CIVIL PROCEDURE — FALSE CLAIMS ACT — D.C. CIRCUIT HOLDS THAT FALSE CLAIMS ACT FIRST-TO-FILE RULE IS NONJURISDICTIONAL. — *United States ex rel. Heath v. AT&T, Inc.*, 791 F.3d 112 (D.C. Cir. 2015).

The qui tam, or citizen suit, provisions of the False Claims Act[1] (FCA) are designed to encourage disclosure of insider information revealing fraud in government contracting.[2] The provisions grant a significant portion of resulting awards to private whistleblowers,[3] giving those whistleblowers a financial interest in cases they bring on behalf of the government. Recently, in *United States ex rel. Heath v. AT&T, Inc.*,[4] the D.C. Circuit found the FCA's first-to-file bar[5] — which tries to stop duplicative, opportunistic suits — to be "nonjurisdictional." Because jurisdictional rules bear on the power of a court to hear an issue, their consequences are clear: they cannot be waived or forfeited, may be raised at any time, must be considered sua sponte, and are not subject to equitable exceptions.[6] As the first circuit to deem the first-to-file bar nonjurisdictional, the D.C. Circuit left open several questions about how courts in general are to apply such a rule and how future parties in that circuit may use this particular rule.

The alleged fraud in *Heath* arose under the Federal Communications Commission's "Education Rate" (E-Rate) program. Providers bid on supplying telecommunications services to schools and libraries.[7] They must offer a discount on normal rates and charge no more than is charged to any "similarly situated" customer.[8] The educational institutions or the providers themselves can then receive partial reimbursement from federal funds.[9] Todd Heath, a private auditor, alleged that AT&T and its subsidiaries systematically overcharged schools, violating the E-Rate plan's requirements by providing lower rates to similarly situated entities; the resulting inflated bills to the federal government were, he asserted, federal false claims.[10] In 2008, Heath had filed an FCA suit against AT&T subsidiary Wisconsin Bell.[11] In a sec-

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1 31 U.S.C. §§ 3729–3733 (2012).

2 *Id.* § 3730.

3 *Id.* § 3730(d). The statute allows treble damages plus a penalty for each "claim," *id.* § 3729(a), and up to thirty percent of awards may go to whistleblowers, *id.* § 3730(d)(2).

4 791 F.3d 112 (D.C. Cir. 2015).

5 31 U.S.C. § 3730(b)(5) ("When a person brings [a qui tam action], [only] the Government may intervene or bring a related action based on the facts underlying the pending action.").

6 Arbaugh v. Y&H Corp., 546 U.S. 500, 514 (2006).

7 47 U.S.C. § 254(h)(1)(B) (2012).

8 47 C.F.R. § 54.500(f) (2014).

9 United States *ex rel.* Heath v. AT&T, Inc., 47 F. Supp. 3d 42, 44 (D.D.C. 2014).

10 *Heath*, 791 F.3d at 117.

11 United States *ex rel.* Heath v. Wis. Bell, Inc., 760 F.3d 688, 690 (7th Cir. 2014).

ond suit filed in the U.S. District Court for the District of Columbia, he claimed this fraud was part of a nationwide overcharging scheme that included parent AT&T and nineteen subsidiaries.[12]

AT&T moved to dismiss the D.C. suit. It argued that the FCA's first-to-file bar precluded Heath's second case or, in the alternative, that the complaint had not met the heightened pleading requirements for fraud.[13] The district court granted the motion to dismiss.[14] It found that Heath's case was prevented by the first-to-file bar,[15] which provides that a "related action" cannot be filed while another FCA case regarding the same facts is "pending."[16] That is, there can be only one pending complaint involving a particular instance of fraud, regardless of whether that claim is the best or most informative. The court stressed that the FCA's whistleblower provisions were meant to alert the government to fraud.[17] Because the "methodology of the accused fraud [was] the same in both actions," the government could have readily understood from the *Wisconsin Bell* complaint and AT&T's corporate structure that the parent company and other subsidiaries might be involved.[18] Thus the suits were "related" for purposes of first-to-file and the second suit was barred.[19] To avoid the bar, the D.C. defendants "would have to be actors the government was not equipped to investigate after the first complaint."[20]

The D.C. Circuit reversed and remanded. Writing for the panel, Judge Millett[21] held that the first-to-file bar was a "nonjurisdictional" rule.[22] This finding, as the court acknowledged, differed from statements in several other circuit courts.[23] *Heath* looked to a line of recent

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[12] *Heath*, 791 F.3d at 117–18. When Heath filed this case, his earlier claim against Wisconsin Bell was on appeal in the Seventh Circuit. *Heath*, 47 F. Supp. 3d at 45.

[13] *Heath*, 791 F.3d at 115. Federal Rule of Civil Procedure 9(b) requires that the facts underlying fraud allegations be "state[d] with particularity." FED. R. CIV. P. 9(b). AT&T argued that Heath had failed to identify specific fraudulent documents and individuals who had committed fraud. *See* Brief for Appellees at 25–28, *Heath*, 791 F.3d 112 (No. 14-7094).

[14] *Heath*, 47 F. Supp. 3d at 47.

[15] *Id.* at 46–47.

[16] 31 U.S.C. § 3730(b)(5) (2012).

[17] *See Heath*, 47 F. Supp. 3d at 46–47.

[18] *Id.* at 46; *see also id.* at 46–47. The opinion did not rule that suits against a subsidiary always preclude suits against a parent corporation. *See id.* at 47.

[19] *Id.* at 46.

[20] *Id.* at 46–47.

[21] Judge Millett was joined by Judges Edwards and Griffith.

[22] *Heath*, 791 F.3d at 127. The main discussion section of the opinion stated only that the rule is "not jurisdictional," *id.* at 119, but the conclusion termed the first-to-file rule "nonjurisdictional," *id.* at 127. Another D.C. Circuit judge had previously suggested that this bar should be understood as a nonjurisdictional rule. *See* United States *ex rel.* Shea v. Cellco P'ship, 748 F.3d 338, 345 (D.C. Cir. 2014) (Srinivasan, J., concurring in part and dissenting in part), *vacated*, 135 S. Ct. 2376 (2015).

[23] *Heath*, 791 F.3d at 119 (citing United States *ex rel.* Ven-A-Care of Fla. Keys, Inc. v. Baxter Healthcare Corp., 772 F.3d 932, 936 (1st Cir. 2014); United States *ex rel.* Carter v. Halliburton Co., 710 F.3d 171, 181 (4th Cir. 2013), *aff'd in part, rev'd in part on other grounds sub nom.* Kellogg

Supreme Court cases cabining the term "jurisdictional" to situations where a clear statement shows Congress intended a rule to be so.[24] Noting the far-reaching consequences of deeming a rule jurisdictional, including that it can then be raised at any point in litigation, the panel asserted that courts "should not lightly attach such drastic consequences to a procedural requirement."[25] It looked to the structure of the FCA, including other sections of the statute that limit jurisdiction in express terms.[26] The panel found no clear statement that the first-to-file bar was intended to be jurisdictional.[27] Instead, the rule "bears only on whether a *qui tam* plaintiff has properly stated a claim."[28]

Having determined the nature of the first-to-file bar, the court found the two complaints were not "related" for purposes of that bar.[29] The court explained that the first suit was insufficient to give the government notice of a potential nationwide scheme, rather than merely actions of a few "rogue personnel" in Wisconsin.[30] It noted that a "lesser fraud does not, without more, include the greater,"[31] expressing some incredulity that the government would be expected to investigate corporation-wide behavior after every allegation of misdeeds by a few employees at a subsidiary.[32] To find the first-to-file bar preclusive of such later, larger-scale fraud claims could improperly "allow isolated misconduct to inoculate large companies against comprehensive fraud liability."[33]

Finally, the court considered whether Heath's complaint met the particularized pleading requirements for fraud, an issue not reached by the lower court. The panel discussed and rejected three separate arguments attacking the sufficiency of the complaint. First, while the complaint did not identify any "specific, affirmative misrepresentations,"

Brown & Root Servs., Inc. v. United States *ex rel.* Carter, 135 S. Ct 1970 (2015)); *see also* United States *ex rel.* Branch Consultants v. Allstate Ins. Co., 560 F.3d 371, 378 (5th Cir. 2009); Walburn v. Lockheed Martin Corp., 431 F.3d 966, 970 (6th Cir. 2005); United States *ex rel.* Grynberg v. Koch Gateway Pipeline Co., 390 F.3d 1276, 1278 (10th Cir. 2004); United States *ex rel.* Lujan v. Hughes Aircraft Co., 243 F.3d 1181, 1186 (9th Cir. 2001). In each case, the first-to-file rule was called "jurisdictional," but little analysis regarding that characterization was provided.

[24] *Heath*, 791 F.3d at 119–20 (citing United States v. Kwai Fun Wong, 135 S. Ct. 1625, 1632 (2015); Sebelius v. Auburn Reg'l Med. Ctr., 133 S. Ct. 817, 824 (2013); Gonzalez v. Thaler, 132 S. Ct. 641, 648 (2012)).

[25] *Id.* at 120.

[26] *Id.* The first-to-file rule is found in the section entitled "Actions by Private Persons" rather than a later section that includes several jurisdictional terms. *See* 31 U.S.C. § 3730(b), (e) (2012).

[27] *Heath*, 791 F.3d at 120–21.

[28] *Id.* at 121.

[29] *Id.* at 121–23.

[30] *Id.* at 122 (quoting United States *ex rel.* Chovanec v. Apria Healthcare Grp., Inc., 606 F.3d 361, 364 (7th Cir. 2010)).

[31] *Id.*

[32] *Id.* at 122–23.

[33] *Id.* at 123.

the complaint could proceed on allegations that AT&T had impliedly certified compliance with the E-Rate program requirements.[34] Second, though no individuals were identified who were alleged to have committed the knowing fraud, a corporation could be considered a "specific actor" to satisfy the *who* of an FCA pleading.[35] Lastly, while AT&T argued that the absence of "representative samples" of fraudulent claims meant the complaint was insufficient, the court rejected that the pleading requirements mandated any "checklist" of items.[36] It instead clarified that "precise details of individual claims are not, as a categorical rule, an indispensable requirement of a viable [FCA] complaint."[37]

Although *Heath*'s decision that the first-to-file bar is nonjurisdictional was precise and straightforward, the implications of the rule being nonjurisdictional are not so neat. The Supreme Court noted just last Term that "[t]he False Claims Act's *qui tam* provisions present many interpretive challenges."[38] The first-to-file bar alone has generated a great deal of interpretive case law.[39] Determining a rule's jurisdictionality likewise poses difficulties.[40] While it does help signal categories of rules that fall under the classification, labeling a rule "nonjurisdictional" is not enough to define how it operates. The D.C. Circuit's decision followed established doctrine but left unanswered questions for future courts.

The jurisdictional/nonjurisdictional dichotomy for procedural rules has been teased out following the Supreme Court's acknowledgment that *jurisdictional* was a term of "many, too many, meanings."[41] To address this problem, the Court established its clear statement principle: a rule would not be jurisdictional unless Congress indicated it should be.[42] By requiring a clear statement, the doctrine seeks to limit potentially harsh consequences. For example, the controversial *Bowles v. Russell*[43] decision strictly applied a fourteen-day time limit, dismissing

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[34] *Id.* at 124.

[35] *Id.* at 125.

[36] *Id.*

[37] *Id.* at 126.

[38] Kellogg Brown & Root Servs., Inc. v. United States *ex rel.* Carter, 135 S. Ct. 1970, 1979 (2015).

[39] *See generally* JOHN T. BOESE, CIVIL FALSE CLAIMS AND *QUI TAM* ACTIONS § 4.03 (4th ed. 2013).

[40] *See* Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 161 (2010) ("[T]he distinction between jurisdictional conditions and claim-processing rules can be confusing in practice.").

[41] Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 90 (1998) (quoting United States v. Vanness, 85 F.3d 661, 663 n.2 (D.C. Cir. 1996)); *see also* Karen Petroski, *Statutory Genres: Substance, Procedure, Jurisdiction*, 44 LOY. U. CHI. L.J. 189, 221–31 (2012) (describing Supreme Court consideration of jurisdictionality over the last decade).

[42] A clear statement on jurisdictionality can come not only from "magic words" but also from a statute's structure. *See, e.g.*, Henderson *ex rel.* Henderson v. Shinseki, 131 S. Ct. 1197, 1204–05 (2011).

[43] 551 U.S. 205 (2007).

the appeal at issue despite the appellant's compliance with (erroneous) court instructions giving seventeen days for filing of that appeal.[44] Where a rule is jurisdictional, it has clear consequences and is not subject to equitable exceptions.[45]

However, deeming a rule nonjurisdictional does not create the opposite of a jurisdictional rule.[46] Professor Scott Dodson convincingly argues that a nonjurisdictional rule is not necessarily devoid of those restrictions that come with a jurisdictional rule.[47] Scholars have variously separated out the broadly characterized category of "nonjurisdictional" requirements into segments — merits and procedural issues, for instance, or litigation preconditions and elements of a claim.[48] Dodson proposes a category of mandatory nonjurisdictional rules, a class of requirements that a court must enforce without discretion if raised.[49] The Supreme Court has emphasized that "calling a rule nonjurisdictional does not mean that it is not mandatory or that a timely objection can be ignored."[50] Nonjurisdictional rules can certainly be couched in mandatory terms.[51] In addition, not all nonjurisdictional rules allow for the same discretion. In one instance, the Supreme Court deemed a time limit for appeal nonjurisdictional but not subject to equitable tolling,[52] despite a presumption in favor of allowing equitable

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[44] *Id.* at 205. *Bowles* did not identify a clear statement but found jurisdictionality from longstanding court interpretation. *See id.* at 209–10.

[45] *See* Howard M. Wasserman, Colloquy Essay, *The Demise of "Drive-By Jurisdictional Rulings*," 105 NW. U. L. REV. 947 (2011) (describing jurisdictional rules and lack of clear distinction between jurisdictional and procedural issues). *But see* Scott Dodson, *Hybridizing Jurisdiction*, 99 CALIF. L. REV. 1439 (2011) (reasoning that jurisdictional rules can have "features of nonjurisdictionality," *id.* at 1442). Justice Black argued that an admittedly jurisdictional rule may still allow a degree of inherent discretion. *See* Teague v. Reg'l Comm'r of Customs, 394 U.S. 977, 982–83 (1969) (Black, J., dissenting from denial of certiorari).

[46] *See* Scott Dodson, *Mandatory Rules*, 61 STAN. L. REV. 1, 5 (2008).

[47] *Id.*; *cf.* Day v. McDonough, 547 U.S. 198 (2006) (sua sponte consideration of habeas petition timeliness permitted, not required); CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3950.1, Westlaw (database updated Apr. 2015) (discussing whether nonjurisdictional deadline may be raised sua sponte). *But see Henderson*, 131 S. Ct. at 1203–04 (concluding jurisdictionality could be shown if Congress attached jurisdictional consequences but that rule at issue was "not meant to have jurisdictional attributes").

[48] *See* Wasserman, *supra* note 45.

[49] Dodson, *supra* note 46, at 9 ("A mandatory rule is nonjurisdictional but nevertheless has the jurisdictional attribute of being unsusceptible to equitable excuses for noncompliance . . . [and] the nonjurisdictional attributes of being waivable, forfeitable, and consentable . . . .").

[50] Gonzalez v. Thaler, 132 S. Ct. 641, 651 (2012); *see also Henderson*, 131 S. Ct. at 1203 (explaining that rules should not be branded jurisdictional "even if important and mandatory"); Perry Dane, *Jurisdictionality, Time, and the Legal Imagination*, 23 HOFSTRA L. REV. 1, 39 (1994) ("[L]egal rules can be mandatory without being jurisdictional.").

[51] *See, e.g.*, United States v. Kwai Fun Wong, 135 S. Ct. 1625, 1632 (2015).

[52] Equitable tolling allows courts to extend procedural deadlines where, for example, a claimant has actively pursued her judicial remedies or has been induced into allowing the filing deadline to pass. *See* Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 95–96 (1990) (describing circumstances in which federal courts allow equitable tolling).

tolling and even though other nonjurisdictional time limits had been subject to such tolling.[53] Rules that are merely procedural still represent important considerations: Justice Stevens posited that "strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law."[54]

The procedural application of the first-to-file bar as a nonjurisdictional rule remains an open question after *Heath*. Nonjurisdictional status does influence features of procedural practice, including the type of motion to dismiss that should be filed.[55] The opinion, however, did not specify whether the rule can now be invoked *only* at the pleading stage, though commentators have suggested that conclusion.[56] *Heath* described potential consequences of jurisdictional rules in general. It did not identify instances in which a nonjurisdictional first-to-file rule would avoid inequitable disposition of a case.[57]

A second question that *Heath* left open is whether the first-to-file bar is waivable or subject to equitable exceptions. The rule is phrased in obligatory terms: "no person other than the Government may intervene or bring a related action."[58] In most of the Supreme Court cases refining the topic, the issue of jurisdictionality was determinative of whether a case could proceed or whether a holding could stand.[59] These involved arguably easier-to-apply rules like employee numerosity requirements[60] or time limits.[61] Courts have held that violation of the FCA's sixty-day sealed complaint filing,[62] another FCA requirement that has been interpreted as nonjurisdictional, does not per

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[53] Sebelius v. Auburn Reg'l Med. Ctr., 133 S. Ct. 817, 827 (2013); *see also Kwai Fun Wong*, 135 S. Ct. at 1631–32; *Irwin*, 498 U.S. at 95–96 (recognizing a rebuttable presumption in favor of equitable tolling).

[54] Mohasco Corp. v. Silver, 447 U.S. 807, 826 (1980).

[55] The Federal Rules of Civil Procedure provide for motions to dismiss for "failure to state a claim upon which relief can be granted" under Rule 12(b)(6), as well as affirmative defenses to pleadings under 8(c) and motions for judgment on the pleadings under 12(c), but permits motions for "lack of subject matter jurisdiction" under 12(b)(1). FED. R. CIV. P. 8, 12.

[56] *See* Patrick Stanton & Kathy Brown, *D.C. Circuit Creates Circuit Split Regarding Jurisdictional Nature of the False Claims Act's First-to-File Rule*, NAT'L L. REV. (July 10, 2015), http://www.natlawreview.com/article/dc-circuit-creates-circuit-split-regarding-jurisdictional-nature-false-claims-act-s [http://perma.cc/S3HR-ZKU3].

[57] *Heath*, 791 F.3d at 120.

[58] 31 U.S.C. § 3730(b)(5) (2012).

[59] *Compare* Arbaugh v. Y&H Corp., 546 U.S. 500, 504 (2006) (finding nonjurisdictional rule could not be asserted after trial on the merits), *with* Bowles v. Russell, 551 U.S. 205, 206–07 (2007) (holding jurisdictional rule precluded filing of appeal).

[60] *See Arbaugh*, 546 U.S. at 504.

[61] *See, e.g.*, Henderson *ex rel.* Henderson v. Shinseki, 131 S. Ct. 1197, 1206 (2011).

[62] 31 U.S.C. § 3730(b)(2). Sealed filing gives the government time to decide whether to intervene. Unlike other seals, the FCA limits access to plaintiffs and the government. *Id.*

se require dismissal of the qui tam.[63] Even acknowledging violation of that rule, a suit could proceed. Meanwhile, *Heath* decided that first-to-file is not jurisdictional but still applied the rule, interpreting the rule to mean that the later suit was not barred instead of using the rule's nonjurisdictionality to justify a judicially crafted exception to the rule. Nonjurisdictional status does not appear to mean a court can simply decide which parts of the FCA it will apply.[64]

With the application of the first-to-file bar as a nonjurisdictional rule still to be determined, the practical impact of designating the rule nonjurisdictional remains to be seen. A variety of commentators covered the announcement in *Heath*, some seeing the ruling on the first-to-file rule's nonjurisdictional status as expanding opportunities for whistleblowers.[65] As highlighted above, it is not necessarily true that future courts will allow equitable exceptions to the bar or allow it to be considered after the pleadings stage. Moreover, even if courts do not allow equitable exceptions and consider first-to-file only at the pleading stage, such applications will not likely open significant opportunities for abuse by either side.

One reason to doubt that a nonjurisdictional first-to-file rule will lead to whistleblower abuse is the typical identity of subsequent defendants. Any defendant who can invoke the rule is either identical or very closely related to a party in an already-pending qui tam. Whether new subsidiaries in a second suit make the suit "related" for first-to-file purposes is a case-specific determination,[66] but suits against genu-

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[63] *See, e.g.*, United States *ex rel.* Lujan v. Hughes Aircraft Co., 67 F.3d 242, 245 (9th Cir. 1995). *But see* United States *ex rel.* Summers v. LHC Grp., Inc., 623 F.3d 287, 289 (6th Cir. 2010) (holding that violation of the rule would lead to automatic dismissal of a claim).

[64] Multiple circuits have described first-to-file as without exceptions. *See, e.g.*, United States *ex rel.* Duxbury v. Ortho Biotech Prods., L.P., 579 F.3d 13, 33 (1st Cir. 2009); United States *ex rel.* Lujan v. Hughes Aircraft Co., 243 F.3d 1181, 1187 (9th Cir. 2001). In theory, calling a rule nonjurisdictional could have a psychological impact, influencing judges to allow more closely related claims. Yet courts can already use differing interpretations of the first-to-file rule itself to allow such suits. The D.C. Circuit has, at least according to some commentators, adopted a much narrower interpretation of what cases are barred than other circuits. *See* Douglas W. Baruch et al., *Court's Ruling on "First-to-File" Bar Creates Circuit Split on Key False Claims Act Issue*, WASH. LEGAL FOUND. (June 6, 2014), http://www.wlf.org/upload/legalstudies/counselsadvisory/06-06-14BaruchBoeseWollenbergCA2.pdf [http://perma.cc/L3N2-ZJTU].

[65] *See, e.g.*, Stanton & Brown, *supra* note 56; *cf.* Matthew Turetzky, *First Circuit Reaffirms FCA's "First-to-File" Bar as a Broad Jurisdictional Limit*, SHEPPARD MULLIN: GOV'T CONTRACTS, INVESTIGATIONS & INT'L TRADE BLOG (Jan. 22, 2015), http://www.governmentcontractslawblog.com/2015/01/articles/fca/first [http://perma.cc/C2AN-X7YK] (describing jurisdictional first-to-file rule as "a potent defense for FCA defendants").

[66] *Compare, e.g.*, United States *ex rel.* Batiste v. SLM Corp., 659 F.3d 1204, 1209 (D.C. Cir. 2011) (finding that complaints involving different subsidiaries were related where both alleged a nationwide fraudulent scheme), *with* United States v. Sanford-Brown, Ltd., 27 F. Supp. 3d 940, 948 (E.D. Wis. 2014) (finding that suits were not related where second complaint involved different campuses and subsidiaries of education provider parent company).

inely new parties are not barred.[67] It is hard to imagine, then, that the same business that has already been fighting one FCA suit would waive or allow itself to forfeit the first-to-file argument.[68] Its incentives against litigating two duplicate cases would be extremely strong. Perhaps such a defendant could deliberately avoid raising the first-to-file bar in hopes of avoiding potentially more damaging allegations down the road in yet another suit, but that strategic use of the rule would seem to fly in the face of the FCA's limits on qui tam actions.

For litigants, the more jurisdictional rules there are in the FCA, the more possibilities there are for the suit to be overturned late in litigation. Because the qui tam provisions of the FCA provide such large financial incentives to encourage private party reporting (an aspect recognized by critics and supporters alike),[69] the loosening of the FCA's statutory bars generally could encourage opportunism. That is potentially true after *Heath* — in theory, some suits might go forward that would have been dismissed under a jurisdictional first-to-file rule. On the other hand, nonjurisdictional status might not loosen the rule at all and could have no practical effect on litigants. The answer depends on fleshing out the application of the nonjurisdictional first-to-file rule.

The potentially harsh consequences of jurisdictional rules mean courts should continue to tease out the rules that have been erroneously labeled jurisdictional. At the same time, more guidance is needed on what removing that label means for future courts' applications of those rules. In the FCA context, courts should not use nonjurisdictionality as an excuse to disrupt the balance struck by statutory limits on qui tam suits. In the meantime, courts' understandings of the substance of the rule will still drive the use — and misuse — of the FCA's first-to-file bar and the success or failure of similar claims.

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[67] *See, e.g.*, *In re* Nat. Gas Royalties Qui Tam Litig. (CO_2 Appeals), 566 F.3d 956, 963–64 (10th Cir. 2009).

[68] Because qui tam complaints are filed under seal, and because the seal can be extended by a court, 31 U.S.C. § 3730(b)(2)–(3) (2012), a first-filed suit could theoretically be unknown to a defendant before a second complaint must be defended. Even if that happened, to operate as a true bar, the first-to-file rule should still apply if and when the duplicative case is revealed. It has also been suggested that disclosure could be allowed to prevent wasting resources on suits that would be subsequently barred. *See* CLAIRE M. SYLVIA, THE FALSE CLAIMS ACT § 11:82, Westlaw (database updated May 2015) ("[T]he Government may request the court to permit disclosure of the existence of the first filed case to the second relator.").

[69] *See* David Freeman Engstrom, *Harnessing the Private Attorney General: Evidence from Qui Tam Litigation*, 112 COLUM. L. REV. 1244, 1247 (2012) (discussing differing views on whether these incentives are the "only way to combat" insiders and capture of government agencies or whether they are bounties given to "'professional' relators").