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## Relaxing Rule 9(b): Why False Claims Act Relators Should be Held to a Flexible Pleading Standard

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# RELAXING RULE 9(B): WHY FALSE CLAIMS ACT RELATORS SHOULD BE HELD TO A FLEXIBLE PLEADING STANDARD

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## INTRODUCTION

A nurse believes that her employer, a hospital, is defrauding the government by submitting claims to Medicare and Medicaid for services the hospital never provided. In her complaint, the nurse alleges that the hospital participated in duplicative and unnecessary testing of patients and duplicative billing for blood draws. She also includes factual references to her personal conversations about the hospital’s policies with other employees, descriptions and technical codes for medical tests of the type that she alleged were falsely submitted, and the testing histories of two actual patients. However, she cannot provide billing numbers, specific dates, or copies of any bill that was sent to the government for these false claims. Instead, she has personal, firsthand knowledge of the submission of the false claims—her supervisors informed her of the details of the scheme to induce her to participate in the fraud.

Based on the facts given above, the Eleventh Circuit would likely find her complaint insufficient due to lack of details about the actual false claims submitted, such as dates and amounts.<sup>1</sup> On the other hand, the Fifth Circuit would probably find her complaint sufficient because her personal knowledge of the scheme provides indicia of reliability that the false claims were actually submitted.<sup>2</sup>

An engineer wishes to bring a suit for falsely certifying and shipping parts that did not meet the government's specifications against a company that manufactures equipment for the armed forces. He works for a competitor of this company, so he has no personal knowledge of the fraudulent acts or access to any of the company's invoices or billing information. In his complaint, the engineer alleges which specific parts were shipped and paid for by the government. He also provides information about the contract between the company and the government. He alleges that the company must have submitted at least one false claim or the government would not have paid for the inadequate equipment.

Without details of the actual false claims submitted—such as copies of invoices—the Eleventh Circuit would likely find the engineer's complaint insufficient.<sup>3</sup> The Fifth Circuit may also find his complaint insufficient because, even though he provided details of the overall scheme to submit false claims to the government, he did not provide any other indicia of reliability to support his claims.<sup>4</sup> However, the Seventh Circuit would likely find the complaint sufficient because it provided enough detail of the overall scheme to infer that the false claims were actually submitted.<sup>5</sup>

These hypotheticals illustrate the division among the circuit courts in deciding cases brought under the False Claims Act (FCA).<sup>6</sup> The FCA is aimed at uncovering fraud against the United States Government

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1. *See, e.g., United States ex rel. Clausen v. Lab. Corp. of Am.*, 290 F.3d 1301, 1311–13 (11th Cir. 2002) (holding that the rule requiring that averments of fraud or mistake must be stated with particularity applies to FCA claims and that the competitor failed to allege with specificity if or when the corporation submitted any improper claims to the government).
  2. *See, e.g., United States ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 190–91 (5th Cir. 2009) (holding that the claim was stated with sufficient particularity without including contents of the bill, exact dollar amounts, or dates to prove by a preponderance that fraudulent bills were actually submitted).
  3. *Supra*, note 1.
  4. *Supra*, note 2.
  5. *See, e.g., United States ex rel. Lusby v. Rolls-Royce Corp.*, 570 F.3d 849, 854 (7th Cir. 2009) (holding that a relator from a competitor did not need to produce invoices that the defendant company submitted to customers at the beginning of a lawsuit since knowledge can be inferred).
  6. 31 U.S.C. §§ 3729–3733 (2012).

through suits brought by private citizens called *relators*. While Federal Rule of Civil Procedure 9(b),<sup>7</sup> which requires a heightened pleading standard in instances of fraud, governs complaints under the FCA, the circuit courts are split in their application of Rule 9(b) to this scenario. The circuits' applications range from rigid to flexible applications of Rule 9(b)'s particularity requirement. Because the Supreme Court has declined to address this issue and because there is no single test that courts can use to decide whether a complaint is sufficient, courts have come to widely disparate decisions. This Note proposes a test under which Rule 9(b) will be satisfied by a complaint filed under the FCA that (1) pleads sufficient detail of a fraudulent scheme and (2) provides reliable indicia of fraudulent claims to conclude that false claims have been filed.

First, this Note will discuss the FCA, contemplating its requirements and purpose. The Rule 9(b) pleading standard will be examined in general and as it applies to the FCA. Second, this Note will examine how the circuit courts have chosen to apply the Rule 9(b) pleading standard to FCA complaints, discussing the courts' holdings within a spectrum of rigid to flexible applications of that rule to highlight the inconsistency surrounding this issue. Third, this Note will suggest that the pleading standard be relaxed in FCA cases to improve access to the judicial system for relators and avoid the informational asymmetry problem.

Fourth, this Note will propose a test for courts to use when evaluating FCA complaints and propose factors that courts should consider when determining if reliable indicia have been provided. Finally, this Note will suggest that the "representative samples" approach and the "status of the relator" approach should be rejected in favor of the flexible approach. Not only will evaluating FCA complaints under this test fulfill the purpose behind the enactment of Rule 9(b), but it will also improve access to the judicial system for relators and allow the FCA to fulfill its remedial purpose. Courts should apply Rule 9(b) flexibly to avoid the unfair burden that a rigid application places on relators. This Note promotes a flexible application of Rule 9(b) in FCA cases and works to clarify the factors courts should consider when applying a flexible application of Rule 9(b) in FCA cases.

## I. OVERVIEW OF THE FALSE CLAIMS ACT & THE PLEADING REQUIREMENT

The FCA is an extremely important tool in uncovering fraud against the United States Government; its goal is to "supplement federal law enforcement resources by encouraging private citizens to

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

uncover fraud on the government.”<sup>8</sup> Because the FCA is a federal statute, a complaint filed pursuant to the FCA is analyzed for sufficiency under Federal Rule of Civil Procedure 9(b).<sup>9</sup>

A. *The False Claims Act*

The FCA aims to “protect[] the federal fisc by imposing severe penalties on those whose false or fraudulent claims cause the government to pay money.”<sup>10</sup> Congress passed the FCA in 1863 to crack down on fraud perpetrated by Union Army suppliers in government defense contracts during the Civil War.<sup>11</sup> The FCA encourages private citizens, called relators, to file *qui tam*<sup>12</sup> cases reporting attempts to defraud the government.<sup>13</sup> The increase in *qui tam* cases filed in the last two decades is dramatic. For example, in 1987 only 30 *qui tam* cases were filed, but in 2013, 753 *qui tam* cases were filed, resulting in recoveries of over \$3 billion.<sup>14</sup> One of the principal uses of the FCA is to battle fraud in the health-care field, covering false claims submitted to Medicare and Medicaid by health-care providers.<sup>15</sup> A relator who successfully submits a claim of fraud will receive between fifteen and twenty-five percent of the proceeds of the action or settlement.<sup>16</sup> Recovery under the FCA can be substantial; for example, “[t]he

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

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

10. United States *ex rel.* Vigil v. Nelnet, Inc., 639 F.3d 791, 796 (8th Cir. 2011).

11. See United States *ex rel.* Grubbs v. Kanneganti, 565 F.3d 180, 184 (5th Cir. 2009) (“The Act is remedial, first passed at the behest of President Lincoln in 1863 to stem widespread fraud by private Union Army suppliers in Civil War defense contracts.”).

12. *Qui tam* is an abbreviation of *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, which means “who as well for the king as for himself sues in this matter.” *Qui Tam Action*, BLACK’S LAW DICTIONARY (10th ed. 2014). A *qui tam* is a lawsuit brought by a private citizen against a person or company who is believed to have violated the law in the performance of a contract with the government or in violation of a government regulation. See, e.g., 31 U.S.C. § 3730 (2012) (“A person may bring a civil action for a violation of section 3729 for the person and for the United States Government.”).

13. 31 U.S.C. § 3730 allows only the U.S. Attorney General or a private citizen action as a whistleblower to file under the FCA. 31 U.S.C. § 3730 (2012). United States *ex rel.* Rost v. Pfizer, Inc., 507 F.3d 720, 726–27 (1st Cir. 2007).

14. *Fraud Statistics Overview Oct. 1, 1987–Sept. 30, 2013*, CIVIL DIV., U.S. DEP’T OF JUSTICE, [www.justice.gov/sites/default/files/civil/legacy/2013/12/26/C-FRAUDS\\_FCA\\_Statistics.pdf](http://www.justice.gov/sites/default/files/civil/legacy/2013/12/26/C-FRAUDS_FCA_Statistics.pdf) [<http://perma.cc/2QDCVUQG>] (last visited Sept. 9, 2015).

15. See *Mikes v. Straus*, 274 F.3d 687, 692 (2d Cir. 2001).

16. 31 U.S.C. § 3730(d)(1) (2012).

healthcare industry alone accounted for over \$9.5 billion in recoveries by the U.S. Department of Justice” from 2009 to 2012.<sup>17</sup>

Generally, the FCA “indicate[s] a purpose to reach any person who knowingly assisted in causing the government to pay claims which were grounded in fraud, without regard to whether that person had direct contractual relations with the government.”<sup>18</sup> The FCA holds liable any person who (1) knowingly submits false claims to the government; (2) causes another to submit false claims; (3) conspires to violate the FCA; or (4) knowingly makes or uses a false record to get a false claim paid by the Government.<sup>19</sup>

Consequently, “[t]he statute attaches liability, not to the underlying fraudulent activity or to the government’s wrongful payment, but to the ‘claim for payment.’ Therefore, a central question in False Claims Act cases is whether the defendant ever presented a ‘false or fraudulent claim’ to the government.”<sup>20</sup> Liability is not triggered simply by submitting a false claim; the potentially liable party must have knowledge that they are submitting a false claim.<sup>21</sup> The FCA defines knowledge as “actual knowledge,” “deliberate ignorance of the truth or falsity of the information,” or “reckless disregard of the truth or falsity of the information;” however, proof of specific intent to defraud is not required.<sup>22</sup> A person found liable for this conduct must pay a civil penalty between \$5,000 and \$10,000 plus three times the amount of the government’s

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17. Martin Merritt & Rachel V. Rose, *Pleading “Healthcare Fraud and Abuse” Under the False Claims Act, Surviving Rule 9(b) and Rule 12(b)(6) Motions to Dismiss*, FED. LAWYER, May 2013, at 63, available at [http://www.slideshare.net/MartinMerritt2/pleading-healthcare-fraud-and-abuse-rule-9b-12-b-6-merritt-rose-05-13?from\\_action=save](http://www.slideshare.net/MartinMerritt2/pleading-healthcare-fraud-and-abuse-rule-9b-12-b-6-merritt-rose-05-13?from_action=save) [<http://perma.cc/U8ES-HBMX>] (referencing statistics from the Office of Public Affairs of U.S. Dept. of Justice).
  18. *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 544–55 (1943).
  19. 31 U.S.C. § 3729(a)(1)(A)–(G) (2012). The FCA also holds liable any person who: (1) has control over government property and knowingly delivers less than all of that property; (2) is authorized to deliver a document certifying receipt of property used by the Government and delivers it without completely knowing that the information on the receipt is true; and (3) knowingly buys public property from a Government employee who may not sell the property. *Id.*
  20. *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 785 (4th Cir. 1999) (citation omitted) (quoting *United States v. Rivera*, 55 F.3d 703, 709 (1st Cir. 1995)).
  21. *United States ex rel. Owens v. First Kuwaiti Gen. Trading & Contracting Co.*, 612 F.3d 724, 728 (4th Cir. 2010) (“Congress . . . has made plain its intention that the act not punish honest mistakes or incorrect claims submitted through mere negligence.”).
  22. 31 U.S.C. § 3729(b)(1) (2012).

damages.<sup>23</sup> In order to successfully bring a *qui tam* action, a relator must meet the pleading requirements of Federal Rule of Civil Procedure 9(b).

*B. The Rule 9(b) Pleading Standard*

Rule 9(b) of the Federal Rules of Civil Procedure requires 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>24</sup> The Rule 9(b) requirement must be read in conjunction with Rule 8(a), which requires a short and plain statement of the claim.<sup>25</sup> Therefore, merely focusing on the fact that Rule 9(b) requires particularity fails to take into account “the general simplicity and flexibility” contemplated by Rule 8(a).<sup>26</sup> When read in conjunction with Rule 8(a), it becomes clear that Rule 9(b) does not require absolute particularity.<sup>27</sup> Many courts require a relator under the FCA to allege the time, place, and content of the fraud as well as allegations that the false claim was actually submitted to the government.<sup>28</sup>

The main purpose of Rule 9(b) is to apprise defendants of the fraudulent claims and acts that form the basis for a claim.<sup>29</sup> The

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23. 31 U.S.C. § 3729(a)(1) (2012).

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

25. See *United States ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 185–86 (5th Cir. 2009) (“The particularity demanded by Rule 9(b) is supplemental to the Supreme Court’s recent interpretation of Rule 8(a) requiring ‘enough facts [taken as true] to state a claim to relief that is plausible on its face.’”); Barney J. Finberg, *Annotation, Construction and Application of Provision of Rule 9(b), Federal Rules of Civil Procedure, That Circumstances Constituting Fraud or Mistake be Stated with Particularity*, 27 A.L.R. FED. 407, §2[a] (1976); FED. R. CIV. P. 8(a).

26. 5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1298 (3d ed. 2004).

27. *Id.*; see *United States ex rel. Joseph v. Cannon*, 642 F.2d 1373, 1386 (D.C. Cir. 1981) (quoting 2A JAMES WILLIAM MOORE, FEDERAL PRACTICE § 9.03, at 9-28 (2d ed. 1980)) (footnote omitted) (“[T]he requirement of particularity does not abrogate Rule 8 . . . it should be harmonized with . . . subdivisions (a) and (e) of Rule 8.”); see also *Grubbs*, 565 F.3d at 185–86 (stating that Rule 9(b) supplements but does not supplant Rule 8(a)).

28. See, e.g., *United States ex rel. Clausen v. Lab. Corp. of Am.*, 290 F.3d 1301, 1311–13 (11th Cir. 2002) (holding that fraud or mistake claims under the FCA must be stated with particularity and that a competitor failed to allege with specificity if or when a corporation submitted any improper claims to the government).

29. See *Semegen v. Weidner*, 780 F.2d 727, 735 (9th Cir. 1985) (citing *Gottreich v. San Francisco Investment Corp.*, 552 F.2d 866 (9th Cir. 1977)) (holding that pleading under Rule 9(b) “is sufficient if it identifies

particularity requirement also protects against vexatious and frivolous claims.<sup>30</sup> All circuit courts that have considered the issue have concluded that Rule 9(b) should apply to *qui tam* actions under the FCA.<sup>31</sup> However, “the degree of particularity necessary to enable the pleading to withstand attack . . . must in practical application necessarily vary with the facts and circumstances of each case.”<sup>32</sup> According to the D.C. Circuit, “Rule 9(b) is mitigated by Rule 8’s short and plain statement language, and the simplicity and flexibility contemplated by the rules must be taken into account when reviewing a complaint for 9(b) particularity.”<sup>33</sup> The debate over what degree of particularity should be applied in FCA cases has caused a circuit split.

## II. CIRCUIT COURT APPLICATION OF THE RULE 9(B) STANDARD

When analyzing circuit court decisions in FCA cases, the need for a uniform test becomes apparent. The circuit courts are split in their application of Rule 9(b) to claims filed under the FCA. The circuits range from a flexible application of Rule 9(b) to a strict adherence to the Rule’s particularity requirement. For example, the First Circuit held that Rule 9(b) may be satisfied even where “some questions remain unanswered [but] the complaint as a whole is sufficiently particular to pass muster under the FCA.”<sup>34</sup> However, the Eleventh Circuit strictly applied Rule 9(b) to require that relators plead specific details as to time, place, and substance of the fraudulent acts as well as who

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‘the circumstances constituting fraud so that the defendant can prepare an adequate answer from the allegations’”).

30. See *United States ex rel. Williams v. Martin-Baker Aircraft Co.*, 389 F.3d 1251, 1256 (D.C. Cir. 2004) (holding general allegations of FCA violations by failing to comply with certification requirements under the Truth Negotiations Act and the accompanying FAR regulating government contracts did not state a claim with sufficient particularity).
31. *E.g.*, *United States ex rel. Joshi v. St. Luke’s Hosp., Inc.*, 441 F.3d 552, 556 (8th Cir. 2006); *Grubbs*, 565 F.3d at 185; *United States ex rel. Karvelas v. Melrose-Wakefield Hosp.*, 360 F.3d 220 (1st Cir. 2004).
32. Finberg, *supra* note 25; see also *Grubbs*, 565 F.3d at 188 (5th Cir. 2009) (citing *Williams v. WMX Techs., Inc.*, 112 F.3d 175, 178 (5th Cir. 1997)) (“[W]e have acknowledged that ‘Rule 9(b)’s ultimate meaning is context-specific,’ and thus there is no single construction of Rule 9(b) that applies in all contexts.”).
33. *United States ex rel. McCreedy v. Columbia/HCA Healthcare Corp.*, 251 F. Supp. 2d 114, 117 (D.D.C. 2003) (citing *United States ex rel. Joseph v. Cannon*, 642 F.2d 1373, 1385–86 (D.C. Cir. 1981)).
34. *United States ex rel. Rost v. Pfizer, Inc.*, 507 F.3d 720, 732 (1st Cir. 2007) (citing *Karvelas*, 360 F.3d at 233 n.17).

engaged in them.<sup>35</sup> There have been no guiding principles established which courts can use to decide whether a complaint satisfies Rule 9(b). The result is that courts fall along a spectrum of rigid to flexible application of the particularity requirement and consider many different variables such as the status of the relator, reliability of information, notice to the defendant, and personal knowledge.

A complaint filed under the FCA that (1) pleads sufficient detail of a fraudulent scheme and (2) provides reliable indicia of fraudulent claims to conclude that false claims have been filed should satisfy the requirements of Rule 9(b). All courts should consider similar factors when determining if reliable indicia have been provided. Finally—although many courts take it into consideration—the relationship the relator has to the defendant is immaterial to that determination. The circuits that have addressed pleading requirements under the FCA take three main approaches: (1) the representative samples approach—an inflexible application of Rule 9(b); (2) the status of the relator approach; and (3) the flexible approach.

#### A. *The Representative Samples Approach*

A few circuits rigidly apply Rule 9(b), requiring relators to plead specific details of individual instances of fraud, often referred to as the representative samples approach.<sup>36</sup>

The Eleventh Circuit applies the most inflexible application of Rule 9(b). In *United States ex rel. Clausen v. Laboratory Corp. of America*,<sup>37</sup> the Eleventh Circuit affirmed the dismissal of a relator's complaint for failure to meet the Rule 9(b) standard.<sup>38</sup> Here, the court, while declining to apply a more flexible standard, suggested that a complaint is sufficient if it pleads an overall scheme and indicia of reliability.<sup>39</sup> The *Clausen* court, however, made it clear that the complaint would satisfy the indicia of reliability only if the complaint

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35. See *United States ex rel. Clausen v. Lab. Corp. of Am.*, 290 F.3d 1301, 1311–13 (11th Cir. 2002) (requiring “some indicia of reliability” in the complaint sufficient “to support the allegation of an actual false claim for payment being made to the Government”).

36. A representative sample, generally, is a specific example of false claims submitted to the government for payment. Many courts specify that a representative sample details the “time, place, and content” of the false claims. See, e.g., *United States ex rel. Nathan v. Takeda Pharm. N. Am., Inc.*, 707 F.3d 451, 455–56 (4th Cir. 2013) (holding “that the district court properly dismissed the amended complaint” for failure to properly allege that “false claims were presented to the government for payment”).

37. 290 F.3d 1301 (11th Cir. 2002).

38. *Id.* at 1315.

39. *Id.* at 1311.

included allegations of the specific contents of actually submitted claims, such as billing numbers, dates, and amounts.<sup>40</sup>

Many circuits only require representative samples in some situations. The Fourth Circuit requires representative samples only “when a defendant’s actions, as alleged and as reasonably inferred from the allegations, *could* have led, but *need not necessarily* have led, to the submission of false claims.”<sup>41</sup> In *United States ex rel. Nathan v. Takeda Pharmaceuticals North America, Inc.*,<sup>42</sup> the court explicitly declined to apply a “relaxed construction of Rule 9(b).”<sup>43</sup> Even though the relator alleged that doctors wrote almost one hundred prescriptions for the drug in question, he failed to allege that the prescriptions were written for off-label uses or that patients ever filled the prescriptions.<sup>44</sup> Overall, the court found that the complaint was insufficient because it could not draw a plausible inference connecting the general statistics alleged to the prescriptions identified.<sup>45</sup> The court determined that the allegations in the complaint were too general because the relator did not “identify with particularity any claims that would trigger liability under the Act.”<sup>46</sup>

Similarly, the First Circuit requires a relator to provide at least some representative samples:

[A] relator must provide details that identify particular false claims for payment that were submitted to the government. In a case such as this, 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. These details do not constitute a checklist of mandatory requirements that must be satisfied by each allegation included in a complaint. However, . . . we believe that “some of this information for at

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40. *Id.* at 1311–13.

41. *Nathan*, 707 F.3d at 457.

42. 707 F.3d 451 (4th Cir. 2013).

43. *Id.* at 457–58.

44. *Id.* at 459–60.

45. *Id.* at 459.

46. *Id.* at 460.

least some of the claims must be pleaded in order to satisfy Rule 9(b).<sup>47</sup>

While these circuits have rigidly applied Rule 9(b) to FCA cases, other circuits have taken a more lenient approach.

*B. The Status of the Relator Approach*

Several circuits apply a flexible interpretation of Rule 9(b) only when the court deems the relator to have some level of “insider” status—that is the relator has personal, firsthand knowledge of the submission of false claims to the government.<sup>48</sup> In *United States ex rel. Thayer v. Planned Parenthood of the Heartland*,<sup>49</sup> the Eighth Circuit held that a relator with personal, firsthand knowledge of the submission of false claims can satisfy Rule 9(b) without representative examples by pleading “particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted.”<sup>50</sup> The court compared this holding with its holding in *United States ex rel. Joshi v. St. Luke’s Hospital*,<sup>51</sup> where it held that “to satisfy Rule 9(b), [the relator] was required to plead at least some representative examples of the false claims” because he “had no direct connection to the hospital’s billing or claims department and could only speculate that false claims were submitted.”<sup>52</sup> While Thayer oversaw Planned Parenthood’s billing and claims systems and, therefore, had

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47. *United States ex rel. Ge v. Takeda Pharm. Co.*, 737 F.3d 116, 123 (1st Cir. 2013) (citing *United States ex rel. Karvelas v. Melrose-Wakefield Hosp.*, 360 F.3d 220, 232–33 (1st Cir. 2004)).

48. Status of the relator refers to the way many courts categorize a relator as either an “insider” or “outsider” depending on what position they hold within the company or organization. For example, some courts would consider an employee of the billing department as an insider, but a doctor in the same hospital an “outsider.” Compare *United States ex rel. Thayer v. Planned Parenthood of the Heartland*, 765 F.3d 914 (8th Cir. 2014) (the relator was the center of the defendant clinic and oversaw the billing and claims system of defendant clinic) with *United States ex rel. Joshi v. St. Luke’s Hosp., Inc.*, 441 F.3d 552 (8th Cir. 2006) (the relator anesthesiologist was held not to be privy to certain details related to his claims). Although this categorization of relators is wholly irrelevant, the terms “relator” or “outsider” as used throughout this Note do not include relators who receive information to bring an FCA claim through public knowledge and would thus fall under the Original Source provision of 31 U.S.C. § 3730(e)(4). See *Hays v. Hoffman*, 325 F.3d 982, 986–87 (8th Cir. 2003) (discussing whether the relator’s factual allegations were drawn from publicly disclosed information and thus barred).

49. 765 F.3d 914 (8th Cir. 2014).

50. *Id.* at 918.

51. 441 F.3d 552 (8th Cir. 2006).

52. *Thayer*, 765 F.3d at 917 (discussing *Joshi*, 441 F.3d at 557).

firsthand knowledge of the false claims, Joshi was an anesthesiologist with no direct connection to the hospital's billing department.<sup>53</sup> The Eighth Circuit applies a more lenient pleading standard when the relator has personal, firsthand knowledge of the actual submission of the false claims; therefore, a doctor in the hospital would have to provide representative samples, but an employee of the billing department would not, simply because of his status or relationship to the defendant.

Although the Sixth Circuit generally requires a relator to plead “characteristic example[s]’ that are ‘illustrative of [the] class’ of all claims covered by the fraudulent scheme,”<sup>54</sup> in *United States ex rel. Chesbrough v. VPA, P.C.*,<sup>55</sup> the court did not foreclose the possibility of a relaxed pleading standard for a relator with firsthand knowledge:

The case law just discussed suggests that the requirement that a relator identify an actual false claim may be relaxed when, even though the relator is unable to produce an actual billing or invoice, he or she has pled facts which support a strong inference that a claim was submitted. Such an inference may arise when the relator has “personal knowledge that the claims were submitted by Defendants . . . for payment.”<sup>56</sup>

On the other hand, the D.C. Circuit allows some flexibility for a relator who does not have personal, firsthand knowledge. The court in *United States ex rel. Williams v. Martin-Baker Aircraft Co.*<sup>57</sup> held that “Rule 9(b) does not require plaintiffs to allege every fact pertaining to every instance of fraud when a scheme spans several years.”<sup>58</sup> The court allowed some flexibility for certain relators stating that “[i]t is certainly true that qui tam plaintiffs . . . often have difficulty getting access to . . . documents. Accordingly, this circuit provides an avenue for plaintiffs unable to meet the particularity standard because defendants control the relevant documents—plaintiffs in such straits may allege lack of access in the complaint.”<sup>59</sup>

These circuits recognize the advantages of a more flexible pleading standard. The D.C. Circuit in particular recognizes the prejudice to relators that can result from informational asymmetry. There are,

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53. *Id.* at 917.

54. *United States ex rel. Snapp, Inc., v. Ford Motor Co.*, 532 F.3d 496, 506 (6th Cir. 2008).

55. *United States ex rel. Chesbrough v. VPA, P.C.*, 655 F.3d 461 (6th Cir. 2011).

56. *Id.* at 471 (quoting *United States ex rel. Lane v. Murfreesboro Dermatology Clinic, PLC*, 2010 WL 1926131, at \*5 (E.D. Tenn. 2010)).

57. 389 F.3d 1251 (D.C. Cir. 2004).

58. *Id.* at 1259.

59. *Id.* at 1258.

however, several circuits that apply Rule 9(b) flexibly in all situations, not just in certain circumstances.

*C. The Flexible Approach*

Several circuits always allow a flexible pleading standard for an FCA relator. For example, the Third Circuit addressed the pleading requirement in *United States ex rel. Foglia v. Renal Ventures Management LLC*,<sup>60</sup> where the relator alleged that the defendant over-billed the government for a certain prescription drug.<sup>61</sup> Although the court recognized this was a “close case as to meeting the requirements of Rule 9(b),” the court found that the complaint was sufficient and rejected the representative samples approach.<sup>62</sup> The court stated that, accepting the relator’s factual allegations as true, there were records showing that less than a normal amount of the drug was used and that Medicare would reimburse for a full vial of the drug regardless of how much was used, thus providing an opportunity for the alleged fraud.<sup>63</sup> Stating that “it is hard to reconcile the text of the FCA, which does not require that the exact content of the false claims in question be shown, with the ‘representative samples’ standard,”<sup>64</sup> the court noted that “we had never ‘held that a plaintiff must identify a specific claim for payment at the pleading stage of the case to state a claim for relief.’”<sup>65</sup>

The Tenth Circuit held that a plaintiff is not required to “provide a factual basis for every allegation.”<sup>66</sup> In *United States ex rel. Lemmon v. Envirocare of Utah, Inc.*,<sup>67</sup> the relators observed and participated in the improper disposal of hazardous waste.<sup>68</sup> The court held that as long

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

61. *Id.* at 158.

62. *Id.*

63. *Id.*

64. *Id.* at 156.

65. *Id.* (citing *United States ex rel. Wilkins v. United Health Group, Inc.*, 659 F.3d 295, 308 (3d Cir. 2011)). The Third Circuit also referenced that Fifth Circuit’s holding in *Grubbs* that “requiring this sort of detail at the pleading stage would be ‘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.’” *Id.* (citing *United States ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 190 (5th Cir. 2009)).

66. *United States ex rel. Lemmon v. Envirocare of Utah, Inc.*, 614 F.3d 1163, 1173 (10th Cir. 2010).

67. 614 F.3d 1163 (10th Cir. 2010).

68. *Id.* at 1166.

as the relator provides (1) details of the fraudulent scheme and (2) “an adequate basis for a reasonable inference that false claims were submitted” the Rule 9(b) standard has been met.<sup>69</sup>

Similarly, a relator in the Fifth Circuit need not allege details of each false claim, but the relator must “provide other reliable indications of fraud and . . . plead a level of detail that demonstrates that an alleged scheme likely resulted in bills submitted for government payment.”<sup>70</sup> In *United States ex rel. Grubbs v. Kanneganti*,<sup>71</sup> the relator alleged that two doctors personally instructed him to contribute to a fraudulent billing scheme.<sup>72</sup> In his complaint, the relator described the scheme in detail as well as “one overt act of false billing for each doctor.”<sup>73</sup> The court held that the complaint could “survive by alleging particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted.”<sup>74</sup> When the logical conclusion of the allegations of a relator’s complaint is that false claims were presented to the government, it is sufficient under Rule 9(b) “even though it does not include exact billing numbers or amounts.”<sup>75</sup>

The Ninth Circuit adopted a flexible application of Rule 9(b) in *United States ex rel. Ebeid v. Lungwitz*.<sup>76</sup> Notably, the court held that the relator must plead (1) “particular details of a scheme to submit false claims” and (2) “reliable indicia that lead to a strong inference that claims were actually submitted.”<sup>77</sup> The court does not require relators to provide representative samples; instead, representative samples are simply one way of meeting the reliable indicia prong of the test.<sup>78</sup> Even though the court acknowledged that a somewhat flexible pleading standard would apply, it found the relator’s complaint insufficient. The relator merely alleged that certain health care businesses “were engaged in the unlawful corporate practice of medicine.”<sup>79</sup> The court noted that the relator “baldly assert[ed]” that, had the

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69. *Id.* at 1172.

70. *United States ex rel. Nunnally v. West Calcasieu Cameron Hospital*, 519 F. App’x 890, 893 (5th Cir. 2013).

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

72. *Id.* at 184.

73. *Id.* at 184–85.

74. *Id.* at 190.

75. *Id.* at 192.

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

77. *Id.* at 998–99 (citing *Grubbs*, 565 F.3d at 190).

78. *Id.* at 998.

79. *Id.* at 1000.

defendant “not concealed or failed to disclose information affecting the right to payment, the United States would not have paid the claims” without providing “any statute, rule, regulation, or contract that conditions payment on compliance with state law governing the corporate practice of medicine.”<sup>80</sup> Because the relator’s complaint contained only conclusory allegations “lacking any details or facts setting out the ‘who, what, when, where, and how’ of the ‘financial relationship’ or alleged referrals,” his complaint was insufficient.<sup>81</sup>

Finally, the Seventh Circuit in *United States ex rel. Lusby v. Rolls-Royce Corp.*<sup>82</sup> rejected the notion that representative samples are required, reversing a district court holding that the relator needed to have “at least one of [defendant’s] billing packages” to meet the Rule 9(b) standard.<sup>83</sup> The defendant argued that the relator’s complaint was insufficient because, although he was an engineer for the company, he was not an insider and did not have access to invoices sent to customers.<sup>84</sup> The court found the relator’s statement that “Rolls-Royce *must* have submitted at least one such certificate [of compliance], or the military services would not have paid for the goods” as sufficient,<sup>85</sup> holding that because “knowledge is inferential,” it is enough to “show, in detail, the nature of the charge, so that vague and unsubstantiated accusations of fraud do not lead to costly discovery and public obloquy.”<sup>86</sup> Even though the relator did not have personal knowledge of the details of the particular fraudulent claims, the Seventh Circuit found that the complaint was sufficient because it alleged the scheme.<sup>87</sup>

### III. A MORE FLEXIBLE STANDARD FULFILLS THE PURPOSE BEHIND RULE 9(B) AND PROVIDES FAIR ACCESS TO THE JUDICIAL SYSTEM FOR RELATORS

The confusion and discord surrounding pleading requirements in FCA cases arises from the lack of a definitive test to determine the sufficiency of a complaint and the lack of identifiable factors that courts can weigh when applying the test. Many courts have stated that a relator must show details of the scheme and some indicia of reliability; however, the courts that have adopted this test interpret indicia of

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80. *Id.*

81. *Id.*

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

83. *Id.* at 854.

84. *Id.*

85. *Id.* at 854–55.

86. *Id.* (citing *United States ex rel. Clausen v. Lab. Corp. of Am.*, 290 F.3d 1301, 1310 (11th Cir. 2002)).

87. *Id.* at 854.

reliability differently and, therefore, have varied results. Further, many courts have incorrectly allowed the status of the relator to affect the pleading requirement. All courts should consider the same factors when determining what constitutes indicia of reliability, and they should reject the representative samples and status of the relator approaches. Applying a uniform, flexible test will prevent courts from placing an unfair pleading burden on relators while still satisfying the Rule 9(b) pleading requirement.

A. *A Flexible Application of Rule 9(b) Provides Notice to the Defendant and Does Not Unfairly Prejudice Relators*

Rule 9(b) “is context specific and flexible and must remain so to achieve the remedial purpose of the False Claims Act.”<sup>88</sup> Fulfilling the purpose behind Rule 9(b) is essential in evaluating an FCA complaint. Rule 9(b) strives mainly to put defendants on notice and allow them to prepare an appropriate defense.<sup>89</sup> Further, it serves to protect defendants from frivolous claims and deter cases filed purely for settlement value, merely to reopen a completed transaction, or only to obtain discovery.<sup>90</sup> Therefore, “[a] court should hesitate to dismiss a complaint under Rule 9(b) if the court is satisfied (1) that the defendant has been made aware of the particular circumstances for which she will have to prepare a defense at trial, and (2) that plaintiff has substantial pre-discovery evidence of those facts.”<sup>91</sup>

To achieve the purpose behind Rule 9(b), the pleading standard must remain flexible in FCA cases. Without flexibility, the “remedial purpose” of the FCA cannot be achieved.<sup>92</sup> Namely, “[w]e reach for a workable construction of Rule 9(b) with complaints under the False Claims Act; that is, one that effectuates Rule 9(b) without stymieing legitimate efforts to expose fraud.”<sup>93</sup> A flexible application of Rule 9(b) in which a relator must satisfy the two-part test of (1) pleading details

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

89. Semegen v. Weidner, 780 F.2d 727, 735 (9th Cir. 1985) (citing Gottreich v. San Francisco Inv. Corp., 552 F.2d 866, 866 (9th Cir. 1977)).

90. Charis Ann Mitchell, Comment, *A Fraudulent Scheme’s Particularity Under Rule 9(b) of the Federal Rules of Civil Procedure*, 4 LIBERTY U. L. REV. 337, 344 (2010); see United States *ex rel.* Folliard v. CDW Tech. Servs. Inc., 722 F. Supp. 2d 20, 25 (D.D.C. 2010) (holding that Rule 9(b) is meant to ensure that defendants have a chance to prepare their defense and to discourage fraud claims solely as a pretext for discovery of unknown wrongs or purely for nuisance value).

91. United States *ex rel.* McCready v. Columbia/HCA Healthcare Corp., 251 F. Supp. 2d 114, 116 (D.D.C. 2003) (quoting Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 784 (4th Cir. 1999)).

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

93. *Id.*

of the overall scheme and (2) presenting sufficient indicia of reliability strikes a balance that protects defendants while preventing plaintiff from filing baseless claims.<sup>94</sup> The test is flexible enough to not preclude meritorious claims from going forward while providing defendants adequate notice of the claims.

Further, a complaint that complies with the flexible, two-part test would limit any “fishing” as the Fifth Circuit explained:

Discovery can be pointed and efficient, with a summary judgment following on the heels of the complaint if billing records discredit the complaint’s particularized allegations. That is the balance Rule 9(b) attempts to strike. And it works best when access to discovery does not inevitably include all discovery’s powers but is tailored by the district court to the case at hand. And the detail must be sufficient to allow this tailoring. Rule 9(b) should not be made to shoulder all the burden of policing abusive discovery.<sup>95</sup>

In *Grubbs*, the Fifth Circuit found that a requirement that a relator plead representative samples such as “exact dollar amounts, billing numbers, or dates” is “one small step shy of requiring production of actual documentation”—a level of proof not demanded by the Rule 9(b) standard—and, therefore, rejected an inflexible application of the Rule.<sup>96</sup>

In *Foglia*, the Third Circuit relied on the Attorney General’s brief for the United States as *amicus curiae* in *Nathan* to add further support for its finding that a flexible pleading standard should apply.<sup>97</sup> In the brief, the Attorney General stated that (1) the “rigid” pleading standard is “unsupported by Rule 9(b)”; (2) “a strict pleading standard undermines the FCA’s effectiveness as a tool to combat fraud against the United States”; and (3) “pleading the details of a specific false claim

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94. *Id.*

95. *Id.* at 191.

96. *Id.* at 189–90 (citing *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007)); *United States ex rel. Pogue v. Diabetes Treatment Ctrs. of Am., Inc.*, 238 F. Supp. 2d 258, 269 (D.D.C. 2002) (“If at trial a *qui tam* plaintiff proves the existence of a billing scheme and offers particular and reliable indicia that false bills were actually submitted as a result of the scheme—such as dates that services were fraudulently provided or recorded, by whom, and evidence of the department’s standard billing procedure—a reasonable jury could infer that more likely than not the defendant presented a false bill to the government, this despite no evidence of the particular contents of the misrepresentation.”).

97. *United States ex rel. Foglia v. Renal Ventures Management LLC*, 754 F.3d 153, 156 (3d Cir. 2014) (quoting Brief for the United States as *Amicus Curiae* at 10–11, *United States ex rel. Nathan v. Takeda Pharm. N. Am., Inc.*, 134 S. Ct. 1759 (2014) (No. 12–1249) (mem.) (denying cert. to 707 F.3d 451)).

presented to the government is not an indispensable requirement of a viable FCA complaint.”<sup>98</sup>

The Third Circuit agreed that a more “nuanced” standard fulfills the purpose behind Rule 9(b) of providing fair notice to defendants of a plaintiff’s claims without prejudicing the relator.<sup>99</sup> A defendant will be able to adequately defend against the claim because many times the defendant is the party who is in possession of the records that are necessary to show that the alleged false claims were never billed for.<sup>100</sup> If a relator is prevented from going forward with his claim simply because he does not have access to the information needed to provide representative samples in his complaint, a meritorious claim may be dismissed. In other words, “[f]actual sufficiency is . . . a poor proxy for meritlessness. . . . It overscreens cases that, though meritorious, cannot meet the fact pleading standard before discovery.”<sup>101</sup> Further, “[t]he overscreening effect is a significant inroad into justice concerns because it prevents deserving plaintiffs from gaining meaningful access to the civil justice system.”<sup>102</sup> If a meritorious claim cannot get past the pleading stage, due to a strict pleading bar, discovery is not even an option.<sup>103</sup>

Relators who are held to a strict pleading standard under Rule 9(b) in FCA cases experience the same adverse effects that plaintiffs complained of after the Supreme Court’s decisions in *Bell Atlantic Corp. v. Twombly*<sup>104</sup> and *Ashcroft v. Iqbal*,<sup>105</sup> which required plaintiffs to include far more detailed facts in a complaint to survive a motion to dismiss.<sup>106</sup> Here too, relators would be adversely affected because they would be forced to provide more detailed facts than they have available to them, causing their case to be dismissed before it can be evaluated on the merits. Studies show that the Supreme Court’s decisions in *Twombly* and *Iqbal* have led to increased dismissals at the motion to dismiss stage.<sup>107</sup> A strict application of Rule 9(b), which requires

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98. *Id.*

99. *Id.* at 156–57.

100. *Grubbs*, 565 F.3d at 190–91.

101. Scott Dodson, *New Pleading, New Discovery*, 109 MICH. L. REV. 53, 68 (2010).

102. *Id.*

103. Leslie A. Gordon, *For Federal Plaintiffs, Twombly and Iqbal Still Present a Catch-22*, A.B.A. J., Jan. 2011, at 16, 17.

104. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

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

106. *Bell Atlantic Corp.*, 550 U.S. 544; *Ashcroft*, 556 U.S. 662.

107. Theodore Eisenberg & Kevin M. Clermont, *Plaintiphobia in the Supreme Court*, 100 CORNELL L. REV. 193, 196, 201 (2014).

relators to plead details they do not have access to, simply places an unfair burden on relators.

Finally, requiring a relator to plead representative samples would discourage relators from coming forward with information of false claims.<sup>108</sup> An inflexible application of Rule 9(b) would “take[] a big bite out of *qui tam* litigation” because a relator is unlikely to have access to these documents unless he works in the defendant’s billing department.<sup>109</sup>

### B. *The Test*

In order to have a consistent, predictable application of Rule 9(b), courts should adopt a uniform, flexible standard. The focus of this test should be on whether the relator provided (1) details of the overall scheme and (2) indicia of reliability. In applying Rule 9(b), “courts must undertake a case-by-case analysis of particular pleadings;”<sup>110</sup> however, a relator’s complaint is sufficient if the “accusations are not vague”<sup>111</sup> and the defendants can “defend against the charge and not just deny that they have done anything wrong.”<sup>112</sup> Representative examples of each individual false claim submitted are not required if the relator details the overall fraudulent scheme and provides an adequate basis for the court to infer that false claims were actually submitted to the government.

#### 1. Prong One: Details of the Overall Scheme

This prong of the test can be satisfied by pleading the when, where, how, and what of the overall fraudulent scheme. This prong looks at the scheme in general because “[t]he particular circumstances constituting the fraudulent presentment are often harbored in the scheme.”<sup>113</sup> The Fifth Circuit has stated as much:

Standing alone, raw bills—even with numbers, dates, and amounts—are not fraud without an underlying scheme to submit the bills for unperformed or unnecessary work. It is the scheme in

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108. See *Grubbs*, 565 F.3d at 191 (“It discourages whistleblowers who may have significant information from coming forward . . .”).

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

110. *United States ex rel. Folliard v. CDW Tech. Servs., Inc.*, 722 F. Supp. 2d 20, 33 (D.D.C. 2010) (quoting *In re Orion Sec. Litig.*, No. 08–CV–1328, 2009 WL 2601952, at \*1 (S.D.N.Y. Aug. 20, 2009)).

111. *Lusby*, 570 F.3d at 855.

112. *United States ex rel. Williams v. Martin-Baker Aircraft Co.*, 389 F.3d 1251, 1259 (D.C. Cir. 2004) (quoting *United States ex rel. Lee v. SmithKline Beecham, Inc.*, 245 F.3d 1048, 1052 (9th Cir. 2001)).

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

which particular circumstances constituting fraud may be found that make it highly likely the fraud was consummated through the presentment of false bills.<sup>114</sup>

A relator can satisfy this prong by alleging how the fraud was carried out as well as the “date, place, and participants” of the fraud.<sup>115</sup> Even if a relator cannot match every fraudulent act with a specific request for payment to the government, the complaint can provide sufficient details of the overall scheme if, for example, the relator alleges which employees submitted the false claims, which government regulation or contract was violated, when the requests were made, and how the regulation or contract was violated.<sup>116</sup> For example, the relator in *Thayer* satisfied this prong by providing the names of the individuals who instructed her to commit the fraudulent acts, the time period over which the fraud took place, which clinics participated in the schemes, and the means by which the fraud was executed.<sup>117</sup>

## 2. Prong Two: Indicia of Reliability

The next prong of the test evaluates the indicia of reliability. The indicia of reliability can be any “factual or statistical evidence to strengthen the inference of fraud beyond possibility.”<sup>118</sup> Any adequate basis from which the court can infer that false claims were actually submitted to the government should be considered sufficient indicia of reliability. Rule 9(b)’s particularity requirement does not necessarily need to be met by stating the exact contents of a bill to the government.<sup>119</sup> If a relator provides the underlying factual basis for the allegations in the complaint, then the second prong of the two-part test is satisfied.

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114. *Id.*

115. *Id.* at 191–92.

116. *See, e.g.,* United States *ex rel.* Lemmon v. Envirocare of Utah, Inc., 614 F.3d 1163, 1173 (10th Cir. 2010) (holding a former employee’s claims that the former employer directed the employee to participate in fraud, that the former employer breached its contractual and statutory obligations, and that the former employer submitted false certifications of fulfillment of those obligations sufficient to pass pleading stage).

117. United States *ex rel.* Thayer v. Planned Parenthood of the Heartland, 765 F.3d 914, 919 (8th Cir. 2014).

118. *See* United States *ex rel.* Rost v. Pfizer, Inc., 507 F.3d 720, 733 (1st Cir. 2007) (holding the relator’s claims were not sufficient because they contained no factual or statistical evidence to strengthen the fraud inference beyond possibility).

119. *See Grubbs*, 565 F.3d at 190 (holding that a relator’s complaint which does not allege the details of a submitted false claim may nevertheless survive).

A relator can satisfy this prong in many ways; however, no matter how the second prong is satisfied, it is imperative that the notice to the defendant requirement is fulfilled. First, personal knowledge of the fraud can satisfy the indicia of reliability requirement.<sup>120</sup> In *Lemmon*, the relator satisfied this prong of the test through his personal knowledge of the false claims. His personal knowledge was sufficient because he participated in the improper disposal of the waste.<sup>121</sup> Similarly, in *Grubbs*, the relator satisfied this prong by alleging his firsthand experience of the doctors approaching to participate in the fraud and the nursing staff attempting to assist him in recording patient visits that had not occurred.<sup>122</sup>

Second, specific contents of actually submitted claims, such as billing numbers, dates, and amounts can satisfy the indicia of reliability requirement. Although the relator in *Clausen* described in detail a fraudulent scheme, his complaint was insufficient because it did not provide “any billing information to support [Clausen’s] allegation that actual false claims were submitted for payment.”<sup>123</sup> Where the relator merely alleged, “these practices resulted in the submission of false claims for payment to the United States,”<sup>124</sup> the court wanted contents of actually submitted false claims stating, “[n]o amounts of charges were identified. No actual dates were alleged. No policies about billing or even second-hand information about billing practices were described. . . . No copy of a single bill or payment was provided.”<sup>125</sup>

Finally, details about the defendant’s billing practices can satisfy the indicia of reliability requirement. In *Thayer*, the relator alleged that her position as manager gave her access to Planned Parenthood’s centralized billing system.<sup>126</sup> She also alleged that she had personal

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120. *See* United States *ex rel.* Ebeid v. Lungwitz, 616 F.3d 993, 999 (9th Cir. 2010) (stating that the FCA is “geared primarily to encourage insiders to disclose information necessary to prevent fraud on the government”); *see also* Hill v. Morehouse Med. Assocs., No. 02-14429, 2003 U.S. App. LEXIS 27956, at \*14-15 (11th Cir. 2003) (stating that because the relator “worked in the very department where she alleged the fraudulent billing schemes occurred,” she was “privity to . . . the internal billing practices” of the defendant and her allegations of false claims were factually credible).

121. United States *ex rel.* Lemmon v. Envirocare of Utah, Inc., 614 F.3d 1163, 1169, 1172–73 (10th Cir. 2010).

122. *Grubbs*, 565 F.3d at 184, 191–92.

123. United States *ex rel.* Clausen v. Lab. Corp. of Am., 290 F.3d 1301, 1306 (11th Cir. 2002).

124. *Id.* at 1312.

125. *Id.*

126. United States *ex rel.* Thayer v. Planned Parenthood of the Heartland, 765 F.3d 914, 919 (8th Cir. 2014).

knowledge of the submission of false claims and described Planned Parenthood's general billing practices.<sup>127</sup> These allegations were enough to satisfy the indicia of reliability requirement.<sup>128</sup>

In sum, personal knowledge, specific details of submitted claims, and details of the defendants billing practices are all ways in which a relator can provide indicia of reliability to satisfy the second prong of the test. This is contrary to the rule used in circuits that have adopted the representative samples approach or the status of the relator approach because those circuits held that a relator can provide indicia of reliability in only one manner. Courts should accept personal knowledge, representative samples, or details of the defendant's billing practices as sufficient to satisfy the second prong of the test instead of limiting relators to just one method. The courts that have restricted relators to only one method of showing indicia of reliability are incorrect because any of the three methods discussed above would put a defendant on notice of the claims.

### 3. The Status of the Relator Approach Should be Rejected

A relator should not be held to a more flexible pleading standard simply because a court finds that he had personal, firsthand knowledge of the claims or classifies him as an "insider." In affirming the dismissal of a complaint for failure to meet Rule 9(b), the Eighth Circuit stated that "[t]he [FCA] is intended to encourage individuals who are either close observers or involved in the fraudulent, activity to come forward, and is not intended to create windfalls for people with secondhand knowledge of the wrongdoing."<sup>129</sup> Although it is important to keep in mind that the objective of uncovering fraud must be balanced against the fact that the ability to bring whistleblower claims may prompt employees to pursue selfish motives or opportunistic behaviors, a person

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127. *Id.*

128. *Id.*

129. United States *ex rel.* Kinney v. Stoltz, 327 F.3d 671, 674 (8th Cir. 2003).

can provide reliable indicia without having firsthand knowledge.<sup>130</sup> Courts must hold all relators to the same standard.<sup>131</sup>

The FCA does not require that a relator be an insider to bring suit; anyone who is aware of false claims against the government may bring suit.<sup>132</sup> Accordingly, “[i]t is generally contemplated that an FCA relator will be an insider, and Congress certainly intended to encourage insider whistleblowers to initiate *qui tam* suits. However, the statute contains no such requirement.”<sup>133</sup> The application of either a rigid or a flexible pleading standard merely on the basis of the relator’s status is arbitrary and distracting. For example, the Eighth Circuit only allows a more flexible pleading standard for a relator who has firsthand knowledge of the submission of the false claims.<sup>134</sup> Specifically, the court required the relator to plead representative samples in *Joshi*, but not in *Thayer* because the relator was an “insider.”<sup>135</sup> The Eighth Circuit applies a more lenient pleading standard when the relator has firsthand knowledge of the actual submission of the false claims. Therefore, someone who works in the billing department at a hospital would have a more flexible pleading standard than a doctor in that same hospital.

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130. *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 649 (D.C. Cir. 1994) (“Seeking the golden mean between adequate incentives for whistle-blowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant information to contribute of their own, Congress has frequently altered its course in drafting and amending the *qui tam* provisions since initial passage of the FCA over a century ago.”); *United States ex rel. Duxbury v. Ortho Biotech Prods., L.P.*, 579 F.3d 13, 16 (1st Cir. 2009) (“Congress has amended the FCA several times ‘to walk a fine line between encouraging whistle-blowing and discouraging opportunistic behavior.’” (citing *United States ex rel. S. Praver and Co. v. Fleet Bank*, 24 F.3d 320, 324–26 (1st Cir. 1994))).
131. Again, this excludes relators who receive their information through public knowledge and are thus subject to the “original source” rule. 31 U.S.C. § 3730(e)(4) (2012); *see supra* note 48.
132. *See* 31 U.S.C. § 3730 (2012) (setting forth a limitation on who can bring suit and stating that a court must dismiss a claim based on publicly disclosed information unless the relator is the original source).
133. *United States ex rel. McCready v. Columbia/HCA Healthcare Corp.*, 251 F. Supp. 2d 114, 119 (D.D.C. 2003) (citing *United States ex rel. LaCorte v. SmithKline Beecham Clinical Labs*, 149 F.3d 227, 234 (3d Cir. 1998)).
134. *Compare* *United States ex rel. Thayer v. Planned Parenthood of the Heartland*, 765 F.3d 914, 917 (8th Cir. 2014) (holding that a flexible standard applied when the relator was the center manager of the defendant who oversaw the defendant’s billing system) *with* *United States ex rel. Joshi v. St. Luke’s Hosp., Inc.*, 441 F.3d 552, 557 (8th Cir. 2006) (finding that a relator, as the defendant hospital’s anesthesiologist, must provide specific details of the claim in order to receive a relaxed pleading standard).
135. *Thayer*, 765 F.3d at 917 (discussing *Joshi*, 441 F.3d at 557).

The FCA does not differentiate based on the status of the relator. Some courts have recognized that making a distinction based on the status of the relator is arbitrary. The court's holding in *United States ex rel. Folliard v. CDW Technology Services, Inc.*<sup>136</sup> is illustrative of this:

[The defendant] asserts that Congress created a policy in the FCA that relators *must* be insiders. This is not the case. . . . [T]he statute contains no such requirement. Any person who can muster sufficient evidence of fraud, that is not publicly disclosed, and be the first to file a complaint alleging that fraud, may maintain a *qui tam* suit. In fact, the statute contemplates that a competitor—manifestly not an insider—may file suit.<sup>137</sup>

Similarly, the District Court for the District of Columbia in *United States ex rel. McCready v. Columbia/HCA Healthcare Corp.*,<sup>138</sup> rejected the notion that a relator must be an insider.<sup>139</sup>

*C. Courts Have Accepted a More Flexible Application of Rule 9(b) in Other Instances of Alleged Fraud*

FCA suits are not the only area of the law in which courts have allowed a more flexible pleading standard. Courts that have allowed a flexible application of Rule 9(b) have mainly done so in instances where the plaintiff would be prejudiced because the defendant possesses the information that the plaintiff needs in order to plead with specificity.

Some courts have allowed a more lenient application of Rule 9(b) to complaints alleging violation of the Private Securities Litigation Reform Act (PSLRA).<sup>140</sup> For example, in *Jones v. Intelli-Check, Inc.*,<sup>141</sup> the court recognized that plaintiffs may not be able to provide representative samples in market manipulation claims under the PSLRA because the information needed may be “peculiarly within the defendant’s knowledge or control.”<sup>142</sup> Therefore, the court relaxed the

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136. *United States ex rel. Folliard v. CDW Tech. Servs., Inc.*, 722 F. Supp. 2d 20 (D.D.C. 2010).

137. *Folliard.*, 722 F. Supp. 2d at 30 n.9 (citing *United States ex rel. McCready v. Columbia/HCA Healthcare Corp.*, 251 F. Supp. 2d 114, 119 (D.D.C. 2003)).

138. 251 F. Supp. 2d 114 (D.D.C. 2003).

139. *Id.* at 119.

140. 15 U.S.C. § 78u-4(b) (2012).

141. *Jones v. Intelli-Check, Inc.*, 274 F. Supp. 2d 615 (D.N.J. 2003).

142. *Id.* at 628 (quoting *In re Rockefeller Ctr. Props., Inc. Sec. Litig.*, 311 F.3d 198, 216 (3d Cir. 2002)); see Damian Moos, Note, *Pleading Around the Private Securities Litigation Reform Act: Reevaluating the Pleading Requirements for Market Manipulation Claims*, 78 S. CAL. L. REV. 763,

pleading requirement.<sup>143</sup> Further, the court in *In re Herbalife Securities Litigation*<sup>144</sup> noted that the Ninth Circuit relaxed Rule 9(b)'s requirements when the "matters at issue are within the opposing party's knowledge."<sup>145</sup> "In such cases, the particularity requirement may be satisfied if the allegations are accompanied by a statement of the facts upon which belief is founded."<sup>146</sup>

There are several other areas in which courts have applied a relaxed Rule 9(b) standard. First, one court held that a Racketeer Influenced and Corrupt Organizations Act (RICO) complaint "need not be specific as to each allegation of mail or wire fraud when the nature of the RICO scheme is sufficiently pleaded so as to give notice to the defendants."<sup>147</sup> In the context of a breach of contract case one court stated, "[a]lthough Rule 9(b) requires heightened specificity, courts should apply the rule with flexibility and 'should not require plaintiffs to plead issues that may have been concealed by the defendants.'"<sup>148</sup> Furthermore, in a complaint alleging a securities law violation, one court held that Rule 9(b) is relaxed to permit discovery where the evidence is within a defendant's exclusive possession.<sup>149</sup> Finally, Rule 9(b) applies to adversary bankruptcy proceedings;<sup>150</sup> however, only a very simple allegation of fraud is enough to satisfy the Rule 9(b) requirement.<sup>151</sup>

These courts have mainly focused on the fact that if the pleading standard is not relaxed, an undue burden will be placed on the plaintiff because the defendant is in possession of the information needed to provide representative samples—the same problem that FCA relators face in jurisdictions with an inflexible pleading standard.

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777–87 (2004) (advocating for a relaxed application of Rule 9(b) in market manipulation claims under the PSLRA).

143. *Jones*, 274 F. Supp. 2d at 628–29.
144. *In re Herbalife Sec. Litig.*, No. CV 95-400 SVW, 1996 U.S. Dist. LEXIS 11484 (C.D. Cal. 1996).
145. *Id.* at \*18 (citing *Wool v. Tandem Computers*, 818 F.2d 1433, 1439 (9th Cir. 1987)).
146. *Id.* (citing *Wool*, 818 F.2d at 1439).
147. *Karreman v. Evergreen Int'l Spot Trading, Inc.*, No. 01 Civ. 9824, 2002 U.S. Dist. LEXIS 17812, at \*17 (S.D.N.Y. 2002) (citing *First Interregional Advisors Corp. v. Wolff*, 956 F. Supp. 480, 485 (S.D.N.Y. 1997)).
148. *Mardini v. Viking Freight, Inc.*, 92 F. Supp. 2d 378, 385 (D.N.J. 1999) (citing *Christidis v. First Pa. Mortg. Trust*, 717 F.2d 96, 99–100 (3d Cir. 1983)).
149. *Deutsch v. Flannery*, 823 F.2d 1361, 1366 (9th Cir. 1987).
150. FED. R. BANKR. P. 7009.
151. *See, e.g., In re Tarragon Corp.*, No. 09-10555, 2011 Bankr. LEXIS 1001, at \*10 (Bankr. D.N.J. 2011) (construing Rule 9(b) "liberally" because a sophisticated defrauder could hide sufficient details of the fraud to make specific, particularized pleading impossible).

## CONCLUSION

The circuit courts have been inconsistent in their application of the Rule 9(b) particularity requirement to FCA complaints. Due to the lack of a specific test that can be applied to all relators' complaints and specific criteria that can be applied in evaluating whether the test has been met, a relator's complaint may be sufficient in one circuit but insufficient in another. Circuits that hold relators to an inflexible Rule 9(b) pleading standard are unfairly prejudicing relators who do not have access to information that is in the hands of the defendant. Therefore, the representative samples approach and the status of the relator approach should be rejected.

When evaluating a relator's complaint every court should consider whether the relator sufficiently alleged: (1) details of the overall fraudulent scheme and (2) indicia of reliability. Personal knowledge, specific details of submitted claims, or details of the defendants billing practices could fulfill the second prong. The two-part test will fulfill the purpose behind the enactment of Rule 9(b)—to put the defendant on notice of the allegations. It will also improve access to the judicial system for relators and allow the FCA to fulfill its remedial purpose. The test will ensure that the relator had reliable information that false claims were submitted without barring relators who cannot gain access to exact details like invoice numbers, dates, and dollar amounts.

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