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# Neither Strict Nor Nuanced: The Balanced Standard For False Claims Act Pleading In The Eleventh Circuit

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## NOTES

### **Neither Strict Nor Nuanced: The Balanced Standard For False Claims Act Pleading In The Eleventh Circuit**

C. CAITLIN GILES\*

*False Claims Act litigation is more hotly contested than ever before. One such controversial issue plaguing federal courts is the proper application of Federal Rule of Civil Procedure 9(b) to actions arising under the False Claims Act. The explosion of litigation under the FCA caused a circuit split to emerge on the correct standard to use when applying Rule 9(b)'s heightened pleading requirement for more particularity. Specifically, courts are split on the level of specificity required to prove that a false claim was submitted to the government. Some apply a "strict" interpretation and require pleadings to include representative samples of the actual false claims that were submitted to the government, while others utilize a more "nuanced" standard and simply demand that complaints include details of a fraudulent scheme paired with reliable indicia to support an inference that claims were submitted. The effect of this uncertainty among the federal circuits means the difference between the dismissal of an action before reaching discovery or the continuation to a potentially multi-million-dollar judgment. As this circuit split implicates vast financial consequences, the Rule 9(b) question in FCA actions is of the utmost importance.*

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*This article focuses on how the Eleventh Circuit interprets the requirements of Rule 9(b), in order to contribute to the widespread commentary on how the circuit split may be resolved. Ultimately, if the Supreme Court does decide to grant cert on this issue, this Comment urges that the Eleventh Circuit should serve as a model for the properly balanced application of Rule 9(b) for actions arising under the False Claims Act.*

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## INTRODUCTION

The False Claims Act (“FCA” or “Act”) is the United States Government’s foremost anti-fraud recovery tool, which subjects anyone who “knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval” to civil penalties, in addition to three times the amount of damages the Government suffered as a result of such action.<sup>1</sup> The Act authorizes private citizens to file a civil action, also known as a *qui tam* action, on behalf of the United States and recover a percentage of the proceeds.<sup>2</sup> Depending on various factors, such as whether or not the Government intervenes and the plaintiff’s overall contribution to the case, a successful

<sup>1</sup> 31 U.S.C.A. § 3729(a)(1) (West 2012).

<sup>2</sup> 31 U.S.C § 3730(b)–(d).

*qui tam* plaintiff may be awarded anywhere between ten to thirty percent of the recovery.<sup>3</sup>

So, why care about this? The biannual Gibson Dunn False Claims Update provides some perspective: “On November 16, 2015, a for-profit education company agreed to pay \$95.5 million to settle claims that the company falsely certified that it was compliant with Title IV . . . The relators will split \$11.3 million.”<sup>4</sup> The employees who blew the whistle on that company are now multi-millionaires. With help from the whistleblowers, the government was able to recover three times the amount that it had originally lost. This is just one company in just one industry.<sup>5</sup> In other cases, the recovery is even more incredible. For example, on “December 8, 2014, two foreign companies settled alleged civil violations relating to services provided to U.S. troops in Afghanistan . . . The companies agreed to pay \$288.35 million in the criminal matter and an additional \$146 million to resolve the civil cases . . . The *qui tam* whistleblower who filed the initial FCA lawsuit will receive \$16.16 million.”<sup>6</sup> As observed by Gibson Dunn, “[t]here is no end in sight to the False Claims Act gold rush.”<sup>7</sup>

Year after year, the list of FCA recoveries continues to grow. In 2014 alone, the government recovered a record-setting \$5.7 billion dollars from settlements and judgments under the False Claims Act.<sup>8</sup> Although 2015 could be considered a down year, the government still collected an impressive sum of \$3.6 billion dollars.<sup>9</sup> Over the past 5 years, the government used the False Claims Act to recover more than \$21 billion dollars.<sup>10</sup> *Qui tam* actions have proven to be

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<sup>3</sup> 31 U.S.C. § 3730(d).

<sup>4</sup> Gibson, Dunn, & Crutcher LLP, *2015 Year-End False Claims Act Update*, GIBSONDUNN (Jan. 6, 2016), <http://www.gibsondunn.com/publications/documents/2015-Year-End-False-Claims-Act-Update.pdf>.

<sup>5</sup> Gibson, Dunn, & Crutcher LLP, *2014 Year-End False Claims Act Update*, GIBSONDUNN (Jan. 7, 2015), <http://www.gibsondunn.com/publications/Documents/2014-Year-End-False-Claims-Act-Update.pdf>.

<sup>6</sup> *Id.*

<sup>7</sup> Gibson, Dunn, & Crutcher LLP, *2015 Mid-Year False Claims Act Update*, GIBSONDUNN (July 8, 2015), <http://www.gibsondunn.com/publications/pages/2015-Mid-Year-False-Claims-Act-Update.aspx>.

<sup>8</sup> Gibson, Dunn, & Crutcher LLP, *supra* note 5.

<sup>9</sup> Gibson, Dunn, & Crutcher LLP, *supra* note 4.

<sup>10</sup> *Id.*

critical for the government's success; in fact, *qui tam* relators instigated "about 67% of all FCA recoveries since 1986."<sup>11</sup> Gibson Dunn reports, "Since 1986, whistleblower *qui tam* cases have led to \$29.2 billion in government recoveries."<sup>12</sup> *Qui tam* plaintiffs filed 713 FCA lawsuits in 2014 and earned \$435 million as a result.<sup>13</sup> As evidenced by the exponential growth of FCA recoveries, both the Department of Justice ("DOJ") and whistleblower counsels are dedicating more time and resources to bringing FCA claims.<sup>14</sup>

This growth means that False Claims Act litigation is more hotly contested than ever before.<sup>15</sup> One such controversial issue plaguing federal courts is the proper application of Federal Rule of Civil Procedure 9(b) to actions arising under the False Claims Act.<sup>16</sup> One effect of the explosion of litigation under the FCA is the emergence of a circuit split on the correct standard to use when applying Rule 9(b)'s heightened pleading requirement for more particularity.<sup>17</sup> Specifically, courts are split on the level of specificity required to adequately plead that a false claim was submitted to the government.<sup>18</sup> Some apply a strict interpretation and require pleadings to include "representative samples" of the actual false claims that were submitted to the government, while others utilize a more nuanced standard and simply demand that complaints include details of a

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<sup>11</sup> Gibson, Dunn, & Crutcher LLP, *supra* note 5.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> See Dep't of Justice Office of Pub. Affairs, *Justice Department Recovers Nearly \$6 Billion from False Claims Act Cases in Fiscal Year 2014*, JUSTICE.GOV (Nov. 20, 2014), <http://www.justice.gov/opa/pr/justice-department-recovers-nearly-6-billion-false-claims-act-cases-fiscal-year-2014>.

<sup>15</sup> Gibson, Dunn, & Crutcher LLP, *supra* note 4.

<sup>16</sup> *Id.* Rule 9(b) of the Federal Rules of Civil Procedure states that "in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally."

<sup>17</sup> Gibson, Dunn, & Crutcher LLP, *2014 Mid-Year False Claims Act Update*, GIBSONDUNN (July 9, 2014), <http://www.gibsondunn.com/publications/Pages/2014-Mid-Year-False-Claims-Act-Update.aspx>; *Foglia v. Renal Ventures Mgmt., LLC*, 754 F.3d 153, 155 (3d Cir. 2014).

<sup>18</sup> See *Foglia*, 754 F.3d at 155–56.

fraudulent scheme “paired with reliable indicia” to support an inference that claims were submitted.<sup>19</sup> The effect of this uncertainty among the circuits could mean the difference between the dismissal of an action before reaching discovery or the continuation towards a potentially multi-million-dollar judgment. As this circuit split implicates vast financial consequences, the Rule 9(b) question in FCA actions is of the utmost importance.<sup>20</sup>

This Comment analyzes how the Eleventh Circuit interprets the requirements of Rule 9(b), in order to contribute to the widespread commentary on how the circuit split may be resolved.<sup>21</sup> Part II details a history of the False Claims Act and current application of Rule 9(b). Part III describes the circuit split and ensuing controversy. Part IV outlines the evolution of the Eleventh Circuit’s Rule 9(b) standard, and argues where the Eleventh Circuit falls on the strict versus nuanced spectrum. Finally, Part V explores whether or not the Supreme Court should grant certiorari to resolve this issue.

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<sup>19</sup> *Id.*

<sup>20</sup> See Robert J. Conlan, Jr., *Third Circuit Adopts More Lenient Application Of Rule 9(b) In FCA Cases*, ORIGINAL SOURCE: THE SIDLEY AUSTIN FALSE CLAIMS ACT BLOG (June 12, 2014), <http://www.lexology.com/library/detail.aspx?g=05b8d4a7-6d87-458b-9ffb-b5cb9e4f812a> (“The chasm between the two camps of Circuits on the Rule 9(b) issue has been sharply delineated for some time. The Third Circuit’s opinion in *Foglia* further highlights the need for the Supreme Court finally to resolve the dispute and set forth clear guidance as to how Rule 9(b) applies to FCA claims.”)

<sup>21</sup> See generally Emily T. Chen, *Depressing Diagnosis: Stringent Particularity Requirement of the Rule 9(b) Pleading Standard As A Critical Bar to Off-Label Promotion Fraud Whistleblowers*, 36 CARDOZO L. REV. 333 (2014); Aaron Rubin, *To Present Bills or Not to Present? An In-Depth Analysis of the Burden of Pleading in Qui Tam Suits*, 8 SETON HALL CIRCUIT REV. 467 (2012); Charis Ann Mitchell, *A Fraudulent Scheme’s Particularity Under Rule 9(b) of the Federal Rules of Civil Procedure*, 4 LIBERTY U. L. REV. 337 (2010); Mark R. Troy, *The Early Round Knockout Punch to A Qui Tam Action: Recent Decisions Upholding Rule 9(b) Challenges to Relators’ Speculative Allegations*, 41 PROCUREMENT LAW. 1 (Winter 2006); Patrick Venter, *Whistleblower’s Delight: An Evaluation of the Third Circuit Decision in Foglia v. Renal Ventures*, 56 B.C.L. REV. E-SUPPLEMENT 195 (2015); and Vann Bentley, *Getting Particular: Finding the Appropriate False Claims Act Pleading Standard Post-Nathan v. Takeda Pharmaceuticals*, 13 GEO. J.L. & PUB. POL’Y 129 (2015).

Ultimately, if the Supreme Court does decide to grant certiorari on this issue, this Comment urges that the Eleventh Circuit should serve as a model for the properly balanced application of Rule 9(b) for actions arising under the False Claims Act.

## II. BACKGROUND: A HISTORY OF THE FALSE CLAIMS ACT AND RULE 9(B)

### A. *The False Claims Act*

The False Claims Act makes it illegal for individuals to present fraudulent claims for payment to the government.<sup>22</sup> The origins of the False Claims Act reflect how fraud has persistently plagued the U.S. government since its founding years.<sup>23</sup> The first impetus for the Act was the Civil War, when fraud by government contractors drastically increased as the demand for war supplies became more urgent.<sup>24</sup> An 1864 copy of Harper's Monthly Magazine illustrated how the Union Army would blindly accept and pay any price for commodities offered, regardless of the item's quality or whether the item was what they had actually requested.<sup>25</sup> For example, when the government purchased sugar, bags of sand arrived and when they bought horses, they received donkeys instead.<sup>26</sup>

At the request of President Lincoln, Congress enacted the precursor to the FCA in 1863 to combat this kind of fraud from Union Army suppliers.<sup>27</sup> The precursor legislation imposed both criminal penalties and civil liability for presenting a false claim against the government.<sup>28</sup> Individuals were fined two thousand dollars for every

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<sup>22</sup> 31 USC § 3729–3732 (2012).

<sup>23</sup> See CLAIRE M. SYLVIA, *THE FALSE CLAIMS ACT: FRAUD AGAINST THE GOVERNMENT* 33–34 (2d ed. 2010).

<sup>24</sup> *Id.* at 42–43

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 43 (quoting Robert Tomes, *Fortunes of War*, 29 HARPER'S MONTHLY MAG. 228 (1864)).

<sup>27</sup> Act of March 2, 1863, ch. 67, § 4, 12 Stat. 696, 698 (1863); H.R. REP. NO. 111-97, at 2–3 (2009).

<sup>28</sup> H.R. REP. NO. 99-660, pt. 2, at 17 (1986). Despite originating in the context of fraud from government contractors, the False Claims Act was meant to address fraud in all industries. See S. REP. NO. 99-345, at 2 (1986) (“Fraud permeates

violation, as well as double the cost of damages suffered by the government as a result of that violation.<sup>29</sup> Importantly, the Act authorized *qui tam* suits, whereby private citizens were “deputized” to pursue civil actions on behalf of the United States.<sup>30</sup> The driving motivation behind enacting the *qui tam* provision was the rationale that private citizens could help expose fraud in ways that the government could not.<sup>31</sup> Thus, Congress drafted the Act’s *qui tam* provisions in order to incentivize private citizens to expose schemes to defraud the government and ultimately participate in the resulting lawsuit as an interested party.<sup>32</sup> The citizen bringing the suit, now known as the “relator,” would bring the action in the name of the United States and participate in the ensuing litigation until reaching a settlement or final judgment.<sup>33</sup> One important motivation under the original Act was that a successful relator received half of the reward, thus recognizing that these individuals could identify fraud more efficiently than the government and should be rewarded for it.<sup>34</sup>

Congress amended the Act several times since its original conception, usually as a response to economic and social policies requiring more or less support for a private law enforcement regime.<sup>35</sup>

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generally all Government programs ranging from welfare and food stamps benefits, to multibillion dollar defense procurements, to crop subsidies and disaster relief programs.”). However, not all fraud is implicated under the False Claims Act. Specifically, liability under the False Claims Act attaches, “not to the underlying fraudulent activity . . . but to the ‘claim for payment.’” *United States v. Rivera*, 55 F.3d 703, 709 (1st Cir. 1995).

<sup>29</sup> *Sylvia*, *supra* note 20, at 44.

<sup>30</sup> *Id.* at 45; H.R. REP. NO. 99-660, at 16. *Qui tam* is shorthand for “qui tam pro domingo rege quam pro se imposito sequitur,” a Latin phrase meaning “who brings the action as well for the king as for himself.” *Ragsdale v. Rubbermaid, Inc.*, 193 F.3d 1235, 1237 n.1 (11th Cir. 1999) (citing *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 746 n. 3 (9th Cir.1993), *cert. denied*, 510 U.S. 1140, 114 S.Ct. 1125, 127 L.Ed.2d 433 (1994).

<sup>31</sup> *Sylvia*, *supra* note 20, at 35; *See U.S. ex rel. Williams v. NEC Corp.*, 931 F.2d 1493, 1497 (11th Cir. 1991) (“The central purpose of the *qui tam* provision in ‘Lincoln’s Law’ then, as is now, was to encourage private individuals aware of fraudulent schemes perpetrated against the government to bring such information forward and thereby aid in the effort to root out fraud.”)

<sup>32</sup> H.R. REP. NO. 111-97, at 2–3 (2009).

<sup>33</sup> *Sylvia*, *supra* note 20, at 45.

<sup>34</sup> *Id.* at 45.

<sup>35</sup> *See Williams*, 931 F.2d at 1497.



Congress first amended the Act in 1943 in response to concerns that the Act was being misused through “parasitical suits,” or lawsuits where the relator brought an action based on information copied from government files.<sup>36</sup> To address this, the amendment required that *qui tam* relators base their allegations on independently obtained information, removing jurisdiction for claims based on any information already in the government’s possession.<sup>37</sup> The amendments also granted the government the power to take complete control over a relator’s claim, resulting in removal of the relator from any further role in the litigation.<sup>38</sup> Finally, the 1943 amendments reduced the relator’s percent of the recovery.<sup>39</sup> If the government intervened, relators were only entitled to ten percent or less, and if the government did not intervene, they were awarded a maximum of twenty-five percent or less of the proceed, a stark contrast to the 1863 statute’s fifty percent allowance.<sup>40</sup> Although these changes prevented citizens from abusing the Act through “parasitical suits,” the practical effect was much broader.<sup>41</sup> Not only did *qui tam* actions become less viable in general, but also the incentives for whistleblowers disappeared, making the risk of whistleblowing not worth the cost.<sup>42</sup> Ultimately, the 1943 amendments rendered the False Claims Act effectively useless.<sup>43</sup>

Forty years later, Congress shifted its focus.<sup>44</sup> Noting that the Act was not being utilized to its full capacity due to restrictive court interpretations, and in response to concerns about the rampant growth of fraud against the government in the 1980s, Congress decided to modernize it through the False Claims Amendments Act of

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<sup>36</sup> Act of Dec. 23, 1943, ch. 377, 57 Stat. 608, codified as amended at 31 U.S.C.A. §§ 232–235 (1976); Sylvia, *supra* note 20, at 48.

<sup>37</sup> *Williams*, 931 F.2d at 1497.

<sup>38</sup> Sylvia, *supra* note 20, at 51–52.

<sup>39</sup> *Id.* at 52.

<sup>40</sup> *Id.* at 52.

<sup>41</sup> *Williams*, 931 F.2d at 1497; Sylvia, *supra* note 20, at 53.

<sup>42</sup> Sylvia, *supra* note 20, at 54.

<sup>43</sup> *Id.* at 53; *Williams*, 931 F.2d at 1497 (“After 1943 . . . government employees were effectively prohibited from bringing suit under the False Claims Act.”)

<sup>44</sup> Sylvia, *supra* note 20, at 57.

1986.<sup>45</sup> These changes first promoted the growth of FCA litigation and still persist in the Act today.<sup>46</sup> The amendments include a provision whereby *qui tam* actions are filed under seal for sixty days and served on the Government, but not the defendant, to provide the Government time to decide whether or not it wants to intervene.<sup>47</sup> If the Government decides to intervene, the *qui tam* relator may continue to participate in the case, subject to a few constraints meant to protect the Government and the defendant.<sup>48</sup> Additionally, with “good cause,” the government now has the option to intervene in a case that it initially declined to join.<sup>49</sup> Congress again recognized that cooperation with private individuals with firsthand knowledge of fraudulent activity was necessary for the Act to be most effective and sought to remove the “conspiracy of silence,” which previously existed under the Act.<sup>50</sup> Congress recognized that “detecting fraud is usually very difficult without the cooperation of individuals who are either close observers or otherwise involved in the fraudulent activity,” especially given the huge difference in resources that large corporations under investigation for fraud have at their disposal compared to that of the government.<sup>51</sup> Thus, the drafters designed the amendments to once again incentivize private citizens to help bolster the “government’s fraud enforcement effort”—the same rationale of the original 1863 enactment.<sup>52</sup>

Currently, when the government intervenes, a successful relator is authorized to receive a minimum of fifteen percent and a maxi-

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<sup>45</sup> *Id.*; False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153 (1986), codified as amended at 31 U.S.C.A. §§ 3729–3733 (1994).

<sup>46</sup> 31 U.S.C.A. § 3729–3732 (2012); Sylvia, *supra* note 20, at 62.

<sup>47</sup> Sylvia, *supra* note 20, at 57; 31 U.S.C.A. § 3730(b)(2)–(3).

<sup>48</sup> Examples include dismissing or settling the action notwithstanding objections of the relator and removing a relator from participation in the case, if doing so will interfere with the Government’s prosecution. Sylvia, *supra* note 20, at 57; 31 U.S.C.A. § 3730(c)(1)–(2).

<sup>49</sup> 31 U.S.C.A. § 3730(c)(3).

<sup>50</sup> In essence, an employee’s unfair choice between keeping his or her job or keeping quiet about an employer’s fraudulent schemes. S. REP. NO. 99-345, at 5 (1986).

<sup>51</sup> S. REP. NO. 99-345, at 4, 8 (1986).

<sup>52</sup> *Id.* at 8.

imum of twenty-five percent of the recovery, depending on the relator's involvement.<sup>53</sup> In contrast, a *qui tam* plaintiff who succeeds without government intervention is entitled to twenty-five to thirty percent of the proceeds.<sup>54</sup> Additionally, a relator must be the original source of information or else he/she may only receive a maximum of ten percent.<sup>55</sup> Recognizing that many *qui tam* plaintiffs are employees who come forward to report the fraudulent activities of their own employers, Congress also sought to protect these whistleblowers.<sup>56</sup> Thus, the amendments included an anti-retaliation provision for *qui tam* relators, which created a right of action for any employee retaliated against due to his or her involvement in a proceeding under the False Claims Act.<sup>57</sup>

Despite these changes, intended to persuade more whistleblowers to come forward with allegations of fraud, Congress still sought to prevent parasitic or frivolous lawsuits.<sup>58</sup> They imposed an original source rule, which says that if the government is aware of information forming the basis for a claim, the relator may only bring a *qui tam* lawsuit if he or she was the original source of that information.<sup>59</sup> Additionally, the Act awards attorney's fees to defendants who prevail in suits that were clearly frivolous or brought for the purpose of harassment.<sup>60</sup>

Since 1986, Congress has continued to amend the False Claims Act when needed to provide clarity and further its intentions. In 2009, under the Fraud Enforcement and Recovery Act ("FERA"), Congress made claims easier to bring under the FCA by expanding liability and funding anti-fraud enforcement.<sup>61</sup> In 2010, Congress

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<sup>53</sup> 31 U.S.C.A. § 3730(d)(1).

<sup>54</sup> *Id.* at § 3730(d)(2); Sylvania, *supra* note 20, at 59.

<sup>55</sup> 31 U.S.C. § 3730(d)(1); Sylvania, *supra* note 20, at 59.

<sup>56</sup> 31 U.S.C. § 3730(h); S. REP. NO. 99-345, at 5 (1986); Sylvania, *supra* note 20, at 59.

<sup>57</sup> 31 U.S.C. § 3730(h); Sylvania, *supra* note 20, at 59.

<sup>58</sup> Sylvania, *supra* note 20, at 59.

<sup>59</sup> 31 U.S.C.A. § 3730(e)(4)(A); Sylvania, *supra* note 20, at 59.

<sup>60</sup> Sylvania, *supra* note 20, at 59; 31 U.S.C.A. § 3730(d)(4).

<sup>61</sup> The Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1617 (2009). For an explanation of these changes, see Jones Day, *Fraud Enforcement Recovery Act of 2009 Becomes Law, Expanding Exposure Under the False Claims Act and Funding Anti-Fraud Enforcement*, JONES DAY

further clarified its intent by amending the False Claims Act through both the Dodd-Frank Wall Street Reform and Consumer Protection Act and the Patient Protection and Affordable Care Act.<sup>62</sup> These changes increased anti-retaliation protection, defined key terms, and further expanded liability under the FCA.<sup>63</sup>

Ultimately, this legislative history shows how Congress intended the False Claim Act to encourage *qui tam* lawsuits and thereby help the government recover billions of dollars.<sup>64</sup> To that end, the Act has been extremely successful; in the 2014 fiscal year alone, the DOJ reported that it obtained a record-breaking \$5.7 billion dollars in settlements and judgments in favor of the government, with \$3 billion filed under the *qui tam* provisions.<sup>65</sup> As indicated in Table 1 below, actions brought by *qui tam* plaintiffs play an increasingly important role in FCA suits, in contrast to government-initiated lawsuits.

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COMMENTARY (June 2009), <http://www.jonesday.com/files/Publication/ba69538b-ed12-4412-a08d-e4ed5aaca676/Presentation/PublicationAttachment/0d373005-e71d-4f4c-a59d-bc0ab830c07e/Fraud%20Enforcement.pdf>.

<sup>62</sup> CLAIRE M. SYLVIA, *THE FALSE CLAIMS ACT: FRAUD AGAINST THE GOVERNMENT* 4 (2d ed. Supp. 2014); Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203 § 1079A(c), 124 Stat. 1376, 2079 (2010); Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 10104(j)(2), 124 Stat. 119 (2010).

<sup>63</sup> *See generally*, Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 6402(f)(1), 124 Stat. 119 (2010) and Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203 § 1079A(c), 124 Stat. 1376, 2079 (2010).

<sup>64</sup> S. REP. NO. 99-345, at 8.

<sup>65</sup> Dep't of Justice Office of Pub. Affairs, *supra* note 14.

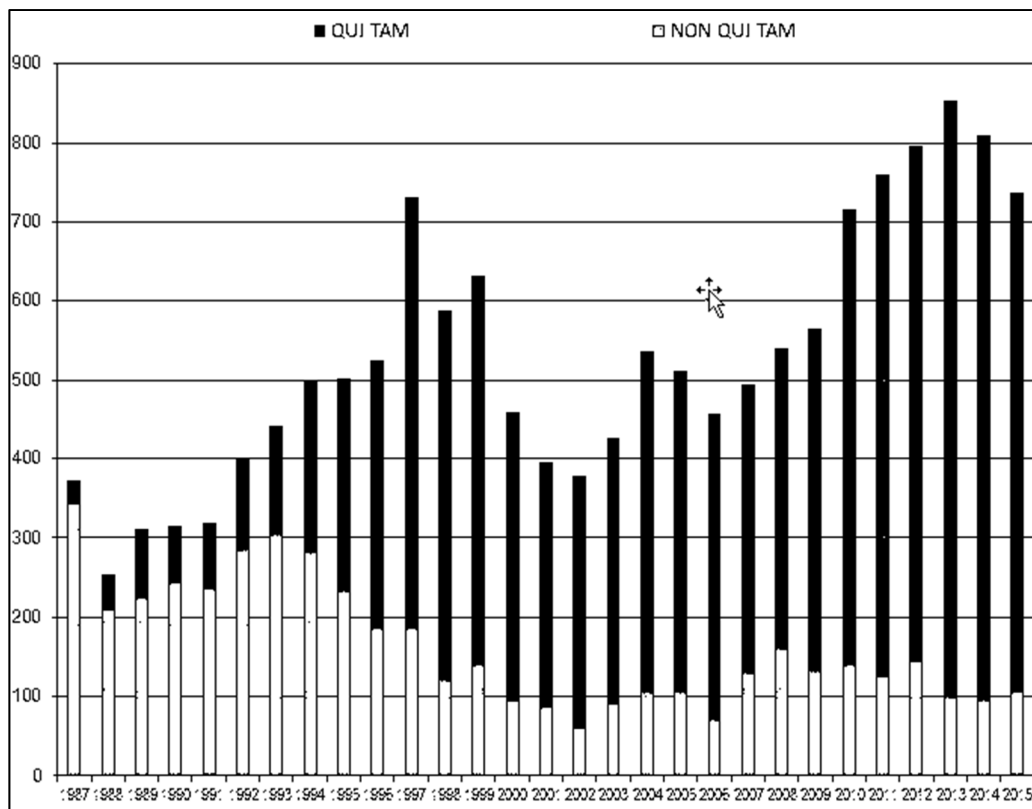


Table 1, “Number of FCA New Matters, Including *Qui Tam* Actions”<sup>66</sup>

*Qui tam* relators filed more lawsuits in 2013 than any year prior,<sup>67</sup> and the Justice Department reported that in 2014, that number exceeded 700 for the second year in a row.<sup>68</sup> Whistleblowers received nearly \$435 million dollars out of FCA recoveries that totaled almost \$3 billion dollars.<sup>69</sup> This trend continued in 2015, where *qui tam* plaintiffs initiated 86% of the FCA cases filed, and recovered a record-breaking \$1.1 billion dollars from cases where the government declined to intervene.<sup>70</sup> Clearly, the congressional purpose motivating the False Claims Act is being met and, as a result,

<sup>66</sup> Gibson, Dunn, & Crutcher LLP, *supra* note 4.

<sup>67</sup> Gibson, Dunn, & Crutcher LLP, *supra* note 17.

<sup>68</sup> Dep’t of Justice Office of Pub. Affairs, *supra* note 14.

<sup>69</sup> *Id.*

<sup>70</sup> Gibson, Dunn, & Crutcher LLP, *supra* note 4.

fraud enforcement under the False Claims Act is recognized as a crucial component of the DOJ's work.<sup>71</sup> As former Acting Assistant Attorney General Joyce Branda commented, "We acknowledge the men and women who have come forward to blow the whistle on those who would commit fraud on our government programs. . . . [i]n strengthening and protecting the False Claims Act, Congress has given us the law enforcement tools that are so essential to guarding the treasury and deterring others from exploiting and misusing taxpayer dollars. We are grateful for their continued support."<sup>72</sup>

### B. *Rules 8 and 9(b)*

In 1938, the drafters of the Federal Rules of Civil Procedure decided to de-emphasize the pleading stage by pushing the sorting function (in essence, the phase when Courts will scrutinize which claims should proceed to trial and which should be dismissed earlier) to the discovery phase, or the next stage of litigation.<sup>73</sup> Now, the basic requirement to get past the pleading stage is simply to provide a "short and plain statement of the claim showing the pleader is entitled to relief."<sup>74</sup> The drafter's decision to utilize "notice pleading" meant that plaintiffs with valid claims, but who could only obtain evidence through a discovery process, would be given access to justice (even if doing so might impose unwarranted costs on defendants).<sup>75</sup> However, the Supreme Court, in the *Twombly-Iqbal* line of cases, imposed a more demanding requirement for complaints to get past the pleading stage.<sup>76</sup> Now the complaint must include more than conclusory statements and, while Rule 8's pleading standard does not require "detailed factual allegations," a pleading that offers a "formulaic recitation of the elements of a cause of action will not

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<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> See Christopher M. Fairman, *An Invitation to the Rulemakers -- Strike Rule 9(b)*, 38 U.C. DAVIS L. REV. 281, 283 (2004); STEPHEN C. YEAZELL, CIVIL PROCEDURE 385 (8th ed. 2012).

<sup>74</sup> Fed. R. Civ. P. 8(a).

<sup>75</sup> Yeazell, *supra* note 69, at 388.

<sup>76</sup> See generally *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); see also *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

do.”<sup>77</sup> In essence, plaintiffs may advance to the discovery phase without significant effort, but at the very least, the plaintiffs must nudge “their claims across the line from conceivable to plausible.”<sup>78</sup>

While Rule 8’s “short and plain statement” requirement controls most proceedings, Rule 9(b) applies in special circumstances: whenever a complaint alleges “fraud or mistake.”<sup>79</sup> When this occurs, the court will apply a heightened pleading standard, whereby “a party must state with particularity the circumstances constituting fraud or mistake.”<sup>80</sup> This particularity requirement must be read in conjunction with Rule 8, not as a substitute.<sup>81</sup> The purposes behind the heightened requirement of Rule 9(b) include: firstly, ensuring “that the defendant has sufficient information to formulate a defense by putting it on notice of the conduct complained of;” secondly, “to protect defendants from frivolous suits;” thirdly, “to eliminate fraud actions in which all the facts are learned after discovery;” and finally, to “protect[] defendants from harm to their goodwill and reputation.”<sup>82</sup> Notably, the common law elements of fraud need not be alleged for Rule 9(b) to apply; the only requirement is that situations involve circumstances that constitute fraud.<sup>83</sup> The oft-quoted standard is that Rule 9(b) is satisfied if the complaint establishes the following four criteria:

- (1) precisely what statements were made in what documents or oral representations or what omissions

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<sup>77</sup> *Iqbal*, 556 U.S. at 678.

<sup>78</sup> *Twombly*, 550 U.S. at 570.

<sup>79</sup> Fed. R. Civ. P. 9(b).

<sup>80</sup> *Id.*

<sup>81</sup> *United States ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 185–86 (5th Cir. 2009) (“We apply Rule 9(b) to fraud complaints with ‘bite’ and ‘without apology,’ but also aware that Rule 9(b) supplements but does not supplant Rule 8(a)’s notice pleading.”)

<sup>82</sup> *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 784 (4th Cir. 1999) (quoting *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)); Fairman, *supra* note 73, at 290; *See also Foglia v. Renal Ventures Mgmt., LLC*, 754 F.3d 153, 155 (3d Cir. 2014); *U.S. ex rel. Clausen v. Lab. Corp. of Am., Inc.*, 290 F.3d 1301, 1310 (11th Cir. 2002); *Wood ex rel. U.S. v. Applied Research Assoc., Inc.*, 328 F. App’x 744, 747 (2d Cir. 2009).

<sup>83</sup> Fairman, *supra* note 73, at 288; Fed. R. Civ. P. 9(b).

were made, (2) the time and place of each such statement and the person responsible for making (or, in the case of omissions, not making) same, (3) the content of such statements and the manner in which they misled the plaintiff, and (4) what the defendants obtained as a consequence of the fraud.<sup>84</sup>

Because FCA cases involve allegations of fraud, federal courts universally apply Rule 9(b) to cases arising under the False Claims Act.<sup>85</sup> Thus, complaints alleging violations of the FCA must comply with the dictates of both Rule 8 and 9(b).<sup>86</sup> To satisfy the particularity requirement of 9(b), relators are required to plead “facts as to time, place, and substance of the defendant’s alleged fraud, specifically the details of the defendants’ allegedly fraudulent acts, when they occurred, and who engaged in them,”<sup>87</sup> or more simply put, the

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<sup>84</sup> *U.S. ex rel. Clausen*, 290 F.3d at 1310 (quoting *Ziemba v. Cascade Int’l, Inc.*, 256 F.3d 1194, 1202 (11th Cir. 2001)).

<sup>85</sup> Cases from each circuit apply Rule 9(b): *See United States ex rel. Schwedt v. Planning Research Corp.*, 59 F.3d 196 (D.C. Cir. 1995); *Gold v. Morrison-Knudsen Co.*, 68 F.3d 1475, 1476 (2d Cir. 1995); *U.S. ex rel. LaCorte v. SmithKline Beecham Clinical Labs, Inc.*, 149 F.3d 227, 234 (3d Cir. 1998) (“Federal Rule of Civil Procedure 9(b) requires plaintiffs to plead fraud with particularity, specifying the time, place and substance of the defendant’s alleged conduct.”); *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 783–84 (4th Cir. 1999); *United States ex rel. Russell v. Epic Healthcare Mgmt. Group*, 193 F.3d 304, 308 (5th Cir. 1999); *Yuhasz v. Brush Wellman, Inc.*, 341 F.3d 559, 563 (6th Cir. 2003) (“The heightened pleading standard set forth in Rule 9(b) applies to complaints brought under the FCA.”); *United States ex rel. Gross v. AIDS Research Alliance*, 415 F.3d 601, 604 (7th Cir. 2005) (“The FCA is an anti-fraud statute and claims under it are subject to the heightened pleading requirements of Rule 9(b).”); *United States ex rel. Joshi v. St. Luke’s Hosp., Inc.*, 441 F.3d 552, 557 (8th Cir. 2006); *Bly-Magee v. California*, 236 F.3d 1014, 1018 (9th Cir. 2001); *U.S. ex rel. Clausen v. Lab. Corp. of Am.*, 290 F.3d 1301, 1308–09 (11th Cir. 2002) (“[W]e now make clear that Rule 9(b) does apply to actions under the False Claims Act.”).

<sup>86</sup> *U.S. ex rel. Keeler v. Eisai, Inc.*, 568 F. App’x 783, 793 (11th Cir. 2014) (unpublished) (“In addition to the requirements of *Twombly*, *Iqbal*, and Federal Rules of Civil Procedure 8(a) and 12(b)(6), claims asserted under the False Claims Act (as well as other fraud claims) are subject to the pleading standards of Federal Rule of Civil Procedure 9(b).”)

<sup>87</sup> *U.S. ex rel. Matheny v. Medco Health Solutions, Inc.*, 671 F.3d 1217, 1222 (11th Cir. 2012) (quoting *Hopper v. Solvay Pharm., Inc.*, 588 F.3d 1318, 1324 (11th Cir. 2009)).



“who, what, when, where, and how of the alleged fraud.”<sup>88</sup> Although some commentators feel this is an improper application of Rule 9(b),<sup>89</sup> the controversy currently plaguing courts is not as much whether Rule 9(b) should apply to FCA litigation, but in the actual application of 9(b).

### III. THE CIRCUIT SPLIT

Federal circuits are currently split on the issue of how to apply Rule 9(b)'s particularity requirement to actions arising under the FCA.<sup>90</sup> Specifically, courts disagree over whether to adopt a more rigid understanding, where actual false claims must be identified, or whether a more nuanced application is preferred, where specific allegations that lead to a reasonable inference that false claims were submitted will generally suffice.<sup>91</sup> The Fourth, Sixth, Eighth, Tenth, and Eleventh Circuits seemingly apply Rule 9(b) more rigidly,<sup>92</sup> while the First, Third, Fifth, Seventh, and Ninth Circuits traditionally take the more nuanced approach.<sup>93</sup> However, it is unclear whether circuits with rigid *per se* requirements consistently uphold

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<sup>88</sup> U.S. ex rel. Ge v. Takeda Pharm. Co., 737 F.3d 116, 123 (1st Cir. 2013) *cert. denied*, 135 S. Ct. 53, 190 L. Ed. 2d 30 (2014) (quoting United States ex rel. Thompson v. Columbia/HCA Healthcare Corp., 125 F.3d 899, 903 (5th Cir. 1997)).

<sup>89</sup> Not all agree that Rule 9(b) should be applied to False Claims Act litigation when such actions do not *necessarily* involve fraud. See Fairman, *supra* note 73, at 302, n.120.

<sup>90</sup> Brief for the United States as Amicus Curiae at 10, United States ex rel. Nathan v. Takeda Pharm. N. Am., Inc., 134 S. Ct. 1759 (2014) (No. 12-1249), *denying cert.* to 707 F.3d 451 (2013).

<sup>91</sup> Gibson, Dunn, & Crutcher LLP, *supra* note 17.

<sup>92</sup> See United States ex rel. Nathan v. Takeda Pharm. N. Am., Inc., 707 F.3d 451, 455–56 (4th Cir. 2013), *cert. denied*, 134 S.Ct. 1759 (2014); United States ex rel. Bledsoe v. Cmty. Health Sys., Inc., 501 F.3d 493, 510 (6th Cir. 2007); United States ex rel. Joshi v. St. Luke's Hosp., Inc., 441 F.3d 552, 557 (8th Cir. 2006); United States ex rel. Sikkenga v. Regence BlueCross BlueShield, 472 F.3d 702, 727–728 (10th Cir. 2006).

<sup>93</sup> See United States ex rel. Grubbs v. Kanneganti, 565 F.3d 180, 190 (5th Cir. 2009); Ebeid ex rel. United States v. Lungwitz, 616 F.3d 993, 998–99 (9th Cir. 2010); Foglia v. Renal Ventures Mgmt., 754 F.3d 153, 155 (3d Cir. 2014); United States ex rel. Duxbury v. Ortho Biotech Prods., 579 F.3d 13, 29 (1st Cir. 2009); United States ex rel. Lusby v. Rolls-Royce Corp., 570 F.3d 849, 854–55 (7th Cir. 2009). □

this rule.<sup>94</sup> This is especially applicable to the Eleventh Circuit, which is often characterized as applying Rule 9(b) more rigidly.<sup>95</sup> Nevertheless, recent Eleventh Circuit decisions seem to be moving away from that standard, casting doubt as to whether there was ever a strict *per se* understanding to begin with.<sup>96</sup>

As the False Claims Act becomes a more popular tool for combatting fraud and reaping its financial rewards, this procedural issue likewise grows in importance.<sup>97</sup> No plaintiff wants a claim dismissed in the pleading stage, but especially not when millions of dollars of recovery are at stake.<sup>98</sup> Despite this importance, in a Fourth Circuit petition for certiorari in *United States ex rel. Nathan v. Takeda Pharmaceuticals North America, Inc.*, the Supreme Court decided not to answer the key question of whether relators must *per se* provide specific identification that false claims were actually submitted in order to meet the demands of 9(b).<sup>99</sup> In the Solicitor General's brief as Amicus Curiae, the government explained that although it recognized the importance of resolving this circuit split and favored the more nuanced approach, it felt that circuits might resolve this issue on their own and thus, Supreme Court intervention was not required.<sup>100</sup> So while it is possible that the federal courts of

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<sup>94</sup> Brief for the United States as Amicus Curiae, *supra* note 90, at 10–11.

<sup>95</sup> *Id.*; *United States ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 190 (5th Cir. 2009); *Foglia v. Renal Ventures Mgmt., LLC*, 754 F.3d 153, 155 (3d Cir. 2014) (“The Fourth, Sixth, Eighth, and Eleventh Circuits have held that a plaintiff must show representative samples.”)

<sup>96</sup> *U.S. ex rel. Willis v. Angels of Hope Hospice, Inc.*, No. 5:11-CV-041 MTT, 2014 WL 684657, at \*7 (M.D. Ga. Feb. 21, 2014) (“*Clausen* has been read to hold that the minimum indicia of reliability required to satisfy Rule 9 are the specific contents of actual claims. But not always.”); *Grubbs*, 565 F.3d at 190.

<sup>97</sup> See Brief for the United States as Amicus Curiae, *supra* note 90, at 16 (“The proper application of Rule 9(b) in the FCA context is thus a significant issue.”)

<sup>98</sup> For this very reason, Rule 9(b) is a well-utilized tool for defendants to stop an action under the FCA well before they incur the sometimes-staggering cost of discovery and trial. One court even commented, “It seems just about every FCA complaint draws a Rule 9(b) motion to dismiss.” *U.S. ex rel. Willis v. Angels of Hope Hospice, Inc.*, 2014 WL 684657, at \*6.

<sup>99</sup> *United States ex rel. Nathan v. Takeda Pharm. N. Am., Inc.*, 707 F.3d 451, 455–56 (4th Cir. 2013), *cert. denied*, 134 S.Ct. 1759 (2014).

<sup>100</sup> Additionally, the facts of the *Takeda* case were not appropriate to decide the issue, as it would have failed under either the nuanced or strict approach. How-

appeals will take a more uniform stance on this issue in the future, “there is . . . at least some continuing uncertainty.”<sup>101</sup>

While some uncertainty still exists, there is no longer a clear dichotomy between “strict” or “nuanced” interpretations of Rule 9(b). Although the circuits articulate different standards and cite different cases (oftentimes noting that they are in disagreement with their sister circuits), they are essentially applying the same reasoning to ferret out frivolous claims; any inconsistencies arise from the fact-dependent nature of the “case-by-case” approach taken in most FCA cases.<sup>102</sup> Ultimately, the driving force behind whether or not a relator will succeed is how a court balances the purpose of the False Claims Act—Congress’s intent to protect the government from fraud by encouraging more actions under the FCA<sup>103</sup>—with that of Rule 9(b)—to prevent harassment and fishing expeditions by opportunistic plaintiffs alleging fraud, a cause especially relevant given the vast amount of claims filed per year.<sup>104</sup> Thus, this Comment

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ever, if a more appropriate, outcome-determinative case arose, the Solicitor General felt that the Supreme Court should then grant *certiorari* to officially announce a uniform standard for Rule 9(b) in the FCA context. Brief for the United States as Amicus Curiae, *supra* note 90, at 14.

<sup>101</sup> *Id.*

<sup>102</sup> For example, the Eleventh Circuit analyzes every motion to dismiss for failure to sufficiently plead Rule 9(b) on a case-by-case basis. *See, e.g., U.S. ex rel. Osheroff v. Tenet Healthcare Corp.*, 2012 WL 2871264 at \*5 (S.D. Fla. July 12, 2012) (“The analysis of whether there are sufficient indications of reliability that actual claims were submitted is performed on a case by case basis.”)

<sup>103</sup> Brief for the United States as Amicus Curiae, *supra* note 90, at 15 (“A rigid rule . . . would hinder the ability of *qui tam* relators to perform the role that Congress intended them to play in the detection and remediation of fraud against the United States.”)

<sup>104</sup> Dep’t of Justice Office of Pub. Affairs, note 14; *see also U.S. ex rel. Pogue v. Diabetes Treatment Centers of Am., Inc.*, 238 F. Supp. 2d 258, 268–70 (D.D.C. 2002) (“A further purpose . . . is to discourage nuisance suits and frivolous accusations; the . . . court tacitly acknowledged that it was applying 9(b) with severe stringency to effectuate these policies.”)

The First Circuit recently expressed this sentiment: “Although [the FCA’s] financial incentive encourages would-be relators to expose fraud, it also attracts ‘parasitic’ relators who bring FCA damages claims based on information within the public domain or that the relator did not otherwise discover. For those reasons, there are a number of limitations on *qui tam* actions, including the particularity requirements of Rule 9(b).” *U.S. ex rel. Ge v. Takeda Pharm. Co.*, 737 F.3d 116, 123 (1st Cir. 2013), *cert. denied*, 135 S. Ct. 53 (2014) (internal citations omitted).

proposes that the Eleventh Circuit's standard is not a rigid application, but one structured to balance those competing needs most fairly. It should no longer be equated with the disfavored rigid understanding,<sup>105</sup> and instead applauded as the correct interpretation of Rule 9(b) in the context of the False Claims Act. To substantiate this claim, this Comment will first explore an important question: what exactly is going on in the Eleventh Circuit?

#### IV. INTERPRETING THE ELEVENTH CIRCUIT

##### A. Clausen: *Setting the Standard*

In the Eleventh Circuit, *United States ex rel. Clausen v. Laboratory Corporation of America, Inc.* (“*Clausen*”) is the landmark case setting the pleading standard precedent for actions under the False Claims Act.<sup>106</sup> The relator, Clausen, was an employee for a rival company of the defendant, Laboratory Corporation of America, Inc. (“LabCorp”), a national provider of medical testing services.<sup>107</sup> Clausen alleged that for almost twenty years, LabCorp violated the FCA by performing “unauthorized, unnecessary or excessive medical tests on [] residents who participated in Government-funded health insurance programs,” as well as overbilling for improper testing services.<sup>108</sup> Clausen argued that LabCorp was defrauding the government by violating health insurance reimbursement laws because “providers are generally entitled to be paid for medical testing only when such testing is (1) medically necessary and/or (2) done at the direction of a patient’s physician” and the tests LabCorp conducted were not.<sup>109</sup>

Clausen amended his complaint after initially filing, providing documentary exhibits that listed what medical services were performed on specific patients at specific locations.<sup>110</sup> Additionally, Clausen offered support for his claims by explaining that his

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<sup>105</sup> Brief for the United States as Amicus Curiae, *supra* note 90, at 14.

<sup>106</sup> *United States ex rel. Clausen v. Lab. Corp. of Am., Inc.*, 290 F.3d 1301, 1310 (11th Cir. 2002).

<sup>107</sup> *Id.* at 1302.

<sup>108</sup> *Id.* at 1303.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 1304.

knowledge of the company's policies arose from conversations with two LapCorp employees.<sup>111</sup> He described what technical codes would have been used on a specific form submitted to Medicare and provided testing histories of three patients at two named locations.<sup>112</sup> Because he provided specific dates and locations of when alleged improper testing occurred, Clausen concluded that these tests resulted in the submission of false claims.<sup>113</sup> However, the court dismissed Clausen's first amended complaint because he failed to plead with the requisite particularity that LabCorp actually submitted false claims to the government.<sup>114</sup>

Clausen submitted a revised twenty-eight-page second amended complaint to address the court's concerns.<sup>115</sup> He provided a blank Health Care Financing Administration Form 1500 and a table of medical test codes.<sup>116</sup> He added to his general allegation that LabCorp's scheme resulted in false claims submissions by further elaborating on how the false claims were submitted via an electronic database on the date of service or within a few days after service.<sup>117</sup> Despite this, the court still found that he failed to provide a copy of a bill or a completed form, allege any actual dates, and could not describe or even offer second-hand information about the billing policies.<sup>118</sup> Ultimately, "Clausen did not add any billing information to support his allegation that actual false claims were submitted for payment . . . . Instead he attached one blank claim form and alleged that certain tests would have been billed on this form with certain test and diagnostic codes filled in."<sup>119</sup> When analyzing FCA cases, closely scrutinizing all of the facts is crucial because every detail

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<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 1305.

<sup>114</sup> *Clausen*, 290 F.3d at 1306 ("While adding certain detail, the First Amended Complaint did not include any further allegations about what other unnamed [Long Term Care Facilities] might have been involved in this arrangement, the specific dates or amounts of any claims submitted to the Government, or copies or detailed sources of information about the claims themselves.")

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 1306.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

matters when applying Rule 9(b); a slight change in exactly what the relator pleads could result in a different outcome.

The court held that Clausen's complaint failed to meet the heightened pleading standard of Rule 9(b).<sup>120</sup> Although Clausen twice amended the complaint with much more detail each time, he still failed to provide specific information about an *actual* claim being submitted to the government, and as Judge Hull phrased it, "the submission of a claim is . . . the *sine qua non* of a False Claims Act violation."<sup>121</sup> In *Clausen*, the Eleventh Circuit pointedly announced that it would not make assumptions; simply pleading the details of a scheme to defraud the government, no matter how specific, would not be enough to meet the demands of Rule 9(b).<sup>122</sup> The relator must also provide a reason for the court to infer that illegal claims for payment were actually submitted to the government.<sup>123</sup> Specifically, the court required that "if 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."<sup>124</sup> Ultimately, the court analyzed each detail presented by Clausen and could not find anything providing an "indicia of reliability" for the court to believe the conclusory assertion that LabCorp submitted false claims to the government.<sup>125</sup>

The obvious counterargument to the majority's opinion was presented in the dissent, which suggests that the majority's interpretation of Rule 9(b) imposes an "impossible" burden, requiring more

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<sup>120</sup> *Clausen*, 290 F.3d at 1315.

<sup>121</sup> *Id.* at 1311 ("The False Claims Act does not create liability merely for a health care provider's disregard of Government regulations or improper internal policies unless, as a result of such acts, the provider knowingly asks the Government to pay amounts it does not owe.")

<sup>122</sup> *Id.* at 1311.

<sup>123</sup> *Id.* at 1311 ("Rule 9(b)'s directive that "the circumstances constituting fraud or mistake shall be stated with particularity" does not permit a False Claims Act plaintiff merely to describe a private scheme in detail but then to allege simply and without any stated reason for his belief that claims requesting illegal payments must have been submitted, were likely submitted or should have been submitted to the Government.")

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 1312.

than is necessary at the pleading stage.<sup>126</sup> However, in an important footnote to the majority opinion, Judge Hull explains that this opinion “merely lists some of the types of information that might have helped Clausen state an essential element of his claim with particularity but does not mandate all of this information for any of the alleged claims.”<sup>127</sup> So although the court suggested that amounts of charges, dates of billing, descriptions of billing policies, or a copy of a bill would be sufficient to survive a Rule 9(b) challenge, it did not hold that each are *per se* necessary.<sup>128</sup> Therefore, the Eleventh Circuit affirmed the trial court’s dismissal of the case for failure to comply with Rule 9(b) because Clausen failed to provide *any* information other than his conclusory belief that the nature of the scheme implied claims must have been submitted.<sup>129</sup>

Judge Barkett’s dissent argued that “conclusory” was the wrong word to describe the plaintiff’s complaint because Clausen listed dates of the allegedly improper medical service and claims that the government was billed a few days later, even providing the specific billing form.<sup>130</sup> Barkett felt that this information was evidence that Clausen inherently had some insight into the billing practices of LabCorp, which is sufficient “indicia of reliability” to infer claims for payment were actually made.<sup>131</sup> In addition, the dissent argued that practically, common sense dictates a reasonable expectation that a medical service provider would submit claims for payment

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<sup>126</sup> United States *ex rel.* Clausen v. Lab. Corp. of Am., 290 F.3d 1301, 1315–17 (11th Cir. 2002) (J. Barkett, dissenting). Judge Barkett approached the issue by focusing on the purpose of Rule 9(b), concluding that mere allegations that a false claim are submitted, like the ones asserted by Clausen, are enough to put defendants on notice and protect defendants from frivolous lawsuits. A district court in the D.C. Circuit has gone so far as to adopt Judge Barkett’s dissent in *Clausen* as the more appropriate interpretation. See U.S. *ex rel.* Pogue v. Diabetes Treatment Ctr. of Am., Inc., 238 F. Supp. 2d 258, 268–70 (D.D.C. 2002) (adopting the *Clausen* dissent and disagreeing with the majority for placing emphasis on “peculiarity” and not enough on the “purpose” of the rule.)

<sup>127</sup> *Clausen*, 290 F.3d at 1312 n.21 (11th Cir. 2002).

<sup>128</sup> *Id.* at 1312.

<sup>129</sup> *Id.* at 1315.

<sup>130</sup> *Id.* at 1317.

<sup>131</sup> *Id.* at 1317 n.3 (“Moreover, does not Clausen’s allegation that bills were submitted “on or within a few days” of the tests performed indicate that he had some familiarity with LabCorp’s billing practices?”)

after performing medical tests eligible for government reimbursement.<sup>132</sup>

In response, the majority called Clausen a “corporate outsider,” implying that the court could not assign reliability to his statements without more explanation (perhaps by elaborating on how he knew LabCorp would bill or describing the billing protocol for the company in general).<sup>133</sup> Although recognizing the difficulty for corporate outsiders who file as *qui tam* relators to plead with specificity, the court refused to create a “special leniency” for Clausen to meet the pleading requirements.<sup>134</sup> However, the court did mention its refusal to relax the standard “under these particular circumstances,” showing its willingness to relax 9(b)’s requirement if a complaint alleged the *right* “indicia of reliability.”<sup>135</sup> In fact, the court commented in a footnote that an exception might be warranted where the relator alleges “prolonged multi-act schemes” where the fraud is more complex.<sup>136</sup> This would serve to be important for the cases that followed *Clausen*.

#### B. *Post-Clausen Interpretation of Rule 9(b)*

The first significant deviation from the standard announced in *Clausen* was in an unpublished opinion, *Hill v. Morehouse Medical Associates, Inc.*<sup>137</sup> In *Hill*, the relator was a former employee of the defendant, a medical service provider.<sup>138</sup> As a professional coder and biller for the company, Hill provided a detailed account of the fraudulent billing practices and scheme to defraud the government.<sup>139</sup> She provided details about who engaged in the schemes and when the schemes occurred, but could not provide exact dates or patient names that were submitted to the Government, as they were

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<sup>132</sup> *Id.* at 1317 (“Perhaps Clausen could have found some information indicating that LabCorp—whose business is to perform medical tests for payment—had a policy of billing for the tests it performed. But here, the majority simply asks for the obvious.”)

<sup>133</sup> *Clausen*, 290 F.3d at 1314.

<sup>134</sup> *Id.* at 1314.

<sup>135</sup> *Id.* at 1314.

<sup>136</sup> *Clausen*, 290 F.3d at 1314 n.25 (11th Cir. 2002).

<sup>137</sup> No. 02-14429, 2003 WL 22019936, at \*1 (11th Cir. Aug. 15, 2003).

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*



confidential and in the possession of defendant.<sup>140</sup> However, she did identify the billing forms and provide a first-hand account of exactly how the process worked.<sup>141</sup> The court expanded on *Clausen*, interpreting footnote 25 to mean that Rule 9(b)'s heightened pleading standard may be relaxed if "evidence of fraud [i]s uniquely held by the defendant provided that the complaint . . . set[s] forth a factual basis for such belief."<sup>142</sup> Thus, the court elaborated what constitutes an "indicia of reliability" to satisfy 9(b) and entitles a relator to a more relaxed pleading standard.<sup>143</sup>

The court in *Hill* distinguished the facts of *Clausen*, where the relator was a "corporate outsider" and only offered conclusory allegations to support his theory, which did not justify relaxing the heightened pleading requirements.<sup>144</sup> Unlike the plaintiff in *Clausen*, Hill worked in the billing and coding department, the actual department from which the fraudulent billing schemes occurred.<sup>145</sup> This first-hand knowledge set her apart from the relator in *Clausen* and allowed her to support her legal theory by identifying confidential documents, providing facts about the billing process, the names of employees responsible for the fraud, and the frequency of the submissions for false payment.<sup>146</sup> As such, the Eleventh Circuit held that Hill's employment in the billing department and first-hand knowledge of the fraudulent practice provided the necessary "indicia of reliability" for the court to infer that false claims were actually submitted and allow Hill to get past the pleading stage, despite her lack of evidence proving as much.<sup>147</sup> This decision, although unpublished and lacking precedential value, is an example of how the Eleventh Circuit intended to consider relaxing the heightened pleading requirement in situations where the court could trust

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<sup>140</sup> *Id.* at \*2.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Hill v. Morehouse Med. Associates, Inc.*, 02-14429, 2003 WL 22019936, at \*3 (11th Cir. Aug. 15, 2003).

<sup>144</sup> *Id.* at \*4.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at \*5 ("Moreover, as Hill was an employee within the billing and coding department and witnessed firsthand the alleged fraudulent submissions, her factual allegations provide the indicia of reliability that is necessary in a complaint alleging a fraudulent billing scheme.")

the relator's less-than-sufficient allegations, which is not consistent with a *per se* rule that the Circuit is sometimes characterized as having.<sup>148</sup>

The Eleventh Circuit interpreted the relationship between *Clausen* and *Hill* in later opinions. In *Corsello v. Lincare, Inc.*, the Eleventh Circuit distinguished the facts from *Hill* to hold that a relator employee salesperson did not provide the requisite "indicia or reliability" to satisfy Rule 9(b) when he failed to provide an underlying basis for his assertions.<sup>149</sup> As a salesperson for defendant, Corsello was not a "corporate outsider," but he was also not employed in the billing department and did not have access to files outside his department.<sup>150</sup> The court narrowly interpreted *Hill*, holding that mere employment with a defendant does not automatically provide the "indicia of reliability" required by *Clausen*.<sup>151</sup> The court acknowledged that the relator in *Hill* had also based some allegations on "information and belief," however noted that Hill provided a higher level of reliability due to her position in the company and her explanation for why she knew bills were submitted, which allowed the court to accept her pleadings.<sup>152</sup> Besides being generally "aware of billing practices," Corsello could not specify why he believed false claims were submitted and so the Court held that "insider" status was not by itself enough to satisfy Rule 9(b).<sup>153</sup>

Taking a more nuanced approach, in *United States ex rel Walker v. R&F Properties*, the Eleventh Circuit held that the relator, a nurse practitioner employed by the defendant, met the heightened pleading standard when she provided specific reasons for her belief that false claims had been submitted to the government, despite lacking documentary evidence.<sup>154</sup> Even though the employee did not work in the billing department (like in *Clausen*), she did more than offer

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<sup>148</sup> One example is the Fifth Circuit in *United States ex rel. Grubbs v. Kanneganti*. 565 F.3d 180, 186, 190 & n. 32 (5th Cir. 2009) ("The *Clausen* court made plain its position that to plead a presentment claim, the minimum indicia of reliability required to satisfy the particularity standard are the specific contents of actually submitted claims, such as billing numbers, dates, and amounts.")

<sup>149</sup> 428 F.3d 1008, 1013–14 (11th Cir. 2005).

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> 433 F.3d 1349, 1360 (11th Cir. 2005).

mere speculation that bills were sent to the government (like in *Hill*), such as describing conversations with other employees about the improper billing practices (unlike in *Corsello*).<sup>155</sup>

However, in *U.S. ex rel. Atkins v. McInteer*, the court took a more “rigid” approach and reaffirmed that *Clausen* imposes a high standard, demanding some other indicia of reliability if a plaintiff can only plead mere conclusory allegations that bills were submitted.<sup>156</sup> Like in *Clausen*, the relator pleaded specifics about the fraudulent scheme, citing patients, dates, and medical records for which false claims were submitted.<sup>157</sup> However, *Atkins* failed to provide sufficient indicia of reliability to believe that false claims were actually submitted to the government.<sup>158</sup> Unlike in *Hill*, he did not work in the billing department and, although he heard rumors about fraudulent billing practices, he never personally observed the fraudulent behavior.<sup>159</sup> *Atkins* could not provide reason for his belief that false claims were submitted and thus, the court dismissed his claim, “for it lack[ed] sufficient indicia of reliability to haul the defendants into court.”<sup>160</sup>

In *U.S. ex rel Sanchez v. Lymphatx, Inc*, the Eleventh Circuit further retreated from the more relaxed approach taken in *Walker*, when it held that an office manager who had direct knowledge of her employer’s billing practice still failed to meet the requirements of Rule 9(b) because she did not provide any specific details about the actual false claims, such as “the dates on or the frequency with which the defendants submitted false claims, the amounts of those claims, or the patients whose treatment served as the basis for the claims.”<sup>161</sup> The court held that “without these or similar details, *Sanchez*’s complaint lacks the ‘indicia of reliability’ necessary under Rule 9(b) to support her conclusory allegations of wrongdoing.”<sup>162</sup> The court in *Sanchez* noted that *Clausen* and *Walker* might lead to inconsistent results, but ultimately upheld *Clausen*. “To the

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<sup>155</sup> *Id.*

<sup>156</sup> 470 F.3d 1350, 1358 (11th Cir. 2006).

<sup>157</sup> *Id.* at 1359.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 1360.

<sup>161</sup> 596 F.3d 1300, 1302 (11th Cir. 2010).

<sup>162</sup> *Id.*

extent that *Walker* conflicts with specificity requirements of *Clausen*,” the court wrote, “our prior-panel-precedent rule requires us to follow *Clausen*.”<sup>163</sup>

Since *Clausen* and *Hill* were decided, several district courts interpreted the Eleventh Circuit as having two separate requirements: either submit actual proof that false claims were submitted to the government *or* provide enough of an “indicia or reliability” for the court to relax the standard and infer that claims were likely submitted.<sup>164</sup> As Judge Huck in the Southern District of Florida explained, “While no specific claims were identified in *Clausen*, the identification of specific claims is only one way to satisfy Rule 9(b)’s requirement, but it is not the only way . . . .As the Eleventh Circuit clarified in *Hill*, the identification of specific claims is not necessary where there is a reliable indication that claims were actually submitted.”<sup>165</sup>

The Middle District of Georgia Court in *U.S. ex rel. Willis v. Angels of Hope Hospice, Inc.* noted yet another interpretation of *Clausen* that lacked clarity, asking “whether establishing the ‘indicia of reliability’ is an additional standard a relator may use in lieu of pleading the details of the submission of false claims or if . . . it is a requirement in addition to pleading actual submission of at least a few false claims.”<sup>166</sup> Ultimately, the district court held that it “does not read *Clausen* or its progeny to hold a relator must in every case allege detailed billing information to withstand a Rule 9(b) motion.”<sup>167</sup> Thus, although the relator could not allege that false claims were actually presented, because of “the particular circumstances of this case,” (whereby the relator had recorded conversations of the

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<sup>163</sup> *Id.* at 1303 n. 4.

<sup>164</sup> *U.S. ex rel. Osheroff v. Tenet Healthcare Corp.*, 2012 WL 2871264 at \*5 (S.D. Fla. July 12, 2012) (interpreting *Clausen* to find that there is more than one way to satisfy Rule 9(b)’s requirements: either by identifying specific claims or providing “some indicia of reliability.”); *See also* *U.S. ex rel. Brunson v. Narrows Health & Wellness, LLC*, 469 F. Supp. 2d 1048, 1051-52 (N.D. Ala. 2006) (determining that *Hill* contains legitimate precedential value, as it is not fundamentally inconsistent with *Clausen*); *U.S. ex rel. Lockhart v. Gen. Dynamics Corp.*, 529 F. Supp. 2d 1335, 1340-41 (N.D. Fla. 2007) (holding complaint sufficient when the relator’s “personal participation put this complaint on a markedly higher level than any of the Eleventh Circuit cases in which a *qui tam* complaint was held deficient,” despite it lacking specific dates or amounts of deliveries).

<sup>165</sup> *Osheroff*, 2012 WL 2871264 at \*5.

<sup>166</sup> No. 5:11-CV-041 MTT, 2014 WL 684657, at \*7 (M.D. Ga. Feb. 21, 2014).

<sup>167</sup> *Id.* at \*8.

defendants' management admitting to fraud), *Clausen* did not require dismissal.<sup>168</sup>

In light of this inconsistency and uncertainty among the district courts, the Eleventh Circuit has clarified the holding and application of *Clausen* in its most recent opinions on this issue. The court in *U.S. ex rel. Keeler v. Eisai, Inc.* addressed circumstances when it should relax the 9(b) standard,<sup>169</sup> and in *U.S. ex rel. Mastej v. Health Management Associates, Inc.*, the court clarified the Eleventh Circuit's meaning of "other indicia of reliability."<sup>170</sup> In *Keeler*, the relator argued that the court should apply a relaxed 9(b) standard and let him continue to discovery by arguing several exceptions that had been recognized by other courts: 1) his corporate insider status provided him with a sufficient indicia of reliability that excused his lack of particularity; 2) he had alleged a far reaching scheme that was so complex that general allegations were sufficient to establish a claim; and 3) the information needed to properly plead the claim were within the exclusive control of the defendant.<sup>171</sup> Although the court recognized the validity of the reasoning behind *Hill*, where the Eleventh Circuit found appropriate circumstances to relax the requirement of Rule 9(b), it also noted that "*Clausen* supersedes *Hill* to the extent that *Hill* is inconsistent with *Clausen*."<sup>172</sup> And in this particular circumstance, a relaxed standard was not warranted because even the minimum pleading requirements of *Clausen* had not been met.<sup>173</sup>

The court did not say that *Hill* was wrongly decided or that the Eleventh Circuit should never relax the pleading standard; instead, it clarified that the court would need to see more substantiated claims before it would do so.<sup>174</sup> For example, in *Hill*, the relator provided first hand knowledge of the fraudulent billing practice.<sup>175</sup>

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<sup>168</sup> *Id.* ("No goal of Rule 9(b) would be served by requiring Willis to have recorded a clerk in Angels' billing department confirming that a bill was actually submitted.")

<sup>169</sup> United States *ex rel. Keeler v. Eisai, Inc.*, 568 F. App'x 783, 801 (11th Cir. 2014).

<sup>170</sup> No. 13-11859, 2014 WL 5471925, at \*12 (11th Cir. Oct. 30, 2014).

<sup>171</sup> *Keeler*, 568 F. App'x at 801.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

Here, the relator alleged he had “both personal and inside knowledge;” but in fact, he was a salesman without access to know whether providers actually submitted claims for reimbursement to the government.<sup>176</sup> In *Hill*, the documents proving fraud were confidential and could not be copied, whereas here, the documentation proving fraud could have been easily accessed.<sup>177</sup> Ultimately, the court found that the complaint was based on unfounded allegations that could not be admitted without going against the entire purpose and intent of Rule 9(b).<sup>178</sup> The result of *Keeler* is confirmation from the Eleventh Circuit that it would apply a more relaxed pleading requirement if, like *Hill*, the facts of the case warranted it, while also reaffirming the validity of *Clausen*’s base requirements.

In *Mastej*, the relator’s complaint detailed a financial incentive scheme run by the defendant and met Rule 9(b)’s required level of specificity.<sup>179</sup> *Mastej* named the doctors and employees involved and described “what the incentives were, when they were provided, why they were provided, and why they were illegal.”<sup>180</sup> However, he failed to provide the same level of detail in regard to whether actual false claims were submitted to the government.<sup>181</sup> Instead of ending the analysis there, the Eleventh Circuit officially recognized that “detailed information about a representative claim is not the only way a relator can establish some indicia of reliability.”<sup>182</sup> A relator could also show “that he personally was in a position to know that actual false claims were submitted to the government and had a factual basis for his alleged personal knowledge.”<sup>183</sup> The court proceeded to analyze whether *Mastej* had proven this under a second step, whereby if the complaint lacked particularity as to false claims actually being submitted, the court would move on to discover whether any “indicia of reliability” warranted relaxing the standard.<sup>184</sup>

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<sup>176</sup> *Id.*

<sup>177</sup> *See Keeler*, 568 F. App’x at 801.

<sup>178</sup> *See Id.*

<sup>179</sup> *Mastej*, 2014 WL 5471925, at \*11.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at \*12.

Ultimately, the court found that Mastej provided sufficient indications of reliability for the court to infer that actual claims were submitted to the government during his time as CEO of one of defendant's regional hospitals.<sup>185</sup> The special considerations that provided "reliable indicia" during Mastej's employment included his personal knowledge working for the defendant for six years; his familiarity with the company's services, patients, revenues and billing practices; his personal interactions with the individuals who committed fraud; and his presence in meetings where Medicare patients and submissions to the government were discussed.<sup>186</sup> However, "after his employment ended, Mastej was no longer privy to information about the Defendants' business practices, Medicare patients, referrals of patients, the billing of services to Medicare, or revenue from Medicare reimbursements."<sup>187</sup> Thus, while the court found Mastej's allegations sufficient for the time period he worked for the Defendant, it also held that Mastej did *not* satisfy the requirement of 9(b) for any allegations of fraud that occurred *after* Mastej left the Defendant's employment.<sup>188</sup> The court emphasized that this analysis was on a case-by-case basis, and was not suggesting a *qui tam* plaintiff-employee could never base his or her case on false claims committed after one has left a defendant's employment.<sup>189</sup> But, because Mastej's reliability stemmed from his highly influential role in the company, when he left, he could no longer provide a factual basis to support his allegation that the defendant must have submitted claims to the government.<sup>190</sup>

Additionally, the court considered the *type* of fraud being alleged, and in this case the fraud (an incentive for referral schemes) only required the names of the patients and alleged doctors who participated in the referrals in order to prove the fraud.<sup>191</sup> In this instance, more specific evidence (such as the type of billing code, date of service and charge, or type of medial service) was not relevant to

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<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at \*13.

<sup>188</sup> *Mastej*, 2014 WL 5471925, at \*12.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at \*13.

<sup>191</sup> *Id.*

whether fraud was committed against the government.<sup>192</sup> More importantly than the result of the case, *Mastej* clarified that the Eleventh Circuit considers whether a relator can establish some other “indicia of reliability” besides providing billing details as an additional option to support an allegation that false claims were actually submitted to the government.<sup>193</sup>

### C. *Nuanced or Strict?*

After establishing the current precedent in Eleventh Circuit FCA cases, the question becomes what exactly is the Eleventh Circuit’s Rule 9(b) standard? The Solicitor General commented that the Eleventh Circuit has not consistently adhered to a rigid understanding of Rule 9(b) and cites *Walker* and *Clausen* as examples of the nuanced “indicia of reliability” approach.<sup>194</sup> However, when considering the circuit split, most still assign the Eleventh Circuit to the strict side.<sup>195</sup> What is interesting is how the entire standard is in flux, whereby certain circuits seemingly go back and forth and others take a firm stance on one side.<sup>196</sup>

Despite characterizations otherwise, the Eleventh Circuit’s approach is neither nuanced nor rigid. In fact, the Eleventh Circuit has never wavered in setting its standard since the seminal case, *Clausen*.<sup>197</sup> Indeed, *Clausen* always provided the option for other “indicia of reliability” to be offered as a means of supporting allegations of fraud and the footnotes provide examples for when it may

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<sup>192</sup> *Mastej*, 2014 WL 5471925, at \*13 (Compare to other FCA cases, where “the allegation is that a defendant’s Medicare claim contained a false statement because the claim sought reimbursement for particular medical services never rendered to the patient, or for medical services that were unnecessary, overcharged, or miscoded, or for improper prescriptions, or for services not covered by Medicare. In those types of cases, representative claims with particularized medical and billing content matter more, because the falsity of the claim depends largely on the details contained within the claim form—such as the type of medical services rendered, the billing code or codes used on the claim form, and what amount was charged on the claim form for the medical services.”) (internal citations omitted).

<sup>193</sup> *Id.* at \*11.

<sup>194</sup> Brief for the United States as Amicus Curiae, *supra* note 90, at 10–11.

<sup>195</sup> Gibson, Dunn, & Crutcher LLP, *supra* note 17.

<sup>196</sup> *Id.*

<sup>197</sup> United States *ex rel.* Clausen v. Lab. Corp. of Am., 290 F.3d 1301, 1312 n.21 (11th Cir. 2002).



be warranted to relax the heightened pleading standard.<sup>198</sup> As Section IIB suggests, from the very beginning, the Eleventh Circuit allowed for both a strict and nuanced interpretation. This is why it is the correct approach. It properly balances the competing purposes behind Rule 9(b) and the False Claims Act in a way that polarizing strict or nuanced interpretations cannot. While we want to encourage lawsuits that expose fraud and reap the substantial reward, we also want to protect defendants from baseless lawsuits that could damage reputations or fail to provide adequate notice for a proper defense. The Eleventh Circuit takes this into account by requiring pleadings to show that false claims were *actually* presented to the government, because without particularity, “there is simply no actionable damage to the public fisc as required under the False Claims Act.”<sup>199</sup>

Although there is a valid argument that requiring less particularity would still fulfill the purpose of Rule 9(b) in one context, such as when details of a scheme sufficiently put the defendant on notice as to the misconduct with which they are charged, it still does not protect defendants against “spurious charges of immoral and fraudulent behavior.”<sup>200</sup> While lack of information in a complaint does not necessitate that the lawsuit is frivolous, if 9(b) is to be safeguarded in even the slightest degree, there should be a threshold barrier requiring specificity to show that false claims were submitted.

At the same time, the Eleventh Circuit acknowledges the intent behind the FCA, which some consider to be “the single most important tool that American taxpayers have to recover funds.”<sup>201</sup> The

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<sup>198</sup> *Id.*

<sup>199</sup> *Id.* at 1311.

<sup>200</sup> United States *ex rel.* Clausen v. Lab. Corp. of Am., 290 F.3d 1301, 1315–17 (11th Cir. 2002) (J. Barkett, dissenting) (“While a requirement that the plaintiff further identify the precise dates and amounts of claims for payment may result in the dismissal of more lawsuits, there is no reason to think that the majority of the additional lawsuits dismissed will be frivolous ones. When an outsider like Clausen has no pre-discovery means of access to the dates on which the defendant submitted its claims for payment, the lack of that information tells us nothing about the likelihood that the lawsuit is frivolous.”)

<sup>201</sup> Dep’t of Justice Office of Pub. Affairs, *Justice Department Celebrates 25th Anniversary of False Claims Act Amendments of 1986*, JUSTICE.GOV (Jan. 31, 2012), <http://www.justice.gov/opa/pr/justice-department-celebrates-25th-anniversary-false-claims-act-amendments-1986>.

government strongly favors eliminating any barriers to entry for FCA lawsuits, and as such, the Solicitor General took the position that the “nuanced” approach is the correct interpretation because “a rigid rule that such complaints are inadequate would hinder the ability of *qui tam* relators to perform the role that Congress intended them to play in the detection and remediation of fraud against the United States.”<sup>202</sup> However, the Solicitor General also made sure to distinguish between circuits that have a “*per se*” rigid rule, as opposed to those who do not consistently apply rigorous requirements.<sup>203</sup> In doing so, he acknowledged that strict circuits are not necessarily incorrect when they also consider other factors to meet the requirement for particularity, such as how relators are often employees in the defendant’s company.<sup>204</sup>

This further supports the argument that traditionally “strict” circuits that also allow inferences of reliability, like the Eleventh, take the more accurate approach. While those circuits require strict adherence to Rule 9(b), they are also willing to relax the requirement when plaintiffs show indicators of reliability that reduce the risk for a frivolous or harmful lawsuit—in essence, meeting both the purpose of Rule 9(b) and the FCA.<sup>205</sup> If given another chance to consider this issue, the government should take into consideration that the extremely “nuanced” approach is also incorrect because it dis-

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<sup>202</sup> Brief for the United States as Amicus Curiae, *supra* note 90, at 14–15.

<sup>203</sup> *See Id.* at 13.

<sup>204</sup> *Id.* at 15–16 (Additionally, the Solicitor General felt that “[s]ubjecting *qui tam* relators to a *per se* rule requiring the identification of specific false claims is especially unwarranted because it attaches dispositive significance to the relator’s awareness of details that in most instances are already known to the government. . . . Requiring *qui tam* complaints to identify specific false claims thus would not meaningfully assist the government’s enforcement efforts.”)

<sup>205</sup> The Solicitor General had also questioned whether the “rigid” approach even existed at all, as most courts do not adhere to it. I tend to agree. I do not think a rigid “*per se*” approach exists, further supporting the notion that the remaining extremely nuanced standards pose more harm. Brief for the United States as Amicus Curiae, *supra* note 90, at 10–11; *Foglia v. Renal Ventures Mgmt., LLC*, 754 F.3d at 156.

charges meaning from Rule 9(b) and provides less protection for unsubstantiated claims, despite its usefulness in helping the government bring more actions under the FCA.

Ultimately, more circuits should look to the Eleventh as a guide in order to properly utilize the False Claims Act, while also upholding the dignity of the Federal Rules of Civil Procedure. There should be neither a “nuanced” nor “strict” approach. Instead, the rule should be governed by a firm commitment to the rigid particularity requirement of 9(b) (which requires either representative samples or specific details that false claims were submitted), while also providing flexible support for plaintiffs with valid claims, but who may not have all the documents alleged with the highest detail.

#### V. WHETHER THE SUPREME COURT SHOULD GRANT CERTIORARI

Given the important ramifications of this issue, many are calling for the Supreme Court to provide a definitive answer on how to apply the particularity requirements of Rule 9(b) to actions under the FCA, and there is currently a pending petition before the Court.<sup>206</sup> Despite these concerns, the Supreme Court will likely not need to grant certiorari on this issue for similar reasons that it denied the 2014 petition from the Third Circuit.<sup>207</sup> Many circuits seem to be shifting between ideologies, and others who are still on opposite ends of the spectrum will likely consider conforming to the majority as recoveries under the FCA continue to grow.<sup>208</sup>

The First Circuit provides a clear example of a shifting ideology. It is commonly cited as taking the more nuanced approach, which generally requires “specific details of a fraudulent scheme paired with reliable indicia that can lead to a strong inference that claims

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<sup>206</sup> The petition arises from the D.C. Circuit case, *United States ex rel. Heath v. AT&T, Inc.*, 791 F.3d 112 (D.C. Cir. 2015). The issue set forth is “Whether a relator asserting a claim under the False Claims Act can satisfy Federal Rule of Civil Procedure 9(b)’s particular pleading requirement without setting forth specific facts regarding at least one allegedly false or fraudulent claim submitted to the government.” Gibson, Dunn, & Crutcher LLP, *supra* note 17; Robert Conlan, Jr., *supra* note 20.

<sup>207</sup> Brief for the United States as Amicus Curiae, *supra* note 90, at 10–11.

<sup>208</sup> *See Id.*; Gibson, Dunn, & Crutcher LLP, *supra* note 17.

were submitted.”<sup>209</sup> Yet, in a 2013 decision, *United States ex rel. Ge v. Takeda Pharmaceutical Co.*, the First Circuit cited the Eleventh and Fourth Circuits to explain its pleading requirement.<sup>210</sup> The court provided a non-exclusive list of details that should be alleged to identify false claims for payment, and although the standard did not constitute a “checklist of mandatory requirements,” the court felt that “at least some of the claims must be pleaded in order to satisfy Rule 9(b).”<sup>211</sup> Although *Ge* could be interpreted as evidence that the First Circuit switched from a more nuanced to a stricter approach,<sup>212</sup> this Comment argues that it merely joined the Eleventh Circuit in finding an appropriate balance. The court even addressed as much, noting that although the False Claims Act creates financial incentives for relators to expose fraud, it also attracts “parasitic relators;” thus, the First Circuit noted that Rule 9(b) is but one “of a number of limitations on *qui tam* actions.”<sup>213</sup>

In contrast to circuits that seem to be moving from one ideology to another, the Third and Fourth Circuits are both examples of courts that have recently vocalized a firm stance that they identify as falling on one side of the circuit split.<sup>214</sup> In *Foglia v. Renal Ventures Management, LLC*, the Third Circuit decided on the nuanced approach favored by the Solicitor General, who had recently said in an amicus curiae brief on this issue that the rigid approach is “unsupported by Rule 9(b) and undermines the FCA’s effectiveness as a tool to combat fraud against the United States.”<sup>215</sup> Ultimately, the Third Circuit sided with the First, Fifth, and Ninth Circuits to hold that in order to

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<sup>209</sup> Gibson, Dunn, & Crutcher LLP, *supra* note 17.

<sup>210</sup> 737 F.3d 116, 123, 125 (1st Cir. 2013) *cert. denied*, 135 S. Ct. 53 (2014).

<sup>211</sup> *Id.* at 123 (quoting *United States ex rel. Clausen v. Lab. Corp. of Am.*, 290 F.3d 1301, 1312 n.21 (11th Cir. 2002)).

<sup>212</sup> Scott Stein, *First Circuit Affirms Ge, Holds The Line On Requiring FCA Claims To Be Pleaded With Particularity*, ORIGINAL SOURCE: THE SIDLEY AUSTIN FALSE CLAIMS ACT BLOG (Dec. 16, 2013), <http://fcablog.sidley.com/blog.aspx?entry=336>.

<sup>213</sup> *United States ex rel. Ge v. Takeda Pharm. Co.*, 737 F.3d at 123.

<sup>214</sup> *See generally* *Foglia v. Renal Ventures Mgmt., LLC*, 754 F.3d 153, 155 (3d Cir. 2014); *United States ex rel. Nathan v. Takeda Pharm. N. Am., Inc.*, 707 F.3d 451, 455–56 (4th Cir. 2013), *cert. denied*, 134 S.Ct. 1759 (2014).

<sup>215</sup> Brief for the United States as Amicus Curiae, *supra* note 90, at 10–11.

satisfy the requirements of Rule 9(b), the relator must “provide particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted.”<sup>216</sup> The Third Circuit’s Rule 9(b) standard does not require much. In *Foglia*, the relator was a nurse who alleged the defendant was over-charging for unused drugs.<sup>217</sup> Without seeking any further information other than inventory logs and the plaintiff’s theory of how the defendant might have engaged in fraudulent practices based on the amount of drugs used each day (and the court even acknowledged that it was possible no fraud occurred), the court found that the plaintiff met the heightened pleading requirement because the allegations gave notice to the defendant and the billing records were within the control of the defendant.<sup>218</sup> Despite the allegations providing sufficient notice to the defendants, this nuanced approach permits claims to proceed to discovery, despite real concern that no fraud had actually occurred—something that 9(b) avidly seeks to prevent.<sup>219</sup>

In contrast, the Fourth Circuit adopted the rigid approach in *United States ex rel. Nathan v. Takeda Pharmaceuticals North America, Inc.*, holding that “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, a relator must allege with particularity that specific false claims actually were presented to the government for payment.”<sup>220</sup> The court intended to choose a side on the “circuit split,” explicitly saying “to the extent that other cases apply a more relaxed construction of Rule 9(b) in such circumstances, we disagree with that approach.”<sup>221</sup>

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<sup>216</sup> *Foglia*, 754 F.3d at 158.

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> See *United States ex rel. Atkins v. McInteer*, 470 F.3d 1350, 1358-61 (11th Cir. 2006) (“When a plaintiff does not specifically plead the minimum elements of [his] allegation, it enables [him] to learn the complaint’s bare essentials through discovery and may needlessly harm a defendant’s goodwill and reputation by bringing a suit that is, at best, missing some of its core underpinnings, and at worst, . . . baseless allegations used to extract settlements.”)

<sup>220</sup> *United States ex rel. Nathan v. Takeda Pharm. N. Am., Inc.*, 707 F.3d 451, 458 (4th Cir. 2013), *cert. denied*, 134 S.Ct. 1759 (2014).

<sup>221</sup> *Id.*

However, because it took a “case-specific” focus, it may end up resolving cases in the balanced form the Eleventh Circuit does.<sup>222</sup> In fact, by already distinguishing cases based on whether the inference leads towards a “necessary” versus “potential” submission of false claims, it intuitively would allow claims without specific details alleged to meet Rule 9(b)’s standard.<sup>223</sup> For example, if the fraudulent scheme implies that the only other logical result of a defendant’s actions was to submit a claim to the government, the Fourth Circuit will infer it without requiring any particularized details proving false claims were submitted. This is the type of approach the Solicitor General seemed to support because it was a balanced opinion, instead of an inflexible “*per se*” rule.<sup>224</sup> This again demonstrates how the “rigid” approach assigned to the Eleventh and Fourth Circuits is not the incorrect interpretation, but instead the properly balanced one.

Similarly, the Eighth and Tenth Circuits show signs of moving from a more strict approach to a more balanced approach.<sup>225</sup> In *United States ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, the Tenth Circuit cited and agreed with the First and Eleventh in holding that a relator must provide details that identify a false claim of payment made to the government.<sup>226</sup> However, in *United States ex rel. Lemmon v. Envirocare of Utah, Inc.*, the court cited the First, Fifth, and Seventh Circuits to hold that “claims 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.”<sup>227</sup> Likewise, in a recent Eighth Circuit decision, *United States ex rel. Thayer v. Planned Parenthood of the Heartland*, the court found that in certain circumstances, it will adopt the lower pleading standard where a “relator can satisfy Rule 9(b) by alleging particular details of a scheme to

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<sup>222</sup> *See Id.*

<sup>223</sup> *Id.*

<sup>224</sup> Brief for the United States as Amicus Curiae, *supra* note 90, at 17.

<sup>225</sup> *United States ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702, 727–28 (10th Cir. 2006); *U.S. ex rel. Lemmon v. Envirocare of Utah, Inc.*, 614 F.3d 1163, 1172 (10th Cir. 2010).

<sup>226</sup> 472 F.3d at 727–28.

<sup>227</sup> 614 F.3d at 1172.

submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted.”<sup>228</sup>

Although some circuits apply a “nuanced” approach, and others a “strict” one, the Eleventh Circuit’s standard is the one that balances both extremes. For example, the Eleventh Circuit requires particularized details for the alleged scheme to submit false claims, as well as particularized details that the false claims were actually submitted.<sup>229</sup> However, if the relator cannot provide particularized details, he may nevertheless prove that reliable indicia exist to warrant relaxing the requirement.<sup>230</sup> If the relator has a valid claim, then regardless of whether or not he is able to prove that a defendant submitted bills to the government, the relator’s case will not be dismissed as long as he provides the court with other reasons to trust his allegations.<sup>231</sup>

Proponents of the nuanced approach might argue that the “balanced” approach is nothing more than the strict circuits adopting the “nuanced” approach. However, there is a fine distinction between the two approaches. The balanced circuits do not automatically assert that mere allegations of a scheme allow the court to infer fraudulent claims were submitted for payment, whereas that approach is the “nuanced” circuit’s default rule. That approach is inappropriate for the reasons provided in the above sections—it degrades the meaning of Rule 9(b) in order to assist the purposes of the FCA. In contrast, the balanced circuits require that both the fraudulent scheme and false submissions for payment be pleaded with specificity. It is only after attempting to ascertain this strict requirement that these courts will then proceed to the next step—determining whether a sufficient indicia of reliability has been demonstrated to allow a reasonable inference false claims were submitted. This two-step process is not an inflexible *per se* rule. Instead, it is the proper application of Rule 9(b), which tries to work with the intent of Congress and find reason to believe a FCA relator by finding legitimacy in their pleading. Thus, while the Eleventh Circuit’s approach is

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<sup>228</sup> 765 F.3d 914, 917–18 (8th Cir. 2014).

<sup>229</sup> United States *ex rel.* Clausen v. Lab. Corp. of Am., Inc., 290 F.3d 1301, 1310–11 (11th Cir. 2002).

<sup>230</sup> *Id.*

<sup>231</sup> *Id.* at 1311.

similar to both the strict and nuanced interpretations, it correctly incorporates both into a two-step analysis that appropriately balances the purposes of Rule 9(b) in the FCA context.

Ultimately, the Supreme Court will not need to grant *certiorari* if circuits continue the trend of shifting from a more extreme approach (whether strict or nuanced) to a more balanced one. However, if the Court does decide to intervene in order to provide clear direction, this Comment strongly urges it to utilize the Eleventh Circuit as a model FCA pleading standard. Circuits that are too nuanced are hamstringing the purpose of Rule 9(b), while circuits that are too strict are impeding the effectiveness of the False Claims Act. The Eleventh Circuit, while still demanding much more specificity than nuanced standards, strikes the perfect balance between servicing both demands.

#### CONCLUSION

Pleading cases under the False Claims Act presents many interesting dilemmas. There are multiple moving parts, actors, and competing interests on both sides. Does the court want to honor the purpose of Rule 9(b), but make it more difficult to plead a claim? Or does it want to honor Congress's intent behind passing the False Claims Act by letting as many relators have their day in court as possible, no matter the legitimacy of their pleadings? Plaintiffs are incentivized to file FCA lawsuits in order to reap a substantial reward and may file frivolous claims simply because there is a slight chance that they succeed and realize the benefits. On the other hand, defendants want to get the case thrown out as early as possible and so automatically file 12(b)(6) motions to dismiss, alleging failure to adequately plead with particularity under Rule 9(b)—even if they actually defrauded the government. Do government contractors and heavily regulated industries, like the healthcare industry, use this litigation to better hide their fraudulent activities? Or is the False Claims Act working and forcing corporations to comply more strictly with government regulations?<sup>232</sup> With the potential for a *qui*

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<sup>232</sup> The DOJ has also placed a “renewed emphasis” on encouraging government compliance, in addition to monetary recovery, evident by the growing amount of settlement agreements. At the American Bar Association’s 10th Na-



*tam* relator to win millions and the government regaining billions, all of this becomes a high stakes game that puts the controversy over Rule 9(b)'s particularity requirements on the radar for so many of these actors. For these reasons, it is extremely important that there be standardization on this issue. Hopefully, the reasoning behind this Comment will challenge the notion that the nuanced approach is the correct interpretation, and instead encourage more circuits to adopt the Eleventh Circuit's well-balanced False Claims Act pleading standard.

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tional Institute on the Civil False Claims Act and Qui Tam Enforcement, the Assistant Attorney General Stuart Delery told attendees that using the FCA to encourage "best practices" was a government priority. Gibson, Dunn, & Crutcher LLP, *supra* note 17.