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# The Qui Tam Question: Proper Pleading Requirements for Relators Under the FCA

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# The *Qui Tam* Question: Proper Pleading Requirements for Relators Under the FCA

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## INTRODUCTION

Government spending on healthcare is expected to exceed $4 trillion in 2020 and to reach roughly $6.19 trillion by 2028.[1] For Medicare alone, spending is expected to grow at an average annual rate of 7% from 2019 to 2028.[2] With this significant increase in government funding going to healthcare, the unavoidable result of potential healthcare fraud is a pressing issue; thus, the need for the False Claims Act ("FCA" or "the Act") has never been higher. In fiscal year 2019 alone, the Department of Justice ("DOJ") obtained more than $3 billion in settlements and judgments from civil cases involving fraud and false claims against the government.[3] With the rapidly increasing amount of government funds funneled into healthcare, the FCA serves as an effective combatant to fraud while also protecting government contractors.

Claims filed under the FCA must meet the pleading requirements of both Rule 8(a) and Rule 9(b) of the Federal Rules of Civil Procedure.[4] However, courts are divided on the proper application of Rule 9(b) to a relator's *qui tam*[5] action.[6] The central issue is whether relators must plead

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1. *CMS: US health care spending will reach $4T in 2020*, ADVISORY BOARD (Apr. 3, 2020), https://www.advisory.com/daily-briefing/2020/04/03/health-spending#:~:text=Spending%20growth%20details%20for%202020,up%20from%2017.7%25%20in%202018 [https://perma.cc/YX9U-NV6W].

2. *Id.*

3. *Justice Department Recovers over $3 Billion from False Claims Act Cases in Fiscal Year 2019*, U.S. DEP'T OF JUSTICE (Jan. 9, 2020), https://www.justice.gov/opa/pr/justice-department-recovers-over-3-billion-false-claims-act-cases-fiscal-year-2019 [https://perma.cc/6MGH-2YKV] (last visited Jan. 27, 2021).

4. *See, e.g.*, United States *ex rel.* Nathan v. Takeda Pharm. N. Am., Inc., 707 F.3d 451, 455–56 (4th Cir. 2013).

5. *Qui tam* is an abbreviation of *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, meaning "who as well for the king as for himself sues in this matter." This is an action brought under a statute that allows a private person to sue for a penalty. *Qui Tam Action*, BLACK'S LAW DICTIONARY (11th ed. 2019).

6. A relator is an informer or someone who furnishes information on which a civil or criminal case is based. *Relator*, BLACK'S LAW DICTIONARY (11th ed. 2019).

specific bills[7] submitted to the government in their complaint.[8] On the one hand, the First, Fourth, Sixth, Eighth, and Eleventh circuits have interpreted the phrase "with particularity" in Rule 9(b) to foreclose an action if a plaintiff, at the pleading stage, does not allege particulars of a specific false claim submitted to the government.[9] This approach is commonly referred to as the representative-sample approach,[10] and courts opting for this approach typically require relators to identify specific false claims submitted to the government by describing the time, place, actors, and contents of the allegedly fraudulent claims.[11]

On the other hand, the Third, Fifth, Seventh, Ninth, and Tenth circuits have opted for a more lenient application of Rule 9(b).[12] These circuits have stated that a relator satisfies the requirements of Rule 9(b) by alleging details of a fraudulent scheme to submit false claims paired with reliable indicia[13] that lead to a strong inference that false claims were actually

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7. A bill is a specific claim for payment submitted to the government, even if the government did not pay the bill. Liability under the FCA attaches to a claim for payment submitted and does not hinge on whether the government paid it. *See* 31 U.S.C. § 3729(b)(2).

8. *Id.*; *see also id.* §§ 3730–3733.

9. *See* United States *ex rel.* Karvelas v. Melrose-Wakefield Hosp., 360 F.3d 220 (1st Cir. 2004); *Takeda*, 707 F.3d 451; United States *ex rel.* Bledsoe v. Cmty. Health Sys., Inc., 501 F.3d 493 (6th Cir. 2007); United States *ex rel.* Joshi v. St. Luke's Hosp., Inc., 441 F.3d 552 (8th Cir. 2006); United States *ex rel.* Clausen v. Lab'y Corp. of Am., 290 F.3d 1301 (11th Cir. 2002).

10. *See Clausen*, 290 F.3d 1301.

11. United States *ex rel.* Foglia v. Renal Ventures Mgmt., LLC, 754 F.3d 153, 155–56 (3d Cir. 2014).

12. *See Foglia*, 754 F.3d 153; United States *ex rel.* Grubbs v. Kanneganti, 565 F.3d 180 (5th Cir. 2009); United States *ex rel.* Lusby v. Rolls-Royce Corp., 570 F.3d 849 (7th Cir. 2009); Ebeid *ex rel.* United States v. Lungwitz, 616 F.3d 993 (9th Cir. 2010); United States *ex rel.* Lemmon v. Envirocare of Utah, Inc., 614 F.3d 1163 (10th Cir. 2010).

13. Under the reliable-indicia standard, courts have found reliable indicia when the relator sets forth (1) statistical proof, (2) direct personal knowledge of the fraud, or (3) direct personal knowledge about the billing process. *See, e.g.*, United States *ex rel.* Nargol v. DePuy Orthopaedics, Inc., 865 F.3d 29, 41 (1st Cir. 2017) (finding that the relators had fit into the "more flexible" approach used when evaluating the sufficiency of fraud pleadings in connection with indirect false claims for government payment and demonstrated "reliable indicia that lead to a strong inference that claims were actually submitted" when the "[r]elators allege[d] that, over a five-year period, several thousand Medicare and Medicaid recipients received what their doctors understood to be Pinnacle MoM device implants; that more than half of those implants fell outside the specifications approved by the FDA; and that the latency of the defect was such that doctors

submitted to the government, even if the relator does not identify a specific false claim.[14] The Supreme Court's heightened plausibility standard for satisfying Rule 8(a), announced in the landmark *Twombly*[15] and *Iqbal*[16] decisions, creates more uncertainty in *qui tam* actions. Since the Supreme Court decided these cases, lower courts have struggled to reconcile the plausibility pleading requirements of Rule 8(a) with the particularity requirements of Rule 9(b) in FCA complaints.[17] Most recently, in 2020, the Supreme Court declined to grant certiorari to resolve this issue.

At the pleading stage, most civil complaints must comply only with Rule 8(a).[18] Under Rule 8(a), plaintiffs are required to state their claims in "short and plain statement[s] showing that [they] are entitled to relief."[19] Because FCA violations are "fraud-like," courts have universally held that FCA complaints are subject to the requirements of Rule 9(b) as well as Rule 8(a).[20] The courts' interpretations of the differing standards of Rules 8(a) and 9(b) have created a circuit split on what exactly a relator is required to plead in an FCA complaint to withstand a motion to dismiss for failure to plead with particularity.[21] In order to resolve the circuit split

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would have had no reason not to submit claims for reimbursement for noncompliant devices" and where the complaint essentially alleged facts showing that it is statistically certain that the defendant caused third parties to submit many false claims to the government); *see also* United States *ex rel.* Chorches v. Am. Med. Response, Inc., 865 F.3d 71, 84–85, 93 (2d Cir. 2017) ("in alleging that supervisors specifically referenced Medicare as the provider to whose requirements the allegedly falsified revisions were intended to conform, the [complaint] supports a strong inference that false claims were submitted *to the government*"); *see also* United States *ex rel.* Thayer v. Planned Parenthood of the Heartland, 765 F.3d 914, 917–20 (8th Cir. 2014) (finding that "a relator who provides sufficient indicia of reliability to support her allegations that false claims were submitted, such as by pleading details about defendant's billing practices and pleading personal knowledge of the defendant's billing practices fulfills Rule 9(b)'s objective . . . .").

14. *See generally Foglia*, 754 F.3d 153; *Grubbs*, 565 F.3d 180; *Lusby*, 570 F.3d 849; *Ebeid*, 616 F.3d 993; *Lemmon*, 614 F.3d 1163.

15. Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

16. Ashcroft v. Iqbal, 556 U.S. 662 (2009).

17. *See* discussion *infra* Section V.D.

18. FED. R. CIV. P. 8(a).

19. *Id.*

20. *See, e.g.*, United States *ex rel*. Rost v. Pfizer, Inc., 507 F.3d 720 (1st Cir. 2007).

21. *See* United States *ex rel*. Grubbs v. Kanneganti, 565 F.3d 180 (5th Cir. 2009) (holding that a relator pleads with particularity by pleading details of a scheme with reliable indicia that lead to a strong inference that false claims were

on the precise meaning of "pleading with particularity" in an FCA action, the Supreme Court should grant certiorari and apply Rule 9(b)'s particularity requirements strictly to the first two elements of an FCA action, that is, (1) that there was a claim for a federal fund and (2) that the claim was false. To satisfy these elements, the relators should be required to plead specific bills that were submitted to the government. The third element, the defendant's knowledge of the claim's falsity, should only be required to satisfy the plausibility standard of Rule 8(a).[22]

Liability under the FCA derives from the claim for payment, not the underlying fraudulent scheme,[23] and courts have held that the claim is the *sine qua non* of an FCA violation.[24] As a result, the circuits that allow a relator to proceed to discovery by merely including details of an alleged fraudulent scheme in the relator's complaint have done so incorrectly.[25] Similarly, courts stating that a relator's allegation of a specific false claim alone is sufficient to satisfy Rule 9(b) have failed to consider that without a fraudulent scheme, there is nothing to prove that the claim was false.[26] Requiring courts to apply different pleading standards to the different elements of an FCA violation serves the purpose of Rule 9(b) and fits well within the Act's unique structure.[27] A relator may sufficiently plead a defendant's scheme under Rule 8(a)'s plausibility standard; but if the scheme did not yield any claims submitted to the government, then the defendant is not liable under the FCA.[28] A relator may also identify specific false claims for payment, yet without any underlying fraudulent scheme, these bills would be interpreted as nothing more than raw numbers.[29] Therefore, requiring specific, fraudulent bills in the complaint

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submitted); *see also* United States *ex rel.* Clausen v. Lab'y Corp. of Am., 290 F.3d 1301 (11th Cir. 2002).

22. *See* discussion *infra* Section V.B.

23. United States *ex rel.* Thayer v. Planned Parenthood of the Heartland, 765 F.3d 914, 916 (8th Cir. 2014); *see also* United States *ex rel.* Longhi v. United States, 575 F.3d 458, 467 (5th Cir. 2009); United States *ex rel.* Aflatooni v. Kitsap Physician Serv., 314 F.3d 995, 1002 (9th Cir. 2002) ("The False Claims Act . . . focuses on the submission of a claim, and does not concern itself with whether or to what extent there exists a menacing underlying scheme.").

24. Hopper v. Solvay Pharm., Inc., 588 F.3d 1318, 1328 (11th Cir. 2009).

25. *See infra* Section III.B.

26. *See infra* Section III.A.

27. *See infra* Part IV.

28. *See generally* 31 U.S.C. § 3729.

29. *See* United States *ex rel*. Grubbs v. Kanneganti, 565 F.3d 180, 190 (5th Cir. 2009) ("Standing alone, raw bills—even with numbers, dates, and amounts—are not fraud without an underlying scheme to submit the bills for unperformed or unnecessary work.").

is the correct application of Rule 9(b) to a violation of the FCA's first two elements.[30] Holding the details of the defendant's fraudulent scheme—the third element—to the Rule 8(a) plausibility standard will best serve the functions of the FCA to uncover fraud against the U.S. government.[31] This standard takes into consideration the expanded information sharing between the DOJ and a relator, and places emphasis on what is truly necessary to constitute an FCA violation.[32]

Part I of this Comment will provide background of the FCA and explain the structure of an FCA lawsuit. Part II will discuss the pleading requirements under the FCA and Rules 8(a) and 9(b) of the Federal Rules of Civil Procedure. Part III will present the cases that illustrate the current circuit split regarding the proper pleading requirements for *qui tam* actions brought under the FCA. This Part will also break down why the federal courts' current approaches fail to adequately consider the use of civil investigative demands[33] and the complexity of an FCA lawsuit in general. Part IV will then argue that although circuits opting for a relaxed application of Rule 9(b) seem to be doing so to combat fraud, the uniqueness of the FCA is best served with a strict application of Rule 9(b)—one that requires the relator to identify a specific claim for payment—in conjunction with Rule 8(a)'s plausibility standard. Part V will propose that a blind application of Rule 9(b) to all three elements of an FCA violation is incorrect and that the only way to achieve the FCA's stated purpose, in conjunction with the government's mandatory investigation, is to properly separate each FCA claim into three elements and apply a different pleading standard to each element.

## I. THE FALSE CLAIMS ACT: HISTORY AND CURRENT USE

Initially created to prevent fraudsters from overcharging Union troops, the FCA has evolved into one of the government's most effective tools to combat fraud against the United States.[34] Amendments to the FCA have placed the government in a more prevalent role in the fight against fraud. The Department of Justice is required to investigate every FCA complaint and then share that information with the relator who filed suit.[35] This

30. *See infra* Section IV.A.
31. *Infra* Part V.
32. *See infra* Section V.B.
33. *See* 31 U.S.C. § 3733 (2018).
34. *See* James B. Helmer, Jr., *False Claims Act: Incentivizing Integrity for 150 Years for Rogues, Privateers, Parasites and Patriots*, 81 U. CIN. L. REV. 1261, 1267 (2013).
35. 31 U.S.C. § 3733.

unique framework is designed to enlist the help of private individuals to sue defendants, yet the current use of the Act could negatively affect defendants' reputations and turn the FCA into a method of recovery for relators that Congress did not intend.[36]

*A. Current Function*

The FCA is currently the government's "primary litigation tool" for recovering losses resulting from fraud,[37] allowing a relator to file suit against a defendant that is defrauding the government.[38] The relator files suit under seal and delivers a copy to the DOJ along with a written disclosure detailing the evidence and information contained in the complaint.[39] While the suit is under seal, the Act requires the DOJ to diligently investigate the allegations contained in the complaint.[40] During this time, the DOJ performs its investigation and ultimately decides whether it wants to intervene or allow the relator to continue prosecuting the alleged fraud on his or her own.[41]

The Act imposes civil and criminal penalties on persons who knowingly present false or fraudulent monetary claims to the federal government or who knowingly use a false record to avoid or decrease a monetary obligation to pay the government.[42] In the FCA, there are seven specific provisions that identify what constitutes a violation.[43] Specifically, the FCA imposes civil penalties and treble damages on any person who, *inter alia*, "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim."[44] The statute attaches liability not to the underlying fraudulent activity or to the government's wrongful payment, but to the claim for payment.[45] Therefore, the central question in FCA cases is whether the defendant ever presented a "false or fraudulent claim" to the government.[46]

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36. *See infra* Section I.A.
37. United States *ex rel.* Steury v. Cardinal Health, Inc., 625 F.3d 262, 267 (5th Cir. 2010).
38. *See generally* 31 U.S.C. § 3730.
39. *Id.* § 3730(b)(2).
40. *Id.* § 3730(a).
41. *See generally id.*
42. *Id.* §§ 3729–3733.
43. *Id.* § 3729(a)(1)(A)–(G).
44. *Id.* § 3729(a)(1)(B).
45. *See generally id.* § 3729.
46. *See id.* § 3729(a)(1)(A).

While there are seven different ways a defendant can violate the FCA,[47] each violation consists of the same central elements: (1) there was a claim for a federal fund; (2) the claim was false; and (3) the defendant knew of its falsity.[48] Thus, a person does not violate the FCA by simply submitting a false claim to the government: the defendant must have submitted, or caused the submission of, the false claim with knowledge of its falsity.[49] The FCA defines knowledge as "actual knowledge," "deliberate ignorance of the truth or falsity of the information," or "reckless disregard of the truth or falsity of the information."[50] Interestingly, the FCA does not require proof of specific intent to defraud.[51]

The Act also reaches far beyond presentment claims and fraud.[52] In fact, "Congress wrote expansively, meaning to reach all types of fraud,

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47. A person may violate the Act in seven ways. If a person

> (1) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval; (2) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim; (3) conspires to commit a violation of [any of the other six methods]; (4) has possession, custody, or control of property or money used; (5) is authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true; (6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge property; or (7) knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government, that person is liable.

31 U.S.C. § 3729(a)(1)(A)–(G); *see also* Charis A. Mitchell, *A Fraudulent Scheme's Particularity Under Rule 9(b) of the Federal Rules of Civil Procedure*, 4 LIBERTY U. L. REV. 337, 346 (2015).

48. *See* Mitchell, *supra* note 47, at 367; *see also* United States *ex rel.* Aflatooni v. Kitsap Physician Serv., 314 F.3d 995, 1000 (9th Cir. 2002) (quoting United States *ex rel.* Oliver v. Parsons Co., 195 F.3d 457, 461 (9th Cir. 1999)).

49. U.S. DEP'T OF JUSTICE, THE FALSE CLAIMS ACT: A PRIMER (2011), https://www.justice.gov/sites/default/files/civil/legacy/2011/04/22/C-FRAUDS_FCA_Primer.pdf [https://perma.cc/NW53-2B3G].

50. 31 U.S.C. § 3729(b)(1).

51. *See id.*

52. *See* Michael Lockman, *In Defense of a Strict Pleading Standard for False Claims Act Whistleblowers*, 82 U. CHI. L. REV. 1559, 1562 (2015). "Presentment"

without qualification, that might result in financial loss to the government."[53] Because the FCA is essentially an anti-fraud statute, a complaint's false claim allegations must comply with the rule requiring a party to state with particularity the circumstances constituting fraud; in addition, the complaint must contain sufficient factual allegations that, when accepted as true, state a claim to relief that is plausible on its face.[54]

*B. History of The False Claims Act*

Congress first enacted the FCA in 1863 due to concerns that suppliers of goods to the Union Army were defrauding the government.[55] The fraud was so pervasive that the government could not stop it on its own,[56] and the solution to this problem was to enlist the help of private individuals to prosecute fraud of which the government was unaware.[57] Because the fraud occurring during the Civil War resulted largely from collusion between civilian or government officials and government contractors, the United States implemented a *qui tam* provision in the Act. The *qui tam* provision allows a person—referred to as a "relator"—to bring a civil action on behalf of themselves and the government to uncover fraud with a chance to share in the penalty recovered in court.[58] The Act was sparingly invoked from its enactment in the 1860s until the 1940s.[59] During the 1940s, relators began filing *qui tam* actions using publicly available information found in criminal indictments.[60] After the government successfully prosecuted criminal fraud cases against defendants, private attorneys would subsequently file FCA civil actions against the same defendants, alleging the exact behavior the government had just proven.[61] The attorneys would win the civil suits, since the government had already proven the existence of fraudulent behavior, and take a percentage of the

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refers to a situation where a defendant presents or submits a false claim to the government.

53. Cook Cnty., Ill. v. United States, 538 U.S. 119, 129 (2003).

54. *See generally* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

55. U.S. DEP'T OF JUSTICE, *supra* note 49.

56. *See* Ryan T. Andrews, *The Plausibility Standard and the False Claims Act: Protecting Fraudsters by Preventing Private Enforcement*, 22 GEO. MASON L. REV. 1283, 1286 (2015).

57. Dingle v. Bioport Corp., 388 F.3d 209, 215 (6th Cir. 2004).

58. *See* § 3730(b), (d) (2018).

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

60. *Id.*

61. *See* Helmer, *supra* note 34, at 1267–68.

recovery without ever actually having to uncover fraud of which the government was unaware.[62] These parasitic lawsuits were exacerbated in *United States ex rel. Marcus v. Hess* in 1943.[63]

In *Marcus*, the relators used a criminal indictment charged against the defendants to file a claim for an FCA violation.[64] The relators' complaints offered no information other than the facts from the criminal indictment, of which the government was already aware.[65] Nonetheless, the Court held that the language of the FCA meant that "[s]uits may be brought and carried on by any person . . . . Although the relator has contributed nothing to the discovery of this crime, he contributed much to accomplishing one of the purposes for which the [A]ct was passed."[66] In this case, the *qui tam* provision appeared to work exactly as Congress intended: the relators brought the civil action and obtained a net recovery for the United States in the amount of $150,000, three times the amount of fines the Department of Justice recovered in the criminal case.[67]

This ruling led the legislature to amend the FCA in 1943, requiring relators to submit evidence of their claims to the government and prohibiting relators from using information that was previously known to the government in their complaint.[68] These amendments, seeking to end the parasitic lawsuits like the one in *Marcus*, practically eliminated all *qui tam* actions.[69] Under the new government-knowledge bar, *qui tam* cases were nearly impossible to bring since someone somewhere in the government would almost always have knowledge of the fraud.[70] Other 1943 amendments to the FCA required relators to provide the government with all evidence in their possession at the time the complaint was filed and to give the government 60 days to intervene in the action.[71] The amended FCA also provided that the relator's share of the profits from the action could be between 10% and 25%, depending on whether the government elected to intervene.[72] Though these amendments were included in an attempt to end parasitic lawsuits and promote relator

62. *Id.*
63. United States *ex rel*. Marcus v. Hess, 317 U.S. 537 (1943).
64. *Id.*
65. *Id.*
66. *Id.* at 545.
67. Helmer, *supra* note 34, at 1268.
68. Act of December 23, 1943, ch. 377, 57 Stat. 608 (codified as amended at 31 U.S.C. § 3730).
69. Helmer, *supra* note 34, at 1270.
70. *Id.*
71. *Id.* at 1270–71.
72. *Id.*

recovery for uncovering previously unknown fraud, the government-knowledge bar made it almost impossible for a relator to bring an FCA claim.[73]

The FCA remained largely unchanged from 1943 until 1986. In 1986, Congress amended the FCA again, this time strengthening the *qui tam* provisions of the Act.[74] The U.S. government spent a significant amount of money on national defense during the Cold War against the Soviet Union, and the large number of government contracts made it easier for contractors to defraud the government.[75] These amendments removed the government-knowledge bar implemented in 1943 and replaced it with a more limited public-disclosure bar, which prevented anyone other than the government from intervening or bringing a related action based on the facts underlying the pending action.[76] Additionally, the 1986 amendments increased relator awards, permitted relators to continue in a suit if the government chose not to intervene, removed the specific-intent requirement for proving fraud, and increased statutory penalties from $2,000 to a range of $5,000–$10,000.[77] The 1986 amendments were enacted not only to encourage whistleblowers, but also to act "as a check that the government does not neglect evidence, cause undu[e] delay, or drop the False Claims case without legitimate reason."[78]

Following Congress's amendments in 1986, pursuing a claim under the FCA was extremely attractive, and the government began recovering more money from false claims than ever before.[79] However, utilization of the FCA came to a halt again in 2008 after the Supreme Court decided *Allison Engine Co. v. United States ex rel. Sanders*, where the Court narrowly interpreted the FCA and required a plaintiff to show that the defendant intended to defraud the U.S. government specifically, rather

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73. *Id.*

74. *Id.*

75. *Id.* at 1271.

76. *See* 31 U.S.C. § 3730(b)(5). The public-disclosure bar prevents anyone other than the government from intervening or bringing a related action based on the facts underlying the pending action. This provision bars any qui tam case that is based on a prior public disclosure of the allegations by the media or a criminal, civil, or administrative hearing unless the relator is an "original source" with direct and independent knowledge of the information on which the allegations are based and who voluntarily provided such information to the government before filing suit.

77. *See id.* § 3729.

78. *See* Helmer, *supra* note 34, at 1275.

79. Andrews, *supra* note 56, at 1296 (noting that the government recovered $38.9 billion from FCA suits between 1986 and 2013).

than a main contractor.[80] Congress believed that the Supreme Court's holding protected defendants in FCA claims—contrary to the Act's purpose of uncovering fraud against the government—and responded legislatively, effectively overruling *Allison Engine* and breathing new life into the FCA.[81]

Specifically, Congress passed the Fraud Enforcement Recovery Act of 2009 ("FERA"), expanding the utilization of FCA claims.[82] These amendments provide the DOJ with expanded tools to conduct civil investigations into fraud and more freedom to share information obtained using civil investigative demands with the relator. This means that relators who lack specific knowledge of violations can avoid a motion to dismiss by supplementing their complaints with information obtained during a government investigation.[83]

Congress once again amended the FCA in 2010 through the Patient Protection and Affordable Care Act ("ACA").[84] The ACA included an exception to the public-disclosure bar for relators who were original sources and also created liability under the FCA for contractors who retain overpayments made by the government or offer kickbacks to receive government funds.[85] The FERA and ACA amendments to the FCA highlight the government's reliance on the FCA as a tool to combat fraud.

### *C. Structure of an FCA Lawsuit*

The procedural framework governing the FCA is unique. When a relator files suit, the suit must be filed under seal for an initial period of 60 days.[86] During this initial 60-day period, the DOJ is required to investigate the relator's claims and determine whether it wants to intervene in the suit.[87] Courts have the authority to grant extensions, at the government's

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80. Allison Engine Co. v. United States *ex rel.* Sanders, 553 U.S. 662, 672–73 (2008).

81. *See* Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 4, 123 Stat. 1617, 1621 (2009).

82. Stephen Sozio & Rachael A. Ream, *Amendments to the False Claims Act Expand Exposure to the Health Care Industry*, CLEVELAND METRO. BAR J. (2013), https://www.jonesday.com/files/Publication/4d682d05-7337-42f7-9c4c-2caa93d75fea/Presentation/PublicationAttachment/195ffe82-0358-4b10-a84b-3335b3dccc71/Sozio_Ream_March13-reprint.pdf [https://perma.cc/EA94-XQB3].

83. Fraud Enforcement and Recovery Act of 2009.

84. Helmer, *supra* note 34, at 1279.

85. Andrews, *supra* note 56, at 1291.

86. 31 U.S.C. § 3730(b)(2).

87. *Id.*

request, beyond the initial 60-day period, so the DOJ can continue its investigation.[88] The extensions are typically granted, and most FCA complaints are under seal for an average of 13 months.[89]

During the investigation, the Attorney General may delegate the power to issue Civil Investigative Demands ("CIDs") to the Assistant Attorney General for the Civil Division.[90] CIDs include the power to demand production of documents, oral testimony, and answers to interrogatories.[91] In addition to CIDs, the FERA amendments give the DOJ freedom to share information obtained through the CIDs with the relator who initially filed suit.[92] This allows the relator to benefit from months, or even years, of investigations and then supplement his or her original complaint with information gathered through investigations, interviews, subpoenas, and discussions with defense counsel.[93] Once the relator adds this information to the complaint, courts evaluate the *qui tam* complaint under the strictures of Rules 8(a) and 9(b).[94]

## II. PLEADING REQUIREMENTS: RULE 8(A) AND RULE 9(B)

All civil actions filed in federal courts are subject to the pleading requirements of Rule 8(a) of the Federal Rules of Civil Procedure.[95] Actions that are based in fraud are also required to meet the pleading requirements of Rule 9(b) of the Federal Rules of Civil Procedure.[96] Thus, *qui tam* actions under the FCA are subject to both Rule 8(a) and Rule 9(b).

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88. *Id.* § 3730(b)(3).

89. *See* Gregory J. Brod, *Qui Tam Cases Remain Under Seal for Years*, HEALTHCARE FRAUD LAW. BLOG (2017), https://www.healthcare-fraud-lawyer.com/qui-tam-cases-remain-seal-years/ [https://perma.cc/G7NW-9WZG].

90. Sozio & Ream, *supra* note 82.

91. *See* 31 U.S.C. § 3733; *see also* Lockman, *supra* note 52, at 1584, 1586:

> CIDs are a type of nonreciprocal, one-sided discovery that can continue for years and can cost FCA targets millions in CID compliance costs. . . . [W]hile the DOJ may investigate and obtain expansive access to an FCA defendant, the defendant has no reciprocal ability to respond with its own discovery requests.

92. Sozio & Ream, *supra* note 82.

93. *See* Lockman, *supra* note 52, at 1565.

94. *See* United States *ex rel.* Grubbs v. Kanneganti, 565 F.3d 180, 185–86 (5th Cir. 2009) ("Rule 9(b) supplements but does not supplant Rule 8(a)'s notice pleading.").

95. *Infra* Section II.A.

96. *Infra* Section II.B.

*A. Rule 8(a)*

Under Rule 8(a), a plaintiff must state his or her claims in short and plain statements showing that he or she is entitled to relief.[97] This style of pleading is referred to as "notice pleading."[98] The idea behind notice pleading is not to keep litigants out of court, but rather to keep them in court.[99] Rule 8(a) abandoned the rigid regime of code pleading that required plaintiffs to plead the facts of their case in detail using only a predetermined set of form allegations.[100] Prior to the Supreme Court's decision in *Twombly*, the Court evaluated Rule 8(a) under the "no set of facts" standard set forth in *Conley v. Gibson*.[101] Under this standard, claims were not to be dismissed pre-discovery "unless it appear[ed] beyond doubt that the plaintiff c[ould] prove no set of facts in support of his claim which would entitle him to relief."[102] The Court reasoned that defendants would be able to apprise themselves of the nature of plaintiffs' claims from the complaint, and then both parties could determine specific facts of the case through liberal opportunity for discovery.[103]

In 2007, the Supreme Court decided *Twombly*, effectively overruling the *Conley* standard that had been in effect for 50 years.[104] In *Twombly*, the Court held that a complaint must contain sufficient factual matter that, if the facts are accepted as true, the complaint "state[s] a claim to relief that is plausible on its face."[105] The plaintiffs in *Twombly* alleged antitrust violations.[106] In considering the high costs of antitrust discovery, the Court stated that complying with discovery created a significant cost to defendants and, therefore, a significant incentive for them to settle otherwise meritless claims in order to avoid that cost.[107] The Court

97. FED. R. CIV. P. 8(a).

98. Notice pleading is a procedural system that requires the pleader to give only a short and plain statement of the claim showing that the pleader is entitled to relief, and not a complete detailing of all facts. *Notice Pleading*, BLACK'S LAW DICTIONARY (11th ed. 2019).

99. *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 575 (2007) (Stevens, J., dissenting).

100. *See* William M. Richman et al., *The Pleading of Fraud: Rhymes Without Reason*, 60 S. CAL. L. REV. 959, 970–71 (1987).

101. Conley v. Gibson, 355 U.S. 41 (1957), *abrogated by Twombly*, 550 U.S. 544.

102. *Id.* at 45–46.

103. *Id.* at 46–48.

104. *Twombly*, 550 U.S. 544.

105. *Id.* at 545.

106. *Id.* at 548.

107. *Id.* at 559.

concluded that trial judges must use motions to dismiss to prevent discovery abuse by dismissing complaints that allege only possible liability, but not plausible liability.[108]

Two years after *Twombly*, the Court decided *Ashcroft v. Iqbal*, a case involving U.S. government discrimination against Arab Muslims.[109] Citing *Twombly*, the Court held that the plaintiff's complaint was insufficient.[110] Additionally, the Court held that *Twombly*'s plausibility standard extends to all federal civil claims.[111] As a result, all civil actions, including FCA complaints, must comply with Rule 8(a)'s plausibility requirement.[112] Accordingly, courts must ignore anything they perceive as a legal conclusion in the complaint and then analyze the remaining allegations to determine whether the complaint states a plausible claim for relief.[113] If the plaintiff's complaint fails to allege a plausible claim for relief, then the court will dismiss the complaint for failure to state a claim.[114]

*B. Rule 9(b)*

In addition to Rule 8(a)'s plausibility requirements, complaints alleging fraud are subject to the heightened particularity standard of Rule 9(b).[115] Rule 9(b) requires that all complaints alleging fraud state with particularity the circumstances constituting fraud.[116] Courts are aware that mere allegations of fraud can do harm and "bite defendants without apology";[117] therefore, claims for fraud must include facts as to the time, place, and substance of the alleged fraud.[118] The application of Rule 9(b) seeks to serve four main purposes: (1) to provide fair notice to allow the defendant to prepare a defense; (2) to deter frivolous or strike suits; (3) to prevent fishing expeditions where all wrongful conduct is learned in

108. *Id.* at 570.
109. Ashcroft v. Iqbal, 556 U.S. 662 (2009).
110. *Id.* at 680.
111. *Id.* at 684.
112. *Id*.
113. *Id.* at 678–83.
114. *See generally* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).
115. FED. R. CIV. P. 9(b).
116. *Id.*
117. United States *ex rel*. Grubbs v. Kanneganti, 565 F.3d 180, 190 (5th Cir. 2009).
118. *Id.* at 185–186; *see also* Andrews, *supra* note 56, at 1293.

discovery; and (4) to prevent harm to the goodwill and reputation of the defendant.[119]

Because fraud is historically a disfavored action,[120] pleadings alleging fraud require greater particularity.[121] A complaint that fails to comply with Rule 9(b) is subject to dismissal, typically without prejudice, which enables the plaintiff to amend the complaint to attempt to supply the missing information.[122] In addition, because fraud covers a potentially wide range of conduct, Rule 9(b) ensures that the defendant has enough particular information to respond.[123] Rule 9(b) also prohibits plaintiffs from using discovery to ascertain whether fraud exists or "unilaterally imposing upon the court, the parties, and society enormous social and economic costs absent some factual basis."[124] In general, the rule requires that the plaintiff explain who was involved, where and when the fraud took place, and the nature of the fraud in their complaint.[125]

The second sentence of Rule 9(b) exempts allegations relating to a defendant's knowledge or intent from the heightened pleading requirements when alleging fraud or mistake.[126] This sentence complements the language of the FCA, where no specific intent to defraud is required.[127] In writing for the majority in *Iqbal*, Justice Kennedy stated that the second sentence of Rule 9(b) should be read to mean that allegations of malice, intent, knowledge, and other conditions of the mind must be plead consistently with the plausibility pleading standard of Rule

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119. *Grubbs*, 565 F.3d at 190.

120. Jeff Sovern, *Reconsidering Federal Civil Rule 9(b): Do We Need Particularized Pleading Requirements in Fraud Cases?*, 104 F.R.D. 143, 144–45 (1985).

121. *Id*.

122. *See* Bly-Magee v. California, 236 F.3d 1014, 1019 (9th Cir. 2001) (citing *In re* Stac Elecs. Sec. Litig., 89 F.3d 1399, 1405 (9th Cir. 1996)).

123. CHARLES A. WRIGHT & ARTHUR A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1296 (West 3d ed. 2004).

124. *Bly-Magee*, 236 F.3d at 1018.

125. *See generally* United States *ex rel.* Doe v. Dow Chemical Co., 343 F.3d 325 (5th Cir. 2003) (stating that the complaint must set forth the "time, place and contents of the false representations, as well as the identity of the person making the misrepresentation and what [that person] obtained thereby"); *see also* United States *ex rel.* Costner v. United States, 317 F.3d 883, 888 (8th Cir. 2003) (stating that the complaint must identify the "who, what, where, when, and how" of the alleged fraud).

126. FED. R. CIV. P. 9(b) ("Malice, intent, knowledge and other conditions of the mind may be averred generally.").

127. *See generally* 31 U.S.C. § 3729(b)(1)(B).

8(a).[128] Justice Kennedy declared that in pleading knowledge under Rule 9(b), one must apply the "still-operative strictures of Rule 8."[129] The strictures of Rule 8 require well-pleaded factual allegations that show plausible entitlement to relief.[130] Accordingly, complaints filed under the FCA must meet both Rule 8(a) and Rule 9(b)'s requirements.

## III. CIRCUIT SPLIT: THE CLAIM OR THE SCHEME?

Federal courts are divided on the correct application of the Federal Rules of Civil Procedure to relators' claims under the FCA.[131] This circuit split stems in large part from the failure to apply the correct pleading standard to the correct element of a relator's claim.[132] Courts that have adopted a strict standard—one that requires that a relator allege a specific false claim for payment in the pleading—have correctly focused on what creates liability under the Act.[133] However, a relator must still plead details of a defendant's fraudulent scheme to satisfy the "conditions of the mind" clause of Rule 9(b). As Justice Kennedy stated in *Iqbal*, this clause essentially requires plausibility.[134]

The First, Fourth, Sixth, Eighth, and Eleventh circuits have all held that a relator must plead a representative sample of the defendant's fraud to satisfy the strictures of Rule 9(b).[135] Conversely, the Third, Fifth, Seventh, Ninth, and Tenth circuits have stated that a relator satisfies the particularity requirement so long as the relator pleads details of a defendant's fraudulent scheme paired with reliable indicia that lead to a reasonable inference that the relator actually submitted false claims.[136]

### *A. Strict Application*

Courts have consistently held that relators must plead with particularity under Rule 9(b) for FCA claims.[137] Certain circuits have

128. Ashcroft v. Iqbal, 556 U.S. 662, 686–87 (2009).
129. *Id.*
130. *Id.* at 678–79.
131. *Compare* United States *ex rel.* Grubbs v. Kanneganti, 565 F.3d 180 (5th Cir. 2009), *with* United States *ex rel.* Clausen v. Lab'y Corp. of Am., 290 F.3d 1301 (11th Cir. 2002).
132. *See generally* 31 U.S.C. § 3729.
133. *Id.*
134. *See generally Iqbal*, 556 U.S. 662.
135. *See infra* Section III.A.
136. *See infra* Section III.B.
137. *See, e.g.*, United States *ex rel.* Rost v. Pfizer, Inc., 507 F.3d 720 (1st Cir. 2007).

required a relator to identify in the complaint a specific false claim submitted to the government, which is referred to as the representative-sample approach.[138] One of the most notable cases of the representative-sample approach is *United States ex rel. Clausen v. Laboratory Corp. of America, Inc*.[139] In *Clausen*, the relator filed a complaint naming a competitor of the relator's employer as the defendant and alleging over a decade of fraudulent billing practices.[140] The court granted the relator leave to amend twice, and the relator eventually provided detailed information about conversations with employees, descriptions and codes for medical tests that represented the false claims, and patient histories for three patients.[141] Additionally, the relator identified the day the defendant rendered the service, a table of medical test codes, and descriptions of how the defendant would identify the testing.[142] The Eleventh Circuit ultimately dismissed the complaint, stating that "[i]f Rule 9(b) is to be adhered to, some indicia of reliability must be given in the complaint to support the allegation of an *actual false claim* for payment being made to the Government."[143] Focusing on the relator's status as a corporate outsider,[144] the court held that the relator's complaint demonstrated no indicia of reliability and therefore must fail since the relator did not plead any individual false claims.[145]

The First Circuit similarly held a relator to the strict particularity standard of Rule 9(b) in *United States ex rel. Karvelas v. Melrose-Wakefield Hospital*.[146] In *Karvelas*, the relator made detailed allegations about numerous fraudulent schemes the defendants committed against the government, described the billing of 12 respiratory therapists when the hospital only employed 7, alleged that the hospital did not use appropriate testing machinery, and alleged that the defendants filed improper

138. *See* United States v. St Luke's Hosp., Inc., 441 F.3d 552, 557 (8th Cir. 2006).

139. United States *ex rel.* Clausen v. Lab'y Corp. of Am., 290 F.3d 1301 (11th Cir. 2002).

140. *Id.* at 1303.

141. *Id.* at 1315.

142. *Id.* at 1306.

143. *Id.* at 1311 (emphasis added).

144. The term "corporate outsider" as used in FCA cases simply implies that the relator is not privy to the defendant's billing practices or accounting information. *See infra* Section IV.C.

145. *Clausen*, 290 F.3d at 1315.

146. United States *ex rel.* Karvelas v. Melrose-Wakefield Hosp., 360 F.3d 220 (1st Cir. 2004).

claims.[147] The district court dismissed the relator's complaint due to the relator's failure to identify a specific invoice, bill, or claim for payment, and the First Circuit affirmed.[148] Notably, the First Circuit stated that though the relator had alleged 16 fraudulent schemes in the 93-page complaint, the relator's claim failed to plead with particularity because it failed to identify the defendants' presentation of a specific false or fraudulent claim to the government.[149]

The Sixth Circuit followed the Eleventh Circuit's representative-sample approach from *Clausen* in deciding *United States ex rel. Bledsoe v. Community Health System*.[150] In *Bledsoe*, the court held that to comply with Rule 9(b), an FCA complaint must identify with particularity one or more specific false claims rather than a scheme for submitting false claims.[151] The Fourth Circuit also requires representative samples when "a defendant's actions, as alleged and as reasonably inferred from the allegations, could have led, but need not necessarily have led, to the submission of false claims."[152] For example, in *United States ex rel. Nathan v. Takeda Pharmaceuticals North America, Inc.*, a relator alleged that a doctor wrote almost 100 prescriptions for the drug in question yet failed to allege that the prescriptions were written for off-label uses.[153] The relator also failed to allege that patients ever filled the prescriptions.[154] The court declined to relax the Rule 9(b) particularity standard, determining that the allegations were not pled with particularity because the relator did not identify any claims that would trigger liability under the FCA.[155]

Perhaps the most inconsistent circuit for FCA claims is the Eighth Circuit.[156] In *United States ex rel. Joshi v. St. Luke's Hosp., Inc.*, the relator was an anesthesiologist who worked for the defendant hospital for seven years.[157] The relator alleged that the defendant received reimbursements

147. *Id.* at 234.
148. *Id.*
149. *Id.* at 241.
150. United States *ex rel.* Bledsoe v. Cmty. Health Sys., Inc., 501 F.3d 492 (6th Cir. 2007).
151. *See id.* at 510.
152. United States *ex rel.* Nathan v. Takeda Pharm. N. Am., Inc., 707 F.3d 451 (4th Cir. 2013).
153. *Id*. at 459–60.
154. *Id*.
155. *See id*.
156. *See* United States *ex rel.* Joshi v. St. Luke's Hosp., Inc., 441 F.3d 552 (8th Cir. 2006); *see also* United States *ex rel.* Thayer v. Planned Parenthood of the Heartland, 765 F.3d 914 (8th Cir. 2014).
157. *Joshi*, 441 F.3d 552.

from Medicare for services a doctor performed when a doctor did not perform the services.[158] In an amended complaint, the relator included a table identifying the anesthesia services provided, the time, the surgeon, the patient's initials, the CRNA who provided the services, and a table listing medications issued to patients and improperly billed in 1995.[159] Despite the descriptions of specific instances of false billing in the relator's complaint, the Eighth Circuit dismissed the complaint for failure to plead with sufficient particularity.[160] While at first glance it appeared that the relator satisfied the "who, what, when, and where" requirements of fraud, the relator failed to plead with particularity because the complaint did not identify a specific claim for payment.[161]

In a more recent Eighth Circuit case, the relators in *United States ex rel. Strubbe v. Crawford County Memorial Hospital* alleged that the hospital violated the FCA by submitting, among other things, false claims for breathing treatments, false claims documenting those breathing treatments, and reimbursement requests for improper payments for expenses.[162] The court acknowledged that the relator pled details of a fraudulent scheme yet held that the complaint failed to allege representative examples of the required specificity.[163] The court noted that the complaint contained an example of a patient who received an unnecessary breathing treatment, but the complaint failed to include the date, the provider performing the treatment, any specific information about the patient, and most importantly, whether a claim was actually submitted for that particular patient.[164]

The Eighth Circuit's strict application in both *Joshi* and *Strubbe* is inconsistent with its decision in *United States ex rel. Thayer v. Planned Parenthood of the Heartland*.[165] The relator in *Thayer* brought a *qui tam* action against Planned Parenthood of the Heartland, alleging that Planned Parenthood submitted false or fraudulent claims for Medicare reimbursement.[166] Specifically, the relator alleged that Planned

158. *Id.* at 553.
159. *Id.* at 555.
160. *Id.* at 556.
161. *See id.* (quoting United States *ex rel.* Costner v. URS Consultants, Inc., 317 F.3d 883, 888 (8th Cir. 2001)).
162. United States *ex rel.* Strubbe v. Crawford Cnty. Mem'l Hosp., 915 F.3d 1158, 1162 (8th Cir. 2019).
163. *Id.* at 1164.
164. *Id*.
165. United States *ex rel.* Thayer v. Planned Parenthood of the Heartland, 765 F.3d 914 (8th Cir. 2014).
166. *Id.* at 915.

Parenthood filed claims for unnecessary quantities of birth control pills, sought reimbursement for abortion-related services, filed claims for the full amount of services that had already been paid in whole or in part by donations, and filed claims for more expensive services than were actually performed.[167] Missing from the relator's complaint was a specific, representative sample of the defendant's fraudulent practices.[168] However, because the relator was the center manager of a Planned Parenthood clinic who had access to the defendant's billing and claims systems, the Eighth Circuit reasoned that a relator could satisfy Rule 9(b) by providing details of a fraudulent scheme paired with reliable indicia that lead to a strong inference that false claims were submitted.[169]

A strict application of Rule 9(b) does not thwart the purpose of the FCA.[170] In fact, requiring a relator to identify a specific claim for payment is more effective than allowing a relator to proceed to discovery without alleging anything that would create liability under the Act, since there can be no liability without a claim for payment submitted.[171] Courts favoring the representative-sample approach have correctly identified the critical, liability-creating element on which FCA claims turn: that the defendant submitted a specific claim for payment to the government.[172] However, the submission of a claim, in and of itself, is not sufficient for an FCA violation.[173] Additionally, these circuits have not always been consistent with the requirement of a representative sample of a false claim, as evidenced in *Thayer*.[174]

Proponents of the relaxed Rule 9(b) standard argue that alleging details of the scheme paired with reliable indicia will ensure that relators

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167. *Id.* at 915–16.

168. *Id.* at 917.

169. *Id.*

170. *See infra* Section IV.A.

171. *See generally* 31 U.S.C. § 3729.

172. *See* United States *ex rel.* Clausen v. Lab'y Corp. of Am., 290 F.3d 1301 (11th Cir. 2002); United States *ex rel.* Karvelas v. Melrose-Wakefield Hosp., 360 F.3d 220 (1st Cir. 2004); United States *ex rel.* Bledsoe v. Cmty. Health Sys., Inc., 501 F.3d 492 (6th Cir. 2007); United States *ex rel.* Nathan v. Takeda Pharm. N. Am., Inc., 707 F.3d 451 (4th Cir. 2013); United States *ex rel.* Strubbe v. Crawford Cnty. Mem'l Hosp., 915 F.3d 1158 (8th Cir. 2019).

173. *See* 31 U.S.C. § 3729(a)(1)(A) ("knowingly presents, or causes to be submitted, a false or fraudulent claim for payment or approval").

174. *See generally Thayer*, 765 F.3d 914 (placing an emphasis on the relator's status as a regional manager for the defendant's company increasing the reliability of the complaint, rather than requiring the relator to identify a specific false claim).

can recover against the defendants.[175] However, the purpose of the *qui tam* provision is to allow the government to enlist the assistance of private individuals to prosecute fraud against the government, leading to the recovery of money that the defendant essentially stole from the government.[176] For this to happen, a relator's complaint, incorporating information from the government's use of CIDs, must identify a specific claim for payment.[177] The representative-sample approach has gotten one part of the analysis right: requiring a relator to identify a specific claim for payment. Circuits opting in favor of a lenient Rule 9(b) standard have done so incorrectly by allowing details of a fraudulent scheme to satisfy Rule 9(b)'s particularity requirements.[178]

### *B. Lenient Approach*

Courts opting for a more lenient standard when applying Rule 9(b) have held that a complaint satisfies Rule 9(b) when it includes particular details of a defendant's fraudulent scheme paired with reliable indicia that lead to a strong inference that the defendant actually submitted false claims.[179] These circuits do not emphasize a specific claim for payment, but rather focus on the underlying scheme.[180] While the scheme is a necessary element to prove a defendant's knowledge of the claim's falsity, details of a fraudulent scheme paired with reliable indicia cannot satisfy the Rule 9(b) particularity standard for FCA violations when there is no specific claim for payment identified.[181]

The Fifth Circuit in *United States ex rel. Grubbs v. Kanneganti* held that a relator satisfies Rule 9(b) by alleging particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that false claims were actually submitted.[182] The relator in

175. *See generally* United States *ex rel.* Grubbs v. Kanneganti, 565 F.3d 180 (5th Cir. 2009).

176. *See* 31 U.S.C. § 3729(a)(1)(A)–(G).

177. 31 U.S.C. § 3729(a)(1)(A) ("knowingly presents, or causes to be submitted, a false or fraudulent claim for payment or approval").

178. *See infra* Section V.A.

179. *See generally Grubbs*, 565 F.3d 180; United States *ex rel.* Lusby v. Rolls-Royce Corp., 570 F.3d 849 (7th Cir. 2009); United States *ex rel.* Lemmon v. Envirocare of Utah, Inc., 614 F.3d 1163 (10th Cir. 2010); Ebeid *ex rel.* United States v. Lungwitz, 616 F.3d 993 (9th Cir. 2010); Foglia v. Renal Ventures Mgmt., LLC, 754 F.3d 153 (3d Cir. 2014).

180. *See* cases cited *supra* note 179.

181. *See* 31 U.S.C. § 3729(a)(1)(A) ("knowingly present[ed], or cause[d] to be presented, a false or fraudulent claim for payment or approval").

182. *Grubbs*, 565 F.3d at 190.

*Grubbs* alleged that two doctors at the hospital where the relator was employed were involved in a fraudulent scheme and had instructed the relator to participate in the scheme.[183] The relator alleged several details of the fraudulent scheme in the complaint,[184] and the court reasoned that the particulars of fraudulent conduct are often harbored in the scheme, whether there is a specific claim pled or not.[185] The court analogized a "claim for payment" to a "hand in a cookie jar," indicating that the specific claim itself does not amount to fraud without details of a scheme to submit false claims.[186] Using this standard, the Fifth Circuit concluded that a complaint satisfied Rule 9(b) if it includes particular details of a fraudulent scheme paired with reliable indicia that lead to a strong inference the claims were submitted, even if the relator cannot allege details of a particular false claim.[187]

The Seventh Circuit has also rejected the argument that a complaint requires a representative sample of a false claim.[188] In *United States ex rel. Lusby v. Rolls-Royce Corporation*, the relator was an engineer for Rolls-Royce for nine years.[189] In the complaint, the relator alleged that Rolls-Royce was improperly making parts and falsely telling the United States that the engines conformed to the government's specifications.[190] The district court held that the relator needed to have "at least one of Rolls-Royce's billing packages" to meet the Rule 9(b) standard.[191] However, the Seventh Circuit reversed, finding the complaint sufficient because it alleged details of the fraudulent scheme, even though the relator did not have personal knowledge of the details of particular fraudulent claims.[192]

The Tenth Circuit has also rejected the representative-sample approach, holding in *United States ex rel. Lemmon v. Envirocare of Utah, Inc.* that a plaintiff is "not required to provide a factual basis for every

183. *Id.* at 184.

184. *See id.* The relator in *Grubbs* alleged that both defendants invited the relator to a dinner, where the defendants allegedly divulged to the relator their fraudulent billing scheme and instructed the relator on how to participate in the scheme.

185. *Id.* at 190.

186. *Id*.

187. *Id*.

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

189. *See id.* at 850.

190. *Id*.

191. *Id.* at 854.

192. *Id*.

allegation."[193] The relators in *Lemmon* were former employees of a government contractor who brought claims under the FCA, alleging that the contractor violated its contractual and regulatory obligations by improperly disposing of hazardous waste and falsely representing to the government that it fulfilled its obligations.[194] While the relators did not include examples of specific false claims in the complaint, the Tenth Circuit held that Rule 9(b) is satisfied as long as the relator provides details of the fraudulent scheme and an adequate basis for a reasonable inference that false claims were submitted.[195]

The Ninth Circuit in *Ebeid ex rel. United States v. Lungwitz* also applied the standard set forth in *Grubbs*.[196] The Ninth Circuit declined to adopt the district court's "categorical" approach, which would require a relator to submit representative samples of a false claim to support their allegations.[197] The language in *Ebeid* is identical to the language in *Grubbs*; the Ninth Circuit held that it is sufficient to allege particular details of a fraudulent scheme paired with reliable indicia that lead to a strong inference that claims were actually submitted to satisfy Rule 9(b).[198]

Lastly, the Third Circuit has also adopted the standard set forth in *Grubbs*.[199] In *United States ex rel. Foglia v. Renal Ventures Management, LLC*, a relator brought a *qui tam* action under the FCA against a dialysis-service care company, alleging the company submitted fraudulent claims for reimbursement for a prescription drug to Medicare.[200] The district court dismissed the claim, but the Third Circuit reversed, holding that a relator satisfies Rule 9(b)'s standards by alleging particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference the claims were actually submitted.[201]

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193. United States *ex rel.* Lemmon v. Envirocare of Utah, Inc., 614 F.3d 1163, 1173 (10th Cir. 2010). The 10th Circuit reasoned that the complaint must provide enough information to describe a fraudulent scheme to support a plausible inference that false claims were submitted.

194. *Id.* at 1166.

195. *Id.* at 1172.

196. Ebeid *ex rel.* United States *ex rel.* United States v. Lungwitz, 616 F.3d 993 (9th Cir. 2010).

197. *Id.* at 998.

198. *Id.* at 998–99. The Court in *Ebeid* quoted the Fifth Circuit's opinion in *Grubbs*, finding that particular details of a fraudulent scheme paired with reliable indicia that lead to a strong inference that false claims were actually submitted satisfy Rule 9(b).

199. *See* United States *ex rel.* Foglia v. Renal Ventures Mgmt., LLC, 754 F.3d 153 (3rd Cir. 2014).

200. *See id.* at 154.

201. *See id.* at 157–58.

What these cases all have in common is that the relator did not plead and was not required to identify a specific false claim that was submitted to the government.[202] Instead, the courts adopted a standard that satisfied Rule 9(b) without identifying any sort of claim that would create liability under the Act.[203] The courts reasoned that a jury could potentially find that the defendant submitted false claims to the government by analyzing the fraudulent scheme paired with reliable indicia.[204] However, this is not the standard under the FCA, which provides liability only for defendants shown to have submitted a specific false claim for payment.[205] By placing emphasis on details of a fraudulent scheme—which would fall under the third element, the defendant's knowledge of the falsity—these courts fail to identify the most important part of the FCA.[206]

## IV. PLEADING A SPECIFIC CLAIM WITH PARTICULARITY

The application of different pleading standards in different circuits highlights the importance of applying the correct pleading standard to each element of an FCA violation.[207] Failure to develop a uniform pleading requirement for *qui tam* actions has led to inconsistent results, even sometimes in the same circuit.[208] Additionally, courts placing emphasis on a defendant's fraudulent scheme have failed to emphasize the liability-creating element of an FCA claim: that a false claim was submitted to the government.[209] A uniform standard requiring a relator to identify a specific claim for payment will resolve these issues and correctly apply Rules 8(a) and 9(b) to the proper element of an FCA violation.[210] Admittedly, a strict representative-sample approach would be at odds with the Fifth Circuit, where the court stated that Rule 9(b)'s ultimate meaning is context-specific and that there is no single application of Rule 9(b) that applies in

202. *See generally* United States *ex rel.* Grubbs v. Kanneganti, 565 F.3d 180 (5th Cir. 2009); United States *ex rel.* Lusby v. Rolls-Royce Corp., 570 F.3d 849 (7th Cir. 2009); United States *ex rel.* Lemmon v. Envirocare of Utah, Inc., 614 F.3d 1163 (10th Cir. 2010); *Ebeid*, 616 F.3d 993; *Foglia*, 754 F.3d 153.

203. *See* 31 U.S.C. § 3729(a)(1)(A).

204. *Grubbs*, 565 F.3d at 189–90.

205. *Id.*

206. *See infra* Section V.B.

207. *See supra* Section III.A–B.

208. *Compare* United States *ex rel.* Joshi v. St. Luke's Hosp., Inc., 441 F.3d 552, 556 (8th Cir. 2006), *with* United States *ex rel.* Thayer v. Planned Parenthood of the Heartland, 765 F.3d 914 (8th Cir. 2014).

209. *See supra* Section III.B.

210. *See infra* Section V.D.

all contexts.[211] Regardless, the Supreme Court's announcement of a uniform standard across all circuits is necessary given the increasing amount of money budgeted to fund healthcare and military projects.[212]

*A. Relators Must Identify a Specific Claim for Payment*

The best way to satisfy the purposes of Rule 9(b) is to require identification of a specific claim for payment.[213] Requiring a particular claim for payment in the relator's complaint satisfies Rule 9(b)'s stated objectives of "ensuring the complaint provides defendants with fair notice of the plaintiffs' claims, protects defendants from harm to their reputation and goodwill, reduces the number of strike suits, and prevents plaintiffs from filing baseless claims then attempting to discover unknown wrongs."[214] Additionally, requiring a relator to plead a specific claim for payment is consistent with the statutory language of the Act.[215]

The FCA contains an express presentment provision,[216] which the Eleventh Circuit has described as the *sine qua non* of an FCA violation.[217] The relaxed circuits have erred in allowing details of a defendant's fraudulent scheme to satisfy the particularity requirements of Rule 9(b) in lieu of identifying a specific claim.[218] The defendant's fraudulent scheme may be sufficient to prove that the defendant had knowledge of the claim's falsity, which is the third element of a violation, but that sufficiency does not negate the requirement that there must be a claim submitted to the government to establish any form of liability.[219]

Relators pushing for a relaxed pleading standard cite numerous reasons for warranting a lower pleading requirement, and an oft-cited

211. United States *ex rel.* Grubbs v. Kanneganti, 565 F.3d 180, 188 (5th Cir. 2009) (citing Williams v. WMX Techs., Inc., 112 F.3d 175, 178 (5th Cir. 1997)).

212. *See* ADVISORY BOARD, *supra* note 1.

213. *See infra* Section IV.A.

214. *See Grubbs*, 565 F.3d at 190.

215. *See generally* 31 U.S.C. § 3729 (2018).

216. *See* § 3729(a)(1)(A) (2018); *see also* United States *ex rel.* Nathan v. Takeda Pharm. N.A., Inc., 707 F.3d 451 (4th Cir. 2013) ("In order for a defendant to be liable, the False Claims Act requires that a claim must have actually been submitted to the Federal Government for payment.").

217. *See* Hopper v. Solvay Pharm., Inc., 588 F.3d 1318, 1328 (11th Cir. 2009) (quoting United States *ex rel.* Clausen v. Lab'y Corp. of Am., Inc., 290 F.3d 1301, 1311 (11th Cir. 2002)).

218. *See generally Grubbs*, 565 F.3d 180.

219. *See generally* § 3729.

reason is informational asymmetries[220] between the defendant and relator.[221] However, with the 2009 FERA Amendments, this issue is not as prevalent as it once was.[222]

*B. CIDs Eliminate Informational Asymmetries*

The government's use of CIDs combined with a broadened power to share this information with relators makes any argument citing informational asymmetries questionable.[223] It is true that when a relator initially files a complaint under seal, they may not have access to any specific claims for payment submitted to the government.[224] However, once the government takes over the investigation, the relator's complaint is merely used to point the DOJ in the right direction.[225] The DOJ can then use the information it discovers through CIDs or pre-election investigation and choose to intervene or allow the relator to continue in the action alone.[226] If the latter situation occurs, the DOJ can share with the relator any and all information it uncovers, and the relator can supplement the initial complaint filed under seal to include this information to meet the particularity requirements of Rule 9(b).[227] There are courts that have relaxed the 9(b) standards whenever the information is expressly in the defendant's control,[228] but this does not warrant lowering the pleading requirements. With the government's expanded use of CIDs and the fact that this information can be relayed to the relator even if the government does not intervene, informational asymmetries—if they exist at all—are no longer a significant issue.

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220. When a relator or court discusses informational asymmetries in the context of an FCA violation, this refers to the fact that a relator does not have access to the information that should be in the complaint.

221. *See* Jetson Leder-Luis, *Whistleblowers, Private Enforcement, and Medicare Fraud*, https://economics.mit.edu/files/18187 [https://perma.cc/3CMQ-3CZG] (last visited Jan. 8, 2021).

222. *See generally* Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1617 (2009); *see also* 31 U.S.C. § 3729.

223. *See generally* Colin T. Reardon, *Pleading in the Information Age*, 85 N.Y.U. L. REV. 2170 (2010).

224. *See generally id.* at 2203.

225. *See* Lockman, *supra* note 52, at 1601 ("rather than casting his own nets, he entrusts the fishing to a third party, and a master angler indeed: the DOJ").

226. *See generally* 31 U.S.C. § 3733.

227. *See generally* Fraud Enforcement and Recovery Act of 2009.

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

*C. Improper Focus on Status of the Relator*

Some courts have also considered the status of the relator, particularly whether the relator has access to the defendant's billing practices, as proof that the relator has knowledge that claims were submitted to the government.[229] Arguments in favor of using the status of the relator as one of many factors are sufficient; but giving a relator's complaint more weight based solely on the relator's position in the company, in the absence of a specific claim for payment pled, is improper.[230] In practice, courts using the relator's status—whether a corporate insider or regular employee—have improperly considered the relator's job status.[231] In *Thayer*, the Eighth Circuit held that a relator had personal, firsthand knowledge of the submission of false claims, though lacking representative samples, because the relator oversaw Planned Parenthood's billing and claims system.[232] In contrast, the Eighth Circuit recognized that the relator in *Joshi* was an anesthesiologist who had no connection to the hospital's billing department or records.[233]

The difference in the status of the relators in *Thayer* and *Joshi*, respectively, was ultimately the difference in satisfying the pleading requirements in each case.[234] The Eighth Circuit's consideration of the relator's status as a corporate insider pushed an otherwise insufficient complaint to the level of sufficient in *Thayer*.[235] However, this approach is improper, as it does not consider the use of the government's investigation or the uniqueness of the FCA itself.[236] Simply because a relator has work history in the defendant's billing department does not

229. *See generally* United States *ex rel.* Thayer v. Planned Parenthood of the Heartland, 765 F.3d 914 (8th Cir. 2014).

230. *See generally* 31 U.S.C. § 3729.

231. *See generally Thayer*, 765 F.3d 914.

232. *Id.* at 917 (discussing United States *ex rel.* Joshi v. St. Luke's Hosp., Inc., 441 F.3d 552, 557 (8th Cir. 2006)).

233. *Id.*

234. *See Joshi*, 441 F.3d at 556 ("[Relator] failed to allege with any specificity the particular circumstances constituting . . . alleged fraudulent conduct"); *but see Thayer*, 765 F.3d 914, 917 ("[Relator] was able to plead personal, first-hand knowledge of Planned Parenthood's submission of false claims. In these circumstances, we find persuasive the approach of those circuits that have concluded that a relator can satisfy Rule 9(b) by 'alleging particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted.'").

235. *Thayer*, 765 F.3d at 919.

236. *See generally* 31 U.S.C. §§ 3729–3733.

automatically result in an inference that false claims were submitted.[237] To be sure, the court in *Joshi* stated that "an insider might have an easier time obtaining information about billing practices and meeting the pleading requirements under the [FCA], [but] neither the Federal Rules nor the FCA offer . . . leniency under these particular circumstances."[238] Accordingly, courts must still apply Rule 9(b) to the first two elements, identifying a claim for payment and that the claim was false, and then require the relator to plead enough facts that make the defendant's knowledge of the falsity plausible.[239] Lowering the particularity standard depending on the relator's job description goes against the purpose of the statute.[240]

*D. DOJ Favors Heightened Particularity*

Proponents of lowering pleading requirements for claims under the FCA fail to consider that the DOJ expressly rejected an amendment in 2007 that would have exempted *qui tam* complaints from Rule 9(b)'s heightened pleading standard altogether.[241] The House of Representatives proposed a legislative amendment in 2007 that included a serious relaxation of pleading requirements under the FCA.[242] The proposed legislation can be read as fundamentally altering the application of Rule 9(b) to FCA claims.[243] Under the amendment, a relator would sufficiently

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237. *See generally Joshi*, 441 F.3d 560.

238. *Id.* The court described "these circumstances" as when the relator failed to allege the defendant's fraudulent conduct with the required specificity.

239. *See generally* 31 U.S.C. § 3729.

240. *Id.*

241. *See* Lockman, *supra* note 52, at 1578; *see also* Letter from Keith B. Nelson, Principal Deputy Assistant Attorney General, to the Honorable John Conyers Jr., Chairman of the Committee on the Judiciary, US House of Representatives (July 15, 2008), *in* U.S. DEP'T OF JUSTICE, *Archives*, https://www.justice.gov/archive/ola/views-letters/110-2/07-15-08-hr4854-false-claims-act-correc tion-act.pdf [http://perma.cc/U6HZ-W66E].

242. *See* False Claims Correction Act of 2007, H.R. Res. 4854, 110th Cong. § 4(e) (2007):

> In pleading an action brought under section 3730(b), a person shall not be required to identify specific claims that result from an alleged course of misconduct if the facts alleged in the complaint, if ultimately proven true, would provide a reasonable indication that one or more violations of section 3729 are likely to have occurred, and if the allegations in the pleading provide adequate notice of the specific nature of the alleged misconduct to permit the Government effectively to investigate and defendants fairly to defend the allegations made.

243. *See id.*

plead a *qui tam* action so long as the allegations provided notice to the defendant of the nature of the misconduct, without requiring the relator to indicate that a specific claim for payment was submitted.[244] In a 2008 memo, the Deputy Attorney General, Keith Nelson, expressed the DOJ's concerns with the proposed amendment.[245] Deputy Attorney General Keith Nelson noted that the proposed amendment would increase overall costs associated with government contracting by federal agencies, including increased discovery and litigation costs with unmeritorious *qui tam* litigation.[246] Moreover, the proposed amendment would appear to permit a relator to claim a share of non-fraud recovery, which is contrary to the purpose of the FCA's reward system.[247]

The DOJ ultimately expressed that the FCA has "worked well" in its present form and determined that there was no need for major amendments.[248] *Qui tam* actions that fail to allege fraud with adequate particularity can waste the government's resources; therefore, the DOJ opposed this attempt to exempt *qui tam* actions from the requirements of Rule 9(b).[249] The DOJ's opposition to lowering or exempting *qui tam* actions from Rule 9(b) highlights even further that a standard requiring a specific claim for payment is warranted. The DOJ sees the FCA as an essential tool to combat fraud against the government, yet this tool should not be used as a method of bringing unmeritorious claims to mine discovery or share in the profits as a relator. Considering that liability derives from a claim for payment, that informational asymmetries are essentially nonexistent, and that the DOJ strongly opposes lowering pleading requirements, the lenient approach is flawed.

## V. PLAUSIBLY PLEADING THE DEFENDANT'S SCHEME

Congress wrote the FCA to expressly require knowledge of "information" regarding a false claim.[250] This requirement is necessary to carry out Congress's clear intent that the FCA—a "quasi-criminal"

244. *See id.*
245. *See* Letter from Keith B. Nelson, *supra* note 241.
246. *See id.*
247. The purpose of the FCA's reward system, which provides relators with a percentage of the amount recovered in court, is to promote the Government's ability to recover losses due to fraud and to give private citizens the incentive to inform the Government of difficult-to-detect fraud. *See* 31 U.S.C. § 3730(d).
248. *See id.*
249. *See id.*
250. *See* 31 U.S.C. § 3729(b).

statute[251] that imposes "essentially punitive" remedies—not be used as a vehicle for either punishing honest mistakes or incorrect claims submitted through mere negligence.[252]

*A. "Information" Means Specific Claim, Not Fraudulent Scheme*

While no specific intent to defraud is required to violate the Act, the Act defines "knowledge" as: (1) "actual knowledge," (2) "deliberate ignorance of the truth or falsity of the information," or (3) "reckless disregard of the truth or falsity of the information."[253] The information referred to in the statute, when interpreting what creates liability under the Act, must be a specific claim for payment.[254] Thus, the knowledge element may only be satisfied when a defendant has knowledge of a claim submitted to the government, not just an underlying scheme.[255] This does not mean that details of the defendant's fraudulent scheme need not be pled; however, these details alone do not satisfy the particularity requirements of Rule 9(b) and should be evaluated in accordance with the plausibility standard of Rule 8(a) based on Justice Kennedy's opinion in *Iqbal*.[256]

*B. Conditions of the Mind and Defendant's Knowledge of the Scheme*

The second sentence of Rule 9(b) states that conditions of the mind can be averred generally.[257] In *Iqbal*, the Court stated that the word "generally" in Rule 9(b) is a relative term, requiring comparison to the particularity requirement when pleading fraud or mistake.[258] The Rule merely excuses a party from pleading discriminatory intent under an elevated pleading standard and does not give the party license to evade the less rigid—though still operative—strictures of Rule 8(a).[259] Accordingly, Rule 8(a) does not empower a party to plead bare elements of a cause of

251. United States *ex rel.* Atkins v. McInteer, 470 F.3d 1350, 1360 (11th Cir. 2006).
252. *See* United States v. Sci. Applications Int'l Corp., 626 F.3d 1257, 1274 (D.C. Cir. 2010) (quoting S. Rep. No. 99-3345, at 6, 19 (1986)).
253. § 3729(b)(1).
254. *See generally* § 3729.
255. *Id.*
256. Ashcroft v. Iqbal, 556 U.S. 662, 686–87 (2009).
257. FED. R. CIV. P. 9(b).
258. *Iqbal*, 556 U.S. at 686.
259. *Id.* at 686–87.

action and survive a motion to dismiss.[260] With the language of *Iqbal* in mind, the intent requirement under the FCA must be held to a different standard than the first two elements of a violation. The first two elements, that a claim was made and that the claim was false, must satisfy Rule 9(b)'s particularity standard by identifying a specific claim for payment submitted to the government.[261] Element three, the defendant's knowledge of the claim's falsity, need only meet the plausibility requirements of Rule 8(a).[262] Courts opting for the lenient approach, which only requires details of a fraudulent scheme paired with reliable indicia, have failed to draw this distinction.[263] Specifically, in *Grubbs*, the Fifth Circuit noted that raw bills—even with numbers, dates, and amounts—are not fraud without an underlying scheme to submit the bills for unperformed or unnecessary work.[264] The court then noted that it is the scheme in which particular circumstances constituting fraud may be found that make it highly likely the fraud was consummated through presentment of false bills.[265]

The *Grubbs* analysis is troublesome for two reasons. First, the fraudulent scheme is analogous to the intent element of an FCA violation.[266] The defendant must possess knowledge that an underlying scheme exists and that the scheme itself is fraudulent. As noted in *Iqbal*, however, knowledge and conditions of the mind are held to a different pleading standard than Rule 9(b)'s particularity standard.[267] This means that the defendant's knowledge of a fraudulent scheme must meet the plausibility standard of Rule 8(a),[268] and this knowledge alone cannot constitute an FCA violation in the absence of identifying a specific claim.

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260. *See id.*

261. *Id.* at 687 ("Rule 8 does not empower respondent to plead the bare elements of [the] cause of action, affix the label 'general allegation,' and expect [the] complaint to survive a motion to dismiss."). The distinctions between Rule 8(a)'s and Rule 9(b)'s pleading requirements are critical in FCA claims. Allowing a relator to proceed to discovery without identifying a specific claim for payment contradicts the plain language of the FCA.

262. *See generally id.* at 686–87. When discussing Rule 9(b), the Court reasoned that Rule 9(b)'s "generally" requirement does not authorize a plaintiff to avoid the strictures of Rule 8(a).

263. *See generally* United States *ex rel.* Grubbs v. Kanneganti, 565 F.3d 180 (5th Cir. 2009).

264. *Id.* at 190.

265. *Id.*

266. *See generally* 31 U.S.C. § 3729(b)(1). The Act explicitly states that no specific intent to defraud is required.

267. *See generally* Ashcroft v. Iqbal, 556 U.S. 662 (2009).

268. *Id.*

Second, once the relator pleads sufficient facts to make it plausible that the defendant engaged in a fraudulent scheme, there are still two other elements of an FCA violation that must be satisfied for liability to attach.[269] The allegations that a claim was submitted to the government and that the claim was false are evaluated under the particularity requirement of Rule 9(b).[270] Allowing a relator's pleading to allege details of a fraudulent scheme and then using those details to satisfy the heightened particularity requirement of Rule 9(b) undermines any force that Rule 9(b) carries in the first place. Pleading details of a fraudulent scheme is a fundamental part of an FCA violation, but pleading these details without any specific claim for payment submitted to the government does not amount to a violation under the Act.[271] The knowledge requirement of the statute also requires a defendant to have knowledge of the "information."[272] Pleading details of a defendant's fraudulent scheme is insufficient to satisfy this requirement without any specific claim presented to the government.[273] As mentioned above, the Act imposes liability on a specific claim for payment submitted.[274] It follows that the "information" referred to in the statute requires the defendant to have knowledge of a specific claim for payment submitted, not only a fraudulent scheme.[275]

Not only does relying solely on a defendant's fraudulent scheme fail to satisfy Rule 9(b)'s particularity requirements, but it also creates additional problems. In *Twombly*, the Court noted that at the pleading stage, in the context of an antitrust conspiracy, a plaintiff must plausibly suggest an agreement between the defendants.[276] In making a determination of whether the allegations were plausible, the Court was unwilling to infer that a conspiracy occurred simply because allegations were consistent with that behavior.[277] The Court stated that there was an obvious alternative explanation for the defendants' conduct and refused to infer that the complaint stated a plausible claim for relief.[278] This reasoning rings true in the context of FCA violations as well.[279]

269. *See* Mitchell, *supra* note 47, at 367.
270. *See* 31 U.S.C. § 3729(a)(1)(A)–(B).
271. *See generally id.* § 3729.
272. *Id.* § 3729(b)(1).
273. *See generally id*. § 3729.
274. *Id*.
275. *Id.*; *see also id.* §§ 3730–3733.
276. *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 545 (2007).
277. *Id.* at 554.
278. *Id*. at 568.
279. *See infra* Section V.C.

*C. Reasonable Alternative Explanation*

The Fifth Circuit wrestled with precisely this issue in *United States ex rel. Integra Med Analytics, LLC v. Baylor Scott & White Health*.[280] Here, the court dismissed a relator's FCA claims that used statistical data to establish a fraudulent scheme against the defendant, stating that although the defendant's practices were consistent with the submission of "fraudulent Medicare reimbursement claims to the government," they were also consistent with the defendant simply "being ahead of most [other] healthcare providers in following new guidelines from CMS."[281] The Fifth Circuit held that the relator's allegations regarding medically unnecessary treatments and statements made by former employees failed to satisfy Rule 9(b) because the allegations were conclusory and "fail[ed] to state the content of" any allegedly fraudulent directives or guidance.[282] This case highlights the problems that arise whenever a relator focuses solely on a defendant's fraudulent scheme[283] and can easily be reconciled with *Twombly*. The *Twombly* case clarifies that there will be no liability whenever there is an obvious alternative explanation for the defendant's conduct.[284] By allowing a relator to plead only a defendant's fraudulent scheme and using that scheme to satisfy the particularity requirements of Rule 9(b), courts expand the meaning of the FCA to potentially create liability under the Act whenever no claim for payment was submitted. This has the potential to unfairly affect defendants who complied with the law and exhibited conduct consistent with a perfectly legal alternative explanation. Thus, it is imperative that relators plead a specific claim for payment submitted to the government.

*D. Reconciling Rules 8(a) and 9(b)*

Strictly applying Rule 9(b) to the first two elements of an FCA violation helps to reconcile Rule 9(b) with Rule 8(a). Rule 9(b) provides that knowledge, malice, and intent can be alleged generally;[285] and the language of the FCA states that "no specific intent to defraud is required."[286] Because of this language, Rule 9(b) need not apply to the

280. United States *ex rel.* Integra Med Analytics, LLC v. Baylor Scott & White Health, 816 Fed. App'x 892 (5th Cir. 2020).
281. *Id.* at 897.
282. *Id.* at 899.
283. *Id.* at 892.
284. *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 567 (2007).
285. FED. R. CIV. P. 9(b).
286. 31 U.S.C. § 3729(b)(1).

third element of an FCA claim—whether the defendant had knowledge of the falsity. If Rule 9(b) requires particularity when alleging fraud, then the only logical conclusion is that "generally" in the second sentence of Rule 9(b) means that the plausibility standard established in *Twombly* and *Iqbal* should apply to the defendant's knowledge of the claim's falsity. Under this standard, claims under the FCA will be evaluated properly and defendants will not face the stigma that inevitably comes with allegations of fraud, avoiding any negative consequences for defendants in FCA suits and deterring relators from riling meritless claims. If, after the DOJ investigation, a relator is unable to point to a specific claim for payment to the government, then the relator should not be entitled to proceed to discovery to uncover something that the DOJ was unable to find. This would undoubtedly waste resources and cause an undue burden on defendants.

However, it is important to understand the truth to the Fifth Circuit's statements in *Grubbs*.[287] The court recognized that raw bills, standing alone, are not fraud without an underlying scheme to submit the bills for unperformed or unnecessary work.[288] This is logical in the sense that there may be a perfectly plausible alternative explanation for the specific claim's falsity. Relators should be required to not only identify specific false claims submitted to satisfy Rule 9(b) but also plead the details of a defendant's fraudulent scheme plausibly under Rule 8(a). This framework satisfies the pleading requirements for civil actions in federal courts and demonstrates why the defendant is or is not liable under the FCA.

## CONCLUSION

Healthcare and military spending combined account for trillions of dollars of the United States government's annual budget.[289] The FCA is certainly an attractive and effective tool to combat the rampant fraud that could occur because of the large number of government contracts.[290]

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287. *See* United States *ex rel.* Grubbs v. Kanneganti, 565 F.3d 180 (5th Cir. 2009).

288. *Id.* at 190.

289. *See* ADVISORY BOARD, *supra* note 1; *see also* Kimberly Amadeo, *US Military Budget, Its Components, Challenges, and Growth*, THE BALANCE (Sept. 3, 2020), https://www.thebalance.com/u-s-military-budget-components-challenges-growth-3306320 [https://perma.cc/NZY7-UN6T].

290. *The federal government spends about $500 billion each year on contracts – that's roughly the size of Sweden's economy*, USASPENDING, https://datalab.usaspending.gov/contract-explorer/ [https://perma.cc/G7KR-TKSU] (last visited Jan. 27, 2021).

However, the trend toward relaxing the pleading requirements for these claims does not adequately consider the complexity and uniqueness of FCA claims or potential adverse impacts that a meritless FCA claim could have on an FCA defendant.[291] Moreover, courts improperly focus on the status of the relator or informational asymmetries when allowing claims that fail to identify a specific false claim to proceed to discovery. The purpose of the FCA is not to provide relators with an easy, sure-fire way to share in the profits of a settlement.[292] Rather, the purpose of the FCA is to uncover actual fraud against the United States.[293] This purpose is best served by requiring courts to apply the proper pleading standard to each element of an FCA violation, conserving DOJ resources and maximizing the success of FCA claims. The Supreme Court should grant certiorari and resolve this issue once and for all. With potentially millions of dollars on the table in terms of the relator's share of recovery, requiring relators to identify the *sine qua non* of an FCA violation—a claim for payment—is a reasonable condition. The proposed standard will save resources and prevent the negative stigma surrounding allegations of fraud for those who contract with the U.S. government.

291. Lockman, *supra* note 52, at 1571 ("agency officials have broad discretion to temporarily debar or permanently suspend a government contractor after a finding of FCA liability").

292. *See generally* 31 U.S.C. § 3729.

293. *Id.*