KAY KANE & A. BENJAMIN SPENCER, FEDERAL PRACTICE AND PROCEDURE § 1298 (4th ed. 2019), Westlaw (database updated Oct. 2020).

107 FED. R. CIV. P. 1.

108 FED. R. CIV. P. 8.

109 *Id.*

110 *See* Sara A. Smoter, Note, *Relaxing Rule 9(b): Why False Claims Act Relators Should Be Held to a Flexible Pleading Standard*, 66 CASE W. RES. L. REV. 235, 240–41 (2015).

111 *See* Brief for the United States as Amicus Curiae at 17, Ortho Biotech Prods., L.P. v. United States *ex rel.* Duxbury, 561 U.S. 1005 (2010), *denying cert. to* 579 F.3d 13 (1st Cir. 2009) (No. 09-654), 2010 WL 2007742, at *17.

112 *See* Law, *supra* note 6, at 871–80.

113 *See* Foglia v. Renal Ventures Mgmt., L.L.C., 754 F.3d 153, 156–57 (3d Cir. 2014) (discussing the differing standards).

114 *See id.*; Law, *supra* note 6, at 871–73.

115 *See* Hagerty *ex rel.* United States v. Cyberonics, Inc., 844 F.3d 26, 31 (1st Cir. 2016); United States *ex rel.* Rost v. Pfizer, Inc., 507 F.3d 720, 732 (1st Cir. 2007), *overruled on other grounds by* Allison Engine Co. v. United States *ex rel.* Sanders, 553 U.S. 662 (2008); Smoter, *supra* note 110, at 241.

lowing "some questions [to] remain unanswered" so long as the "complaint as a whole" is sufficient to satisfy the requirements of the FCA.[116] The Third Circuit (along with a couple of other circuits) has adopted an even more flexible approach, which allows a plaintiff to meet the particularity requirement when they "allege 'particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted.'"[117]

III
FACTORS LEADING TO THESE DECISIONS

While it might appear that *Carter* was the main motivation behind the recent decisions, this Note argues that several other factors, most notably the circuits' precedent, support the nonjurisdictional interpretation of the rule. This can be seen by looking at "external" and "internal"[118] factors that influenced the decisions, as well as the purpose of the FCA generally. Subpart A will explore the external factors leading to the decisions, including *Carter*. Subpart B will discuss the internal factors that led to the decisions—notably, how the decisions fit within the First and Third Circuits' precedent. Subpart C will then focus on the purpose behind the FCA and how it influenced the decisions.

A. External Factors

The most obvious external factors are the two developments from the Supreme Court: the clear statement rule and *Carter*.[119] A jurisdictional characterization of the first-to-file rule is particularly susceptible to criticism on clear-statement-rule grounds. The word "jurisdiction" does not appear anywhere in the provision,[120] which states only that "no person

116 *Rost*, 507 F.3d at 732.

117 Ebeid *ex rel.* United States v. Lungwitz, 616 F.3d 993, 998–99 (9th Cir. 2010) (quoting United States *ex rel.* Grubbs v. Kanneganti, 565 F.3d 180, 190 (5th Cir. 2009)); Law, *supra* note 6, at 880 (quoting *id.*).

118 As used in this Note, the term "internal factor" refers to the circuits' own jurisprudence and other influencing factors that are specific to the circuits. All other factors fall under "external factors," though this is not always a clear line to draw.

119 *See* United States *ex rel.* McGuire v. Millenium Labs., Inc., 923 F.3d 240, 249–51 (1st Cir. 2019) (discussing both of these), *cert. denied*, 140 S. Ct. 851 (2020).

120 *See, e.g.*, United States *ex rel.* Heath v. AT&T, Inc., 791 F.3d 112, 120 (D.C. Cir. 2015) (stating the first-to-file rule "does not speak in jurisdictional terms" (internal quotations omitted) (quoting Arbaugh v. Y & H Corp., 546 U.S. 500, 515 (2006)).

other than the Government" can intervene in an action or bring a related claim.[121] The lack of the word "jurisdiction" here is especially significant because other provisions of the FCA do speak in jurisdictional terms.[122] The provision titled "Certain Actions Barred" contains multiple references to "jurisdiction."[123] The First and Third Circuits noted this inconsistency in their decisions.[124]

The legislative history of the FCA lends support to a nonjurisdictional characterization as well. In discussing what would become known as the first-to-file rule, it was stated that the rule was only meant to "further clarif[y] that only the Government may intervene in a *qui tam* action."[125] The Committee did not even think that this provision would be at issue in many cases, noting that "there are few known instances of multiple parties intervening in past *qui tam* cases."[126] In contrast, it was stated multiple times that § 3730(e) "prohibits *qui tam* actions."[127] This lack of support for a jurisdictional characterization in the legislative history is striking because the legislative history even lends support to a jurisdictional characterization of at least one rule that clearly does *not* speak in jurisdictional terms. A look at the legislative history reveals that the government knowledge bar was meant to act as a jurisdictional bar.[128] But this provision simply orders the court to "dismiss an action or claim" that falls within the provision.[129]

So when Congress intended for a provision of the FCA to be jurisdictional, it knew how to say it. It said nothing like this either when formulating the first-to-file rule or when discussing the purpose of the provision. And its purpose—to make sure that only the government could intervene in already-brought claims—is achieved just as easily with either characterization.[130] In *Millenium Labs*, the First Circuit looked to the

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121 31 U.S.C. § 3730(b)(5) (2018).

122 *Id.* § 3730(e).

123 *Id.*

124 United States *ex rel.* JKJ P'ship 2011 L.P. v. Sanofi-Aventis U.S. L.L.C. (*In re* Plavix Mktg., Sales Practices and Prods. Liab. Litig. (*No. II*)), 974 F.3d 228, 232 (3d Cir. 2020); *Millenium Labs.*, 923 F.3d at 250.

125 S. REP. NO. 99-345, at 25 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5290.

126 *Id.*

127 *Id.* at 29–30, *reprinted in* 1986 U.S.C.C.A.N. at 5294–95.

128 *Id.* at 12, *reprinted in* 1986 U.S.C.C.A.N. at 5277.

129 31 U.S.C. § 3730(e)(4)(a) (2018). Note, however, that this does fall within the broader subset of rules noted above titled "Certain Actions Barred."

130 *See* United States *ex rel.* McGuire v. Millenium Labs., Inc., 923 F.3d 240, 251 (1st Cir. 2019), *cert. denied*, 140 S. Ct. 851 (2020).

legislative history and purpose of the first-to-file rule and concluded that "[t]he first-to-file rule advances [its] goal even when the provision is not jurisdictional."[131]

However, the clear statement rule and the legislative history cannot entirely account for the decisions. While what satisfies the clear statement rule is always evolving, the rule has been around for some time.[132] As early as 2006—thirteen years before *Millenium Labs* and fourteen before *In re Plavix Marketing*—the Supreme Court stated that "when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character."[133] *Arbaugh* and several other cases developing the clear statement rule predate all of the First Circuit's first-to-file rule cases.[134] So the external factor that most likely had the greatest impact was *Carter* (as well as *Hayes* from the Second Circuit and *Heath* from the D.C. Circuit).

Looking at the First Circuit's decisions post-*Carter*, it can be seen that the court slowly grew doubtful of its previous characterization of the rule. Explicitly, the First Circuit referenced *Carter* at least twice before its decision in *Millenium Labs*.[135] In *Gadbois*, the court invoked both *Carter* and *Heath* in a footnote.[136] Then in *Novartis*, the First Circuit once again utilized a footnote to reference *Carter*, and the court cited its own decision in *Gadbois* to show that there was "doubt" about the first-to-file rule's characterization.[137]

The doubt is also implicit in the way the First Circuit began to discuss the first-to-file rule post-*Carter*. Before *Carter*, the First Circuit was more definitive about its characterization of

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131 *Id.* The Third Circuit did not make note of this legislative history, instead relying on the clear statement rule entirely. United States *ex rel.* JKJ P'ship 2011 L.P. v. Sanofi-Aventis U.S. L.L.C. (*In re* Plavix Mktg., Sales Practices and Prods. Liab. Litig. (*No. II*)), 974 F.3d 228, 232 (3d Cir. 2020).

132 *See* Erin Morrow Hawley, *The Supreme Court's Quiet Revolution: Redefining the Meaning of Jurisdiction*, 56 WM. & MARY L. REV. 2027, 2043 (2015) (noting that the rule has its "foundations" as early as 1998).

133 Arbaugh v. Y & H Corp., 546 U.S. 500, 516 (2006).

134 *Duxbury* was the first case within the circuit that treated the rule as jurisdictional and was decided in 2009. *See Millenium Labs.*, 923 F.3d at 250 (describing *Duxbury* as "the oldest case" which "label[ed] the first-to-file rule as jurisdictional").

135 *See* United States *ex rel.* Kelly v. Novartis Pharm. Corp., 827 F.3d 5, 12 n.9 (1st Cir. 2016); United States *ex rel.* Gadbois v. PharMerica Corp., 809 F.3d 1, 3–6 (1st Cir. 2015).

136 *Gadbois*, 809 F.3d at 6 n.2.

137 *Novartis*, 827 F.3d at 12 n.9.

the rule.[138] It had explicitly referred to the first-to-file rule as a "jurisdictional bar" not once[139] but twice.[140] The First Circuit was even more definitive in *United States ex rel. Wilson v. Bristol-Myers Squibb, Inc.*, stating that "[t]he FCA first-to-file rule is jurisdictional."[141] It would reaffirm its stance later that year.[142]

However, post-*Carter*, this definitive language disappeared. In *Gadbois*, the reference is not so much to the classification of the rule on the merits but to how the defendant viewed the rule.[143] The Court stated "[the defendant] not[ed] that we have described the first-to-file bar as jurisdictional."[144] Not only does the wording focus more heavily on the *defendant's* assertion that the rule is jurisdictional, it characterizes the prior cases within the circuit as a "descri[ption]." In *Kelly*, the only reference to the rule being jurisdictional in the body of the opinion is a quote, with the First Circuit stating that "*the [district] court held* that the first-to-file rule 'ought not bar the exercise of jurisdiction over the [action] in this particular case.'"[145] The First Circuit's discussion of its characterization appears in a footnote in which the court "assume[d]" that the rule "remain[ed] jurisdictional."[146] Only once the court was ready to explicitly recharacterize the rule did it make reference to its "prior characterization" in a substantive discussion.[147]

But maybe *Carter* was more of a greenlight for these circuits than it was a revelation. The effect of the opinions of

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138 *See* United States *ex rel.* Heineman-Guta v. Guidant Corp., 718 F.3d 28, 30 (1st Cir. 2013); United States *ex rel.* Duxbury v. Ortho Biotech Prods., L.P., 579 F.3d 13, 16 (1st Cir. 2009).

139 *Duxbury*, 579 F.3d at 16 (stating that "the FCA includes jurisdictional bars that limit a district court's subject matter jurisdiction over qui tam actions" and that "[t]wo of these bars are relevant to [the] action," and then listing the first-to-file rule as one of these).

140 *Heineman-Guta*, 718 F.3d at 30 (referring once again to "jurisdictional bars" which "limit[ ] . . . [the] subject matter jurisdiction" of the court and then referencing the first-to-file rule).

141 United States *ex rel.* Wilson v. Bristol-Myers Squibb, Inc., 750 F.3d 111, 117 (1st Cir. 2014).

142 United States *ex rel.* Ven-A-Care of the Fla. Keys, Inc. v. Baxter Healthcare Corp., 772 F.3d 932, 936 (1st Cir. 2014).

143 United States *ex rel.* Gadbois v. PharMerica Corp., 809 F.3d 1, 4–5 (1st Cir. 2015).

144 *Id.* at 4.

145 United States *ex rel.* Kelly v. Novartis Pharm. Corp., 827 F.3d 5, 11 (1st Cir. 2016) (emphasis added) (quoting United States *ex rel.* Garcia v. Novartis AG, 91 F. Supp. 3d 87, 99 (D. Mass. 2015)).

146 *Id.* at 12 n.9.

147 *See* United States *ex rel.* McGuire v. Millenium Labs., Inc., 923 F.3d 240, 249 (1st Cir. 2019), *cert. denied*, 140 S. Ct. 851 (2020).

other courts can be seen in the First Circuit even before *Carter*. In a case decided the year before *Carter*, the First Circuit seemed to be cognizant of the fact that other circuits might be on the verge of changing their characterization of the rule. While the court did state that it viewed the rule as jurisdictional, it attached a citation to a separate opinion in a D.C. Circuit case for the proposition that "[the] D.C. Circuit has not definitively ruled on first-to-file bar's jurisdictional character."[148] So it would appear that the First Circuit was always looking to how other courts were characterizing the rule when faced with the issue.

Interestingly, the Third Circuit did not discuss *Carter* anywhere in its discussion of the first-to-file rule.[149] However, what it did focus on was the trend of its sister circuits on the issue. The Third Circuit took a moment to highlight the decisions of other circuits, but it added that the circuits that took the jurisdictional view "mainly [do so] in older opinions."[150] By discussing these precedents in this way, the Third Circuit minimized the view of circuits that view the rule as jurisdictional, analogous to how the First Circuit minimized its previous treatment of the rule. The Third Circuit no doubt noticed the growing trend of its sister circuits holding the first-to-file rule is nonjurisdictional and wanted to highlight this, and it is possible that this ultimately had an effect on how the Third Circuit decided to write on its blank slate. However, as argued below, there are jurisprudential reasons to support this interpretation in both the precedent of the First and Third Circuits.

Finally, these decisions must be read in light of the growing support for the nonjurisdictional characterization of the rule within the legal community,[151] along with support for a more flexible interpretation of the FCA generally.[152] This climate appears to have permeated the First and Third Circuits.

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148 United States *ex rel.* Ven-A-Care of the Fla. Keys, Inc. v. Baxter Healthcare Corp., 772 F.3d 932, 936 (1st Cir. 2014) (citing United States *ex rel.* Shea v. Cellco P'ship, 748 F.3d 338, 345–46 (D.C. Cir. 2014) (Srinivasan, J., concurring in part and dissenting in part), *vacated*, 575 U.S. 1035 (2015)).

149 United States *ex rel.* JKJ P'ship 2011 L.P. v. Sanofi-Aventis U.S. L.L.C. (*In re* Plavix Mktg., Sales Practices and Prods. Liab. Litig. (*No. II*)), 974 F.3d 228, 232–33 (3d Cir. 2020).

150 *Id.* at 232.

151 *See, e.g.*, Glass, *supra* note 31, at 2386–92 (advocating for a nonjurisdictional characterization of the rule).

152 *See* Law, *supra* note 6, at 885 (stating that a strict interpretation of Rule 9(b) in the context of the FCA "[u]ndermines [e]nforcement" of the FCA).

B. Internal Factors

The nonjurisdictional characterization of the rule fits squarely within the trend that the First and Third Circuits have taken on other FCA issues, which has led these circuits to take a more lenient approach to the FCA. And, by the time of the decision in *Millenium Labs*, the First and Third Circuits' case law was perfectly poised for a nonjurisdictional characterization of the rule—though for different reasons. This recharacterization put the First and Third Circuits' positions on the rule in accord with their overall FCA jurisprudence, which is similar to that of the Second and D.C. Circuits.

Beginning with how the First Circuit's case law was primed for the recharacterization, as a principle of stare decisis, a panel of an appellate court is generally bound by prior panel decisions,[153] a doctrine known as the "law-of-the-circuit" doctrine.[154] While the doctrine would have normally bound the First Circuit to its prior characterization, the court's particular formulation of the rule and previous cases on the first-to-file rule allowed the court to revisit the issue.

In the First Circuit, a panel of the court is "constrained by prior panel decisions directly (or even closely) on point,"[155] but there are two exceptions.[156] First, when "controlling authority that postdates the decision, like a Supreme Court opinion, en banc decision of the circuit, or statutory overruling," demands it.[157] Second, when there is "non-controlling authority that postdates the decision that may offer 'a compelling reason for believing that the former panel, in light of new developments, would change its collective mind.'"[158] The First Circuit offered two different rationales for why its law of the circuit did not bind it.

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153 *See, e.g.*, United States v. Rodriguez, 311 F.3d 435, 438 (1st Cir. 2002) ("[W]e are bound by the law of the circuit doctrine.").

154 *See* United States v. Guzmán, 419 F.3d 27, 31 (1st Cir. 2005).

155 *Id.* *Stare decisis* inherently allows for some leeway in how binding past decisions can be and does not necessarily require the circuit to create exceptions. Thomas A. Lorenzen, *Appellate* - Stare Decisis*: Will Precedent Survive Scrutiny?*, CROWELL MORING (Jan. 22, 2020), https://www.crowell.com/NewsEvents/Publications/Articles/Appellate-Stare-Decisis-Will-Precedent-Survive-Scrutiny [https://perma.cc/XU7M-ZX6P]. However, in order to fit the *Millenium Labs* reasoning and motivation into the framework of the First Circuit, the remainder of the Note will focus on the language of the First Circuit's articulation of the test, just as the First Circuit itself did in the *Millenium Labs* opinion. *See* United States *ex rel.* McGuire v. Millenium Labs., Inc., 923 F.3d 240, 249–50 (1st Cir. 2019), *cert. denied*, 140 S. Ct. 851 (2020).

156 Sánchez *ex rel.* D.R.-S. v. United States, 671 F.3d 86, 96 (1st Cir. 2012).

157 *Id.*

158 *Id.* (quoting *Guzmán*, 419 F.3d at 31).

First, it implied there *was* no law of the circuit to follow.[159] Looking to its past cases dealing with the first-to-file rule, the court noted that these did not dedicate any "substantive analysis to this issue."[160] This is true, as prior First Circuit cases had essentially stated that the rule was jurisdictional as a given fact.[161] Due to the fact these cases "failed to apply the *Arbaugh* clear-statement test," the court determined they did not have any precedential weight.[162] Because of this, it could be argued that no "prior panel decision[ ] [was] directly (or even closely) on point."[163]

Alternatively, assuming there *was* a law of the circuit, the circumstances at the time of *Millenium Labs* warranted revisiting the subject. While there was no controlling authority on the rule which postdated the First Circuit's previous decisions, the law of the circuit's second exception provided an opportunity to recharacterize the rule.[164] The court found reason to believe that the existence of *Carter* provided subsequent "noncontrolling authority" that would lead the prior panels to characterize the rule as nonjurisdictional.[165] Thus, looking to the state of the precedent within the First Circuit, the *Millenium Labs* opinion fits in nicely.

The Third Circuit was in an even better position than the First Circuit: it had not even remotely addressed the issue, so it did not have any prior decisions that it had to limit or overrule.[166] And this lack of precedent tracks with the trend of other circuits that have currently held the rule to be nonjurisdictional. At the time the D.C. Circuit decided *Heath*, there was no case within the circuit on point, giving it a blank slate to write on.[167] The Second Circuit was in a similar position, not

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159 *See* United States *ex rel.* McGuire v. Millenium Labs., Inc., 923 F.3d 240, 250 (1st Cir. 2019), *cert. denied*, 140 S. Ct. 851 (2020).

160 *Id.*

161 *See, e.g.*, United States *ex rel.* Wilson v. Bristol-Myers Squibb, Inc., 750 F.3d 111, 117 (1st Cir. 2014) (simply stating that the "first-to-file rule is jurisdictional").

162 *Millenium Labs.*, 923 F.3d at 250.

163 *Guzmán*, 419 F.3d at 31.

164 *Millenium Labs.*, 923 F.3d at 249.

165 *Id.*

166 *See* United States *ex rel.* JKJ P'ship 2011 L.P. v. Sanofi-Aventis U.S. L.L.C. (*In re* Plavix Mktg., Sales Practices and Prods. Liab. Litig. (*No. II*)), 974 F.3d 228, 232 (3d Cir. 2020) (discussing no circuit precedent).

167 United States *ex rel.* Heath v. AT&T, Inc., 791 F.3d 112, 119 (D.C. Cir. 2015). At least two cases had come before the D.C. Circuit in which the trial court had treated the first-to-file bar as jurisdictional, and the decision of the trial court was ultimately upheld by the circuit. United States *ex rel.* Shea v. Cellco P'ship, 748 F.3d 338, 340 (D.C. Cir. 2014), *vacated*, 575 U.S. 1035 (2015); United States *ex rel.* Batiste v. SLM Corp., 659 F.3d 1204, 1206 (D.C. Cir. 2011). However,

citing a single precedent on the first-to-file rule from within the circuit that could bind it in *Hayes*.[168] This stands in stark contrast with the Fourth Circuit, which has stated that it has "held" the rule to be jurisdictional.[169] In a subsequent opinion produced by *Carter* on remand, the Fourth Circuit indicated that it considered itself bound by this, and the court elected not to recharacterize the rule.[170] It appears that this lack of precedent on point is a significant indicator of how a circuit might rule post-*Carter*—perhaps why the First Circuit felt the need to demonstrate that there might not be any precedent on point.

The nonjurisdictional characterization fits into the larger picture of the FCA within the First and Third Circuits, which typically allows for flexible interpretations of the FCA for relators. Put simply, the First and Third Circuits' current FCA jurisprudence can be generalized in this way: these circuits support interpretations of the FCA that either make recovery easier for relators or alternatively are harsher on defendants.

This can be seen in the First and Third Circuits' stances on some of the issues arising under the FCA, discussed above. In the current split on the Rule 9(b) particularity requirement, the First Circuit currently gives more leeway to relators at the pleading stage than several other circuits are willing to give.[171] And the Third Circuit is even more lenient, distinguishing it as one of the most lenient circuits in terms of what a relator must plead to satisfy the particularity requirement.[172] On at least one issue, the First Circuit has been the harshest circuit for defendants: it created the *Blackstone* rule.[173] The Third Circuit has not adopted the *Blackstone* rule, but it did at the very least recognize the validity of legally false claims premised on an implied certification theory.[174]

The history of the First Circuit's treatment of the first-to-file rule also evidences a historical trend towards leniency for

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neither of these cases required the court to rule on the correctness of this characterization. In fact, Judge Srinivasan noted this in *Shea*, stating in his partial concurrence that "[t]he court's affirmance, however, should not be understood as a holding that the first-to-file bar is a jurisdictional limitation." *Shea*, 748 F.3d at 345 (Srinivasan, J., concurring in part and dissenting in part).

168 United States *ex rel.* Hayes v. Allstate Ins. Co., 853 F.3d 80, 85–86 (2d Cir. 2017).

169 United States *ex rel.* Carter v. Halliburton Co., 866 F.3d 199, 203 n.1 (4th Cir. 2017).

170 *Id.*

171 *See* Law, *supra* note 6, at 871–81.

172 *See supra* note 117 and accompanying text.

173 *See supra* notes 100–04 and accompanying text.

174 *See supra* notes 94–99 and accompanying text.

relators. When it decided *Gadbois*, it was seemingly the only circuit that allowed a plaintiff to cure a first-to-file defect with an amended complaint.[175] The alternative was the much harsher requirement of requiring that the court dismiss the action and have the relator go through the motions of refiling the complaint.[176] Now, it considers the rule to be nonjurisdictional in nature, which is ultimately better for relators because it leaves the claim open to less attack. Similarly, because a court is not obligated to address merits issues that are not raised by the parties, a relator will not be caught off guard when the court raises a first-to-file issue that the parties have not put before the court.[177]

So the First and Third Circuits seem to favor interpretations of the FCA that make the task of being a relator easier—and they adopted such an interpretation in *Millenium Labs* and *In re Plavix Marketing*.

C. The Purpose of the FCA

A more lenient interpretation of FCA's provisions may also comport with the purpose of the FCA. The FCA is meant to encourage private parties to bring qui tam claims when the government is not in a position to discover or prosecute the fraud itself.[178] Why should a court of the same government make it harder for relators to succeed on their claim? Between 1986 and 2012, the FCA resulted in the recovery of $22 billion from qui tam cases.[179] Assuming that this refers to the amount recovered by the government *after* the qui tam plaintiff received their portion of the award, the amount of fraud discovered in these cases would be staggering.

If each qui tam plaintiff received the lowest portion of the award contemplated by the FCA (15%)[180] the awards in these cases potentially totaled more than $25 billion. However, the government also recovered an *additional* $11 billion from cases it brought on its own.[181] Accounting for the fact that the FCA

175 *See* Sorger, *supra* note 45, at 43–44.
176 *See id.* at 43.
177 *Cf.* Gonzalez v. Thaler, 565 U.S. 134, 141 (2012) (demonstrating that jurisdictional issues must uniquely be questioned by the court, implying that others do not have to be questioned sua sponte).
178 S. REP. NO. 99-345, at 4 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5269 ("Detecting fraud is usually very difficult without the cooperation of individuals who are either close observers or otherwise involved in the fraudulent activity.").
179 *See* Delery, *supra* note 38.
180 31 U.S.C. § 3730(d)(1) (2018).
181 Delery, *supra* note 38.

allows for treble damages, this could mean that the government was defrauded of roughly $11 billion over this period.[182] While this number might appear relatively small, it should be remembered that "most fraud goes undetected,"[183] meaning that the actual amount of money lost to fraud is very likely much greater. The rate at which the government is discovering fraud also seems to be increasing. The government recovered $33 billion between 1986 and 2012, but at least $11 billion of that amount was recovered in the span of a mere three years.[184] If the FCA were more liberally applied, it could result in a massive amount of fraud being uncovered and a massive amount in awards being recovered by relators and the government.

Thus, it may not be sound to deny the use of a powerful litigation tool to plaintiffs who are attempting to aid the federal government. By more liberally opening the courthouse doors, the First and Third Circuits are acting exactly as Congress intended. The government—and thus the public—has a policy of finding and combatting fraud, and courts at times serve as the most powerful tool for enforcing public policy. Disadvantaging plaintiffs in FCA cases may simply be cutting off your nose to spite your face. The upshot of this is that the First and Third Circuits—and every other federal court of appeal—have an incentive to adopt interpretations of the FCA that allow for leniency towards relators. Congress enacted the bars in the FCA to prevent duplicative or frivolous claims brought under the FCA, but surely it did not mean to prevent any more than that.[185] The First and Third Circuits seem, whether overtly or not, to have recognized that this more lenient interpretation of the FCA comports more with the original intention of the act than a stricter interpretation does.

In fact, the First and Third Circuits might also have a more local reason for allowing the success of relators' claims. Most modern FCA claims arise from the healthcare industry.[186] From a consumer perspective, the states within the First and Third Circuits have some of the largest numbers in terms of the

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182 *See* 31 U.S.C. § 3729(a)(1).

183 S. REP. NO. 99-345, at 2, *reprinted in* 1986 U.S.C.C.A.N. at 5267 (quoting U.S. GEN. ACCOUNTING OFFICE, AFMD-81-57, FRAUD IN GOVERNMENT PROGRAMS: HOW EXTENSIVE IS IT? HOW CAN IT BE CONTROLLED? iv (1981) (stating that "most fraud remains undetected").

184 Delery, *supra* note 38.

185 *See supra* Part I.

186 Delery, *supra* note 38.

amount of money spent on healthcare.[187] The First Circuit also includes Massachusetts, one of the capitals of the American healthcare and biotech industries.[188] The first-to-file cases coming out of the First Circuit show the prevalence of the industry in the region; many of the FCA cases within the circuit arise in the context of the healthcare industry.[189] *In re Plavix Marketing* from the Third Circuit did as well.[190] Courts in these circuits might face these cases more frequently than other circuits, making their characterization of a rule extremely significant to qui tam litigation as a whole.

And this slow recognition and effectuation of the purpose of the FCA is not novel to the present day—or the courts. All three branches of government have experienced an ebb and flow of support for qui tam actions. The government originally favored them quite a bit.[191] Arguably, this support was strongest in the federal judiciary given how liberally the Supreme Court interpreted qui tam provisions in their infancy.[192] After an initial period of enthusiasm, however, qui tam actions lost favor with nearly every branch of government.[193] Eventually, the government saw the error of its ways. Congress decided that it needed to revitalize the act,[194] and the executive branch has finally begun to more liberally enforce it.[195]

The courts have been slower to adopt this enthusiasm and have had to do so in a piecemeal way. The creation of the "legally false" claim demonstrates the slow but eventual proliferation of a broader interpretation of the statute. Now, perhaps the first-to-file rule's time has come. This slowness to

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187 Kaiser Family Found., *Health Care Expenditures Per Capita by State of Residence*, KFF, https://www.kff.org/other/state-indicator/health-spending-per-capita/?activeTab=map&currentTimeframe=0&selectedDistributions=health-spending-per-capita&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D [https://perma.cc/YHT3-CMCK] (last visited Mar. 14, 2021).

188 *Life Sciences Map of the USA*, U.S. LIFE SCI. DATABASE http://www.usalifesciences.com/us/portal/map.php [https://perma.cc/2P8S-6PN4] (last visited Mar. 14, 2021).

189 *E.g.*, United States *ex rel.* McGuire v. Millenium Labs., Inc., 923 F.3d 240, 245 (1st Cir. 2019), *cert. denied*, 140 S. Ct. 851 (2020); United States *ex rel.* Kelly v. Novartis Pharm. Corp., 827 F.3d 5, 8 (1st Cir. 2016).

190 United States *ex rel.* JKJ P'ship 2011 L.P. v. Sanofi-Aventis U.S. L.L.C. (*In re* Plavix Mktg., Sales Practices and Prods. Liab. Litig. (*No. II*)), 974 F.3d 228, 230 (3d Cir. 2020).

191 *See* Hamer, *supra* note 7, at 90.

192 *See id.*

193 S. REP. NO. 99-345, at 2–8 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5266–73.

194 *Id.* at 8, *reprinted in* 1986 U.S.C.C.A.N. at 5273.

195 Delery, *supra* note 38.

act can be especially evident in the federal court system, where rules are generally developed through at least thirteen different federal circuits. While Congress or the Supreme Court could resolve this split, there is no indication that this will happen any time soon. In fact, perhaps the Court's silence on the issue in *Carter* is evidence that for now, the circuits will have to continue the debate.

IV
PREDICTING FUTURE FLIPS

So given that a uniform rule is not likely to be handed down, what can the decisions teach about the first-to-file rule going forward?[196] Looking to the circuits that have already adopted the nonjurisdictional characterization identifies four factors relevant to determining whether a circuit will characterize the rule as nonjurisdictional in the future: the general trend of how courts are interpreting the FCA, the existence (or nonexistence) of circuit precedent on the issue, the circuit's position on other FCA issues, and whether the circuit covers a geographic region in which an industry that produces a lot of qui tam litigation has a strong foothold. However, none of these factors are dispositive of how a circuit will rule on an issue. In fact, some disparities would arise if they were to be considered dispositive. Instead, these should be looked at as guideposts that can be used to signal when a court might be on the verge of interpreting the first-to-file rule as nonjurisdictional.

First, as a whole, the system appears to be trending toward encouraging a more lenient interpretation of the FCA. This has the potential to lead to more circuits characterizing the rule as nonjurisdictional. However, this trend has not uniformly led to post-*Carter* decisions holding the rule nonjurisdictional. This can be seen in the fact that multiple circuits have continued to characterize the rule as jurisdictional. Both the Fourth[197] and Tenth[198] Circuits have continued to adhere to this characterization.

Second, it seems that a circuit that has not explicitly held that the rule is jurisdictional is more likely to interpret the rule

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196 This discussion may be more broadly applicable to other FCA issues going forward. However, this Part only focuses on how a circuit is likely to characterize the first-to-file rule.

197 United States *ex rel.* Carter v. Halliburton Co., 866 F.3d 199, 203 n.1 (4th Cir. 2017).

198 United States *ex rel.* Little v. Triumph Gear Sys., Inc., 870 F.3d 1242, 1251 (10th Cir. 2017).

as nonjurisdictional in the post-*Carter* world. All four of the circuits that have adopted this interpretation either did not—or feel they did not—explicitly hold that the rule was jurisdictional.[199] The Fourth and Tenth Circuits, however, *have* done so, a fact that these circuits focused on in their post-*Carter* opinions that reaffirmed their characterization of the rule.[200]

However, even when a circuit has previously characterized the rule as jurisdictional and continues to do so, readers of the opinions should be aware of language that could signal a change. With the benefit of hindsight, it can be seen that the First Circuit slowly positioned itself to change its interpretation. There were roughly four years between *Carter* and *Millenium Labs*, during which the First Circuit kept its jurisdictional characterization.[201] But along the way, it signaled that there was doubt within the court about the rule's characterization by using language such as "at least in this Circuit"[202] or "assume."[203] So even if a circuit appears to still be adhering to the jurisdictional view, the exact wording that a court uses might signal an eventual recharacterization of the rule.

Third, a circuit that has adopted a more lenient (or harsh, as it relates to defendants) approach to other FCA issues might be more open to adopting the nonjurisdictional approach. Looking to the Rule 9(b) split, all four circuits that have adopted the nonjurisdictional characterization of the rule seem to endorse a more lenient approach to the particularity requirement.[204] Similarly, on the issue of legally false claims, the First and D.C. Circuits adopted the *Blackstone* rule,[205] and the Second and Third Circuits recognized implied certification claims in some form.[206] The Fourth Circuit, however, did not recognize the implied certification theory at all, adhering to the

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199 *See* United States *ex rel.* McGuire v. Millenium Labs., 923 F.3d 240, 250–51 (1st Cir. 2019), *cert. denied*, 140 S. Ct. 851 (2020); *see also* United States *ex rel.* JKJ P'ship 2011 L.P. v. Sanofi-Aventis U.S. L.L.C. (*In re* Plavix Mktg., Sales Practices and Prods. Liab. Litig. (*No. II*)), 974 F.3d 228, 232 (3d Cir. 2020) (citing no circuit precedent that held the rule was jurisdictional); United States ex rel. Hayes v. Allstate Ins. Co., 853 F.3d 80, 85–86 (2d Cir. 2017) (same); United States *ex rel.* Heath v. AT&T, Inc., 791 F.3d 112, 119 (D.C. Cir. 2015) (same).

200 *Carter*, 866 F.3d at 203 n.1; *Little*, 870 F.3d at 1251.

201 *See, e.g.*, United States *ex rel.* Kelly v. Novartis Pharm. Corp., 827 F.3d 5, 12 n.9 (1st Cir. 2016) (involving a *qui tam* action under the FCA).

202 United States *ex rel.* Ven-A-Care of the Fla. Keys, Inc. v. Baxter Healthcare Corp., 772 F.3d 932, 936 (1st Cir. 2014).

203 *Kelly*, 827 F.3d at 12 n.9.

204 *See* Law, *supra* note 6, at 873–78.

205 Martin, *supra* note 5, at 241.

206 *See id.*

strictest approach to the split.[207] The Tenth Circuit, meanwhile, had adhered to the same rule as the Second Circuit.[208]

Finally, it might be significant that a circuit is situated in a region that contains a lot of FCA litigation. Specifically, it might be helpful to see whether any of the industries that give rise to a significant amount of FCA litigation have a strong foothold in the geographic area that the circuit covers. The two largest of these are the healthcare and the financial services industries.[209] Looking to the First, Second, Third, and D.C. Circuits, one of these industries is relatively prevalent in the regions they cover, with healthcare spending being higher in these areas than in many areas of the country.[210]

An illustration of where some of these factors might intersect can be found in the Ninth Circuit. When the Ninth Circuit has ruled on the FCA, it has often done so in a way that favors a lenient interpretation of the Act. For example, the Ninth Circuit has adopted one of the most flexible Rule 9(b) pleading standards to date.[211] It also recognizes the implied certification theory, though it has "not tak[en] a clear position on the express condition-of-payment requirement."[212]

While the Ninth Circuit currently classifies the rule as jurisdictional,[213] there are signs that it might be doubting this characterization. In an opinion published only a month after *Carter*, it stated that "*[w]e treat* the first-to-file bar as jurisdictional."[214] This somewhat mirrors the language of the First Circuit's statement that the rule was jurisdictional "in th[e] Circuit."[215] Additionally, the Ninth Circuit simply stated that this characterization is how it treats it, rather than giving any "substantive analysis to this issue."[216] If the Ninth Circuit *were* to decide to change its characterization, it has certainly set itself into a near-identical position to that of the First Circuit pre-*Millenium Labs*. The Ninth Circuit also has the same

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207 *See* Arnholt & Harvie, *supra* note 96, at 3. However, the Fourth Circuit would then adopt implied certification in 2015. *Id.* at 2.

208 Martin, *supra* note 5, at 241.

209 Delery, *supra* note 38.

210 Kaiser Family Found., *supra* note 187.

211 *See* Law, *supra* note 6, at 880.

212 Martin, *supra* note 5, at 232.

213 United States *ex rel.* Hartpence v. Kinetic Concepts, Inc., 792 F.3d 1121, 1130 (9th Cir. 2015).

214 *Id.* (emphasis added).

215 United States *ex rel.* Ven-A-Care of the Fla. Keys, Inc. v. Baxter Healthcare Corp., 772 F.3d 932, 936 (1st Cir. 2014).

216 United States *ex rel.* McGuire v. Millenium Labs., Inc., 923 F.3d 240, 250 (1st Cir. 2019), *cert. denied*, 140 S. Ct. 851 (2020).

incentives as the other circuits that characterize the rule as nonjurisdictional. Spending on healthcare is large in certain areas within the circuit, and the healthcare and biotech industries have a large foothold in California, just as they do in Massachusetts.[217] If the Ninth Circuit were to find the rule in front of it again, it could very well become the fifth circuit to adopt the nonjurisdictional characterization.

CONCLUSION

The recent decisions by the First and Third Circuits that the first-to-file rule of the False Claims Act is nonjurisdictional appear to be motivated in large part by recent decisions coming out of the Supreme Court as well as sister circuits. However, while these appear to have acted as catalysts for their holdings, the road to this characterization had already been paved. It was ultimately the result of the recognition by the First and Third Circuits—and the federal court system as a whole—of the importance and utility of the False Claims Act. In looking to how circuits will rule on this issue in the future, on the immediate circuit-to-circuit level, circuits that are in the same position as the First and Third Circuits—economically and jurisprudentially—will trend toward relator-favorable interpretations of the Act. On the whole, however, the system at large will likely trend in this direction given enough time.

217 Kaiser Family Found., *supra* note 187.