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Charis Ann Mitchell

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## COMMENT

### A FRAUDULENT SCHEME'S PARTICULARITY UNDER RULE 9(B) OF THE FEDERAL RULES OF CIVIL PROCEDURE

*Charis Ann Mitchell*<sup>†</sup>

#### ABSTRACT

While the False Claims Act is one of the federal government's most successful tools in recovering money received under a false claim, there remains room for improvement. Under the False Claims Act, a citizen, known as a relator, may bring a lawsuit, a *qui tam* action, on behalf of the government when the relator knows of a company or individual cheating the government. However, this concept has been undermined by the courts' improper application of Federal Rule of Civil Procedure 9(b), where it states that fraud must be stated with particularity. Not only does Rule 9(b) not properly apply to a *qui tam* action, but the courts also insist on holding a relator to an impossible standard of particularity.

Although some courts have attempted to give a relator a relaxed pleading standard, each attempt has been unsuccessful due to one point: the court focuses on particular pleading in the wrong element of an action under the False Claims Act. In order to state a cause of action under the Act, the relator must plead: (1) there was a claim for a federal fund; (2) the claim was false; and (3) the defendant knew of its falsity. The judiciary has been demanding a relator plead the first two elements with particularity, meaning that the relator must identify a specific claim.

Such an application undermines the *qui tam* provisions of the False Claims Act and improperly restricts the relator, who has no access to the claims themselves, since a relator is not a real party in interest in a *qui tam* action. Therefore, this Comment proposes that Rule 9(b) should apply only to a relator's pleading of a specific fraudulent scheme—that is, applying Rule 9(b) to the third element of an action under the Act.

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<sup>†</sup> Charis Ann Mitchell received her J.D. from Liberty University School of Law in 2009, where she graduated *summa cum laude* as valedictorian of her class. Her term as law clerk for the Honorable Eric G. Bruggink of the United States Court of Federal Claims begins in August 2010, and she is a member of the Virginia State Bar. She would like to thank her brother, Michael, and her parents, Michael and Sharyn, for their continual support, love, and encouragement. She also thanks Professor Joel D. Hesch for his insight during the writing of this Comment.

The House of Representatives is currently proposing to fix this discrepancy between the False Claims Act and the rules of procedure. If the legislation is successful, the relator will be granted appropriate leeway in the relator's pleading, providing a balance between pleading with particularity under Rule 9(b) and pleading a short and plain statement under Rule 8. Such a legislative amendment will functionally override Rule 9(b), and solve the problem that has surfaced in the courts.

Whether the legislature is successful or not, this Comment proposes a standard workable under the current state of the law that will cease undermining the False Claims Act and the relators' ability to bring actions on behalf of the United States.

## I. INTRODUCTION

The False Claims Act (FCA) is the federal government's primary anti-fraud tool.<sup>1</sup> Through the assistance of willing citizens throughout the country, the United States Department of Justice has been able to recover over \$21 billion from false claims since the FCA was amended in 1986.<sup>2</sup> Nearly seventy-eight percent of that recovery is associated with suits brought by private citizens on behalf of the government. These citizens, called "relators," bring these suits under the *qui tam* provisions of the FCA.<sup>3</sup>

While not directly a "fraud" statute, it is nearly unanimous among the courts that Federal Rule of Civil Procedure<sup>4</sup> 9(b)<sup>5</sup> applies to these *qui tam*<sup>6</sup>

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1. The False Claims Act (FCA) is located at 31 U.S.C. §§ 3729-3733 (2006).

2. Press Release, Department of Justice, More than \$1 Billion Recovered by Justice Department in Fraud and False Claims in Fiscal Year 2008 (Nov. 10, 2008), available at <http://www.justice.gov/opa/pr/2008/November/08-civ-992.html>.

3. *Id.*

4. For space and brevity, this Comment will abbreviate "Federal Rules of Civil Procedure" as FRCP and refer to individual rules as merely "Rule" with a number following.

5. FRCP 9(b) states, "In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." FED. R. CIV. P. 9(b).

6. The term "*qui tam*" is "short for the Latin phrase *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, which means 'who pursues this action on our Lord the King's behalf as well as his own.'" Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 769 n.1 (2000) (emphasis added). A "relator" is the formal term for the colloquialism "whistleblower," the private citizen who reports the fraud. See United States *ex rel.* Karvelas v. Melrose-Wakefield Hosp., 360 F.3d 220, 225 n.7 (1st Cir. 2004) ("A 'relator' is '[a] party in interest who is permitted to institute a proceeding in the name of the People or the Attorney General when the right to sue resides solely in that official.' Black's Law Dictionary 1289 (6th ed. 1990).")

complaints brought under the FCA.<sup>7</sup> Rule 9(b) has a significant impact upon the relator and the case he filed on behalf of the government.

When a Rule 9(b) motion is filed against a relator's complaint, the motion is treated as a motion for dismissal under Rule 12(b)(6).<sup>8</sup> A motion to dismiss for failure to state a claim is "viewed with disfavor and [is] rarely granted."<sup>9</sup> Curiously, this is contrary to the incessant application of Rule 9(b) to *qui tam* complaints and the frequent dismissals throughout the circuits. Under this standard, if a relator fails to satisfy Rule 9(b), his complaint may be dismissed with prejudice,<sup>10</sup> causing the relator no longer to be able to pursue the cause of action on behalf of the government.

Rule 9(b) requires that any charges of fraud be pled with particularity,<sup>11</sup> and the courts have applied the Rule to every element of an FCA complaint.<sup>12</sup> In applying Rule 9(b) to each specific element, many courts demand that the relator identify a specific false claim for payment or an invoice provided to the government. However, such an application undermines the purposes of the FCA by holding the relator to an unattainable standard of particularity. Therefore, Rule 9(b) should be applied only to whether the relator pled a *scheme* with particularity.

Even while clinging to this inaccurate application, some circuits have attempted to apply a modified standard of pleading for a *qui tam* complaint.<sup>13</sup> Some courts evaluate whether a complaint has sufficient indicia of reliability,<sup>14</sup> and some may relax the standard of particularity

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7. See, e.g., *United States ex rel. Riley v. St. Luke's Episcopal Hosp.*, 355 F.3d 370 (5th Cir. 2004); *United States ex rel. Aflatooni v. Kitsap Physician Serv.*, 314 F.3d 995 (9th Cir. 2001).

8. See, e.g., *United States ex rel. SNAPP, Inc. v. Ford Motor Co.*, 532 F.3d 496 (6th Cir. 2008).

9. *Burlington N. & Santa Fe Ry. Co. v. Consol. Fibers, Inc.*, 7 F. Supp. 2d 822, 824 (N.D. Tex. 1998). "A dismissal for failure to state a claim is disfavored in the law and justified only if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *In re U.S. Abatement Corp.*, 39 F.3d 556, 559 (5th Cir. 1994). Further, courts "will only rarely encounter circumstances which justify granting such a motion." *Mahone v. Addicks Util. Dist. of Harris County*, 836 F.2d 921, 926 (5th Cir. 1988). Both *U.S. Abatement Corp.* and *Mahone* are quoted in JAMES B. HELMER, JR., *FALSE CLAIMS ACT: WHISTLEBLOWER LITIGATION* 357 (3d ed. 2002).

10. Frequently the relator will first be dismissed with leave to amend the complaint, but the ultimate result is that the complaint is dismissed with prejudice.

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

12. As discussed below, every action under the FCA demands that three elements be met: (1) there was a claim for a federal fund; (2) the claim was false; and (3) the defendant knew of its falsity.

13. See *infra* Part V.

14. See *infra* Part IV.A.

when the defendant has exclusive access to the proof of the case.<sup>15</sup> Nevertheless, even these courts continue to miss the mark by continuing to focus on and require the pleading of a specific false claim.

With the purposes of the FCA and the contemporary pleading rules in mind, this Comment proposes that the current disarray and misapplication of Rule 9(b) in the circuits be solved with a simple standard to evaluate a complaint's particularity. While Rule 9(b) retains an important function in the judicial system, in the context of a *qui tam* claim under the FCA, it is essential that the courts apply Rule 9(b) to the defendant's knowledge of the fraudulent scheme, thus rejecting the demand for identification of a specific claim for payment in the complaint. Since the relator is not the actual party in interest in a *qui tam* action, most relators do not have access to a cheating defendant's billing documents and invoices, and therefore should be allowed to plead the defendant's fraudulent scheme, that is, the defendant's knowledge of the falsity of a claim for payment. In addition, relators should not be forced into the impossible situation of pleading each fraudulent invoice.<sup>16</sup> This standard fulfills the purposes of imposing particularized pleading, while also satisfying the purposes underlying the FCA itself.

This Comment also addresses the proposed House Revision dubbed the "False Claims Act Correction Act of 2007," which offers an alternative solution to the circuit confusion.<sup>17</sup> The House of Representatives' proposal<sup>18</sup> offers appropriate protections for *qui tam* defendants while balancing the government's great need for the dedicated relators who assist the government in recovering billions of dollars obtained by submitting false claims to the government.<sup>19</sup> This Comment also discusses the legality of such a legislative provision and its ability to functionally override the Federal Rules of Civil Procedure.

Part II of this Comment discusses the history of the FCA, Rule 9(b), and the interrelationship of the two. Part III addresses the disastrous results that occur when the courts stringently apply Rule 9(b) to the claim-for-payment element of a *qui tam* action. The various attempts to relax pleading are then discussed in Part IV, followed in Part V by a discussion of why Rule 9(b) should not be applied to a *qui tam* complaint. Since courts have incorrectly but relentlessly applied Rule 9(b) to an FCA action, Part VI proposes a

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15. See *infra* Part IV.A.

16. See *infra* Part VI.

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

18. The Senate's version of the bill does not retain a fix for the Rule 9(b) split, and the Senate should be encouraged to adopt the House's version of the bill.

19. See *supra* note 2 and accompanying text.

standard according to which the courts should apply Rule 9(b) to a *qui tam* complaint. Part VII discusses and evaluates the merits of the House of Representatives' proposal to amend the FCA and remedy the current misapplication of the Rule. Part VIII briefly concludes.

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

### A. *A Brief History of the False Claims Act*

The False Claims Act was enacted in 1863 during the Civil War in order to stop contractors from committing fraud against the military.<sup>20</sup> Due to the amount of false claims submitted, the FCA was implemented and allowed knowledgeable citizens to bring *qui tam* actions against anyone who submitted a false claim to the United States Government.<sup>21</sup> "Such persons, known as 'relators,'" became "private attorneys general who were rewarded for prosecuting the action by receiving 50 percent of all monies recovered in the suit."<sup>22</sup> Although the FCA was not facially a "fraud" statute, the intent of passing the FCA was clear: to "prevent and punish frauds upon the government of the United States" and include the average citizen in the battle.<sup>23</sup>

Despite the need for *qui tam* actions to help the government recover falsely obtained money, the FCA was used infrequently.<sup>24</sup> In the early part of the 1940s, the FCA was amended to prevent people from filing *qui tam* complaints based upon actions that had already been instituted in the criminal courts. Once an indictment was brought, the relator would then file a *qui tam* against the same individual for the same claim.<sup>25</sup> These "parasitic" lawsuits did not satisfy the purpose of the FCA, but rather undermined the allowance of the Attorney General to control the litigation

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20. United States *ex rel.* Minn. Ass'n of Nurse Anesthetists v. Allina Health Sys. Corp., 276 F.3d 1032, 1041 (8th Cir. 2002).

21. HELMER, *supra* note 9. The Union military was suffering from massive instances of fraud and misrepresentations. "Reports of munitions filled with sawdust rather than explosives and boots made of cardboard rather than leather abounded. Union soldiers opened crates of muskets, only to find them filled with sawdust instead of firearms." *Id.* at 35. For a comprehensive summary of the history of the FCA, see HELMER, *supra* note 9, at 34-61.

22. HELMER, *supra* note 9, at 34.

23. *Id.* at 36 (quoting CONG. GLOBE, 37th Cong., 3d Sess. 348 (1863)); see CLAIRE M. SYLVIA, FALSE CLAIMS ACT: FRAUD AGAINST THE GOVERNMENT 38 (2004). The FCA was, in essence, "setting a rogue to catch a rogue" by encouraging an individual to turn on the fraud doer and report the fraud to the government. United States *ex rel.* Foulds v. Tex. Tech. Univ., 171 F.3d 279, 293 (5th Cir. 1999).

24. SYLVIA, *supra* note 23, at 46.

25. HELMER, *supra* note 9, at 43.

against those defrauding the government,<sup>26</sup> spurring the FCA amendments in 1943.<sup>27</sup> The result of these amendments was that the effectiveness of the FCA was drastically limited in assisting the government to recover money wrongfully obtained.<sup>28</sup>

When the government was faced once again with rampant fraud against the military, Congress reevaluated the FCA and determined it was essential to amend the statute.<sup>29</sup> The 1986 Amendments, signed into law by President Reagan, enabled the government to intervene in a *qui tam* action,<sup>30</sup> allowed the original complaint to be filed under seal for sixty days,<sup>31</sup> granted the original source exception to the public disclosure bar,<sup>32</sup> prohibited retaliation against a relator,<sup>33</sup> and guaranteed a relator a minimum percentage award in a successful *qui tam* action.<sup>34</sup> Congress made further

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26. See SYLVIA, *supra* note 23, at 47; United States *ex rel.* Marcus v. Hess, 317 U.S. 537 (1943). *Hess* is the landmark case that spurred the 1943 amendments to the FCA. In *Hess*, the Supreme Court held that under the original FCA, a relator may bring a civil *qui tam* action against someone even if there was already a criminal indictment on file. In response,

Attorney General Francis Biddle asked Congress to repeal the *qui tam* provisions of the False Claims Act. Congress refused to go so far, but it did amend the Act to provide that there would be no jurisdiction over *qui tam* suits whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought.

United States *ex rel.* Minn. Ass'n of Nurse Anesthetists v. Allina Health Sys. Corp., 276 F.3d 1032, 1041 (8th Cir. 2002) (citations and internal quotation marks omitted).

27. SYLVIA, *supra* note 23, at 46. The key amendment from 1943 was the public disclosure bar, preventing these lawsuits. See, e.g., Rockwell Int'l Corp. v. United States *ex rel.* Stone, 549 U.S. 457 (2007). For a discussion of the public disclosure bar and the original source exception issues presented in the *Rockwell* decision, see Joel D. Hesch, *Restating the "Original Source Exception" to the False Claims Act's "Public Disclosure Bar,"* 1 LIBERTY U. L. REV. 111 (2006).

28. HELMER, *supra* note 9, at 47. The 1943 Amendments undermined the effectiveness of the Act in inciting relators to come forward and bring *qui tam* actions on behalf of the government. A percentage award was no longer guaranteed, the percentage was dramatically decreased, and the government had to lack knowledge *entirely* when the action was filed or else the action was dismissed. "While the elimination of the guaranteed bounty was discouraging, the most devastating effect of the Amendments was the jurisdictional bar that prevented any *qui tam* action unless the government lacked all knowledge of the fraud." *Id.*

29. SYLVIA, *supra* note 23, at 53.

30. 31 U.S.C. § 3730(b)(2), (4) (2006 & Supp. 2009).

31. *Id.* § 3730(b)(2).

32. *Id.* § 3730(e)(4).

33. *Id.* § 3730(h).

34. HELMER, *supra* note 9, at 55-56. See generally 31 U.S.C. §§ 3729-3733.

minor amendments<sup>35</sup> to the FCA in 1988, and this relator-friendly version of the statute is the current law.<sup>36</sup>

Upon the successful 1986 amendments to the FCA, the FCA became the government's primary tool to recover federal funds wrongfully obtained.<sup>37</sup> Of the approximately \$1 billion recovered by the government in 2008, relators filing *qui tam* actions<sup>38</sup> were awarded \$198 million.<sup>39</sup>

*B. Federal Rule of Civil Procedure 9(b): The Defendants' Friend*

In contrast to the movement toward notice pleading in Rule 8, where a "short and plain statement" is adequate for pleading,<sup>40</sup> Rule 9(b) proclaims that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally."<sup>41</sup> This requirement reflects the historical practice of requiring specific pleading in English and early American law.<sup>42</sup> These two requirements do not contradict each other, but flow into a complementary pleading system in

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35. SYLVIA, *supra* note 23, at 59. These amendments limited the ability to recover as a relator when the person was actually perpetrating the fraudulent scheme.

36. When the purposes of the FCA are evaluated, the history of the statute itself demonstrates the legislative reliance on the relator. It is essential to allow a relator to bring a *qui tam* claim and not impose an impossible standard of pleading, undermining the purpose of the FCA and allowing fraudulent contracts to be maintained against the federal government.

37. *Aveco Corp. v. U.S. Dep't of Justice*, 884 F.2d 621, 622 (D.C. Cir. 1989).

38. A relator is provided with substantive rights under the FCA. The relator has the right to continue with the case if the government chooses to not intervene, a right to remain as a joint plaintiff in the action, and a right to a percentage of the amount the government recovers as a result of the action. *See generally* 31 U.S.C. § 3730. Without these rights and the opportunity for a relator to bring a suit on behalf of the government, the federal government would miss many opportunities to collect money paid out under fraudulent or false means.

39. Press Release, Dep't of Justice, More than \$1 Billion Recovered by Justice Department in Fraud and False Claims in Fiscal Year 2008 (Nov. 10, 2008), *available at* <http://www.justice.gov/opa/pr/2008/November/08-civ-992.html>.

40. FRCP 8(a)(2) provides, "A pleading that states a claim for relief must contain a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2). This rule leads to shorter complaints and a more efficient system of pleading in the federal court system.

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

42. 5A CHARLES ALLEN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1296, 30 (3d ed. 2004).



which a plaintiff is to plead concisely and clearly the requisite elements of fraud to avoid dismissal for failure to state a claim.<sup>43</sup>

The purposes of Rule 9(b) and its requirement of particularity have been delineated by many federal courts.<sup>44</sup> These purposes include protecting defendants from frivolous claims,<sup>45</sup> avoiding cases filed just for settlement value,<sup>46</sup> discouraging cases merely to reopen a completed transaction,<sup>47</sup> deterring suits filed in an attempt merely to obtain discovery,<sup>48</sup> enabling the defendant to prepare an appropriate responsive pleading,<sup>49</sup> and attempting to disfavor cases alleging fraud.<sup>50</sup> Courts rarely assign priority among these purposes, though allowing the defendant to prepare an appropriate responsive pleading is a prevalent concern.

While some of these purposes behind the requirement of particularity under Rule 9(b) may be seen in a relator's pleading under the FCA, requiring a relator to plead a specific claim is shrouded in the language of these purposes; however, it is questionable whether these purposes are fulfilled by imposing the requirement of strict particularity.<sup>51</sup> Nonetheless, the requirement of Rule 9(b) remains the court-imposed interpretation for all FCA *qui tam* pleadings.

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43. *Felton v. Walston & Co.*, 508 F.2d 577, 581 (2d Cir. 1974) (“[I]n applying [R]ule 9(b) we must not lose sight of the fact that it must be reconciled with [R]ule 8 which requires a short and concise statement of claims.”).

44. *See United States ex rel. Costner v. United States*, 317 F.3d 883 (8th Cir. 2003); *United States ex rel. Clausen v. Lab. Corp. of Am., Inc.*, 290 F.3d 1301 (11th Cir. 2002); *Koch v. Koch Indus., Inc.*, 203 F.3d 1202 (10th Cir. 2000); *Hart v. Bayer Corp.*, 199 F.3d 239 (5th Cir. 2000); *Ackerman v. Nw. Mut. Life Ins. Co.*, 172 F.3d 467 (7th Cir. 1999); *Rolo v. City Investing Co. Liquidating Trust*, 155 F.3d 644 (3d Cir. 1998); *Banca Cremi, S.A. v. Alex Brown & Sons, Inc.*, 132 F.3d 1017 (4th Cir. 1997); *Campaniello Imports, Ltd. v. Saporiti Italia S.P.A.*, 117 F.3d 655 (2d Cir. 1997); *In re Stac Electronics Secs. Litig.*, 89 F.3d 1399 (9th Cir. 1996); *McGinty v. Beranger Volkswagen, Inc.*, 633 F.2d 226 (1st Cir. 1980); *In re Credit Acceptance Corp. Secs. Litig.*, 50 F. Supp. 2d 662 (E.D. Mich. 1999).

45. *United Features Syndicate, Inc. v. Miller Features Syndicate, Inc.*, 216 F. Supp. 2d 198, 221 (S.D.N.Y. 2002) (“Since it is a serious matter to charge a person with fraud, a plaintiff is not permitted to do so unless he is in a position and is willing to put himself on record as to what the alleged fraud consists of specifically.” (citations omitted)).

46. *See Creative Foods of Ind., Inc. v. My Favorite Muffin, Too, Inc.*, No. IP 01-0228-C-T/K, 2002 WL 244584, at \*1 (S.D. Ind. Jan. 14, 2002) (noting that Rule 9(b) discourages inclusion of accusations in complaints “simply to gain leverage for settlement or for other ulterior purposes”).

47. *See Chamberlain Mach. Works v. United States*, 270 U.S. 346 (1926).

48. *See Wafra Leasing Corp. v. Prime Capital Corp.*, 247 F. Supp. 2d 987 (N.D. Ill. 2002).

49. *See, e.g., Chisolm v. Transouth Fin. Corp.*, 164 F.3d 623 (4th Cir. 1998).

50. *See Segal v. Gordon*, 467 F.2d 602 (2d Cir. 1972).

51. *See infra* Parts III-VI.

C. *The Qui Tam Action and Its Relationship to Rule 9(b)*

It has been universally held<sup>52</sup> that Rule 9(b) applies to a *qui tam* complaint.<sup>53</sup> A prevailing reason for requiring a *qui tam* complaint to satisfy Rule 9(b) is to enable the defendant to mount an appropriate defense;<sup>54</sup> in order to determine a complaint's sufficiency under Rule 9(b), "the most basic consideration . . . is the determination of how much detail is necessary to give adequate notice [to the defendant] . . . and enable him to prepare a responsive pleading."<sup>55</sup> Further, as the Sixth Circuit recently determined, a relator is to plead with particularity in order to:

discourage[] fishing expeditions and strike suits which appear more likely to consume a defendant's resources than to reveal evidences of wrongdoing. Because the defendant is informed of which of its specific actions allegedly constitute fraud, it can limit discovery and subsequent litigation to matters relevant to these allegations. Additionally, Rule 9(b)'s particularity requirement protects a *qui tam* defendant from unwarranted damage to its reputation caused by spurious charges of immoral and fraudulent behavior. Because the defendant is notified immediately of the focus of a relator's complaint, it can quickly resolve frivolous disputes by attacking the narrow basis of an allegation of fraud.<sup>56</sup>

Within the determination that the relator is to file a complaint that complies with Rule 9(b) particularity, courts have been specific, though not

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52. See, e.g., *United States ex rel. Rost v. Pfizer, Inc.*, 507 F.3d 720 (1st Cir. 2007). While numerous circuits have ruled on the application of Rule 9(b) to the FCA, the United States Supreme Court has never evaluated the Rule's application to *qui tam* actions under the FCA.

53. The prevailing, and unreasonable, interpretation requires a relator to plead a specific claim for payment in the complaint itself.

54. E.g., *United States ex rel. SNAPP, Inc. v. Ford Motor Co.*, 532 F.3d 496, 505 (6th Cir. 2008). Providing the defendant with adequate notice is one of the most cited purposes by courts deciding motions for dismissal under Rule 9(b). "One possible rationale for this treatment is the heightened possibility of spurious allegations in a *qui tam* suit. These cases indicate that courts recognize the need to provide *qui tam* defendants with the full protections provided by Rule 9(b)." JOHN T. BOESE, *CIVIL FALSE CLAIMS AND QUI TAM ACTIONS* § 5-04(B), at 5-49 (3d ed. Supp. 2008-2).

55. 5A CHARLES ALLEN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1298 (3d ed. 2004).

56. *SNAPP, Inc.*, 532 F.3d at 504 (citations and internal quotation marks omitted).

necessarily uniform, in delineating what such compliance looks like.<sup>57</sup> Under the FCA, there are seven possible causes of action against a defendant.<sup>58</sup> Each of the violations requires three elements: (1) there was a claim<sup>59</sup> for a federal fund; (2) the claim was false; and (3) the defendant

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57. This includes the Fifth Circuit, which erroneously applied Rule 9(b) by demanding particularity even beyond the actual text of the rule. Rule 9(b) states in relevant part: “Malice, intent, knowledge, and other conditions of a person’s mind may be alleged generally.” FED. R. CIV. P. 9(b). However, in *United States ex rel. Williams v. Bell Helicopter Textron Inc.*, the Fifth Circuit improperly dismissed the relator’s complaint despite the relator attaching copies of the false claims submitted to the government and names of violating employees along with pleading the relevant time period in 1998. *United States ex rel. Williams v. Bell Helicopter Textron Inc.*, 417 F.3d 450, 454 (5th Cir. 2005). The court stated that even though the complaint alleged that “Bell Helicopter discovered these false charges and failed to report them to the government,” the complaint did not contain the appropriate level of detail as a basis for the defendant’s knowledge. *Id.* The Fifth Circuit ignored the second half of Rule 9(b) that states that knowledge may be pled generally and decided to arbitrarily apply the heightened pleading requirement even to the knowledge element of the FCA action. *Id.* *Williams* stands as another example of courts misapplying the Rule, and acting against the proper focus of a *qui tam* complaint: allowing the federal government to benefit from the provision allowing a relator to bring an action on behalf of the attorney general.

58. The FCA lists seven ways a person may violate the act. If a person

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

that person is liable. 31 U.S.C. § 3729(a) (2006 & Supp. 2009).

59. 31 U.S.C. § 3729(b)(2) (defining “claim” in relevant part as, inter alia, “any request or demand, whether under a contract or otherwise, for money or property and whether or not the United States has title to the money or property, that . . . is made to a contractor, grantee, or other recipient, if the money or property is to be spent or used on the Government’s behalf or to advance a Government program or interest, and if the United States Government provides or has provided any portion of the money or property requested or demanded”).

knew of its falsity.<sup>60</sup> Typically, most courts require that the relator plead specifics regarding the “time, place, persons, and fraudulent nature of the alleged acts.”<sup>61</sup> These requirements translate into courts requiring the relator to provide detailed and specific claims for payment in the initial pleading.<sup>62</sup>

### III. THE APPLICATION OF RULE 9(B) TO THE *QUI TAM* ACTION AND ITS DISASTROUS RESULTS

When the courts require a relator to identify specific invoices or bills,<sup>63</sup> they limit the government’s ability to utilize the False Claims Act.<sup>64</sup> By dismissing cases that present valid violations of the FCA, the courts thwart the purpose of the FCA and devalue the necessity of private citizens bringing *qui tam* actions.

A definitive illustration of Rule 9(b) undermining the FCA is the First Circuit Court of Appeals’ decision in *United States ex rel. Karvelas v.*

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60. *United States ex rel. Aflatooni v. Kitsap Physician Serv.*, 314 F.3d 995, 1000 (9th Cir. 2002); *United States ex rel. Darrig v. Med. Consultants Network, Inc.*, No. 04-650-HA, 2006 U.S. Dist. LEXIS 80789, at \*5-6 (D. Or. Nov. 2, 2006), *rev’d and remanded*, 303 F. App’x 429 (9th Cir. 2008); *United States ex rel. Stewart v. La. Clinic*, No. 99-1767, 2003 U.S. Dist. LEXIS 9401, at \*28 (E.D. La. June 4, 2003).

61. BOESE, *supra* note 54, § 5.04, at 5-49.

62. Courts vary in what details they require. These details range from contract information, patient names, physician names, identification numbers, dates, times, amounts, billing cycles, and any other minutiae that results in disallowing a relator from bringing a *qui tam* action under the FCA. However, the Fifth Circuit recently acknowledged the impropriety of courts requiring detail that would carry the burden of proof in the relator’s complaint:

Nevertheless, a plaintiff does not necessarily need the exact dollar amounts, billing numbers, or dates to prove to a preponderance that fraudulent bills were actually submitted. To require these details at pleading is one small step shy of requiring production of actual documentation with the complaint, a level of proof not demanded to win at trial and significantly more than any federal pleading rule contemplates.

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

63. In other words, a specific claim.

64. SYLVIA, *supra* note 23, at 537. By disallowing valid *qui tam* complaints because of a procedural dissection, the government will lose the valuable assistance of relators contemplated and intended under the FCA. “The Act is designed to encourage private individuals to report and pursue allegations of fraud against the Government. Because these private individuals are ordinarily not parties to the relevant transaction with the Government, they may be unaware of some of the details of the alleged false or fraudulent conduct.” *Id.*

*Melrose-Wakefield Hospital*.<sup>65</sup> In 2004, the First Circuit improperly applied Rule 9(b), affirming the district court's dismissal<sup>66</sup> of a *qui tam* action that outlined numerous fraudulent schemes.<sup>67</sup> In *Karvelas*, the relator was employed at the defendant hospital for fifteen years. He claimed that the hospital "falsely certified" that it was in compliance with Medicare standards for three years.<sup>68</sup> By making these false certifications, the relator alleged that the hospital "wrongfully billed Medicare and/or Medicaid, presumably on the basis of services that were being provided improperly or not at all."<sup>69</sup>

In his complaint, the relator made detailed allegations about thirteen fraudulent schemes the defendants were committing against the government. Not only did he have direct knowledge of the false claims submitted,<sup>70</sup> but he also clearly described the billing of twelve respiratory therapists when the hospital only employed seven;<sup>71</sup> that the hospital did not use appropriate testing machinery, which was required for federal reimbursement;<sup>72</sup> and that the defendants had filed improper claims because they knew the bills were for unnecessary medical treatment.<sup>73</sup> The District

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

66. United States *ex rel.* *Karvelas v. Melrose-Wakefield Hosp.*, No. 01-10583-DPW, 2003 U.S. Dist. LEXIS 8846 (D. Mass. 2003).

67. *Karvelas*, 360 F.3d at 221.

68. *Id.* at 223.

69. *Id.*

70. *Karvelas*, 2003 U.S. Dist. LEXIS 8846, at \*15 ("He states that he witnessed the fraudulent conduct alleged herein, but does not provide specifics regarding the documents submitted to HCFA to make the false claims." (internal quotation marks omitted)).

71. *Id.*

In the complaint, *Karvelas* states that the documents signed under the penalty of perjury and false statement submitted to the United States Government certified that there were 11.8 Respiratory Therapists, but does not provide any further detail regarding what type of document it was, when it was submitted, or by whom it was submitted.

*Id.* (internal quotation marks omitted).

72. *Id.* at \*18.

The hospital performed blood tests with machinery and equipment that was not tested, or up to code, or certified, and did not meet the standards accepted by the medical community, which were not in compliance with the Clinical Laboratory Improvement Amendments of 1988 nor had certification from the College of American Pathologists, which *Karvelas* alleges are required to receive payment under Medicaid and Medicare.

*Id.* (internal quotation marks omitted).

73. *Id.* at \*19-20 ("In contravention of Medicare and Medicaid provisions, which require that services be certified as being medically necessary, the defendants knowingly

Court dismissed the complaint despite the relator's firsthand knowledge and his dialogue with the defendants about the fraudulent schemes, because he failed to identify a specific invoice, bill, or claim for payment in his complaint.<sup>74</sup>

The First Circuit affirmed the dismissal of the complaint with prejudice. The appellate court declared that the complaint was merely attempting to mine discovery, and that the ninety-three-page complaint, even read in the light most favorable to the plaintiff, could not present a viable claim.<sup>75</sup> Despite the relator alleging that he had incriminating documents<sup>76</sup> and identifying some physicians by name,<sup>77</sup> the court stated that:

details concerning the dates of the claims, the content of the forms or bills submitted, their identification numbers, the amount of money charged to the government, the particular goods or services for which the government was billed, the individuals involved in the billing, and the length of time between the alleged fraudulent practices and the submission of claims based on those practices are the types of information that may help a relator to state his or her claims with particularity.<sup>78</sup>

The court determined that the complaint failed to satisfy Rule 9(b)<sup>79</sup> because the relator did not plead a specific date, exact claim for payment, specific identification numbers, individuals involved in improper billing,<sup>80</sup>

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filed improper claims in that they presented claims for medical items or service that they knew were not medically necessary." (internal quotation marks omitted)).

74. The court also determined that the documents were not solely in the defendant's possession, and therefore Karvelas could not attempt to rely on a theory that he did not have access to the actual claims. *Id.* at \*29.

75. *United States ex rel. Karvelas v. Melrose-Wakefield Hosp.*, 360 F.3d 220, 231 (1st Cir. 2004).

76. *Karvelas*, 2003 U.S. Dist. LEXIS 8846, at \*18 ("Karvelas also states that he is in possession of time sheets that reflect the staffing issues dating from 1996-97 but has not provided this documentation.").

77. *Id.* at \*24 ("He alleges that the defendant hospital steered and channeled patients to a home health company in which it had an interest. He also alleges that Dr. Sen, Dr. Mohammed Akabarian, Dr. Michael Zak, and other hospital staff engaged in 'self-referrals' and 'conflicts of interest' . . ." (citation omitted)).

78. *Karvelas*, 360 F.3d at 233.

79. *Id.* at 235. "As the district court correctly concluded, Karvelas's failure to identify with particularity any actual false claims that the defendants submitted to the government is, ultimately, fatal to his complaint." *Id.*

80. The court failed to recognize that Karvelas *did* name physicians. *Karvelas*, 2003 U.S. Dist. LEXIS 8846, at \*24.

or the source of information for his allegations.<sup>81</sup> The complaint was dismissed despite the relator's clear and detailed identification of ongoing fraudulent schemes.

This First Circuit case does not stand alone in its improper application of Rule 9(b). The Fifth Circuit also relied on fundamentally flawed analysis in dismissing the relator's complaint in *United States ex rel. Russell v. Epic Healthcare Management Group*.<sup>82</sup> In *Russell*, the relator brought an action alleging that her employer was charging Medicare for services that were never rendered.<sup>83</sup> The relator's complaint described the time period during which the scheme occurred, the names of patients who were ineligible to be charging Medicare, and the fact that the defendant had instructed the workers to "generate regular records for [the defendant's] ineligible Medicare-patients even though [sic] they did not qualify for Medicare [sic] services."<sup>84</sup> In her complaint, Russell alleged personally witnessing inaccurate billing.<sup>85</sup>

Nevertheless, the Fifth Circuit determined that the complaint did not satisfy Rule 9(b)'s particularity requirement and dismissed the claim. In a cursory discussion, the court held that in order to satisfy Rule 9, a relator must plead a specific "claim" presented to the government: "Because such statements or claims are among the circumstances constituting fraud in a False Claims Act suit, these must be pled with particularity under Rule 9(b)."<sup>86</sup> Ignoring the specificity of the allegations that would direct the

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81. *Id.* at \*2-3. Sadly, the relator made it clear that he knew of the schemes first hand, and the district court even laid out the circumstances in its opinion:

Karvelas alleges that, on September 9, 1996, he notified the Vice President of Human Resources, Richard Kenny, that the hospital should take corrective action regarding defective arterial blood gas (ABG) testing machinery, about understaffing and patient neglect. Karvelas also claims he informed Kenny his supervisors had destroyed incident reports regarding medical errors. He complained to Kenny that he had been directed by his supervisor to complete patient evaluations, which were improperly billed to Medicare and Medicaid, and had been threatened with retaliation if they failed to participate in this illegal activity.

*Id.* (citations, internal quotation marks, and footnotes omitted).

82. *United States ex rel. Russell v. Epic Healthcare Mgmt. Group*, 193 F.3d 304 (5th Cir. 1999). Due to the Fifth Circuit's cursory disposal of the relator's claim, the facts must be derived from the briefs provided in the case.

83. Brief of Appellants at 5, 6, *United States ex rel. Russell v. Epic Healthcare Mgmt. Group*, 193 F.3d 304 (5th Cir. 1999) (No. 98-20743), 1998 WL 34085825.

84. *Id.* at 11.

85. Brief of Appellees at 4, *United States ex rel. Russell v. Epic Healthcare Mgmt. Group*, 193 F.3d 304 (5th Cir. 1999) (No. 98-20743), 1999 WL 33613046.

86. *Russell*, 193 F.3d at 308.

defendant to the fraudulent scheme and the eyewitness account of the relator, the court refused to “relax” the pleading standard.<sup>87</sup>

These two cases are merely representative samples of many such decisions where the relator provides more than sufficient notice and detail concerning the nature of the allegations, sufficient reliability, and a firsthand view of the fraudulent scheme that exploited the federal government. Yet the courts continue to insist on a rigid application of Rule 9(b) to the claim for payment itself. The complaints being dismissed are not situations of mere speculation or information and belief. Some of the relators that are dismissed are employed in the very department carrying out the fraudulent scheme, with firsthand knowledge of exactly how the scheme works, describing the particular actors and the actual instructions that create the scheme to cheat the government—in other words, the ideal relator under the FCA. The only missing piece is what particular invoices contained the payments of a false claim, so the courts determine that Rule 9(b) need only be applied to the *claim-for-payment* aspect of the FCA action.

Such cases provide a perfect snapshot of the dangers of improperly applying Rule 9(b), and the government and taxpayers are suffering through this misapplication. For instance, if the First Circuit had appropriately allowed the relator to plead the fraudulent *schemes* with particularity,<sup>88</sup> then Karvelas would have been allowed to continue in his case and assist the government in recovering millions of dollars obtained through fraudulent devices. The defendant would not be compromised, because when provided with such particular detail of the scheme, the defendant is put on sufficient notice to prepare a response and will be able to cite to the invoices from its own files.

#### IV. JUDICIAL RELAXATION OF RULE 9(B): AN ATTEMPT TO QUALIFY THE MISAPPLICATION

Although courts have labored under the rigid belief that the “claim” element(s) of a *qui tam* complaint must be pled with particularity, many courts have carved exceptions for some relators' complaints. These exceptions normally fall into one of two categories: (1) where the complaint

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87. *Id.* at 308-09.

88. That is, describing the procedures that were in violation of the federal requirements, the years in which the scheme occurred, the general overarching plan, and, if applicable, the people with whom the relator spoke about the scheme yet was denied any remedy. In essence, pleading the third prong of an FCA *qui tam* action: *knowing* of the falsity. *See supra* notes 65-74 and accompanying text.



possesses appropriate indicia of reliability,<sup>89</sup> or (2) when the evidence is exclusively within the defendant's control.<sup>90</sup>

#### A. *A Complaint's Indicia of Reliability*

If a complaint carries sufficient "indicia of reliability" on its face, some courts<sup>91</sup> will not dismiss the complaint despite the fact that it lacks a specific claim for payment being pled.<sup>92</sup> The indicia of reliability determination usually relies on the relator being an insider and working in the billing or accounting department of the defendant.<sup>93</sup> This concept of a minor relaxation from demanding a specific invoice finds its roots in the Eleventh Circuit Court of Appeals with its decision in *United States ex rel. Clausen v. Laboratory Corp. of America, Inc.*<sup>94</sup> Just as *Karvelas* is a lasting testament to the misapplication of Rule 9(b), *Clausen* is a decision demonstrating the disaster of strict application of Rule 9(b) to the *claim* element, dismissing a strong complaint on the erroneous analysis that it did not satisfy the strictures of Rule 9(b). Nevertheless, the *Clausen* decision is the source of "indicia of reliability."

##### 1. Indicia of Reliability: Roots in Misapplication

In *United States ex rel. Clausen v. Laboratory Corp. of America, Inc.*, Clausen filed a *qui tam* action naming one of his employer's competitors as defendant; the complaint alleged over a decade of fraudulent billing practices in the defendant's testing services.<sup>95</sup> After the relator amended his

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89. See, e.g., *United States ex rel. Kennedy v. Aventis Pharms., Inc.*, 512 F. Supp. 2d 1158 (N.D. Ill. 2007); cf. *Corsello v. Lincare, Inc.*, 428 F.3d 1008 (11th Cir. 2005) (affirming dismissal of complaint).

90. See, e.g., *United States ex rel. Willard v. Humana Health Plan of Tex., Inc.*, 336 F.3d 375, 385 (5th Cir. 2003).

91. See, e.g., *United States v. Gwinn*, No. 5:06-cv-00267, 2008 U.S. Dist. LEXIS 26361 (S.D.W. Va. Mar. 31, 2008) (determining that even though the action was not a *qui tam* filed by a relator, the indicia of reliability standard could still be applied); cf. *United States ex rel. Nichols v. Omni H.C., Inc.*, No. 4:02-cv-66(HL), 2008 U.S. Dist. LEXIS 25441 (M.D. Ga. Mar. 31, 2008) (dismissing complaint); *United States ex rel. Digiovanni v. St. Joseph's/Candler Health Sys., Inc.*, No. CV404-190, 2008 U.S. Dist. LEXIS 9935 (S.D. Ga. Feb. 8, 2008) (same).

92. See *United States ex rel. Walker v. R&F Properties of Lake County, Inc.*, 433 F.3d 1349 (11th Cir. 2005).

93. See *United States ex rel. Atkins v. McInteer*, 470 F.3d 1350 (11th Cir. 2006).

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

95. *Id.* at 1303.

complaint twice, the complaint was dismissed, with the dismissal affirmed by the appellate court.<sup>96</sup> Clausen provided detailed information about conversations with employees, descriptions and codes for medical tests that represented the false claims, and three patient histories.<sup>97</sup> In his second amended complaint, Clausen even provided “a table of medical test codes,” model forms that would have been presented to the government as a bill, descriptions of how the testing would be identified, and the identification of patient lists and code charts that would reveal the false claims filed with the government.<sup>98</sup> Clausen even identified the day the service was rendered. However, the defendant persisted in moving for dismissal because Clausen did not identify a specific false claim that was submitted to the government.<sup>99</sup>

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The essence of his allegations is that between the late 1980s and 1998 LabCorp performed unauthorized, unnecessary or excessive medical tests on LTCF residents who participated in Government-funded health insurance programs and then knowingly submitted bills for this work to agents of the Government, requesting taxpayer funds to which it was not entitled. Clausen also alleges that although LabCorp was entitled to receive payments for some work related to its testing services, such as blood draws and transportation costs, it overbilled for those services during this time period as a result of the improper tests it performed.

*Id.*

96. *Id.* at 1315.

97. *Id.* at 1304.

98. *Id.* at 1306.

The Second Amended Complaint suggested one can understand many details about the alleged false claims by (1) looking at one of the three LTCF patient lists identifying what tests each patient was receiving, (2) obtaining the appropriate codes for those tests from the medical test code chart, and (3) turning to the blank Form 1500 to see how LabCorp would have filled out a claim for each individual with this information.

*Id.*

99. *Id.* at 1307.

[T]he district court concluded that Clausen’s revised pleading suffers from the same defect as the [First] Amended Complaint in that it did not identif[y] a single fraudulent claim by date filed, amount or claim number that was actually submitted to the government. The district court pointed out that [i]dentifying the type of claim form used and stating that a claim was filed on the day of service or a few days thereafter is not sufficient to identify the fraud claims with sufficient particularity to comply with Rule 9(b) in the context of this case. Continuing to enforce the dictates of Rule 9(b), the district court added that [t]he particularity requirement of Rule 9 is a nullity if Plaintiff gets a ticket to the discovery process without identifying a single false claim by amount.

*Id.* (alterations in original) (internal quotation marks omitted).

The appellate court agreed, again stating that the complaint's "fatal flaw" was having no specific false claim identified. In making this decision, the court stated:

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. . . . [I]f Rule 9(b) is to be adhered to, *some indicia of reliability must be given in the complaint to support the allegation of an actual false claim for payment being made to the Government.*<sup>100</sup>

The court proceeded to find that since Clausen was a corporate "outsider,"<sup>101</sup> his complaint demonstrated no indicia of reliability and therefore must fail since he did not plead any individual false claims.<sup>102</sup> The

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100. *Id.* at 1311 (emphasis added) (citations omitted).

101. Clausen filed a suit against a competitor; the court did not elaborate on whether Clausen's complaint would have passed muster if he was an "insider." *See id.* at 1314.

102. *Id.* at 1315. While "indicia of reliability" was merely mentioned in passing in *Clausen*, it has developed into a test on its own to determine whether the complaint satisfies Rule 9(b) or not. This is a good development for *qui tam* complaints and the private citizens who bring these actions, but defendants see it from another side:

The "indicia of reliability" test has, unfortunately, developed from a minor factor in *Clausen* to a deciding factor . . . . This development is contrary to the language and intent of Rule 9(b), as well as established authority in other circuits. Rule 9(b) is an unequivocal pleading requirement: it sets forth what "particulars" must be included on the fact of the complaint. Indeed, Rule 9(a) specifically states that it "is not necessary to aver the capacity of the party to sue" unless "necessary to show the jurisdiction of the court." By relying so heavily on the capacity of the party, the prior job descriptions, roles or knowledge of the party, the Eleventh Circuit is effectively relaxing the Rule 9(b) pleading requirements whenever relators aver that their insider status provides an "indicia of reliability" to unacceptably vague pleadings.

BOESE, *supra* note 54, § 5.04(b), at 5-62.5. Boese fails to recognize the purposes behind the FCA and the purposes of the Rule 9 requirements in the first place: providing the defendant with notice in order to prepare a defense. When a relator has laid out a specific allegation of a long-term fraudulent scheme, the defendant will be more than able to mount a defense. The defendant, or anyone in the *qui tam* action, will know exactly what is being alleged against it.

Eleventh Circuit would soon take the indicia of reliability evaluation and make it a deciding factor in ruling on a Rule 9(b) motion.<sup>103</sup>

## 2. The Eleventh Circuit: Closer to the Goal, yet Still Falling Short

The Eleventh Circuit proceeded to apply the indicia of reliability evaluation in *United States ex rel. Walker*<sup>104</sup> and the unpublished *Hill v. Morehouse Medical Associates* decision.<sup>105</sup>

In *Walker*, the appellate court evaluated a nurse practitioner's allegation that the hospital submitted false claims to Medicare, billing for services rendered by a physician when the services were actually performed by a nurse or a physician assistant.<sup>106</sup> The District Court denied the defendant's motion to dismiss under Rule 9(b), and the Eleventh Circuit affirmed.<sup>107</sup> Distinguishing the *Clausen* case from the case then at hand, the appellate court determined that since the relator was a nurse practitioner, had billed as a physician, and had entered into personal discussions regarding the billing procedure, the relator had alleged sufficient facts to put the defendant on notice of the allegations against it.<sup>108</sup> Even though the court was hesitant because the relator never pointed to a specific claim for payment in her complaint, it allowed the case to move forward.

Though a step in the right direction, the Eleventh Circuit's decision still does not satisfy the purposes of the FCA. While the court's ultimate decision to allow the relator's case to go forward was correct, the decision failed to reach the heart of the issue; the Eleventh Circuit still demands that a specific *claim for payment* be pled. In *Walker*,<sup>109</sup> the relator actually participated in the false billing. The so-called relaxation that took place does not protect a relator employee who was not directly involved in the

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103. Not only did Clausen appropriately plead a fraudulent scheme, but he also offered specific details on the who, what, where, when, and how that should have satisfied Rule 9(b) analysis. In other words, he sufficiently pled that the defendant had knowledge of the claim's falsity. See *Clausen*, 290 F.3d at 1304-06.

104. *United States ex rel. Walker v. R&F Properties of Lake County, Inc.*, 433 F.3d 1349 (11th Cir. 2005).

105. *Hill v. Morehouse Med. Assocs.*, No. 02-14429, 2003 WL 22019936 (11th Cir. Aug. 15, 2003). Under the Eleventh Circuit rules of procedure, unpublished opinions "are not considered binding precedent, but they may be cited as persuasive authority." 11th Cir. R. 36-2. Though unpublished, the *Hill* decision carries persuasive weight and was followed in the Northern District of Alabama. *United States ex rel. Brunson v. Narrows Health & Wellness L.L.C.*, 469 F. Supp. 2d 1048 (N.D. Ala. 2006).

106. *Walker*, 433 F.3d at 1353.

107. *Id.* at 1360.

108. *Id.*

109. See discussion *infra* Part IV.A.2.

false billing. The Eleventh Circuit properly allowed the relator to move forward because her complaint had sufficient indicia of reliability.<sup>110</sup> However, due to the focus on the *claim* element of the action, if she had not been the nurse who actually made incorrect bills, she would have been dismissed for not identifying a specific bill or invoice.<sup>111</sup>

The Eleventh Circuit continued to apply the idea of indicia of reliability in the unpublished *Hill* opinion, where it held that the relator's complaint met the particularity requirements of Rule 9(b).<sup>112</sup> Hill worked as a coder and biller for the defendant, and she alleged that the defendant instituted a scheme of submitting claims for work that was never performed. Hill amended her complaint to include the coding process, the forms, and details about "five fraudulent billing schemes, who engaged in them, and the frequency of the schemes."<sup>113</sup> Hill saw dozens of claims filed but did not identify any specific patients, dates, or any actual claims submitted to the government.<sup>114</sup>

Due to the lack of *claim for payment* in the pleading, the district court dismissed her complaint, but the Eleventh Circuit stated that proper indicia of reliability would save a relator's complaint.<sup>115</sup> In this case, Hill was employed "in the very department where she alleged the fraudulent billing schemes occurred," "had firsthand information" about the billing, pointed

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110. For a critique against the use of the indicia of reliability test, see BOESE, *supra* note 54, § 5.04(b), at 5-57-5-58.

111. *Walker*, 433 F.3d at 1360.

Walker's complaint identifies her as a nurse practitioner who was employed at LFM. Walker alleges that, during her employment at LFM, she never had her own UPIN and that she was instructed each day which doctor she would be billing under. The Amended Complaint also alleges that Walker had at least one personal discussion with LFM's office administrator (identified in the complaint by name) during which the two women discussed that Walker did not have her own UPIN, whether Walker and the other nurse practitioners and physician assistants should have their own UPINs, that (according to the office administrator) LFM billed all nurse practitioner and physician assistant services as rendered incident to the service of a physician, that . . . LFM had never billed nurse practitioner or physician assistant services in another manner, and the propriety of the billing method.

*Id.* (citations and internal quotation marks omitted).

112. *Hill v. Morehouse Med. Assocs.*, No. 02-14429, 2003 WL 22019936, at \*5 (11th Cir. Aug. 15, 2003).

113. *Id.* at \*1.

114. *Id.* at \*2.

115. Even though unpublished, *Hill* was followed in *United States ex rel. Brunson v. Narrows Health & Wellness LLC*, 469 F. Supp. 2d 1048 (N.D. Ala. 2006) (holding the relator's complaint satisfied Rule 9(b)).

to documents in the defendant's possession, and knew the specific codes that were upcoded.<sup>116</sup>

Although positive at first blush, *Hill* and its application of Rule 9(b) contain the same deficiencies as *Walker*. Though taking a step forward and not forcing a relator to plead a specific bill, invoice, or claim, both decisions still force the relator to actually participate in the billing and submission of claims. Thus, the indicia of reliability "relaxation," while moving in the right direction, refuses to address the problem: the court is perpetuating a rigid application of Rule 9(b) to the claim-for-payment element of the FCA action.

### 3. The Eighth Circuit: Dismissing Relators' Claims Despite Their Indicia of Reliability

The Eighth Circuit profoundly demonstrates the deficiency in seeking specific indicia of reliability in lieu of a distinct claim.<sup>117</sup> In *United States ex rel. Joshi v. St. Luke's Hospital, Inc.*,<sup>118</sup> the relator was an anesthesiologist who administered anesthesia at the defendant hospital for seven years.<sup>119</sup> In his complaint, Dr. Joshi alleged that the defendants received Medicare reimbursement for services being performed by a doctor when a doctor actually had not directed or supervised the work,<sup>120</sup> that the defendants would bill Medicare for entire boxes of supplies or prescriptions rather than the amount actually used,<sup>121</sup> and that the defendant participated in a conspiracy in violation of the FCA.<sup>122</sup>

In his first complaint, the relator merely alleged, "St. Luke's had all the work done by the CRNAs and Dr. Bashiti assigned to itself, and the medical bills to the government sufficiently identify the time, place, and content of the fraudulent representations."<sup>123</sup> After he received leave to amend, the relator added a table that identified the anesthesia services provided, the time, the surgeon, the patient initials, the CRNA who performed the services, and a table that summarized, based on information

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116. *Hill*, 2003 WL 22019936, at \*4.

117. Ironically, a leading author believes the indicia of reliability test is harming the *defendants* in an FCA action brought by a relator. See generally BOESE, *supra* note 54.

118. *United States ex rel. Joshi v. Saint Luke's Hosp., Inc.*, 441 F.3d 552 (8th Cir. 2006).

119. *Id.* at 553.

120. *Id.* "Dr. Joshi alleges that Dr. Bashiti failed both to perform pre-anesthetic evaluations and prescribe anesthesia plans, and Dr. Bashiti falsely certified he supervised or directed the work of several certified registered nurse anesthetists." *Id.*

121. *Id.* at 554.

122. *Id.*

123. *Id.* (internal quotation marks omitted).

and belief, the medications that were issued to patients and improperly billed in 1995.<sup>124</sup>

The Eighth Circuit, even though touting that it would evaluate indicia of reliability, still dismissed the complaint. Despite the relator clearly describing specific instances of false billing,<sup>125</sup> the Eighth Circuit found it appropriate to dismiss Dr. Joshi's complaint because he did not sufficiently plead the "who, what, where, when, and how" of the alleged fraud.<sup>126</sup> In other words, he did not identify a specific claim for payment.<sup>127</sup>

The only difference between Dr. Joshi and his relator counterparts in the Eleventh Circuit cases of *Walker* and *Hill* is that he was not actually participating in the false billing. He was merely an anesthesiologist who worked with the individuals committing the false billing for seven years.<sup>128</sup>

Such a dismissal undermines the FCA. Despite the relator providing a chart with intricate details,<sup>129</sup> the court still determined that, under the misapplied particularity standard of Rule 9(b), the relator could not satisfy the heavy pleading burden because he provided no claim numbers.<sup>130</sup>

*Joshi* is a capstone demonstrating that even though a court may speak in terms of indicia of reliability, the continual focus on pleading a specific bill or invoice is an improper application of the Rule. Rule 9 is satisfied when a complaint, such as the relator's in *Joshi*, sufficiently and with particularity lays out the who, what, where, when, and how of a fraudulent scheme. Still, the complaint fails under the courts' current misapplications in the *qui tam* context.

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124. *Id.* at 555.

125. Dr. Joshi was an anesthetist, the origination of the false claims alleged against the hospital and Dr. Bashiti. After spending seven years working with the doctor and the system of the hospital, it is difficult to conceive of someone who could provide more sufficient indicia of reliability. *See generally id.*

126. *Joshi*, 441 F.3d at 556 (*quoting* United States *ex rel.* Costner v. URS Consultants, Inc., 317 F.3d 883, 888 (8th Cir. 2001)).

127. Any individual reading the opinion can see that he actually did answer all five of the journalistic questions—but not in the form of a specific claim.

128. *Joshi*, 441 F.3d at 557.

129. Including the initials of the patients that were served on the bill sent to Medicare. *Id.* at 555.

130. Again, when a Rule 9(b) motion is brought forward, the court is to assume all facts alleged in the complaint are true. A motion to dismissed is disfavored. *See supra* note 9.

*B. Another Attempt at Misapplication: When the Information Is Exclusively in the Defendant's Control*

While some courts attempted to implement the indicia of reliability as some relaxation in applying Rule 9(b) in the *qui tam* context, a few courts have attempted to relax current Rule 9(b) strictures when the information about specific claims made to the government is exclusively in the defendant's control.<sup>131</sup>

Because a relator is not the harmed party in a *qui tam* action, the relator does not have access to the actual documentation of the false claims.<sup>132</sup> In a typical court case, the person filing the action is the injured party and has possession of the incriminating documents. However, a *qui tam* plaintiff stands in the place of the federal government, the real party in interest. Therefore, the main obstacles to pleading fraud with particularity manifest themselves when the government chooses not to intervene<sup>133</sup> in the relator's action.<sup>134</sup> Thus, a relator does not have access to the needed documents and has no access to the necessary detail to identify specific claims being submitted to the government. A relator may not have been employed in the defendant's billing department or copied documents before leaving his job.

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131. See, e.g., *United States ex rel. Willard v. Humana Health Plan of Tex., Inc.*, 336 F.3d 375, 385 (5th Cir. 2003) ("It is true that the pleading requirements of Rule 9(b) may be to some extent relaxed where . . . the facts relating to the alleged fraud are peculiarly within the perpetrator's knowledge."). This rule has also been applied in other fraud or fraud-based claims: "We have noted on a number of occasions that the particularity requirement of Rule 9(b) must be relaxed where the plaintiff lacks access to all facts necessary to detail his claim, and that is most likely to be the case where, as here, the plaintiff alleges a fraud against one or more third parties." *Corley v. Rosewood Care Center, Inc.*, 142 F.3d 1041, 1051 (7th Cir. 1998).

132. In 2009, the Seventh Circuit put a spin on this exception in *United States ex rel. Lusby v. Rolls-Royce Corp.*, 570 F.3d 849, 854 (7th Cir. 2009). The relator did not have access to the actual invoices or contracts, but alleged specific parts that violated the government contracts. Rather than adopting the defendant's theory regarding Rule 9(b), the court stated that the relator did not have access to the paperwork to make the specified allegations, so as long as there was enough information in the complaint for the court to make an inference of fraud, the complaint passed muster. *Id.* Assumedly, the relaxation was due to the fact that he did not have access to the incriminating documents.

133. When the government chooses not to intervene in the case pursuant to 31 U.S.C. § 3730(b)(4)(B), the relator may choose to continue in prosecuting the action on the government's behalf under 31 U.S.C. § 3730(c)(3). Even if the government initially chooses not to intervene in the action, it may still do so later on in the proceeding, at the government's sole discretion. When the government exercises this choice to not intervene the relator has the most problems with satisfying Rule 9(b).

134. Anna Mae Walsh Burke, *Qui Tam: Blowing the Whistle for Uncle Sam*, 21 NOVA L. REV. 869, 899 (1997) (stating that a relator could plead actual invoices, amounts, and purchase agreements only when the government intervenes in the case).



The defendant then is in exclusive control of the necessary documentation displaying a specific invoice or bill.<sup>135</sup>

Therefore, since the relator may not have access to the exact claim numbers or documents, when the evidence is in the defendant's control, a relator may not have to identify a specific claim.<sup>136</sup> While a relator is still held to Rule 9(b) particularity and obligated to plead the "time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what that person obtained thereby,"<sup>137</sup> there is a chance that the relator may not have to identify a specific claim.

#### 1. Application of "Defendant's Control": Still Focused on a Specific Claim

The Northern District of Illinois aptly evaluated a complaint when the information was exclusively in the defendant's control in *United States ex rel. Yannacopolous v. Lockheed Martin Corp.*<sup>138</sup> In *Yannacopolous*, the relator was a consultant who worked on a contract selling American military equipment to the Greek government.<sup>139</sup> Lockheed Martin<sup>140</sup> was awarded the lucrative contract to sell F-16s to the Greeks.<sup>141</sup> The relator brought a seven-count complaint, alleging the defendants engaged in numerous schemes: (1) submitting false statements for the F-16 airframe, (2) submitting false records in relation to maintenance, (3) submitting false statements about the production of the goods, (4) submitting false claims for work never actually performed, (5) submitting claims to collect in excess of what they were entitled to, (6) failing to disclose a price

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135. Some courts have determined in similar situations that it is appropriate not to dismiss a relator's complaint. *See, e.g., United States ex rel. Downy v. Corning, Inc.*, 118 F. Supp. 2d 1160 (D.N.M. 2000).

136. Unlike an average fraud case, a relator is not in possession of the necessary information to sufficiently fulfill all of the requisite elements of the violation—e.g., identity of a specific claim, names and dates of the people who are participating in the fraud, etc. Typically, the defendant is the only party who knows this information, and the defendant is the party who knows it the best, so the courts should not waste precious time worrying that the defendant will not be aware of the conduct for which it is accused. HELMER, *supra* note 9, at 357.

137. *Williams v. WMX Tech., Inc.*, 112 F.3d 175, 177 (5th Cir. 1997) (quoting *Tuchman v. DSC Comm'n Corp.*, 14 F.3d 1061, 1068 (5th Cir. 1994)).

138. *United States ex rel. Yannacopolous v. Lockheed Martin Corp.*, 315 F. Supp. 2d 939 (N.D. Ill. 2004).

139. *Id.* at 941.

140. Lockheed was the successor company that took over the contract negotiations and sales.

141. *Yannacopolous*, 315 F. Supp. 2d at 943.

adjustment, and (7) modifying a contract to overcharge the government by over \$29 million.<sup>142</sup>

The relator did not identify any specific invoices in his complaint, garnering a motion for dismissal for failing to plead fraud with particularity. The defendant claimed that the relator failed to allege the who, what, when, and where of the fraudulent scheme.<sup>143</sup> The court disagreed. "Those details . . . are in the exclusive possession of defendants, and relator need not allege them under Rule 9(b)."<sup>144</sup> The relator was thus allowed to continue in his quest to recover money paid out by the government due to false claims. The relator appropriately cited "what the defendants did to defraud the United States," and pled "specific timeframes"; demanding greater specificity of "where" would undermine the purpose of notice pleading under Rule 8.<sup>145</sup> Further, the relator had no access to this information, and since that was the case, demanding more specificity would not be feasible.<sup>146</sup>

Since the relator was able to sufficiently apprise the defendant of the situation for which it was being sued, it was appropriate to allow the complaint to move forward. Yannacopoulos did not have access to the defendant's records and thus was incapable of identifying a specific claim for payment. If he had been required to plead a specific claim, his complaint would have been dismissed with no opportunity to exercise the *qui tam* right granted to him under the FCA. Nevertheless, the court still erroneously focused on the claim element of the action, rather than acknowledging that the fraudulent scheme was pled with particularity.

Another District Court applied the relaxed standard of "in the defendant's control" to the pleading in *United States ex rel. Downy v. Corning, Inc.*<sup>147</sup> The relator in *Downy* offered a complaint that sufficiently alleged an overall fraudulent scheme of over-reporting to Medicare in order to receive more money, but did not specify any specific false claim for payment.<sup>148</sup> However, she did identify the time period, the defendants, and the alleged wrongdoing. In response to a motion to dismiss under Rule 9(b) because the relator did not specify any false claims, the court stated, "The Court notes some form of limited discovery would probably be necessary to allow Relator to provide such specific examples, if they exist, since information concerning the physicians who requested PSA/PAP tests from

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142. *Id.* at 944.

143. *Id.* at 945-46.

144. *Id.* at 945.

145. *Id.* at 945-46 (citations omitted).

146. *Id.*

147. *United States ex rel. Downy v. Corning, Inc.*, 118 F. Supp. 2d 1160 (D.N.M. 2000).

148. *Id.* at 1172.

Defendants' laboratories is undoubtedly in Defendants' possession rather than the public domain."<sup>149</sup> Therefore, the motion for dismissal was denied because the relator had no access to the documentation that was exclusively in the defendant's control.

*Yannacopolous* and *Downy*, while allowing the relators to move forward with their complaints, still erroneously focused on the pleading of a claim itself, rather than the defendant's comprehension of falsity and the fraudulent scheme. In any event, some courts do not acknowledge any relaxation if the relator has no access to the documents,<sup>150</sup> and even courts that do proclaim a relaxed standard still dismiss otherwise adequate *qui tam* complaints.

## 2. Relators Still Slip Through the Cracks of Dismissal Under the "In the Defendant's Control" Theory

Even those circuits that acknowledge the inadequacy of forcing a relator to identify specific claims fail to properly apply Rule 9(b). For example, the Court of Appeals for the Fifth Circuit has applied an exception when "the facts relating to the alleged fraud are peculiarly within the defendant's knowledge."<sup>151</sup> Nevertheless, the court determined that the exception "must not be mistaken for a license to base claims of fraud on speculation and conclusory allegations."<sup>152</sup> This translates into dismissing complaints when they do not identify a specific invoice or bill, whether or not the relator has access to the information.

The Fifth Circuit fell into this trap in an unpublished opinion in 2005.<sup>153</sup> In *Sealed Appellant I*, the relator laid out a fraudulent scheme in which the defendant allegedly failed to satisfy requirements for ambulance runs to be reimbursed by Medicare.<sup>154</sup> The appellant was a former Director of Compliance for the appellee and had been fired before he could collect his personal effects and documents that would have supported his *qui tam* claim.<sup>155</sup>

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149. *Id.* at 1173.

150. *See, e.g.,* *Corsello v. Lincare, Inc.* 428 F.3d 1008 (11th Cir. 2005).

151. *United States ex rel. Sandra Russell v. Epic Healthcare Mgmt. Group*, 193 F.3d 304, 308 (5th Cir. 1999).

152. *United States ex rel. Thompson v. Columbia Healthcare Corp.*, 125 F.3d 899, 903 (5th Cir. 1997).

153. *Sealed Appellant I v. Sealed Appellee I*, 156 F. App'x 630 (5th Cir. 2005).

154. *Id.* at 631.

155. *Id.* at 632. The Appellant also brought a claim for wrongful discharge under 31 U.S.C. § 3730(h), which provides in relevant part:

Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or

The appellant's complaint was dismissed even though he discussed the training sessions for the billing clerks, his experience as a Director of Compliance, and a supervisor's specific instructions.<sup>156</sup> The appellant attempted to convince the court that he was entitled to a relaxed pleading standard because the information necessary to plead a specific false claim was in the appellee's possession. However, the court curtly dismissed this plea, stating that the appellant had not shown any effort to obtain the information from any other source and therefore was not entitled to a relaxed pleading standard.<sup>157</sup> "[N]othing prevented Appellant from contacting Appellee's employees on his own, whether before commencing the litigation or after. Accordingly, the district court properly granted Appellee's motion to dismiss Appellant's claim for violation of the FCA for failure to plead with particularity and failure to state a claim."<sup>158</sup>

This result is inexplicable. The court's expectation that the defendant would simply give the relator the false claims is incomprehensible. The court states that there is a relaxed pleading standard when the information is exclusively in the hands of the defendant or the government, and then it dismisses the claim because the relator "could" go to the defendant and ask for the incriminating documents, which is likely an exercise in futility. Even though he was fired before he could return to his office even to collect his personal property,<sup>159</sup> the court determined that "it defied credulity that he is unable to identify any details of a single false claim submitted to the government."<sup>160</sup> However, the court's decision itself defies credulity and is a vivid example of the misapplication of Rule 9(b) and any so-called "relaxed" standard under the current regime of pleading.<sup>161</sup>

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agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, or agent on behalf of the employee, contractor, or agent or associated others in furtherance of other efforts to stop 1 or more violations of this subchapter.

31 U.S.C. § 3730(h)(1) (2006 & Supp. 2009).

156. *Id.* at 631-32.

157. *Id.* at 634.

158. *Id.*

159. *Id.* at 632 ("Appellant was unable to retrieve from his office his personal effects or documentation that supported his allegations.").

160. *Id.* at 634.

161. The Fifth Circuit also falls into this trap. While admitting that a relator may plead with a relaxed specificity when the information is in the defendant's control, it still keeps restrictions on the relators. *United States ex rel. Willard v. Humana Health Plan of Tex. Inc.*, 336 F.3d 375, 385 (5th Cir. 2003). While Willard's one-sentence allegation would not have been sufficient under any standard, the court's flippant dismissal due to the relator not

### 3. The First Circuit Ignores Its Own Precedent of a “Relaxed” Standard

In 2007, the United States Court of Appeals for the First Circuit demonstrated the fact that even when applying a “relaxed” standard to the pleading of a specific claim in the complaint, demanding a specific invoice or bill undermines the *qui tam* provision in the FCA.<sup>162</sup> Prior to the *Rost* case, the First Circuit had clearly stated in *Karvelas*:

[W]e have said that Rule 9(b) pleading standards may be relaxed, in an appropriate case, when the opposing party is the only practical source for discovering the specific facts supporting a pleader’s conclusion. In such cases, even for a plaintiff’s allegations of fraud, if the facts would be peculiarly within the defendants’ control, a court may allow some discovery before requiring that plaintiff plead individual acts of fraud with particularity.<sup>163</sup>

In *Rost*, the defendant was accused of submitting claims for reimbursement to the government for off-label uses of prescriptions.<sup>164</sup> The relator, the former Vice President of Marketing in one of the defendant’s divisions, pled that he had “no control over or dealings with such entities” that were alleged to violate the FCA, and he therefore had “no access to the records in [the defendant’s] possession.”<sup>165</sup> In his complaint, Rost named the distributors that promoted off-label uses, stated that the defendant provided \$200 per patient to physicians who prescribed the drug, and alleged that the defendant hired promoters for the sole purpose of determining how to promote the drug for off-label uses.<sup>166</sup>

Despite relying on *Karvelas* to dismiss the relator’s complaint, the appellate court determined that “[a]t most, Rost raises facts that suggest fraud was possible; but the complaint contained no factual or statistical evidence to strengthen the inference of fraud beyond possibility” because Rost never pled a specific claim.<sup>167</sup> The court ignored its own clear

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stating she did not have access to the documents demonstrates the danger of allowing the court to arbitrarily allow or disallow a more relaxed pleading standard.

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

163. United States *ex rel.* Karvelas v. Melrose-Wakefield Hosp., 360 F.3d 220, 229 (1st Cir. 2004) (citations omitted).

164. *Rost*, 507 F.3d at 723.

165. *Id.* at 726.

166. Reply Brief for Plaintiff-Appellant at 17-18, United States *ex rel.* Rost v. Pfizer, Inc., 507 F.3d 720 (1st Cir. 2007) (No. 06-2627).

167. *Rost*, 507 F.3d at 733.

precedent, choosing to overlook the explicit claim that the defendant had sole possession of the claims,<sup>168</sup> causing the relator to have absolutely no access to the information demanded by the court. Therefore, the relator was unable to reach the details of specific claims for payment.

Although not requiring a relator to plead a specific claim when the evidence is in the defendant's control occasionally allows a relator to appropriately plead a fraudulent scheme, the test is unreliable and still retains an improper focus of the application of Rule 9(b) to a *qui tam* complaint.

#### V. RULE 9(B) SHOULD NOT APPLY TO A *QUI TAM* COMPLAINT UNDER THE FALSE CLAIMS ACT

Even though a majority of courts have determined that Rule 9(b) applies to a *qui tam* action, the Rule should not apply to an action filed under the False Claims Act.<sup>169</sup> Facially, the FCA does not require fraud: "no specific intent to defraud is required."<sup>170</sup> Rather, an FCA action is a statutory violation not having any relation to a common law fraud charge, which is the violation contemplated by Rule 9.<sup>171</sup>

The government or the relator in an FCA suit is not required to allege fraud for every violation of the FCA. In other words, a person may violate the FCA in other ways besides committing fraud. In the FCA, there are seven specific provisions that identify what constitutes a violation.<sup>172</sup> Three of the primary provisions require *either* a "false or [a] fraudulent claim."<sup>173</sup> The key is the disjunctive "or"—a claim need not be fraudulent to violate the statute. In the same vein, another provision requires the relator to allege "a false record or statement"; fraud is not even a violation of this provision of the FCA.<sup>174</sup> Merely filing a false claim violates the FCA—no fraud is required, thereby removing it from the scope of Rule 9(b).<sup>175</sup>

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168. Even though the government would also have a copy of the claims at issue, the courts uniformly describe the information to be in the defendant's possession.

169. HELMER, *supra* note 9, at 357.

170. 31 U.S.C. § 3729(b)(1)(B) (2006 & Supp. 2009).

171. United States *ex rel.* Johnson v. Shell Oil Co., 183 F.R.D. 204, 208 (E.D. Tex. 1998).

172. 31 U.S.C. § 3729(a)(1)(A)–(G); *see supra* note 58.

173. *Id.* § 3729(a)(1)(A)–(B).

174. *Id.* § 3729(a)(1)(G).

175. Helmer, while arguing that Rule 9(b) does not apply at all, nonetheless discusses that even if Rule 9(b) *does* apply to a *qui tam* complaint, then it cannot require absolute particularity. While not providing an explicit standard, he encourages the courts to find another way to apply Rule 9(b) to a relator's claim. HELMER, *supra* note 9, at 360.

Further, the FCA does not require “specific intent to defraud.”<sup>176</sup> The statute does require that the actor “knowingly” commit the act, which may be defined as “deliberate ignorance.”<sup>177</sup> Such deliberate ignorance is not an element of a claim for fraud. Therefore, since fraud is not required for a violation of the FCA, the courts should not read such a requirement into the pleading; Rule 9(b) should not be blindly applied to a *qui tam* complaint.

The Supreme Court recently stated that courts “should generally not depart from the usual practice under the Federal Rules on the basis of perceived policy concerns.”<sup>178</sup> In other words, the Federal Rules of Civil Procedure should not be extended beyond their typical application and intended purpose. Rule 9(b) should not be expanded to apply to the FCA, a situation where fraud is not required for a violation.<sup>179</sup> Such actions are not contemplated by the Rule itself. The courts have determined in *qui tam* case law that the policy concerns reflected in Rule 9(b) are manifest in *qui tam* actions, forcing *qui tam* complaints to satisfy Rule 9(b). Such action is an inappropriate extension of the courts’ power.

Simply because fraud is one way an actor may violate the FCA, it does not follow that the courts should apply Rule 9(b) to every *qui tam* complaint. If fraud is not alleged, pleading with particularity should not be demanded at all, since that complaint does not fall under the scope of the Rule. The words of the Supreme Court and the statute’s absence of fraud as a requirement demonstrate that Rule 9(b) should not automatically apply to all *qui tam* complaints. Regretfully, the courts have refused to undergo appropriate analysis, and they routinely apply Rule 9(b) to any and all *qui tam* actions, whether there is an allegation of fraud or not. While it is ideal, and legally appropriate, for Rule 9(b) not to be applied to any aspect of a *qui tam* complaint, it is far from the current state of the law. Therefore, it is necessary for the courts to employ a standard that balances the particularity requirement of Rule 9(b) with the short and plain pleading requirement of Rule 8.

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176. 31 U.S.C. § 3729(b).

177. *Id.* § 3729(b)(1)(A)(ii). Deliberate ignorance is not fraud and is not construed as fraudulent intent, thus providing more evidence that not every action that may violate the FCA requires fraud.

178. *Jones v. Bock*, 549 U.S. 199, 211 (2007).

179. *But see* 27 FEDERAL PROCEDURE, LAWYER’S EDITION, 667 (Francis M. Dougherty ed., 2008) (“The particularity requirement of Rule 9(b) extends to all averments of fraud or mistake, whatever the theory of legal duty—statutory, tort, contractual, or fiduciary.”).

## VI. WHAT CAN BE DONE: PLEADING A FRAUDULENT SCHEME WITH PARTICULARITY

In order to preserve the integrity of the False Claims Act and permit relators to function as assistants to the government, it is essential for the courts to adopt a proper interpretation of particularity under Rule 9(b). The “unique aspects of the FCA suggest that rigorous application of Rule 9(b) would undermine the Act. The Act is designed to *encourage* private individuals to report and pursue allegations of fraud against the Government.”<sup>180</sup> Although some circuits have applied a “relaxed” particularity,<sup>181</sup> proper complaints still fail because the courts apply Rule 9(b) particularity to the wrong element of an action under the FCA. This results in the courts undermining the FCA and, in essence, allowing Rule 9(b) to gut the power of a *qui tam* relator.

A violation of the FCA essentially requires three elements: (1) there was a claim for a federal fund; (2) the claim was false; and (3) the defendant knew of its falsity.<sup>182</sup> Unfortunately, when the courts demand that a relator plead with particularity under Rule 9(b),<sup>183</sup> the relator is required to plead all three elements with particularity. However, this application is erroneous.<sup>184</sup> Even though the FCA does not require any evidence of fraudulent intent for a violation, if the courts persist in applying Rule 9(b) to any FCA case, the heightened pleading requirement should only be applied to the element that most closely reflects fraudulent intent. Thus, courts should require the identification of a “scheme” to receive federal funds when the actor is not entitled to them. Therefore, Rule 9(b) should be applied only to the *knowledge* element of the action.

In an effort to align the purposes of the FCA, Rule 9(b), and Rule 8, courts should adopt the following standard:

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180. SYLVIA, *supra* note 23, at 537.

181. *See* discussion *supra* Part IV.

182. *United States ex rel. Aflatooni v. Kitsap Physician Serv.*, 314 F.3d 995, 1000 (9th Cir. 2002); *United States ex rel. Darrig v. Med. Consultants Network, Inc.*, No. 04-650-HA, 2006 U.S. Dist. LEXIS 80789, at \*5-6 (D. Or. Nov. 2, 2006), *rev'd and remanded*, 303 F. App'x 429 (9th Cir. 2008); *United States ex rel. Stewart v. La. Clinic*, No. 99-1767, 2003 U.S. Dist. LEXIS 9401, at \*28 (E.D. La. June 4, 2003).

183. It is questionable that Rule 9(b) should even be applied to a *qui tam* complaint. *See supra* Part V.

184. As discussed in this Comment, such an application places an unreasonable burden on the relator when more often than not he does not have access to the claims despite firsthand knowledge of the defendant's scheme.



When a relator identifies with particularity a defendant's fraudulent scheme, the complaint is pled with sufficient particularity under Rule 9(b).

Under this standard, Rule 9(b) is applied to the third element of an FCA violation: the defendant's knowledge of falsity.<sup>185</sup> Such a standard not only allows the government to benefit from those citizens willing to assist the government in uncovering false claims, but it also protects the FCA defendants. Complaints satisfying this standard provide defendants with sufficient detail and information to curtail spurious charges and allow them to prepare an adequate response to the allegations, a key purpose in applying Rule 9 to a *qui tam* complaint.<sup>186</sup> This standard will also prevent relators from overcompensating with unnecessary verbiage in the complaints, thus also furthering the current pleading strictures under Rule 8.

Consider two illustrations demonstrating how this standard will further the purposes of the FCA and Rule 9(b).

Joe works as a nurse at a major hospital. An executive calls a staff meeting where he states that each time a patient comes in and is treated for a cold, the nurse working with the doctor is to change the diagnosis and treatment on the chart to pneumonia, thus obtaining more money from Medicare or Medicaid.<sup>187</sup> Joe continues in his normal job, routinely observing patient charts and altering the doctors' diagnoses on the charts from "cold" to "pneumonia." After a few months, Joe decides that the scheme is wrong and that he has to do something. He goes to the managing nurse and tells him that the hospital is cheating Medicare. His superior asks

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185. The First Circuit recently determined that "providing 'factual or statistical evidence to strengthen the inference of fraud beyond possibility'" only when the "defendant induced *third parties* to file false claims with the government" would be sufficient. *United States ex rel. Duxbury v. Ortho Biotech Prods., L.P.*, 579 F.3d 13, 29 (1st Cir. 2009). While this may allow a relator to allege a fraudulent scheme if he had sufficient indicia of reliability in this one circumstance, the First Circuit did not overrule *Karvelas* or provide any relaxation for other *qui tam* claims. Nonetheless, *Duxbury* represents a beacon of hope that the courts may be moving toward adopting the standard proposed in this Comment.

186. *See supra* note 23.

187. This fraudulent scheme is known as "upcoding." "Upcoding," a common form of Medicare fraud, is the practice of billing Medicare for medical services or equipment designated under a code that is more expensive than what a patient actually needed or was provided, and is the source of much litigation under the False Claims Act." *United States ex rel. Bledsoe v. Cmty. Health Sys.*, 501 F.3d 493, 498 n.2 (6th Cir. 2007). For more details on different types of fraudulent schemes, see JOEL D. HESCH, *WHISTLEBLOWING: HOW TO COLLECT MILLIONS OF DOLLARS FOR REPORTING FRAUD, A GUIDE TO GOVERNMENT REWARD PROGRAMS* (2008).

Joe if he has ever seen any claims being sent to Medicare—how would he know what is being paid? He is told to continue in the routine or be fired.

Joe then files a *qui tam* complaint, alleging that the hospital knew that each common cold treated at the hospital was billed to Medicare as pneumonia. Joe does not work in the hospital's billing or accounting department, so he cannot plead any specific invoices or claim numbers. He can, however, provide eyewitness testimony from the meeting that there is a fraudulent scheme occurring, and he can state that when he drew his supervisor's attention to the illegality of the scheme, the supervisor told him to ignore the implications. After the complaint is unsealed and served on the defendant hospital, Joe is greeted with a motion to dismiss under Rule 9(b).

Regretfully, under the current application of Rule 9(b), even though Joe can name doctors who reported pneumonia, the time period the upcoding occurred, the meetings in which he participated, and the fact that he had a one-on-one conversation with the head nurse, he cannot point to a specific claim or invoice sent to the government. His complaint is dismissed for lack of particularity, leaving the government without the help of a willing relator.

Under this Comment's proposed standard, Joe's complaint would satisfy the particularity required by Rule 9(b). Joe would be able to describe the fraudulent scheme in firsthand detail, with names of individuals in the meeting and the time he saw the upcoding. He would also be able to identify the hospital's actual knowledge of falsity, since he can cite the conversation with the head nurse.<sup>188</sup> Furthermore, he sat in the meetings where the entire scheme was outlined, witnessed the patients entering with a common cold, and saw the charts being altered to reflect treatment for pneumonia. Joe can plead the fraudulent scheme with particularity, satisfying the strictures of Rule 9(b).

Consider another situation. A project manager who has been hired by the military to build aircraft tells Mike to use Grade B metal to build the aircraft. This is different than the metal the company used for the last few hundred planes; in fact, it is much cheaper. Mike follows his instructions, but discovers that under that contract, they were supposed to use only Grade A metal for the projects. Mike approaches the president of the company, telling him his concern about using Grade B instead of Grade A metal. The president asks if Mike has seen any such claims being submitted to the government. Since Mike is only a technician building the craft, he

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188. It is essential to remember that at this stage of the litigation, Joe is not proving liability; he is merely putting the defendant on notice in order to prepare a response.

cannot point to any exact claims; Mike is certain, however, that Grade B metal should not be used. Mike is ignored and told to do his job.

Mike, after talking to the other workers, finds that this is not the first time that Grade B metal has been used under identical contracts with the government. He files a *qui tam* action under the FCA, alleging that the company he works for has been using Grade B metal while receiving payment for aircraft built with Grade A metal.

Once again, if the defendant moved for dismissal under the current application of Rule 9(b), Mike would be left in the cold and could not assist the government in recovering the money that was obtained through the false claims. Under the standard proposed in this Comment, however, his complaint would satisfy the particularity demanded by Rule 9(b) because he could accurately describe the situation where the project manager instructed the use of the improper metal, the president was aware of the situation, and improper metal was consistently used in producing the aircraft. Even though he does not have access to an exact invoice, he can plead the general scheme with sufficient particularity; the company is using cheaper metal and billing the government for the expensive Grade A metal.

#### VII. THE HOUSE OF REPRESENTATIVES: ATTEMPTING A LEGISLATIVE REMEDY FOR THE CIRCUIT CONFUSION AND MISAPPLICATION

For over twenty years, the 1986 amendments to the False Claims Act have reigned as the government's primary anti-fraud tool. Recently, Congress has once again decided that it is necessary to reevaluate the FCA. Due to the misapplication of Rule 9(b), the House of Representatives has included a legislative amendment that will address the misapplication among the circuits. The House has proposed:

In pleading an action brought under section 3730(b), a person shall not be required to identify specific claims that result from an alleged course of misconduct if the facts alleged in the complaint, if ultimately proven true, would provide a reasonable indication that one or more violations of section 3729 are likely to have occurred, and if the allegations in the pleading provide adequate notice of the specific nature of the alleged misconduct to permit the Government effectively to investigate and defendants fairly to defend the allegations made.<sup>189</sup>

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

This proposed legislative fix reflects the balance offered in this Comment to remedy the circuit confusion and the application of Rule 9(b) to the FCA. The proposed amendment may require even less particularity in a *qui tam* complaint than this Comment's proposal that a relator be allowed to plead the defendant's knowledge of a fraudulent scheme.<sup>190</sup>

*A. The Legislature May Override a Federal Rule of Civil Procedure*

The House of Representatives' proposal raises the question of whether the legislature has the authority to overrule a Federal Rule of Civil Procedure. Under the Rules Enabling Act,<sup>191</sup> "The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals."<sup>192</sup> Therefore, the legislature has authorized the Court to promulgate its own rules of procedure, including Rule 9(b).

However, Congress does possess the authority to statutorily override a Federal Rule of Civil Procedure.<sup>193</sup> When evaluating the Civil Rights Act of 1964 and its relationship to Rule 8, the Tenth Circuit made the determination that "there is no contest as to the plenary power of Congress to statutorily supersede any or all of the Rules. But unless the congressional intent to do so clearly appears, subsequently enacted statutes ought to be construed to harmonize with the Rules, if feasible."<sup>194</sup> In other words, when Congress makes it clear that the purpose of the statute is to override the application of a Rule, then the statute is the standing procedural law. If the intent is clear, it must be read to comply with the Court's rules of procedure.

The Northern District of Texas agreed, ruling that a statute, when Congressional intent is clear, preempted Federal Rule of Civil Procedure 17(b).<sup>195</sup> The court held that the Comprehensive Environmental Response,

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190. *See infra* Part VI.

191. 28 U.S.C. §§ 2071–2077 (2006).

192. 28 U.S.C. § 2072(a).

193. *See Burlington N. & Santa Fe Ry. Co. v. Consol. Fibers, Inc.*, 7 F. Supp. 2d 822 (N.D. Tex. 1998).

194. *United States v. Gustin-Bacon Div., Certain-Teed Prods. Corp.*, 426 F.2d 539, 542 (10th Cir. 1970).

195. *BNSF*, 7 F. Supp. 2d at 829. CERCLA governs a corporation's capacity to be sued, which is normally governed by state law, and the capacity to be sued is delineated in FED. R. CIV. P. 17(b). The court determined that the intent behind CERCLA, a federal statute, was evident, in that it should preempt state statutes as well as the Federal Rules of Civil Procedure.

Compensation and Liability Act not only preempts state statutes, but also overrides the Federal Rules of Civil Procedure, when the congressional intent is clear or the statute creates “a regulatory scheme which wholly conflicts with the state statute.”<sup>196</sup>

The First Circuit followed suit in its *Grossman v. Johnson*<sup>197</sup> decision. In determining that a shareholder’s action had to properly satisfy the FRCP, the Court determined that there was insufficient evidence that Congress desired to override or add to a rule of civil procedure. The Court reiterated: “In the absence of a clear inconsistency or a *demonstrated congressional purpose* to exclude one or more of the Federal Rules, a subsequently enacted statute should be so construed as to harmonize with the Federal Rules if that is at all feasible.”<sup>198</sup>

*B. The False Claims Act Amendment Intends To Override Rule 9(b)*

Since the Amendments have not yet been enacted, the congressional record thus far is limited to a brief discussion contained within the House Record. In the congressional record, the purpose behind the amendment to the FCA is clear: to override the courts that have inappropriately dismissed relators’ claims when they properly allege a fraudulent scheme but fail to plead a specific false claim, providing greater flexibility in the pleading of an action under the FCA. In introducing the proposed amendments, Congressman Howard Berman<sup>199</sup> of California stated:

Many courts unreasonably have barred whistleblowers with potentially meritorious claims from pursuing cases. For example, the courts have dismissed cases brought by insiders who know key details of fraudulent schemes because they can’t plead specific details of the billing documentation, such as the dates and identification numbers of invoices—information ordinarily sought and obtained in discovery.<sup>200</sup>

There is no question of the Congressional intent behind this proposed amendment to the FCA. It intends to override the courts’ current

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196. *BNSF*, 7 F. Supp. 2d at 826.

197. *Grossman v. Johnson*, 674 F.2d 115 (1st Cir. 1982).

198. *Id.* at 122-23 (emphasis added). The court evaluated the fact that in this instance, Congress had cited to the Federal Rules of Civil Procedure as an appropriate safeguard in securities and distributions circumstances.

199. Congressman Berman, along with Senator Charles Grassley, sponsored the 1986 Amendments to the FCA.

200. 153 CONG. REC. E2658, E2658 (daily ed. Dec. 19, 2007) (statement of Rep. Berman).

misapplication of Rule 9(b) to a *qui tam* complaint and provide greater flexibility in the pleading of an action under the FCA.

After witnessing the functioning of the FCA for the last twenty-two years,<sup>201</sup> Congress now considers amending the FCA in order to fulfill the underlying purposes of the FCA. “The law has not been a success in one critical respect: it could be doing far more.”<sup>202</sup> This includes providing a proper pleading standard for a relator’s *qui tam* complaint:

The amendments proposed in this legislation will remove these debilitating qualifications and to [sic] clarify that the Act is intended to “reach all types of fraud, without qualification” leading to Government losses. We intend for these amendments to apply to all future cases as well as all cases that are pending in the courts on the date the amendments become law.

The Amendments’ most critical goals are the following: . . . [c]larifying that plaintiffs do not need to have access to individual claims data or documents to bring a False Claims Act case.<sup>203</sup>

It cannot be clearer that Congress’s intent behind amending the FCA is to allow a relator to plead “an alleged course of misconduct” that would appropriately direct the defendant to prepare a sufficient defense based on the complaint itself.<sup>204</sup> Congressman Berman makes explicit reference to the types of cases described in this Comment as an improper application of Rule 9(b), leaving an unmistakably clear path of intent to override Rule 9(b).

In addition to the statement of the Congressman himself, testimony at the Congressional hearings on the amendments reveals the purpose behind the

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201. In the words of Representative Berman:

I am very happy to report that, in the years since 1986, the amended Act has returned over \$20 billion to the United States Government that otherwise would have been lost to fraud. For the most part, the law has been a resounding success. The Government has received full compensation for many of its losses, and has also imposed financial penalties on many who have knowingly over-billed the Government.

*Id.*

202. *Id.*

203. *Id.* at E2658-59.

204. False Claims Act Correction Act of 2007, H.R. Res. 4854, 110th Cong. § 4(e) (2008).

proposed amendment. The testimony of Shelley R. Slade,<sup>205</sup> an attorney specializing in whistleblower litigation, explained why the amendment is necessary:

The courts are misguided in applying this aspect of Rule 9(b) jurisprudence in the FCA context. In contrast to common law fraud cases, the *qui tam* plaintiff in a FCA lawsuit is not a party to the fraudulent transaction. It is the United States . . . that is the party to the transaction. It is consequently unreasonable to expect the *qui tam* plaintiff to have access to the transactional documents, which are almost always held exclusively by the wrongdoer on the one hand, and the government itself on the other.<sup>206</sup>

Congressional intent is clear: the purpose of the pleading standard in the False Claims Act Correction Act of 2007 is to overrule Rule 9(b) and the courts' various misconstructions of that Rule. With the intent clearly in the fore, the Rule will be officially preempted and relators will be granted the appropriate pleading standard under the amended False Claims Act.

#### VIII. CONCLUSION

The near universal application of Federal Rule of Civil Procedure 9(b) to a relator's *qui tam* complaint under the False Claims Act is undermining the very purpose behind the Act. When the courts demand that a relator plead a specific claim, the relator is unable to ever satisfy the stringent particularity pleading standard. Since the courts have held that Rule 9(b) should be applied to a *qui tam* complaint, the courts must impose a standard that allows a relator to plead a specific *fraudulent scheme*, applying the particularity of Rule 9(b) to the *knowledge of falsity* aspect of the FCA.

While the House of Representatives has proposed an appropriate answer to the misapplication of Rule 9(b) by crafting the False Claims Act Amendments to override the Rule, it is uncertain whether the legislative solution will be enacted. Whether Congress approves the amendments or

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205. Slade is a partner in the Washington, D.C. firm of Vogel, Slade, & Goldstein, LLP, which specializes in whistleblower litigation. She was also named one of the top whistleblowing attorneys in *The Washingtonian*. See <http://www.washingtonian.com/articles/mediapolitics/5907.html#whistleblower>. For more information about Ms. Slade, see <http://www.false-claims-act-health-care-fraud-whistleblower-attorney.com/index.php>.

206. False Claims Act Correction Act of 2007: Hearing on H.R. 4854 Before the H. Comm. on the Judiciary, 110th Cong. 24 (2008) (statement of Shelley R. Slade, Partner, Vogel, Slade & Goldstein, LLP).

not, however, the only way to permit full functionality of the FCA is to alter the overwhelming application of Rule 9(b) to the *claim* element of the *qui tam* action. By allowing a relator to plead a fraudulent scheme with particularity, the purposes of the FCA, as well as the purposes of requiring fraud to be pled with particularity, will be appropriately balanced, saving the government millions of dollars each year.