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Proper Pleading or Premature Proof? Rule 9(b)'s Particularity Requirement and the False Claim s Act

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PROPER PLEADING OR PREMATURE PROOF? RULE 9(B)'S PARTICULARITY REQUIREMENT AND THE FALSE CLAIMS ACT

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I. INTRODUCTION

In the 2014 fiscal year, the Department of Justice recovered a record setting $5.69 billion in settlements and judgments from civil cases involving fraud against the government and false claims[1]—the largest total recovery of its kind in history.[2] Between 2009 and 2013, recoveries under the False Claims Act (FCA)[3] totaled $17 billion—$13.4 billion of which derived from suits filed under its *qui tam*[4] provisions.[5] As a notable former columnist for the *New Yorker* aptly observed, "[T]he mechanisms and institutions that were supposed to limit corruption ended up facilitating corruption rather than stopping it."[6] Because the federal government is so dependent upon private-sector cooperation to supply goods and services for education, healthcare, and defense, a perfect environment exists in which to overbill, undersupply, and steal from the national treasury.

FCA actions against the healthcare industry alone resulted in a staggering $2.6 billion recovered in 2013, and recoveries from government contractors for defense supplies, like fighter jet engines, constituted more than $887 million of that year's total recovery.[7] In fact, fraud in the healthcare industry has been so

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[1] *Justice Department Recovers Nearly $6 Billion from False Claims Act Cases in Fiscal year 2014*, DEP'T OF JUSTICE (Nov. 20, 2014) [hereinafter DOJ Statistics], http://www.justice.gov/opa/pr/justice-department-recovers-nearly-6-billion-false-claims-act-cases-fiscal-year-2014.

[2] *See Justice Department Recovers $3.8 Billion from False Claims Act Cases in Fiscal Year 2013*, DEP'T OF JUSTICE (Dec. 20, 2013), http://www.justice.gov/opa/pr/justice-department-recovers-38-billion-false-claims-act-cases-fiscal-year-2013 (noting the highest recover for a single year as of 2013 was nearly $5 billion).

[3] False Claims Act, 31 U.S.C. §§ 3729–3733 (West 2014).

[4] The FCA's *qui tam* provision allows a private individual to assert a claim under the FCA on behalf of the United States to recover money that was allegedly gained or retained fraudulently by a company providing goods or services to the federal government. *See* False Claims Act, 31 U.S.C. § 3730(d) (2012).

[5] DOJ Statistics, *supra* note 2.

[6] JAMES SUROWIECKI, THE WISDOM OF CROWDS 127 (2004). Surowiecki details the institutionalization of trust in capitalism starting with the Quakers and progresses to a discussion of J.P. Morgan's epic success on Wall Street. *Id.* at 122. He then describes how this trust creates an atmosphere in which fraud can thrive; because consumers generally place great trust in our capitalist society, they are hesitant to sue the corporations that serve as this society's bedrock. *Id.* at 124. Because the government's trust in contractors, as a consumer, has led to few self-instituted actions for fraud against such contractors, the FCA's *qui tam* provision attempts to remedy this dearth of enforcement by allowing private individuals to sue on behalf of the U.S.

[7] *See* DOJ Statistics, *supra* note 2 (noting that specific defense contractors made up a large portion of the $887 million).

rampant that Attorney General Eric Holder and Secretary of Health and Human Services Kathleen Sebelius created an interagency task force called the Health Care Fraud Prevention and Enforcement Action Team (HEAT) in 2009.[8] Upon the HEAT's inception, Secretary Sebelius cleverly declared, "Today, we are turning up the heat on perpetrators who steal from the taxpayers and threaten the future of Medicare and Medicaid."[9] As Attorney General Holder recognized, these stolen taxpayer dollars serve other valuable purposes like "medicine, elder care or emergency room visits, but instead are wasted on greed."[10]

The FCA is a necessary mechanism for the government to recoup valuable dollars stolen by private profiteers. In discussions regarding the expansion of *qui tam* capability under the FCA in the 1986 amendments, the Senate Committee on the Judiciary favorably commented on the *qui tam* provision, stating that "only a coordinated effort both of the Government and the citizenry will decrease this wave of defrauding public funds."[11] The FCA's *qui tam* provisions aid in this coordinated effort by provisionally deputizing private citizens to investigate, uncover, and sue those defrauding the government.[12]

However, because it allows the informer to share in the government's recovery, so called "parasitic" informers can abuse the FCA by bringing actions based on information within the public domain or that the informer did not discover on his or her own.[13] Because of its susceptibility to abuse by those who cannot bring no new information or allegations to light, Congress has tailored the FCA since its inception to "walk a fine line between encouraging whistle-blowing and discouraging opportunistic

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[8] *Attorney General Holder and HHS Secretary Sebelius Announce New Interagency Health Care Fraud Prevention and Enforcement Team*, DEP'T OF HEALTH & HUMAN SERVS. (May 20, 2009), http://wayback.archive-it.org/3926/20131018161638/http://www.hhs.gov/news/press/2009pres/05/20090520a.html.

[9] *Id.*

[10] *Id.*

[11] S. REP. NO. 99-345, at 2 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5267.

[12] *See* Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 784 (4th Cir. 1999) ("[The FCA's] *qui tam* action would help the government uncover fraud and abuse by unleashing a 'posse of ad hoc deputies to uncover and prosecute frauds against the government.' " (quoting United States *ex rel.* Milam v. Univ. of Tex. M.D. Anderson Cancer Ctr., 961 F.2d 46, 49 (4th Cir. 1992))).

[13] *See* United States *ex rel.* Rost v. Pfizer, Inc., 507 F.3d 720, 727 (1st Cir. 2007).

behavior" by enacting a series of jurisdictional requirements[14] that the informer must meet before the claim can be properly adjudicated.[15]

Aside from these requirements, which strive to deter the opportunistic behavior by informers basing FCA claims on information already held by the government, every circuit court of appeals has also held that prospective FCA plaintiffs, whether private informers in a *qui tam* action or the government itself, must comply with the particularity requirements of Federal Rule of Civil Procedure 9(b).[16] Rule 9(b) thus requires that the plaintiff pursuing an FCA action plead the circumstances constituting the fraudulent conduct with particularity.[17] This requirement serves to give sufficient notice to the defendant of the charges levied so that it may formulate a defense, as well as to deter frivolous suits.[18]

In the context of the FCA, the First, Fourth, Sixth, Eighth, and Eleventh Circuits have interpreted the "particularity" dictate of Rule 9(b) to foreclose an action by a plaintiff who, at the pleading stage, does not allege the particulars of the specific false claim submitted to the government for reimbursement, or provide a representative sample of the claims submitted, describing the time, place, actors, and contents of the allegedly fraudulent claims.[19] Additionally, the First Circuit requires plaintiffs to allege the specifics of the false claim at issue in order to comply

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[14] *See* 31 U.S.C. § 3730(e) (2012). Although originally enacted as a jurisdictional bar, the public disclosure bar, 31 U.S.C. § 3730(e)(40(a), is now an affirmative defense as changed by the Affordable Care Act. *See* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, Title X, 124 Stat. 119, 901 (2010) (codified in scattered sections of U.S.C.).

[15] *See* United States *ex rel.* Springfield Terminal Ry. v. Quinn, 14 F.3d 645, 651 (D.C. Cir. 1994) (commenting that Congress tailored the FCA to achieve a balance between providing adequate incentives to encourage claims by meritorious, legitimate whistleblowers and discouraging suits by opportunistic relators with nothing significant to contribute).

[16] *See* JOHN T. BOESE, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS § 5.04 & n.229 (4th ed. 2014) ("Every major federal court of appeals has held that because the essence of a False Claims Act case is fraud, Rule 9(b) applies to FCA cases.").

[17] *See* FED. R. CIV. P. 9(b) ("In alleging fraud or mistake, a party must state *with particularity* the circumstances constituting fraud or mistake." (emphasis added)).

[18] *See* United States *ex rel.* Stinson, Lyons, Gerlin & Bustamante, P.A. v. Blue Cross Blue Shield of Ga., Inc., 755 F. Supp. 1055, 1056–57 (S.D. Ga. 1990) (listing the purposes of Rule 9(b)).

[19] *See* United States *ex rel.* Foglia v. Renal Ventures Mgmt., LLC, 754 F.3d 153, 155–56 (3d Cir. 2014) (discussing the circuit split regarding the particularity requirement of Rule 9(b) in the context of the FCA).

with Rule 9(b)'s particularity requirements.[20] However, even these circuits have not followed a per se rule and have relaxed the requirement in narrow circumstances.[21]

On the other hand, the Third, Fifth, Seventh, Ninth and Tenth Circuits have interpreted the standard broadly—requiring that the FCA plaintiff only allege the particulars of a fraudulent scheme paired with reliable indications that lead to a strong inference that false claims were actually submitted.[22]

The different circuits' interpretations of the requirements of Rule 9(b) are inconsistent and ripe for review by the Supreme Court. The "representative sample" interpretation—requiring plaintiffs to identify specific false claims that were submitted to the government—practically compels the FCA plaintiff to provide documentative evidence at the pleading stage. This requirement "would essentially eviscerate [Rule 8(a)'s plausibility] standard and require claimants to provide detailed proof of their allegations at this early stage in the litigation."[23]

The "reliable indicia" standard followed by the Third, Fifth, Seventh, Ninth and Tenth Circuits, on the other hand, satisfies the purposes of Rule 9(b) and, when paired with the "plausibility" standard articulated by the *Twombly/Iqbal* decisions, satisfies the

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[20] *See* United States *ex rel.* Karvelas v. Melrose-Wakefield Hosp., 360 F.3d 220, 232 (1st Cir. 2004) (requiring identification of particular false claims to overcome a motion to dismiss based on failure to plead with requisite particularity).

[21] For example, the First and Eighth Circuits have traditionally required specific false claims to be alleged in a relator's complaint. But when the relator alleges that the defendant induced a third-party to submit false claims or that the defendant induced the government to contract with it based upon fraudulent conduct, the circuits have allowed the claims to proceed notwithstanding the relator's failure to identify specific fraudulent claims. *See In re* Baycol Prods. Litig., 732 F.3d 869, 875–77 (8th Cir. 2013) (allowing relator's fraud-in-the-inducement claim to proceed without identifying particular false claims); United States *ex rel.* Duxbury v. Ortho Biotech Products, L.P., 579 F.3d 13, 29 (1st Cir. 2009) (holding district court's requirement that the relator submit specific false claims was error).

[22] *See Foglia*, 754 F.3d at 155–56 (discussing circuits applying the broader interpretation of Rule 9); *see also* United States *ex rel.* Lusby v. Rolls-Royce Corp., 570 F.3d 849, 854–55 (7th Cir. 2009) (Easterbrook, J.) (requiring relator only to allege, in detail, the nature of the charge to prevent vague and unsubstantiated allegations of fraud); United States *ex rel.* Lemmon v. Envirocare of Utah, Inc., 614 F.3d 1163, 1172 (10th Cir. 2010) ("[C]laims under the FCA need only show the specifics of a fraudulent scheme and provide an adequate basis for a reasonable inference that false claims were submitted as part of that scheme." (citations omitted)).

[23] United States *ex rel.* Sansbury v. LB & B Assocs., Inc., No. 87-251 (EGS), 2014 WL 3509789, at *11 (D.D.C. 2014).

purposes of notice pleading without unduly discouraging valuable *qui tam* FCA enforcement.

Part II of this Note will detail the history of the FCA, starting with its enactment in the Civil War continuing through its progeny, specifically the 1943 amendments first enacted to prevent parasitic suits and the 1986 amendments reviving its *qui tam* viability.[24] It will also discuss liability under the FCA. Part II will then explain the circuits' respective interpretations of Rule 9(b) in the context of the FCA.

Part III.A of this Note will demonstrate how the more exacting representative sample approach is inconsistent with the Federal Rules' notice pleading and discovery regime and undermines the purpose for and enforcement of the FCA. Then, Part III.B will show how the reliable indicia approach serves the purposes of Rule 9(b) without undermining the enforcement of the FCA. Part III.B will also look to the decisions applying Rule 9(b)'s particularity requirement after the dual *Twombly/Iqbal* decisions, and will assert that, in light of its facial plausibility requirement, the more lenient interpretation of Rule 9(b) sufficiently serves the purposes of notice pleading.

Part IV will conclude by arguing that the lenient interpretation of Rule 9(b) is the standard that should be applied because it adequately serves the purposes of both Rule 9(b) and notice pleading post *Twombly* and *Iqbal* without discouraging *qui tam* FCA actions.

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[24] Although the FCA was amended in 2006, 2009, and 2010 via the Fraud Enforcement Recovery Act, the Dodd-Frank Act, and the Affordable Care Act, none of these amendments altered the particularity requirement or its analysis, so they are largely irrelevant to this Note to the extent they do more than encourage more *qui tam* actions. *See* Dodd-Frank Wall Street Reform & Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified in scattered sections of U.S.C.) (improving anti-retaliation ability under the FCA); Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified in scattered section of U.S.C.) (narrowing the public disclosure bar and expanding the original source provision to make it easier to prosecute fraud); Fraud Enforcement and Recovery Act of 2009 (FERA), Pub. L. No. 111-21, 123 Stat. 1617 (2009) (codified in scattered sections of 18 and 31 U.S.C.) (clarifying reach of the conspiracy to defraud and reverse claims liability).

II. BACKGROUND

A. THE FALSE CLAIMS ACT: FROM MULES TO MILLIONS

The False Claims Act is a primary tool used by the federal government to recover money from those who defraud the national treasury,[25] and it has a venerable history. During the Civil War, crooked defense contractors sold sickly mules, broken weapons, and spoiled rations to the Union Army.[26] In one instance, a contractor bought broken rifles from the government for roughly $17,000, and then resold them to the Army for a little over $109,000.[27] A report conducted by the House Committee on Government Contracts in 1862 concluded such fraudulent conduct cost the national treasury over $17 million.[28]

In response to these profiteers' widespread fraud, the 37th Congress passed the initial iteration of the modern day FCA.[29] The original FCA allowed "any person" to institute an action on behalf of himself and on behalf of the United States.[30] The suit was to be "in the name of the United States."[31] Thus, even the earliest form of the FCA contained a *qui tam* provision, allowing private citizens to sue on behalf of the United States government. The provision entitled a private individual who brought the suit to retain half of the forfeiture and half of the damages caused to the United States, with the other half going to the government.[32] Just like the current FCA, the original Act also empowered the United States to pursue the action on its own behalf.[33]

The FCA does not contain the first *qui tam* provision enacted by Congress. Indeed, one of the very first laws enacted by the 1st Congress was a *qui tam* provision that allowed an informer to

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[25] *See* United States *ex rel.* Steury v. Cardinal Health, Inc., 625 F.3d 262, 267 (5th Cir. 2010) ("The FCA is the Government's 'primary litigation tool' for recovering losses resulting from fraud." (citing United States *ex rel.* Marcy v. Rowan, Cos., 520 F.3d 384, 388 (5th Cir. 2008))).

[26] David L. Haron, Mercedes Varasteh Dordeski & Larry D. Lahman, *Bad Mules: A Primer on the Federal and Michigan False Claims Acts*, 88 MICH. B.J. 22, 22 (2009).

[27] United States *ex rel.* Marcus v. Hess, 127 F.2d 233, 236 n.14 (3d Cir. 1942), *rev'd on other grounds*, 317 U.S. 537 (1943).

[28] *Id.* at 235 n.12 (discussing the history of the False Claims Act).

[29] False Claims Act, ch. 67, 12 Stat. 696 (Mar. 2, 1863).

[30] *Id.* at 698.

[31] *Id.*

[32] *Id.*

[33] *Id.*

collect a penalty if a collector, naval officer, or surveyor failed to publish a table of rates, fees, and duties, as required by law, or if the officer demanded a fee higher than the published amount.[34] Subsequent congressional sessions adopted other *qui tam* provisions,[35] but only three beside the FCA remain in effect today.[36]

Because the losses sustained during the Civil War resulted largely from collusion between civilian or government contractors with government officials, the United States needed another policing system. The *qui tam* provision of the FCA provided this enforcement and helped the treasury recoup its losses.[37] The idea behind the *qui tam* provision of the FCA was the old-fashioned notion of "setting a rouge to catch a rouge," which Senator Howard claimed was the "most expeditious way . . . of bringing rogues to justice."[38] By providing a monetary recovery for those pursuing FCA violations on behalf of the United States, Congress incentivized informers to disclose fraudulent schemes whereby contractors were profiting off of the government. The private enforcement mechanism's provision of this incentive was as clever as it was necessary, for it circumvented further possible collusion between government officials and contractors that caused some of the fraudulent conduct to go undeleted in the first place.

At first, the FCA remained rarely invoked. There were actions for false claims for provisions supplied during the Oregon Indian War of 1854, false depositions made in support of a pension claim, and delivery of nonconforming mattresses and stone to the United States.[39]

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[34] Act of July 31, 1789, ch. 5, § 29, 1 Stat. 29, 44–45.

[35] *See, e.g.*, Act of Feb. 20, 1792, ch. 7, § 25, 1 Stat. 232, 239 (authorizing half of the penalty to be distributed to the informer for violations relating to the post office); Act of Mar. 1, 1793, ch. 10, § 12, 1 Stat. 329, 331 (authorizing portion of the penalty forfeited for trading with Indians to be given to the informer).

[36] CLAIRE M. SYLVIA, THE FALSE CLAIMS ACT: FRAUD AGAINST THE GOVERNMENT § 2:5 (Westlaw, April 2014); *see* 25 U.S.C. § 201 (2012) (penalties for violating Native American protection laws); 18 U.S.C. § 962 (2012) (providing for forfeiture of ships armed against friendly nations); 46 U.S.C. § 80103 (2012) (forfeiture of ships found taking underwater treasure from the Florida coast to a foreign port). Situations in which these statutes are applicable are very unique, thus they are rarely invoked.

[37] JOEL M. ANDROPHY, FEDERAL FALSE CLAIMS ACT AND QUI TAM LITIGATION § 2.04[2] (2005).

[38] *Id.* (citing CONG. GLOBE, 37th Cong., 3d Sess. 955 (1863) (statement of Senator Howard)).

[39] *See* United States v. Griswold, 26 F. Cas. 42, 43 (D. Or. 1877) (No. 15,266) (bringing suit against defendant for false claims for supplies); Edgington v. United States, 164 U.S.

During the 1930s and 1940s however, individual relators—as the plaintiffs instituting suits in *qui tam* actions are known[40]—began to use publically available information regarding contractors' fraudulent billing practices, which they found in criminal indictments, as the foundation for their claims under the FCA.[41] Because the government was already aware of the fraud, these suits were unnecessary and did not serve the purpose of the FCA—supplementing government enforcement. In 1943, the Supreme Court held that these kind of parasitic suits were permitted under the FCA, much to the dismay of the Solicitor General and the Department of Justice.[42]

In *United States ex rel. Marcus v. Hess*, the relators "investigated" by using a criminal indictment charged by the United States against the defendants to file a claim for a FCA violation.[43] The Department of Justice proffered a few arguments against allowing such parasitic suits (where the relator brought no new allegations forward), but the Court ultimately held the language of the Act plainly said "[s]uits may be brought and carried on by any person."[44] The Court then noted, "[although] the [relator] has contributed nothing to the discovery of this crime, he has contributed much to accomplishing one of the purposes for which the Act was passed. The suit results in a net recovery to the government of $150,000."[45]

In the wake of this 1943 ruling, relators rushed to courthouses to file FCA suits as soon as the Department of Justice filed a criminal indictment.[46] Congress subsequently amended the FCA to require relators to submit evidence of their claims to the

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361, 362 (1896) (making false statements in order to secure pension on behalf of his mother); Carter v. McClaughry, 183 U.S. 365, 369–70 (1902) (delivering lower quality mattresses and stone than contracted for to the Savannah harbor).

[40] BLACK'S LAW DICTIONARY (9th ed. 2009) ("A person who furnishes information on which a civil or criminal case is based; an informer.").

[41] Anna Mae Walsh Burke, *Qui Tam: Blowing the Whistle for Uncle Sam*, 21 NOVA L. REV. 869, 872 (1997).

[42] *See* United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 546–47 (1943) (rejecting the government's arguments because they are "directed solely at what the government thinks Congress should have done rather than at what it did").

[43] *Id.* at 545.

[44] *Id.* at 546 (quoting U.S. Rev. Stat. §§ 3490–3493).

[45] *Id* at 545 (permitting parasitic suits where relator garnered information regarding defendants' fraud from their previous indictment).

[46] *See* ANDROPHY, *supra* note 37, § 2.04[2] (discussing the high volume of FCA actions filed in the wake of *Hess*).

Department of Justice and later included a jurisdictional requirement that mandated relators to use information that was not previously known to the government to file suit.[47]

Over the next thirty years, courts practically barred suits by all relators who obtained any of their information to allege fraud from the government.[48] Unhappy with the scarcity of claims being pursued, Congress passed the False Claims Amendments Act of 1986.[49]

The new FCA only excludes suits when the facts used to allege violations of the FCA were disclosed to the public in a "Federal criminal, civil, or administrative hearing in which the Government or its ascent is a party . . . or other Federal report, hearing, audit, or investigation; or from the news media."[50] This ensured that relators could not file suits concerning fraudulent activity solely based on information already known by the government, furthering the purpose of the FCA's *qui tam* provision: supplementing governmental enforcement. To further discourage opportunistic suits, the 1986 Amendments also included a first-to-file bar, prohibiting intervention or any new suits based on facts underlying a pending FCA action.[51] This requirement further promotes enforcement of the FCA because it encourages relators to file suit quickly and gives them the peace of mind that as long as they file first, subsequent interveners cannot "free ride" on the information they uncovered and thus cut into their share of the recovery.[52]

Following the amendments in 1986, which made the FCA more in line with the current statute,[53] pursuing *qui tam* actions became more attractive, and the government's recoveries increased

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[47] Act of December 23, 1943, ch. 377, 57 Stat. 608 (codified as amended at 31 U.S.C. § 3730).

[48] *See* SYLVIA, *supra* note 36, § 2:9 (discussing the strict interpretation of the 1943 amendment's jurisdictional requirement).

[49] *See* False Claims Amendment Act, Pub. L. No. 99-562, 100 Stat. 3153 (1986) (codified as amended at 31 U.S.C. §§ 3729–3733).

[50] 31 U.S.C. § 3730(e)(4)(A)(i)–(iii) (2012).

[51] *Id.* § 3730(b)(5).

[52] *See* United States *ex rel.* LaCorte v. SmithKline Beecham Clinical Labs., Inc., 149 F.3d 227, 234 (3d Cir. 1998) (declining to interpret § 3730(b)(5) to only bar suits based on facts that are *identical* to those underlying the pending suit).

[53] *Compare* False Claims Amendments Act, Pub. L. No. 99-562, 100 Stat. 3153 (1986), *with* 31 U.S.C. §§ 3729–3733 (2012).

significantly.[54] While Congress amended the FCA a few more times since the False Claims Amendments Act,[55] the recent controversies concern a judicially-created bar that discourages *qui tam* plaintiffs: the "representative sample" application of Rule 9(b), requiring a plaintiff to plead an actual example of a false claim submitted to the government in order to overcome a motion to dismiss.[56]

B. PLEADING UNDER FEDERAL RULES OF CIVIL PROCEDURE 8 AND 9

1. Notice Pleading, Rule 8's Facial Plausibility Requirement, and the Iqbal*'s Court's Brief Discussion of Rule 9(b).* It is well known that under Federal Rule of Civil Procedure 8(a), a plaintiff must *ordinarily* make his claims in "short and plain statement[s] showing that [he] is entitled to relief."[57] The purpose of simple notice pleading was to give defendants "fair notice of what the plaintiff's claim is and the grounds upon which it rests."[58] Notice pleading relies on liberal discovery rules and summary judgment motions to define the disputed issues and dismiss unmeritorious claims.[59] As Justice Stevens noted, "Under the [notice] pleading standards of the Federal Rules, the idea was not to keep litigants out of court but rather to keep them in."[60] At one time, controversy surrounded Rule 8(a)'s "short and plain statement" requirement, with the tensions of notice pleading and discovery costs pulling in opposite directions.[61] However, the Supreme Court settled this matter in its landmark *Twombly/Iqbal* decisions.[62]

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[54] *See* SYLVIA, *supra* note 36, app. D (comparing no recovery for the government in 1987 with $1,937,046, 275 in recoveries in *qui tam* actions in which the government intervened in 2009).

[55] *See supra* note 24 and accompanying text.

[56] *See, e.g.*, United States *ex rel.* Foglia v. Renal Ventures Mgmt., LLC, 754 F.3d 153, 155 (3d Cir. 2014) (discussing the requirement of the Fourth, Sixth, Eight, and Eleventh Circuits that FCA relators plead a "representative sample," or a specific fraudulent claim that was made in order to overcome a motion to dismiss).

[57] FED. R. CIV. P. 8(a).

[58] *See* Conley v. Gibson, 355 U.S. 41, 47 (1957) (providing for very broad interpretation of the "short & plain statement" requirement), *abrogated by* Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).

[59] *See* Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512 (2002) (noting that a heightened pleading standard conflicts with Rule 8(a)).

[60] *Twombly*, 550 U.S. at 575 (Stevens, J., dissenting); *see also id.* ("The merits of a claim would be sorted out during a flexible pretrial process . . . .").

[61] *See id.* at 546 (majority opinion) ("It is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to

Bell Atlantic Corp. v. Twombly, clarified in *Ashcroft v. Iqbal*, held that a complaint must contain enough factual matter supporting its claim that, if accepted as true, "state[s] a claim to relief that is *plausible* on its face."[63] The Court restated its holding in *Conley v. Gibson* that Rule 8(a) requires only that a complaint give the defendant fair notice of what the claim is and the grounds on which it rests.[64]

Twombly concerned a complaint alleging antitrust violations, and the Court considered the high costs of antitrust discovery.[65] In rejecting respondent's argument for a relaxed standard, the Court refused to excuse the complaint's failure to satisfy the plausibility standard on the grounds that unmeritorious claims could be needed at early stages in the discovery process, especially in light of the "common Lament" that judicial supervision has only modesty checked discovery abuses.[66] However, in the appeal underlying *Iqbal*, the Second Circuit held that *Twombly*'s plausibility requirement did not apply in actions for constitutional violations, finding held that the complaint was sufficient despite the Court's holding in *Twombly*.[67]

Rejecting the Second Circuit's position in the proceeding below,[68] the Court reiterated the applicability of the plausibility requirement, stating that its decision in *Twombly* "expounded the pleading standard for 'all civil actions,' and it applies to antitrust and discrimination suits alike."[69] Therefore, because the facial plausibility requirement of Rule 8(a) articulated in the

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antitrust discovery can be expensive."); *see also* Ashcroft v. Iqbal, 556 U.S. 662, 686 (2009) (declining to allow the plaintiff to proceed where his complaint was not plausible on its face, despite the Second Circuit's promise to the defendants of "minimally intrusive discovery").

[62] *See Twombly*, 550 U.S. at 545–46 (articulating plausibility requirement in suit alleging antitrust violations); *Iqbal*, 556 U.S. at 684 (applying the *Twombly* plausibility standard to "all civil actions").

[63] *See Iqbal*, 556 U.S. at 678 (emphasis added) (quoting *Twombly*, 550 U.S. at 570 (internal quotation marks omitted)).

[64] *See Twombly*, 550 U.S. at 545 (citing *Conley*, 355 U.S. at 47).

[65] *See id.* at 546 (noting that antitrust discovery can be expensive).

[66] *See id.* (discussing "obvious" potential for expense where the putative plaintiff class represents 90% of local telephone and Internet subscribers in an action against America's largest telecommunications firms for unspecified instances of antitrust violations).

[67] *See Iqbal*, 556 U.S. at 662 (discussing the posture of the case).

[68] *See id.* at 684 ("Though *Twombly* determined the sufficiency of a complaint sounding in antitrust, the decision was based on [the Court's] interpretation and application of Rule 8." (citing *Twombly*, 550 U.S. at 554)); *see also id.* at 684–85 (rejecting that the question presented on a motion to dismiss turns on the controls placed on the discovery process).

[69] *Id.* at 684 (citations omitted) (citing FED. R. CIV. P. 1; *Twombly*, 550 U.S. at 554–56).

Twombly/Iqbal decisions applies to "all civil actions," it likewise applies to complaints filed for violations of the FCA.

The plausibility standard articulated by the *Twombly/Ibal* decisions requires that complaints contain factual allegations sufficient to allow the court to draw the *reasonable inference* that the defendant is liable for the asserted claim.[70] As the Court discussed in *Iqbal*, the *Twombly* decision illustrated the two-pronged approach for evaluating a complaint on a motion to dismiss under the Federal Rules of Civil Procedure.[71] First, threadbare recitals of the elements of a claim or legal conclusions are not afforded the assumption of truth.[72] Second, the court evaluates the non-conclusory factual allegations, and only those that "permit the court to infer more than the mere possibility of misconduct" are deemed sufficient.[73]

In *Iqbal*, though, the Court went further and held that while Rule 9(b) provides that "intent . . . [may] be alleged generally," the Rule does not give a plaintiff a "license to evade the less rigid—though still operative—strictures of Rule 8."[74] The Court reasoned that in the context of Rule 9(b), the term "general" is relative and

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[70] *See id.* at 678 (citing *Twombly*, 550 U.S. at 556). The Court noted that this "plausibility" requirement is not a "probability" requirement, but only asks for enough factual content to allow the court to infer that there is more than a "mere possibility" that the defendant is liable. *Id.* at 678–79 (citing *Twombly*, 550 U.S. at 556).

[71] *See id.* at 679 (illustrating application of the plausibility requirement in *Twombly*).

[72] *See id.* at 678 (citing *Twombly*, 550 U.S. at 555) (holding that the tenant that the court must accept all the allegations contained in a complaint as true is inapplicable to legal conclusions).

[73] *Id.* at 679 (stating that the second prong asks whether the complaint alleges a plausible claim for relief and discussing the requirement that the allegations must allow for more than a possibility of misconduct). Although the Court did reverse the Second Circuit's holding, it also agreed with the circuit that determining the plausibility of a complaint will be a "context-specific" task requiring the court to draw on judicial experience and common sense. *Id.* (citing Iqbal v. Hasty, 490 F.3d 143, 157–58 (2d Cir. 2007)).

[74] *See id.* at 686–87 (quoting FED. R. CIV. P. 9(b)) (noting that complaints must comply with both Rule 8 and Rule 9 to survive a motion to dismiss). The respondent generally pleaded that he was discriminated against "on account of [his] religion, race, and/or national origin," and such allegations, if accepted as true, would have been sufficient to overcome a motion to dismiss. *Id.* at 686 (citations omitted) (alterations in original). The Court declined to accept the allegation as true, however, because it was a legal conclusion per the first prong of the plausibility standard, despite the respondent's contention that Rule 9 allowed him to plead "intent . . . generally." *Id.*

should be compared to the particularity requirement in Rule 9(b) for pleading fraud or mistake.[75]

Thus, "all civil actions," including those under the FCA, must comply with the facial plausibility requirement of Rule 8(a),[76] and if the action sounds in fraud, it is also subject to the even higher particularity standard required by Rule 9(b).[77] Therefore, when ruling on a motion to dismiss pursuant to Rule 12(b)(6), the reviewing court may dismiss a complaint for fraud, like those under the FCA, for its failure to comply with either Rule 8 or Rule 9.[78]

2. Rule 9(b)'s Particularity Requirement and the False Claims Act. The controversy surrounding plausible pleading under the FCA implicates not only Rule 8, but also Rule 9, which requires plaintiffs (and in the context of the FCA, relators) "alleging fraud or mistake . . . [to] state with particularity the circumstances constituting fraud or mistake."[79]

In general, Rule 9(b) serves four different purposes:

> First, the rule ensures that the defendant has sufficient information to formulate a defense by putting it on notice of the conduct complained of. . . . Second, Rule 9(b) exists to protect defendants from frivolous suits. A third reason for the rule is to eliminate fraud actions in which all the facts are learned after discovery. Finally, Rule 9(b) protects

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[75] *See id.* at 686 ("Rule 9 merely excuses a party from pleading . . . intent under an elevated pleading standard." (citing 5A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1301, at 291 (3d ed. 2004))).

[76] *See id.* at 684 (reiterating that the *Twombly*'s plausibility standard applies to "all civil actions").

[77] *See* FED. R. CIV. P. 9(b) ("In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake . . . .").

[78] As the Fifth Circuit has explained, "The particularity demanded by Rule 9(b) is supplemental to the Supreme Court's . . . interpretation of Rule 8(a) . . . but does not supplant Rule 8(a)'s notice pleading." United States *ex rel.* Grubbs v. Kanneganti, 565 F.3d 180, 185–86 (5th Cir. 2009). Interestingly, in the *Grubbs* decision, the Fifth Circuit stated that they would allow a FCA relator to proceed if he alleges particulars of a detailed fraudulent scheme, and not necessarily the particulars of the submitted bills, tacitly adopting the more lenient standard, but also noted they "apply Rule 9(b) . . . with 'bite' and 'without apology.' " *Id.* at 185.

[79] FED. R. CIV. P. 9(b).

> defendants from harm to their goodwill and reputation.[80]

One court has noted, in ruling on a Rule 12(b)(6) motion premised on the claimants failure to comply with the requirements of Rule 9(b), that courts should be hesitant to dismiss a complaint if it is bolstered by substantial prediscovery evidence showing the plausibility of the underlying facts and if the complaint sufficiently alerts the defendant to the particular circumstances underlying the allegations against it.[81]

The FCA provides seven different ways in which a defendant may be liable, and six of them have a knowledge requirement.[82] Under the FCA, "knowing" or "knowingly" has two requirements with respect to information: (1) that a person "has actual knowledge of the information," and (2) "acts in deliberate ignorance of the truth or falsity of the information; or acts in reckless disregard of the truth or the falsity of the information."[83] Proving the knowledge element does not require showing a specific intent to defraud.[84]

Although the language of the FCA states that proving the "knowing" requirement does not require proof of specific intent to defraud, in 1994, the Eleventh Circuit held that a relator alleging a health plan administrator improperly submitted claims to Medicare needed to comply with Rule 9(b), and that the complaint "must allege the details of the defendant[']s allegedly fraudulent acts, when they occurred, and who engaged in them."[85] Then, eight years later, in dismissing a relator's action under the FCA

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[80] United States *ex rel.* Stinson, Lyons, Gerlin & Bustamante, P.A. v. Blue Cross Blue Shield of Ga., Inc., 755 F. Supp. 1055, 1056–57 (S.D. Ga. 1990) (describing purposes of Rule 9(b)).

[81] *See* Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 784 (4th Cir. 1999) (discussing the sufficiency of claims under Rule 9(b)).

[82] *See* 31 U.S.C. § 3729(a)(1)(A) (2012) (knowingly presenting a false claim); *id.* § 3729(a)(1)(B) (knowingly making a false statement or record as a precondition to payment); *id.* § 3729(a)(1)(D) (possessing money belonging to the government and knowingly delivering less than the amount due); *id.* § 3729(a)(1)(E) (intending to defraud the government, delivering a certification of government property used, without completely knowing if it is true); *id.* § 3729(a)(1)(F) (knowingly buying public property from a government employee); *id.* § 3729(a)(1)(G) (knowingly making a false statement in order to avoid paying money to the government).

[83] *See id.* § 3729(b)(1)(A)(i)–(iii) (describing definition of knowledge under the FCA).

[84] *Id.* § 3729(b)(1)(B).

[85] *See* Cooper v. Blue Cross & Blue Shield of Fla., Inc., 19 F.3d 562, 568 (11th Cir. 1994) (citing Durham v. Bus. Mgmt. Assocs., 847 F.2d 1505 (11th Cir. 1988)).

for not complying with Rule 9(b), the Eleventh Circuit reiterated that relators alleging any violations of the FCA must comply with the particularity requirements of Rule 9(b).[86]

The court proffered multiple different reasons for the requirement, one being that "the Supreme Court and this Court have consistently recognized the Act as an anti-fraud statute."[87] Furthermore, the Eleventh Circuit noted that it has never required the elements of actions under the FCA to entirely overlap with those of common-law fraud for the purposes of complying with the dictates of Rule 9(b).[88]

The Eleventh Circuit's application of Rule 9(b) to actions under the FCA is not unique to the federal court system; other circuits have cited the Eleventh Circuit's holding in *Cooper v. Blue Cross & Blue Shield of Florida, Inc.* for the proposition that Rule 9(b) applies to FCA actions.[89] In fact, every federal court of appeals has held that Rule 9(b) applies to claims under the FCA because the essence of such claims is fraud.[90] Thus, in actions under the FCA, claimants must "plead with particularity" the circumstances surrounding the alleged false claims or certifications; however, the nature of this requirement has been subjected to divergent interpretations.[91]

C. "PARTICULARITY" WITHIN 9(B): AN EVEN SPLIT

1. The Representative Sample: An Approach Riddled with Exceptions. Not only did *Clausen* conclusively establish in the Eleventh Circuit that actions under the FCA must be pleaded with

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[86] *See* United States *ex rel.* Clausen v. Lab. Corp. of Am., 290 F.3d 1301, 1308–09 (11th Cir. 2002) (dismissing relator's argument that *Cooper* did not apply to *all* actions under the FCA).

[87] *Id.* at 1309.

[88] *Id.*

[89] *See, e.g.*, Bly-Magee v. California, 236 F.3d 1014, 1018 (9th Cir. 2001); United States *ex rel.* LaCorte v. SmithKline Beecham Clinical Labs., Inc., 149 F.3d 227, 234 (3d Cir. 1998); Gold v. Morrison-Knudson Co., 68 F.3d 1475, 1476 (2d Cir. 1995).

[90] BOESE, *supra* note 16, § 5.04 & n.229.

[91] *See* United States *ex rel.* Foglia v. Renal Ventures Mgmt., LLC, 754 F.3d 153, 155–56 (3d Cir. 2014) (discussing the circuit split regarding "particularity" within the application of Rule 9(b) to FCA actions). Although the circuits have taken divergent approaches, the commonly used and generally accepted standard for evaluating particularity requires the pleader to allege the time, place, and content of false representation, the identity of the actor, and what the actor obtained from his misrepresentation. *See* United States *ex rel.* Grubbs v. Kanneganti, 565 F.3d 180, 186 (5th Cir. 2009) (quoting United States *ex rel.* Russell v. Epic Healthcare Mgmt. Grp., 193 F.3d 304, 308 (5th Cir. 1999)).

particularity,[92] but it also implicitly affirmed the district court's application of what, today, is dubbed the "representative sample."[93] The lower court dismissed Clausen's first amended complaint[94] because it "failed to identify a single claim that was actually submitted pursuant to the allegedly fraudulent schemes identified."[95]

In affirming the district court's dismissal of Clausen's second amended complaint,[96] the Eleventh Circuit noted that, despite the district court's suggestions, he failed to "include identification information of actual, and not merely possible or likely, claims submitted, items on particular forms and the dates on which they were submitted to the Government."[97] Although he "set out the process by which Defendants *could have* produced false claims, [Clausen] provide[d] no facts that this process *did in fact* result in the *submission* of false claims."[98]

While the Eleventh Circuit recognized that a plaintiff is not required to actually prove the allegations contained in the complaint at the pleading stage,[99] it criticized the complaint because Clausen did not include any evidentiary support with respect to his allegation of submission of false claims or even dates of the claims.[100] The Eleventh Circuit, however, does recognize one important exception from the general representative sample approach in: when the relator is *not an outsider* and his complaint alleges why he believes false claims were submitted.[101]

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[92] *See Clausen*, 290 F.3d at 1308–09 (applying Rule 9(b) to all actions under the FCA).

[93] *See id.* at 1313 (affirming the district court's dismissal for failing to allege the particulars of a claim that was actually submitted).

[94] *See id.* at 1305 (discussing how Clausen's first amended complaint only alleged that "these practices resulted in the submission of false claims for payment to the United States").

[95] United States *ex rel.* Clausen v. Lab. Corp. of Am., 198 F.R.D. 560, 563 (N.D. Ga. 2000).

[96] *See Clausen*, 290 F.3d at 1306 (noting that Clausen's second amended complaint only alleged that billing forms were submitted "for the services provided on the date of service or within a few days thereafter").

[97] *Id.* at 1313 (describing the district court's suggestions and disposition and adding that Clausen's second amended complaint did not alter much NCP).

[98] *Clausen*, 198 F.R.D. at 563 (emphasis added).

[99] *See Clausen*, 290 F.3d at 1313 (noting, however, that the court cannot be left questioning whether the complaint is mere conjecture or a specifically pleaded allegation).

[100] *Id.* at 1306.

[101] *See* United States *ex rel.* Walker v. R&F Props. of Lake Cnty., Inc., 433 F.3d 1349, 1360 (11th Cir. 2005) (affirming the district court's denial of defendant's motion to dismiss where the insider relator failed to allege a specific false claim that was submitted). *But see* Corsello v. Lincare, Inc., 428 F.3d 1008, 1013–14 (11th Cir. 2005) (affirming dismissal of complaint when the relator was the defendant's former sales employee, but failed to allege

Following the Eleventh Circuit's opinion in *Clausen*, the First Circuit also held that Rule 9(b) applies to actions under the False Claims Act, stating that "every circuit court that has addressed this issue has concluded that the heightened pleading requirements of Rule 9(b) apply to claims brought under the FCA."[102] In applying its interpretation of the Rule's requirements to the relator's complaint, the First Circuit stated that "a relator must provide details that identify particular false claims for payment that were submitted to the government."[103] However, the First Circuit has since retreated slightly from its original position, and now allows relators alleging third-party inducement to provide " 'factual or statistical evidence to strengthen the inference of fraud beyond possibility' without necessarily providing details" of each false claim.[104] Except for third-party inducement claims, however, the First Circuit still adheres to the strict approach requiring the relator to allege the particulars of specific false claims that were submitted.[105]

Similarly, the Eighth Circuit has interpreted the particularity requirement to mean that relators' claims must include "facts as the time, place and *content* of the defendant's false representations, as well as the details of the defendant's fraudulent acts," and, moreover, that the relator must provide some *representative samples* of the alleged fraudulent claims for payment.[106] In *United States ex rel. Joshi v. St. Luke's Hospital,*

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the "who, what, when, where and how" of the fraudulent submissions, even though he pleaded an improper scheme).

[102] United States *ex rel.* Karvelas v. Melrose-Wakefield Hosp., 360 F.3d 220, 228 (1st Cir. 2004) (citing *Clausen*, among others), *abrogated by* United States *ex rel.* Gagne v. City of Worcester, 565 F.3d 40 (1st Cir. 2009).

[103] *Id.* at 232 (identifying the necessary details that must be included, such as the content of the forms or bills submitted, their identification number, the amount charged, and the individuals involved, among others).

[104] *See* United States *ex rel.* Duxbury v. Ortho Biotech Prods., L.P., 579 F.3d 13, 29 (1st Cir. 2009) (quoting United States *ex rel.* Rost v. Pfizer, Inc., 507 F.3d 720, 733 (1st Cir. 2007)) (holding that the district court's requirement that relators were to identify particular false claims for payment was in error).

[105] *See id.* (distinguishing between claims that the defendant *itself* submitted false claims and claims that the defendant induced third parties to submit false claims); *see also* United States *ex rel.* Ge v. Takeda Pharm. Co., 737 F.3d 116, 129 (1st Cir. 2013) (affirming district court's dismissal on Rule 9(b) grounds where the relator failed to allege any details of specific false claims).

[106] *See* United States *ex rel.* Joshi v. St. Luke's Hosp., Inc., 441 F.3d 552, 556–57 (8th Cir. 2006) (per curiam) (emphasis added) (discussing requirements for meeting particularity standard under Rule 9(b)), *cert. denied*, 549 U.S. 881 (2006); *see also* United States *ex rel.*

Inc., the Eighth Circuit analogized the relator's allegation that "every" claim submitted by the defendant was fraudulent to a relator's allegation that fraudulent bills "must have" been submitted by the defendant in an FCA suit from the Eleventh Circuit.[107] Following the Eleventh Circuit in *Corsello v. Lincare, Inc.*, the Eighth Circuit held that Joshi's allegations did not meet the requirements of Rule 9(b) because he did not provide any examples of the alleged fraudulent conduct.[108] However, recently, the Eighth Circuit has relaxed requirements for relators bringing "fraud-in-the inducement" claims, and now allows claimants to overcome a motion to dismiss so long as they plead that the defendant's fraudulent conduct included the governmental payments or contract grants.[109] The Eighth Circuit recently went even further, though, and has held that specific false claims are not required if the relator comes from within the defendant—such as a former employee—and pleads first-hand knowledge of the submission of false claims.[110]

Likewise, the Sixth Circuit has adopted the strict view of "particularity" within Rule 9(b), holding that relators pleading "complex and far-reaching fraudulent scheme[s] . . . [need to] provid[e] examples of specific false claims submitted to the government pursuant to that scheme" in order to overcome a Rule 12(b)(6) motion.[111] Like the Eighth Circuit in *Joshi*, the Sixth Circuit held that the required sample of false claims for payment provided in the complaint must be representative of the

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Kinney v. Stoltz, 327 F.3d 671, 674 (8th Cir. 2003) (noting that the Eighth Circuit has not previously ruled on the requirements of 9(b) as to the FCA, but that every other circuit to address the question has concluded that they do apply).

[107] *See Joshi*, 441 F.3d at 557 (analogizing Joshi's claims to the relator's claims in *Corsello v. Lincare, Inc.*, 428 F.3d 1008, 1011 (11th Cir. 2005)).

[108] *Id.* (affirming the district court's dismissal of Joshi's claim for failure to comply with Rule 9(b)).

[109] *See In re* Baycol Prods. Litig., 732 F.3d 869, 875–77 (8th Cir. 2013) (declining to require allegations of a specific false claim when the relator alleges fraudulent conduct and a corresponding claim for payment).

[110] *See* United States *ex rel.* Thayer v. Planned Parenthood of the Heartland, 765 F.3d 914, 915 (8th Cir. 2014) (deciding not to require representative samples when the relator is a whistleblower from within the defendant company and has first-hand knowledge of its business). This would likely be the case as in *Walker*, in which the relator, as a result of his first-hand knowledge, was able to recognize the discrepancies between the defendant's billing statements and records of the goods and services it provided.

[111] United States *ex rel.* Bledsoe v. Cmty. Health Sys., Inc., 501 F.3d 493, 510 (6th Cir. 2007).

defendant's class of general, allegedly fraudulent, conduct.[112] The Sixth Circuit has left open a broad possibility, however, that the representative sample approach may be relaxed when the relator has pleaded facts sufficient to support a "strong inference" that the defendant submitted a false claim,[113] which casts doubt on this circuit's future adherence to the strict interpretation. This latitude seemingly provides relators with substantial opportunity to heavily fact-plead their allegations—yet without specifying the particulars of an actual false claim—and still meet the "strong inference" exception standard, although the court gave only one example of how this might occur.

In 2013, the Fourth Circuit considered a relator's challenge of its precedent that the particular circumstances required to be pleaded for an action under the FCA include the "contents of the false representations."[114] The relator in *United States ex rel. Nathan v. Takeda Pharmaceuticals North American, Inc.* argued that Rule 9(b) only requires that the relator plead "the existence of a fraudulent scheme that supports the inference that false claims were presented to the government for payment."[115] In contrast, the defendant urged that the relator must "plead facts plausibly alleging that particular, identifiable false claims were actually presented to the government for payment" in order to comply with Rule 9(b).[116] The Fourth Circuit declined to adopt the relator's lenient interpretation of the Rule in place of its precedent, reasoning that the four purposes of Rule 9(b) described in *United States ex rel. Stinson, Lyons, Gerlin, & Bustamante, P.A. v. Blue Cross Blue Shield of Ga., Inc.*,[117] apply with equal force to claims

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[112] *Id.* (citing *Joshi*, 441 F.3d at 557).

[113] *See* Chesbrough v. VPA, P.C., 655 F.3d 461, 471 (6th Cir. 2011) (leaving open the possibility that the "relaxed" approach may apply, but declining to apply it in the case at bar). The Sixth Circuit also contemplated that the "relaxed" approach may be appropriate in some situations, such as when the relator has first-hand knowledge of the alleged fraudulent billing practices, *id.*, like the Eleventh Circuit's similar exception in *Walker*, and the Eighth Circuit's exception in *Thayer*.

[114] *See* United States *ex rel.* Nathan v. Takeda Pharms. N. Am., Inc., 707 F.3d 451, 455 (4th Cir. 2013) (describing the relator's assertion that Rule 9(b) requires only alleging a fraudulent scheme in sufficient detail to support the inference that the defendant submitted false claims to the government).

[115] *Id.* at 456 (discussing the relator's argument).

[116] *Id.* (describing the defendant's argument against the more lenient standard).

[117] *See* 755 F. Supp. 1055, 1056–57 (S.D. Ga. 1990) (listing the four purposes of Rule 9(b)).

brought under the FCA.[118] However, the circuit recognizes that a relator may not *have to* identify a particular false claim submitted for payment if the defendant's alleged conduct could *necessarily* lead to the inference that it presented false claims for reimbursement.[119] Although this does signal a retreat from the Fourth Circuit's previous representative sample requirement, it only applies to the narrow class of cases where the allegations lead *solely* to the inescapable inference that the defendant submitted claims.[120]

While the Second Circuit has not directly addressed how particularly an FCA relator must plead in order to survive motion to dismiss, it has upheld the dismissal of at least one claim that failed to identify a single record or billing statement that the relator alleged to be false.[121] However, courts within the Second Circuit have applied both the "identifiable claim" or representative sample approach endorsed by the more stringent circuits and the reliable indicia approach used by the lenient ones.[122] At the time of *United States ex rel. Kester v. Novartis Pharmaceuticals Corp.*, though, only one district court in the Second Circuit had applied the more lenient approach while all others had required relators to identify the particulars of the alleged false claims for payment.[123] Further, Judge McMahon contemplated that the circuit's holding

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[118] *Nathan*, 707 F.3d at 456 (citing United States *ex rel.* Wilson v. Kellogg Brown & Root, Inc., 525 F.3d 370, 379–80 (4th Cir. 2008); Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 789–90 (4th Cir. 1999)) (declining to adopt the relator's standard in favor of the stricter interpretation).

[119] *See* Brief for the United States as Amicus Curiae at 12, United States *ex rel.* Nathan v. Takeda Pharms. N. Am., Inc., (No. 12-1349), 134 S. Ct. 1759 (2014) [hereinafter Brief for the United States–*Nathan*] (citations omitted) (noting the Fourth Circuit recognized exception to requiring relators to plead specific false claims).

[120] Regarding exceptions to the representative sample requirement, the Sixth Circuit's "strong inference" exception places a lesser burden on the relator than does the Fourth Circuit's "necessary inference" exception. The allegations supporting a "strong inference" of false claim submission may also support other inferences, but the inference of false claim submission must only be plausible, not probable, to overcome a motion to dismiss. On the other hand, a "necessary inference" exception suggests that the allegations of the fraudulent conduct must *only* lead to the inference that fraudulent claims were submitted. Essentially, the allegations would have to foreclose any other explanation for the fraudulent conduct.

[121] *See* Wood *ex rel.* United States v. Applied Research Assocs., Inc., 328 Fed. App'x 744, 750 (2d Cir. 2009) (affirming the district court's dismissal where relator failed to identify a single false claim submitted to the government for payment).

[122] *See* United States *ex rel.* Kester v. Novartis Pharms. Corp., 23 F. Supp. 3d 242, 257 (S.D.N.Y. 2014) (discussing particularity within the FCA in the Second Circuit).

[123] *See id.* (discussing application of the particularity requirement within district courts in the Second Circuit).

in *Wood ex rel. United States v. Applied Research Assocs., Inc.* "strongly suggests that the Second Circuit would approve a pleading rule comparable to the 'identification' standard articulated by the [First Circuit in *Karvelas*]."[124] So while the Second Circuit has yet to adopt its preferred standard, it has affirmed a dismissal under the representative sample approach, and the majority of district courts in the jurisdiction adhere to that approach, as well.

Similarly, the District of Columbia Circuit has not defined what "particularity" entails within the False Claims Act, but it has affirmed the dismissal of complaints that fail to allege specific false claims that were submitted.[125] However, the D.C. Circuit has recognized that because *qui tam* plaintiffs are often *former* employees of the defendants, they often have difficulty gaining access to such documents after their employment has been terminated.[126] So, when a relator lacks the documents necessary to plead with the requisite particularity, the D.C. Circuit allows the relator to plead "lack of access," provided that his allegations identify the document or documents evidencing the false claims, among other things.[127]

Accordingly, albeit subject to many exceptions, half of the circuit courts that have squarely addressed the requirements of Rule 9(b) in a FCA action generally require that a relator provide a representative sample of actual submitted false claims indicative of the broader class of claims that form the basis of the action. Nonetheless, this "general rule" is subject to multiple exceptions throughout the circuits, which suggests that the representative sample approach is too stringent, and should be relaxed in order to take into account the " 'simplicity and flexibility contemplated by the rules' " when reviewing a claim under Rule 9(b).[128] Further,

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[124] *Id.* at 256 (requiring the identification of a false claim that was submitted).

[125] *See* United States *ex rel.* Bender v. N. Am. Telecomms. Inc., 499 Fed. App'x 44, 44–45 (D.C. Cir. 2013) (affirming dismissal when the relator failed to allege specific false claims); United States *ex rel.* Williams v. Martin-Baker Aircraft Co., 389 F.3d 1251, 1256–57 (D.C. Cir. 2004) (affirming dismissal because the relator failed to identify the content of any false submission to the government).

[126] *See Williams*, 389 F.3d at 1258 (describing the difficulties confronting *qui tam* plaintiffs).

[127] *See id.* (discussing an alternative option for *qui tam* relators without critical documents necessary to plead with particularity).

[128] *See* United States *ex rel.* Sansbury v. LB&B Assoc., Inc., 58 F. Supp. 3d 37, 56 (D.D.C. 2014) (citing United States *ex rel.* McCready v. Columbia/HCA Healthcare, 251 F. Supp. 2d 114, 116 (D.D.C. 2003)).

the recent shift in the Fourth and Sixth Circuits away from strictly requiring the particulars of a specific false claim toward the allowing of allegations, which lead to a "necessary inference" or "strong inference," respectively, suggests they are trending toward the reliable indicia standard endorsed by the lenient circuits.

2. The Reliable Indicia Approach: Plausible Allegations and a Detailed Scheme. Where did the relator in *Nathan* get his interpretation of Rule 9(b)'s particularity requirement in the context of false claims?[129] Well, in 2009, two circuits also addressed the question of what "particularity" requires within the FCA, and those circuits held that the relator *does not* need representative samples of the false claims submitted, but rather that a relator may "alleg[e] particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted."[130]

In an action by a psychiatrist against his employer hospital and other doctors that worked there alleging that the hospital and doctors charged Medicare and Medicaid for services not performed, the Fifth Circuit recognized that the nature of the different claims under the FCA called for different requirements and that "Rule 9(b)'s ultimate meaning is context-specific."[131] In *United States ex rel. Grubbs v. Kanneganti*, defendants argued that because § 3729(a)(1) required the alleged violator to present the bill to the government, the contents of the bill needed to be pleaded with particularity.[132] The court rejected this argument, reasoning that the particulars of fraudulent conduct are often harbored in the scheme.[133] The court then analogized the specific bills for payment to a "hand in the cookie jar," stating that the hand alone does not constitute fraud "separate from the fib that the treat has been

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[129] *See supra* notes 114–15 and accompanying text.

[130] United States *ex rel.* Grubbs v. Kanneganti, 565 F.3d 180, 190 (5th Cir. 2009) (declining to adopt representative sample standard); *see also* United States *ex rel.* Lusby v. Rolls-Royce Corp., 570 F.3d 849, 854–55 (7th Cir. 2009) ("It is enough to show, in detail, the nature of the charge, so that vague and unsubstantiated accusations of fraud do not lead to costly discovery and public obloquy." (citations omitted)); *id.* (declining to require that the relator produce invoices with his complaint).

[131] *See Grubbs*, 565 F.3d at 188 (citing Williams v. WMX Techs., Inc., 112 F.3d 175, 178 (5th Cir. 1997)) (noting that there is no single construction of Rule 9(b) applicable to every context).

[132] *Id.* at 190 (urging court to adopt the representative sample approach).

[133] *Id.*

earned when in fact the chores remain undone."[134] This analogy illustrates that a specific claim for payment is not fraudulent alone, but only in conjunction with the allegation that it has not been earned. The Fifth Circuit then held that a claim under the FCA may survive the motion to dismiss if it "alleg[es] particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted."[135]

The Seventh Circuit has also adopted the looser construction of "particularity" in actions under the FCA,[136] although not quite in the same terms as the Fifth Circuit's newly articulated standard.[137] The Seventh Circuit's iteration of the particularity test greatly emphasized the plausibility requirement that had emerged with the *Twombly* decision.[138] Although the relator could not produce the specific requests for payment that he alleged to be fraudulent, the Seventh Circuit reversed the dismissal of his claim, reasoning that his allegations raised a plausible inference that false claims were actually submitted for payment.[139]

At one time, the Tenth Circuit utilized the representative sample approach, first exemplified in *Clausen* and later articulate in *Karvelas*, when it affirmed a district court's dismissal of the relator's claim because it did not "allege specific facts demonstrating that the . . . defendants caused" false claims to be submitted.[140] However, after *Iqbal* and *Twombly*, the Tenth

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[134] *Id.*

[135] *Id.*

[136] *See* United States *ex rel.* Lusby v. Rolls-Royce Corp., 570 F.3d 849, 854 (7th Cir. 2009) (holding that Rule 9(b) is satisfied by showing, in detail, the nature of the charge so as to prevent the allegations from being vague and unsubstantiated).

[137] *Compare Grubbs*, 565 F.3d at 190 (holding that particularity is satisfied by alleging particular details of a scheme paired with reliable indicia), *with Lusby*, 570 F.3d at 854–55 (declining to refute the exclusion of all possibility of honesty to meet the particularity requirement).

[138] *See Lusby*, 570 F.3d at 854–55 ("[N]or need a pleading exclude all possibility of honesty in order to give the particulars of fraud." (citing Ashcroft v. Iqbal, 556 U.S. 662 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 554 (2007))).

[139] *Lusby*, 570 F.3d at 854–55. If the defendant submitted a certificate of compliance containing false information, as Lusby alleged, then it committed fraud. *Id.* Because federal regulations required the defendant to submit a compliance certificate with each request for payment, Lusby argued that the defendant *must have* submitted at least one such certificate, or else the military would not have paid for the goods. *Id.*

[140] United States *ex rel.* Sikkenga v. Regence Bluecross Blueshield of Utah, 472 F.3d 702, 727 (10th Cir. 2006) ("[A] relator must provide details that identify particular false claims

Circuit abandoned the requirement that the relator's pleadings must "identify the time, place, [and] content" of the fraudulent conduct and instead retreated to the more lenient standard, requiring only plausible allegations of a fraudulent scheme which support a reasonable inference that false claims were submitted.[141]

Aligning itself with the Fifth Circuit, the Ninth Circuit, in *Ebeid ex rel. United States v. Lungwitz*, rejected the district court's "categorical" approach, which would have required the relator to submit representative samples of the false claims to support every allegation.[142] Instead, the Ninth Circuit held "it is sufficient to 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.' "[143] While submitting representative samples will suffice under Rule 9(b) for the payment element, a relator is only required to plead with particularity a reasonable basis to infer that the government either paid money or forfeited money owed.[144]

Most recently, the Third Circuit also adopted the *Grubbs* standard, requiring only that a relator allege a fraudulent scheme along with reasonable indicia that support a strong inference that false claims were submitted to the government.[145] The Third Circuit reasoned that asking for a representative sample of the false claims is "one small step shy of requiring production of actual documentation with the complaint, a level of proof not demanded to win at trial and significantly more than any federal pleading rule contemplates."[146]

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for payment that were submitted to the government." (citing United States *ex rel.* Karvelas v. Melrose-Wakefield Hosp., 360 F.3d 220, 232 (1st Cir. 2004))).

[141] *See* United States *ex rel.* Lemmon v. Envirocare of Utah, Inc., 614 F.3d 1163, 1171–72 (10th Cir. 2010) (rejecting a sample requirement in favor of plausible pleading).

[142] *See* Ebeid *ex rel.* United States v. Lungwitz, 616 F.3d 993, 998 (9th Cir. 2010) (recognizing that other circuits had adopted the representative sample approach).

[143] *Id.* at 998–99 (quoting United States *ex rel.* Grubbs v. Kanneganti, 565 F.3d 180 (5th Cir. 2009)).

[144] *Id.* at 999 n.4 (explaining that a representative sample will establish a *prima facie* case under the FCA in accordance with Rule 9(b)).

[145] *See* United States *ex rel.* Foglia v. Renal Ventures Mgmt., LLC, 754 F.3d 153, 156–57 (3d Cir. 2014) ("Insofar as the purpose of Rule 9(b) is to 'provide defendants with fair notice of the plaintiff's claims, the more 'nuanced' approach followed by the First, Fifth, and Ninth Circuits will suffice." (citations omitted) (footnotes omitted)).

[146] *Id.* at 156 (quoting *Grubbs*, 565 F.3d at 190).

III. ANALYSIS

After the Third Circuit's decision in *Foglia*, five circuits have taken the point of view that the relator need only allege a scheme of fraud with particularity, along with reasonable indicia supporting the inference that the defendant submitted false claims to the government.[147] On the other hand, five other circuits continue to analyze relators' pleadings' compliance with Rule 9(b) using the more rigid representative sample interpretation.[148] This even circuit split creates uncertainty regarding what a relator must plead in order to comply with Rule 9(b) in claims under the FCA, and should be resolved by the adoption of a uniform approach.

The representative sample approach requires the relator to allege the particulars of a specific false claim that was submitted for payment. Many relators are and will be unable to meet the requirements of Rule 9(b) under this approach because the requisite samples or claims are generally not available to *qui tam* plaintiffs. The representative sample approach, therefore, is inconsistent with the purposes of notice pleading under the Federal Rules because it practically requires evidence at the pleading stage of litigation. This effectively closes the courthouse door to relators that were not or are no longer are employed by the defendant, discourages private FCA enforcement, and contravenes the purpose of the *qui tam* enforcement provision that is central to the FCA.

Conversely, the reliable indicia approach allows suits by relators who never had or no longer have access to the documents that reveal the specific claims for payment they allege to be fraudulent. Therefore, the reliable indicia approach to evaluating complaints under Rule 9(b) should be preferred over the representative sample approach. It encourages private enforcement of the FCA, which provides greater returns for the government and taxpayers, and, at the same time, adequately serves the purposes underlying Rule 9(b). Further, when paired with the *Twombley/Iqbal* facial plausibility requirement of Rule

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[147] *See supra* Part II.C.*2* (identifying the circuits which have adopted and applied the representative sample approach).

[148] *See supra* Part II.C.*1* (identifying the circuits which have adopted and applied the reliable indicia approach).

8(a), the reliable indicia approach serves the purposes of notice pleading, without prematurely dismissing potentially meritorious suits before the discovery process.

A. PITFALLS OF THE REPRESENTATIVE SAMPLE: INCONSISTENCY AND UNDERENFORCEMENT

The representative sample approach, followed by the First, Fourth, Sixth, Eighth, and Eleventh Circuits, practically requires proof at the pleading stage of litigation, which is inconsistent with the purposes of notice pleading and discovery under the Federal Rules. This standard discourages the private anti-fraud effort, which undermines enforcement of the FCA, and does not serve the purpose of its *qui tam* provision.

First, by requiring a sample of the specific claim alleged to be fraudulent with a relator's complaint, this approach prematurely requires the production of evidence and denies the relator the opportunity to proceed to discovery—the stage of litigation ordinarily reserved for gathering such evidence. This requirement is at odds with the simplicity contemplated by the Federal Rules.

Second, because *qui tam* plaintiffs will often lack access to the documentary evidence necessary to overcome a motion to dismiss, the representative sample approach discourages private enforcement of the FCA and provides no assistance to the government, contrary to the purpose of its *qui tam* provision.

1. The Representative Sample's Premature Proof Requirement is Inconsistent with the Purposes of Notice Pleading and the Discovery Process under the Federal Rules. The representative sample approach requires that a FCA plaintiff (either a relator or the government) identify particular false claims—or a representative subset thereof—or allege details such as the dates, contents, and amounts, of the particular false claims actually submitted for payment to the government.[149] But as the Sixth Circuit noted, this approach to applying Rule 9(b) "is one small

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[149] *See, e.g.*, United States *ex rel.* Bledsoe v. Cmty. Health Sys., Inc., 501 F.3d 493, 510 (6th Cir. 2007) (requiring the relator to provide examples of specific false claims submitted in furtherance of fraudulent scheme); United States *ex rel.* Joshi v. St. Luke's Hosp., Inc., 441 F.3d 552, 556–57 (8th Cir. 2006) (requiring the relator to provide *representative samples* of the submitted false claims); United States *ex rel.* Clausen v. Lab. Corp. of Am., 290 F.3d 1301, 1311 (11th Cir. 2002) (affirming the district court's dismissal where the relator failed to identify any specific claims that were submitted).

step shy of requiring production of actual documentation with the complaint."[150] This is inconsistent with the pleading requirements of the Federal Rules of Civil Procedure, which neither require a claimant to detail the facts buttressing his allegations nor to describe the evidence to be submitted in support of those claims.[151] To be sure, under the Federal Rules' notice pleading regime, the pleading process solely concerns the task of notice-giving, while the discovery process, on the other hand, serves as the "device for ascertaining the facts, or information as to the existence or whereabouts of facts relevant to [the] issue" between the parties.[152]

The representative sample approach, in requiring proof at the pleading stage, forecloses a relator lacking documentation of specific false claims from utilizing discovery—the very process created to reveal such documentation. Many *qui tam* plaintiffs are former employees of the defendant they charge with submitting false claims and, therefore, often times have difficulty accessing to the relevant documents since their employment has been terminated.[153] That relators cannot identify or document the particular claims that they allege are fraudulent does not necessarily mean that their claims are unmeritorious or frivolous. While *qui tam* plaintiffs that are former employees of the defendant may lack access to records documenting the specific false claims, they could have first-hand knowledge of the defendant's scheme to defraud the government.[154]

For example, in *Lusby*, the relator, a former employee of defendant Rolls-Royce, alleged that Rolls-Royce violated the FCA by certifying that the turbine blades of one of its airplane engines manufactured for the U.S. military complied with the contractual specifications, when, in fact, certain tests showed otherwise.[155] His complaint also alleged that Rolls-Royce knew about the deficiency because not only did he inform his supervisors of the results, but Rolls-Royce's own quality assurance department

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[150] United States *ex rel.* Grubbs v. Kannegauti, 565 F.3d 180, 190 (5th Cir. 2009).

[151] *See* ELIZABETH M. BOSEK ET AL., 4 CYC. OF FED. PROC. § 14:175 (3d ed. 2010).

[152] Hickman v. Taylor, 329 U.S. 495, 501 (1947).

[153] *See* United States *ex rel.* Williams v. Martin-Baker Aircraft Co., 389 F.3d 1251, 1258 (D.C. Cir. 2004) (describing the difficulty for *qui tam* plaintiffs in getting documents to support their allegations).

[154] *See generally Grubbs*, 565 F.3d 180 (2009); United States *ex rel.* Lusby v. Rolls-Royce Corp., 570 F.3d 849 (7th Cir. 2009).

[155] *See Lusby*, 570 F.3d at 853–54 (describing relator's complaint).

confirmed their noncompliance.[156] However, the district court dismissed his complaint because he could not produce at least one of Rolls-Royce's billing packages (the request for payment and corresponding certificate of compliance).[157]

On appeal, the Seventh Circuit reversed the dismissal, reasoning that his allegations raised a plausible inference that false claims were actually submitted. Also, the court did not think it necessary for a relator to provide invoices and accompanying representations at the outset of litigation.[158] Even though he had first-hand knowledge of the alleged fraudulent conduct and his complaint detailed what he believed to be the fraudulent scheme, most circuits applying the representative sample approach would have affirmed his dismissal.[159]

Notice pleading requires only that the plaintiff's complaint give the defendant fair notice of the nature of the plaintiff's claim and the alleged wrongful conduct on which it is based,[160] not that he plead the evidence that will support his claim.[161] The representative sample approach, however, *does require* that a relator plead the evidence, namely a specific false claim for payment, in order to withstand a motion to dismiss, and for this reason, it is at odds with the notice pleading regime.[162]

Under the correct understanding of the federal courts' litigation system, whether the defendant actually submitted a false claim is

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[156] *Id.* at 853.

[157] *Id.* at 854 (describing the ruling in the court below).

[158] *Id.* at 854–55; *supra* note 139 and accompanying text.

[159] *See, e.g.*, United States *ex rel.* Joshi v. St. Luke's Hosp., Inc., 441 F.3d 552, 557 (8th Cir. 2006) (noting that the relator was an anesthesiologist at the defendant hospital, not a member of the billing department and that his allegations of fraudulent conduct were unsupported); Corsello v. Lincare, Inc., 428 F.3d 1008, 1013 (11th Cir. 2005) (noting that the relator was a sales employee at the defendant hospital, not a member of the billing department and that his allegations of fraudulent conduct were unsupported). *But see In re* Baycol Prods. Litig., 732 F.3d 869, 875–77 (8th Cir. 2013) (declining to require allegations of a specific false claim when the relator alleges fraudulent conduct and a corresponding claim for payment); United States *ex rel.* Walker v. R&R Props. of Lake Cnty., Inc., 433 F.3d 1349, 1360 (11th Cir. 2005) (affirming the district court's denial of the defendant's motion to dismiss where the relator failed to allege a specific false claim that was submitted).

[160] Conley v. Gibson, 355 U.S. 41, 47 (1957), *abrogated by* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

[161] *See* BOSEK ET AL., *supra* note 151, § 14:175 (describing how notice pleading's purpose is to give the defendant fair notice of the claims against him or her, not to prove those claims).

[162] *See supra* notes 23, 103 and accompanying text (noting that the First Circuit requires a specific false claim for payment and discussing this approach's drawbacks).

a fact that the relator would have to prove at trial,[163] but he should be allowed the opportunity to meet this burden after and with the aid of the discovery process, which is aimed at uncovering the facts relevant to his claims.[164] If there was no false claim or statement, then allowing a relator lacking documentary evidence at the outset of litigation to proceed to discovery would yield the same result, although in the form of a motion for summary judgment.[165] This requirement simply provides an avenue for a defendant to attack the relator's claim for a procedural misstep, or mere technicality, and does not facilitate decisions on the merits, contrary to the approach adopted by the Federal Rules.[166]

Moreover, the exact contents of the bills are not *necessary* to establish liability under the FCA: liability is established if the plaintiff proves that the defendant presented fake or fraudulent claims to the government for payment.[167] To require relators to plead the details of the allegedly fraudulent payments or claims when they are not even required to succeed on the merits at the trial stage, is anomalous and is "significantly more than any federal pleading rule contemplates."[168]

2. The Representative Sample Approach Undermines Enforcement of the FCA. Because many *qui tam* suits, like those in *Grubbs* and *Lusby*, are brought by former employees of the

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[163] *See Lusby*, 570 F.3d at 854 (noting how an FCA relator would have to prove an actual false claim *to succeed at* trial, but not *to get to* trial).

[164] *See* Hickman v. Taylor, 329 U.S. 495, 501 (1947) (discussing the pleadings and discovery process set out by the Federal Rules).

[165] *See, e.g.*, United States *ex rel.* Lusby v. Rolls-Royce Corp., No. 1:03-cv-680-SEB-WGH, at *24 (S.D. Ind. Sept. 24, 2012) (order granting summary judgment) (granting the defendant's motion for summary judgment where the relator was "unable to identify individual parts and transactions involving nonconforming goods sold to the government"). Interestingly, the relator was unable to identify the transactions because the defendant did not assign serial or tracking numbers to the allegedly nonconforming engines. *Id.* at *27.

[166] *See* Conley v. Gibson, 355 U.S. 41, 48 (1957) ("The Federal Rules reject the approach that pleading is a game of skill in which one misstep . . . may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits."), *abrogated by* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2009). *But see* United States *ex rel.* Clausen v. Lab. Corp. of Am., 290 F.3d 1301, 1314 (11th Cir. 2002) (discussing how a corporate outsider may have "to work hard to learn details" of fraudulent schemes, and that neither the Federal Rules nor the FCA offer leniency to compensate for this hardship).

[167] *See* United States *ex rel.* Grubbs v. Kanneganti, 565 F.3d 180, 189–90 (5th Cir. 2009) (noting that liability under the FCA is established merely by fraudulent presentment which does not require proof of the exact contents of the fraudulent bill, although their amounts would be useful in determining damages).

[168] Brief for the United States–*Nathan*, *supra* note 119, at 11.

defendant, the representative sample approach dismisses many claims simply because the relator is not privy to the defendant's billing practices or procedures. This requirement undermines the purpose for the FCA's *qui tam* provision and discourages its enforcement. As Judge Easterbrook noted in *Lusby*, because the plaintiff will likely lack access to the specific requests for payment, unless he works in the defendant's accounting department, requiring such documents at the pleading stage would take a "big bite out of *qui tam* litigation."[169]

Application of the representative sample approach discourages relators not privy to billing procedures from coming forward with valuable information regarding potentially fraudulent schemes, which hinders their ability to perform the role that Congress intended them to play in the detection and remediation of fraud against the government.[170] The raw bills themselves are not per se fraudulent; rather, they are evidence of the defendant's scheme to bill the government for underperformed or unnecessary work, the true fraud at the heart of FCA actions.[171] Even more so than the bills, the government needs evidence of the defendants' fraudulent intent in order to prosecute these offenders, which these relators, as current and former employees of the defendants, may possess and which the U.S. might otherwise never uncover.[172] As such, the representative sample approach discourages them to come forward without documentation of specific false claims, even though they are "well-positioned to provide valuable assistance to the government's anti-fraud efforts."[173]

The government is, in most circumstances, already aware of the particular details of the claim submitted for payment, such as the dates, contents, and amounts, because it is in possession of them, and it rarely needs assistance from the relator to identify claims for payment that have been submitted.[174] Relators typically assist the government's anti-fraud efforts by exposing the defendant's

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[169] United States *ex rel.* Lusby v. Rolls-Royce Corp., 570 F.3d 849, 854 (7th Cir. 2009).

[170] The Solicitor General has twice asserted that a per se application of this approach frustrates the congressional intent of the *qui tam* provision of the FCA. *See* Brief for the United States–*Nathan*, *supra* note 119, at 14–15 (citing Brief of the United States as Amicus Curiae at 16–17, Ortho Biotech Prods., L.P. v. United States *ex rel.* Duxbury, 561 U.S. 1005 (2010) (No. 0-654)).

[171] *See supra* note 134 and accompanying text.

[172] Brief for the United States–*Nathan*, *supra* note 119, at 15.

[173] *Id.*

[174] *Id.* at 16.

conduct or other information to which the government is not privy that shows the claims to be fraudulent, not by identifying the bills.[175] Therefore, the representative sample requirement imposes an unnecessary hurdle on a relator's pursuit of an FCA claim and thereby hampers the government's enforcement of the FCA.[176]

The *qui tam* provision of the FCA was included to incentivize private policing of the FCA in order to supplement the government's own efforts.[177] By discouraging relators from bringing forward the factual information and circumstances that make the defendant's submission of claims fraudulent, the government's enforcement is not supplemented, and the *qui tam* provision's purpose is not served. As such, the representative sample approach diminishes the FCA's effectiveness as a tool to combat fraud against the government.[178]

Compare a relator who brings an FCA suit based on information contained in a government indictment with one who brings an FCA claim in a circuit applying the representative sample approach to Rule 9(b). In the former instance the relator is *barred* from pursuing the claim *because* the government already has the information regarding the fraud,[179] and in the latter, he is *required* to produce the details regarding the particular claim for payment *even though* the government already has the information.[180] If using information already known to the government to allege an FCA claim does not serve the Act's purpose in the former case, requiring him to allege such information surely does not serve its purpose in the latter. But the representative sample approach requires just that—the relator must allege the details of the alleged false claims when, in many instances, the government is already aware of these details, but only needs the information regarding the conduct that makes the claims fraudulent.[181]

The representative sample interpretation of Rule 9(b) discourages *qui tam* plaintiffs from bringing to light potentially

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[175] *Id.* at 15.

[176] *Id.* at 16.

[177] *See* ANDROPHY, *supra* note 37, § 2.04[2] (citing CONG. GLOBE, 37th Cong., 3d Sess. 955 (1863) (statement of Senator Howard)).

[178] *See* Brief for the United States–*Nathan*, *supra* note 119, at 10.

[179] *See* 31 U.S.C. § 3730(e)(4)(i) (2012) (unless, of course, the Government opposes dismissal).

[180] *See* Brief for the United States–*Nathan*, *supra* note 119, at 10 (discussing downfalls of strict interpretation).

[181] *Id.*

fraudulent conduct in situations where they are not privy to the billing procedures of the defendant, even though they are otherwise ready and willing to pursue a claim under the FCA.[182] Because they are discouraged from bringing suit due to their lack of access to the documents or information required to identify the contents of the allegedly by false bills, some potentially fraudulent conduct goes undetected by the government, undermining the effectiveness of the FCA.

B. THE RELIABLE INDICIA APPROACH: SUPPLEMENTING THE ANTI-FRAUD EFFORT AND GIVING SUFFICIENT NOTICE

On the other hand, the reliable indicia approach to applying Rule 9(b)'s particularity requirement[183] only requires a relator to allege the particular details of the circumstances constituting the fraudulent scheme and to provide an adequate basis to allow the court to draw the reasonable inference that claims were actually submitted as a part of that scheme.[184] Unlike the representative sample approach, this interpretation serves the purposes underlying the application of Rule 9(b) without thwarting enforcement of the FCA. When applied in concert with the *Twombly/Iqbal* facial plausibility requirement of Rule 8(a), this approach also sufficiently serves the purpose of notice pleading.

1. The Reliable Indicia Approach Serves Rule 9(b)'s Purposes Without Obstructing FCA Enforcement. The reliable indicia approach to evaluating FCA claims under Rule 9(b) is consistent with and adequately serves the purposes underlying the Rule's application to FCA claims without unduly hindering of *qui tam* plaintiffs, unlike the stricter representative sample approach. Application of Rule 9(b) serves four main purposes: to provide fair notice in order to allow the defendant to prepare a defense, to deter frivolous or strike suits, to prevent fishing expeditions where all of the wrongful conduct is learned of during discovery, and to

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[182] *Id.*

[183] *See* United States *ex rel.* Foglia v. Renal Ventures Mgmt., LLC, 754 F.3d 153, 156–57 (3d Cir. 2014); Ebeid *ex rel.* United States v. Lungwitz, 616 F.3d 993, 998–99 (9th Cir. 2010); United States *ex rel.* Lemmon v. Envirocare of Utah, Inc., 614 F.3d 1163, 1171–72 (10th Cir. 2010), United States *ex rel.* Grubbs v. Kanneganti, 565 F.3d 180, 190 (5th Cir. 2009); United States *ex rel.* Lusby v. Rolls-Royce Corp., 570 F.3d 849, 854–55 (7th Cir. 2009).

[184] *See, e.g.*, *Lemmon*, 614 F.3d at 1172 (discussing how FCA claims "need only show the specifics of a fraudulent scheme").

prevent harm to the goodwill and reputation of the defendant.[185] Because the reliable indicia approach still requires the particulars of the circumstances underlying the defendant's fraudulent scheme paired with an adequate basis for inferring that claims were submitted in furtherance of that scheme to be alleged,[186] it adequately serves all the purposes underlying Rule 9(b).

In order to meet the burden of the reliable indicia approach, a relator needs to allege not only the particulars of the defendant's allegedly fraudulent scheme, but also details leading to a strong inference that claims were actually submitted.[187] For example, in support of his claim that the defendants submitted claims to the government for medical services that were not actually provided, the relator in *Grubbs* provided the dates on which the defendants recorded services to patients that were not actually provided and the type of services, along with the corresponding billing code that would be used on the bill.[188] These allegations sufficiently alerted the defendants to the nature of the relator's allegations—their fraudulent recording of services that had not been provided—in order for them to prepare a defense, even though he did not allege specific false claims that were submitted. Especially considering that the contents of the false claim do not have to be proven to succeed on the merits of an FCA suit,[189] those contents are certainly not necessary to provide the defendant fair notice of conduct on which the fraud claim is based.

In regard to Rule 9(b)'s focus on preventing abusive discovery,[190] the reliable indicia approach's requirement that the allegations lead to a "strong inference" that false claims were actually submitted limits any "fishing" to "small pond that is either stocked or dead."[191] The discovery process can be directed,

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[185] *See* United States *ex rel.* Stinson, Lyons, Gerlin, & Bustamante, P.A. v. Blue Cross Blue Shield of Ga., Inc., 755 F. Supp. 1055, 1056–57 (S.D. Ga. 1990) (listing the four purposes of Rule 9(b); *see also Grubbs*, 565 F.3d at 190 (same).

[186] *Grubbs*, 565 F.3d at 190.

[187] *Id.*

[188] *Id.* at 192.

[189] *See id.* at 189 (noting that liability under the FCA is established by fraudulent presentment, which does not require proof of the exact contents of the fraudulent bill, although their amounts would be useful in determining damages).

[190] *See Stinson*, 755 F. Supp. at 1056–57 (noting that one purpose of Rule 9(b) is to prevent "fishing expeditions" where the wrongful conduct is learned of wholly through discovery).

[191] *Grubbs*, 565 F.3d at 191.

curtailed, and limited by the discretion of the presiding judge, and any frivolous claims can be dispatched at the summary judgment stage if the defendant's billing records discredit the relator's particular allegations.[192] Similarly, a pointed discovery process may allow for a quick motion for summary judgment, preventing any harm to the defendant's goodwill or reputation. Further, FCA complaints must be filed under seal, which lessens the impact of the allegations on defendant's goodwill and reputation in the first place.[193]

Because many *qui tam* plaintiffs are former or current employees of the defendant, they have valuable information that is relevant to determining whether the defendant engaged in fraud, notwithstanding the fact that they lack the documents or particulars of the actual claims submitted.[194] It is this type of information—information regarding the defendant's conduct, not its claims for payment—that the government needs to know in order to determine whether the defendant is engaged in fraud[195] and that the FCA's *qui tam* provision was designed to bring forward.

The reliable indicia approach allows a relator who only has this type of information to come forward and adequately plead a claim under the FCA even though he does not have the claims for payment, unlike the representative sample approach. Because that approach disallows suits where the relator does not have access to the relevant documents, it thwarts the efforts of the FCA.[196] Conversely, as discussed above, the reliable indicia approach adequately "effectuates [the purposes of] Rule 9(b) without stymieing legitimate efforts to expose fraud."[197]

2. Application of the Reliable Indicia Approach in Conjunction with Rule 8(a)'s Facial Plausibility Requirement Sufficiently Serves the Purposes of Notice Pleading. The dual *Twombly/Iqbal* decisions clarified that in "all civil actions," a plaintiff's complaint must contain sufficient factual allegations to allow for the

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[192] *Id.*

[193] *See* 31 U.S.C. § 3730(b)(2) (2012) (requiring complaints to remain under seal for at least sixty days).

[194] *See supra* notes 170–73 and accompanying text.

[195] Brief for the United States–*Nathan*, *supra* note 119, at 15.

[196] *See supra* Part III.A.*2* (detailing how the representative sample approach undermines FCA enforcement).

[197] *Grubbs*, 565 F.3d at 190.

plausible inference that the defendant is liable, and if the action sounds in fraud, like those under the FCA, they are subject to Rule 9(b).[198] Rule 9(b) does not supplant Rule 8(a)'s plausibility requirement, but supplements it.[199] And when analyzed together, Rule 8(a) and Rule 9(b) require only "simple, concise, and direct allegations of the circumstances constituting fraud, which after *Twombly* must make relief plausible, not merely conceivable, when taken as true."[200] Under the FCA, Rule 8(a) and the particularity requirement of Rule 9(b) together require that the complaint allege the particulars of the conduct constituting fraud and that such allegations support a plausible inference that false claims were submitted. The reliable indicia approach sufficiently meets these requirements.

The reliable indicia approach requires the allegations support a "strong inference" that claims were actually submitted for payment, which is more in line with Rule 8(a)'s plausible inference standard than is the representative sample approach. That approach, on the other hand, requires no inference at all because it requires the alleged false claims to be identified. But as the Seventh Circuit has noted, the pleadings do not have to exclude *all possibility* of honesty in order to allege the particulars of fraud.[201] And as *Twombly* made clear, the plausibility requirement of Rule 8(a) does not impose a probability requirement, it only asks for enough facts to allow for the reasonable inference that discovery will yield evidence of liability.[202]

The representative sample approach essentially makes Rule 8(a)'s "short and plain statement" requirement meaningless by requiring proof at the onset of litigation.[203] So long as the inference may be drawn from the complaint that the plaintiff will be able to produce evidence on all the essential elements of a claim, it complies with the plausibility standard. And the reliable indicia approach

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[198] Ashcroft v. Iqbal, 556 U.S. 662, 684 (2009).

[199] *Grubbs*, 565 F.3d at 186.

[200] *Id.* (discussing how Rule 9 supplements, but does not supplant, the requirements of Rule 8).

[201] United States *ex rel.* Lusby v. Rolls-Royce, Corp., 570 F.3d 849, 854 (7th Cir. 2009).

[202] Bell Atl. Corp. v. Twombly, 550 U.S. 554, 556 (2007) ("Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.").

[203] *See* United States *ex rel.* Sansbury v. LB&B Assocs., Inc., No. 07-251 (EGS), 2014 3509789, at *13 (D.D.C. July 16, 2014).

asks for more than an inference, it asks for a "strong inference."[204] This approach is more consistent with the facial plausibility requirement than is the representative sample approach.

Also, when paired with the facial plausibility standard, the reliable indicia approach sufficiently serves to give the defendant fair notice of the grounds on which the plaintiff's claim rests, thereby serving the purpose of notice pleading. For example, in *Grubbs* and *Lusby*, the relators' allegations provided detailed descriptions of the defendants' conduct that made the claims fraudulent, which allowed the courts to draw the plausible inferences that claims were submitted, even though they did not identify the particulars of the specific claims.[205]

The failure to provide invoices or bills that were submitted for payment does not make the relator's claim any less plausible so long as he alleges the particulars of a scheme that will allow for the inference that they were submitted.[206] As long as the relator's claim alleges the defendant's scheme to defraud with particularity the defendant will be provided with both adequate notice as to the conduct at issue and sufficient information with which to form a defense. Requiring identification of the claims, on the other hand, does not aid the defendant in preparing its defense, because whether they are alleged or not, the claims are easily identifiable and accessible to the defendant because they are in its possession.[207]

Because the reliable indicia approach requires an adequate basis for drawing the "strong inference" that false claims were submitted to the government, and Rule 8(a)'s interpretation in *Twombly/Iqbal* requires a plausible inference of liability, this approach is most in line with pleading procedure under the Federal Rules. The representative sample approach does not ask for an inference at all, but requires the contents of the claims to be identified, which borders on a probability, if not an evidentiary, requirement.

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[204] *Grubbs*, 565 F.3d at 190.

[205] *See Lusby*, 570 F.3d at 854–55; *see also Grubbs*, 565 F.3d at 192.

[206] *Lusby*, 570 F.3d at 854.

[207] *See id.* ("[A] relater is unlikely to have those documents unless he works in the defendant's accounting department . . . .").

IV. CONCLUSION

The preferable approach to applying Rule 9(b) is the reliable indicia approach. First, the reliable indicia approach sufficiently serves the purposes of Rule 9(b). This approach requires the particulars of the purported fraudulent conduct to be alleged, thereby giving the defendant fair notice of the grounds on which the complaint is based. Second, because the particular details of the scheme will narrow the relevant issues, the discovery pool will be limited, preventing "fishing" expeditions, frivolous claims, and strike suits. The defendant will also not suffer any greater harm to its reputation, because such claims must be filed under seal.[208] The reliable indicia approach serves the purpose of notice pleading for the same reason that it satisfies the purposes of Rule 9(b)'s fair notice concern—by requiring particularized allegations of the details surrounding the fraudulent scheme. This approach serves the underlying purposes of the notice pleading regime underlying the Federal Rules without thwarting the efforts of otherwise willing *qui tam* relators to come forward with their allegations.

The reliable indicia approach is also preferable to the representative sample approach because the latter approach is inconsistent with notice pleading and the discovery process in that it practically asks for evidence of a false claim to be submitted at the pleading stage. Further, it undermines enforcement of the FCA because it discourages and disallows suits by relators who may have information that is valuable to the government in determining whether the defendant engaged in fraud, but lack access to the documents needed to identify the particulars of the false claims. This heavy burden imposes a requirement that asks for probability—not plausibility—that is at odds with the facial plausibility requirement of Rule 8(a).

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[208] This sealed filing allows the government to conduct an independent investigation to determine whether to intervene or not, and the defendant is only privy to the filing if the seal is partially lifted. To prevent retaliation, identifying characteristics of the whistleblower may be redacted in the disclosure provided to the defendant.