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Catch Me If You Can: The Divergent and Inconstant Pleading Requirements Governing Qui Tam Complaints

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On August 29, 2014, the U.S. Court of Appeals for the Eighth Circuit joined the growing number of federal appellate courts to reduce the degree of particularity a relator must plead in a *qui tam* False Claims Act (FCA) complaint.

In *U.S. ex rel. Thayer v. Planned Parenthood of the Heartland*, the Eighth Circuit held, ''a relator can satisfy Rule 9(b) without pleading representative examples of false claims if the relator can otherwise plead the 'particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted.' ''[1] In other words, under Rule 9(b), a relator no longer needs to plead with particularity that an actual false claim was ever presented to the federal government.

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The Eighth Circuit's decision in *Thayer*, coming on the heels of a similar decision three months earlier by the Third Circuit in *U.S. ex rel. Foglia v. Renal Ventures Management, LLC*,[2] deepens a circuit split concerning Rule 9(b)'s proper application to *qui tam* complaints.

Appellate courts are sharply divided over whether a *qui tam* complaint can overcome a motion to dismiss under Rule 9(b) if it pleads a fraudulent scheme to submit false claims, but neglects to plead with particularity that false claims were actually presented to the government for payment (''presentment'').

Three circuits take a strict approach, holding, with limited exceptions, that a *qui tam* complaint must plead presentment with particularity, for instance by citing dates of claims, identification numbers, amounts billed, goods or services in the bill, or persons who submitted the bill.[3] One circuit takes an intermediate approach,

[1] No. 13-1654, 2014 WL 4251603, at *3, — F.3d — (8th Cir. Aug. 29, 2014) (quoting U.S. *ex rel.* Grubbs v. Kanneganti, 565 F.3d 180, 190 (5th Cir. 2009)).

[2] 754 F.3d 153, 156 (3d Cir. 2014).

[3] *See* U.S. *ex rel.* Karvelas v. Melrose-Wakefield Hosp., 360 F.3d 220, 232 (1st Cir. 2005); Sanderson v. HCA-The Healthcare Co., 447 F.3d 873, 877 (6th Cir. 2006); U.S. *ex rel.* Clausen v. Lab. Corp. of Am., Inc., 290 F.3d 1301, 1308-14 (11th Cir. 2002); *see also infra* Part III.A. *But see* U.S. *ex rel.* Duxbury v. Ortho Biotech Prods., L.P., 579 F.3d 13, 29-32 (1st Cir. 2009)

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holding that a *qui tam* complaint must plead presentment with particularity if there is any doubt that false claims were in fact presented to the federal government.[4] And five circuits take the ''relaxed'' approach enunciated in *Foglia* and *Thayer*, holding that a *qui tam* complaint can overcome a motion to dismiss by pleading a fraudulent scheme paired with ''reliable indicia that lead to a strong inference that claims were actually submitted''—an approach that has gained momentum since 2009.[5]

Courts continue to grapple with what facts a relator must plead with respect to presentment in part because many whistleblowers are privy to the underlying fraud but—unless they are in the accounting or billing department—have no specific information about whether the defendant or third party actually presented false claims.

On one hand, presentment of a false claim is the central element of an FCA action brought under § 3729(a)(1).[6] On the other hand, requiring that *qui tam* complaints plead presentment with particularity, according to the U.S. Solicitor General, ''undermines the FCA's effectiveness as a tool to combat fraud against the United States.''[7]

During an FCA boom that has seen $17 billion in government recoveries over the last five years,[8] however, the current circuit split has sown a complicated patchwork of federal law for FCA defendants to navigate—one that provides varying degrees of defendant protections depending on where the relator files suit—and thus is worthy of Supreme Court resolution.

This article provides an overview of Rule 9(b) and its applicability to FCA complaints, discusses the development of divergent standards among appellate courts for applying Rule 9(b) to *qui tam* complaints, and explains why the Supreme Court should resolve the circuit split.

I. Rule 9(b) Particularity Standard Applied to Qui Tam Complaints

By way of background, the FCA, also known as the ''Lincoln Law,'' is the federal government's primary tool to combat fraud on the government and generally prohibits a person from knowingly presenting or causing to be presented to the government a false claim for payment or approval, or knowingly making or causing to be made a false record or statement material to a false claim.[9] Under the FCA's *qui tam* provisions, a private person with information about a potential fraud (a ''relator'') may bring an FCA action on behalf of the government, and, if successful, shares in the award.[10]

. . . [T]he current circuit split has sown a complicated patchwork of federal law for FCA defendants to navigate—one that provides varying degrees of defendant protections depending on where the relator files suit—and thus is worthy of Supreme Court resolution.

Appellate courts agree that Federal Rule of Civil Procedure 9(b), which requires plaintiffs to plead fraud with heightened particularity compared to non-fraud matters,[11] applies to FCA actions, which are essentially suits alleging that a defendant defrauded the government.[12] Rule 9(b)'s purposes are manifold, including to afford defendants fair notice in order to prepare a defense; to protect defendants from suffering reputational harm from meritless fraud claims; to discourage strike suits (where a plaintiff files suit in hopes that the defendant will settle to avoid the higher costs of litigating); and to prevent filing of suits aimed at engaging in fishing expeditions to uncover relevant information during discovery. To achieve these goals, Rule 9(b) requires that, ''[i]n alleging fraud or mistake, a party must state *with particularity* the circumstances constituting fraud or mistake.''[13]

(citing more flexible standard for third-party submission of false claims but limiting holding to its facts), *cert. denied*, 130 S. Ct. 3454 (2010); Chesbrough v. VPA, P.C., 655 F.3d 461, 471 (6th Cir. 2011) (suggesting court might relax pleading standard for *qui tam* complaints in future if relator plead personal knowledge that claims were submitted); U.S. *ex rel.* R&F Props. of Lake Cnty., Inc., 433 F.3d 1349, 1359-60 (11th Cir. 2005) (recognizing relaxed standard where relator pleads presentment with personal knowledge).

[4] U.S. *ex rel.* Nathan v. Takeda Pharms. N. Am., Inc., 707 F.3d 451, 457 (4th Cir. 2013), *cert. denied*, 134 S.Ct. 1759 (2014); *cf.* U.S. *ex rel.* Lusby v. Rolls-Royce Corp., 570 F.3d 849, 854-55 (7th Cir. 2009) (not articulating a standard, but holding that complaint did not need to plead information about invoices when it was clear that claims were submitted); *see also infra* Part II.B.

[5] *See, e.g.*, *Foglia*, 754 F.3d at 156 (quoting U.S. *ex rel.* Grubbs v. Kanneganti, 565 F.3d 180, 190 (5th Cir. 2009)); *Grubbs*, 565 F.3d at 190; *Thayer*, 2014 WL 4251603 at *3 (quoting *Grubbs*, 565 F.3d at 190); U.S. *ex rel.* Ebeid v. Lungwitz, 616 F.3d 993, 998-99 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 801 (2010); U.S. *ex rel.* Lemmon v. Envirocare of Utah, Inc., 614 F.3d 1163, 1172 (10th Cir. 2010); *see also infra* Part III.C.

[6] 31 U.S.C. § 3729(a)(1) (2006); *Clausen*, 290 F.3d at 1312 (''The submission of a claim is . . . the *sine qua non* of a False Claims Act violation.'').

[7] Brief for the United States as Amicus Curiae at 10-11, U.S. *ex rel.* Nathan v. Takeda Pharm. N. Am., Inc., 134 S. Ct. 1759 (2014).

[8] *See Justice Department Recovers $3.8 Billion from False Claims Act Cases in Fiscal Year 2013*, DEPT. OF JUSTICE (Dec. 20, 2013), http://www.justice.gov/opa/pr/justice-department-recovers-38-billion-false-claims-act-cases-fiscal-year-2013 (noting that DOJ recovered $3.8 billion in FCA settlements and judgments in FY2013, bringing the total to $17 billion since January, 2009). *See also See Fraud Statistics Overview*, CIVIL DIVISION, U.S. DEPARTMENT OF JUSTICE, *available at* http://www.justice.gov/civil/docs_forms/C-FRAUDS_FCA_Statistics.pdf (last visited Oct. 2, 2014).

[9] 31 U.S.C. § 3729(a)(1).

[10] § 3730(b).

[11] FED. R. CIV. P. 9(b) (2006).

[12] *See e.g.*, *Clausen*, 290 F.3d at 1309 n.16 (collecting cases and noting that Rule 9(b)'s applicability to *qui tam* suits is ''beyond dispute'').

[13] FED. R. CIV. P. 9(b) (emphasis added). Rule 9(b) also provides that, ''Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.'' *Id.* By contrast, Rule 8(a)'s standard for pleading other matters requires only ''a short and plain statement of the claim showing that the

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Although appellate courts unanimously agree that Rule 9(b) applies to FCA complaints, they disagree about *how* it applies—specifically, about the degree of particularity a relator must provide in a *qui tam* complaint to satisfy Rule 9(b).

In garden-variety, non-FCA fraud suits, Rule 9(b)'s application can be relatively straightforward, albeit case-specific. In non-FCA fraud suits, courts often hold that, to satisfy Rule 9(b), the complaint must specify the statement or omission the plaintiff alleges is fraudulent, who made the statement, where and when the statement was made, and how the statement was fraudulent—the ''who, what, when, where and how of the alleged'' fraud.[14] This standard roughly tracks the common law elements of fraud, where the plaintiff alleges that the defendant knowingly made a material misrepresentation that the plaintiff relied upon to its detriment.

But Rule 9(b)'s application in the FCA context—where the defendant or a third party must have presented false claims to the government to be liable—is not readily apparent. And the question is recurring not only because Rule 9(b) is often a defendant's first line of defense against a *qui tam* complaint, but also because whistleblowers who are privy to substantial information about an underlying fraudulent scheme commonly file suit without information about the resulting false claims to the government.

II. Circuit Split: Representative Claims, Strong Inference of Presentment, or Somewhere in Between?

Beginning around 1999, appellate court decisions applying Rule 9(b) to *qui tam* complaints adopted a strict approach, requiring that the relator plead with particularity not only a fraudulent scheme, but also presentment of an actual false claim for payment to the federal government.[15] Between 1999 and 2009, however, some of these circuits formulated limited exceptions to the rule, and, since 2009, several appellate courts have altogether departed from the strict approach in favor of a relaxed Rule 9(b) pleading standard, whereby a relator can overcome a motion to dismiss by pleading a fraudulent scheme to submit false claims paired with reliable indicia creating a strong inference of presentment.[16]

This section provides a comprehensive overview of how each approach developed among appellate courts and surveys the current standard in each circuit that has adopted an approach.

A. Strict Approach to Rule 9(b): Relator Must Plead Presentment with Particularity

Between 1999-2009, the predominant view among appellate courts was that a relator must plead presentment with particularity in a *qui tam* complaint to satisfy Rule 9(b).

The Fifth Circuit became one of the earliest appellate courts to adopt this approach, in its 1999 decision *U.S. ex rel. Russell v. Epic Healthcare Management Group*, concluding, ''The conduct to which liability attaches in a False Claims Act suit consists in part of false statements or claims for payment 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).''[17]

The court declined to relax Rule 9(b) in the context of *qui tam* suits, explaining ''[t]he text of the rule provides no justification for doing so. . . . A special relaxing of Rule 9(b) is a *qui tam* plaintiff's ticket to the discovery process that the statute itself does not contemplate.''[18] Although the Fifth Circuit later retreated from its approach in 2009, its early emphasis on the centrality of the presentment element to an FCA action influenced several other decisions.

Relying in part on *Russell*, the Eleventh Circuit in *U.S. ex rel. Clausen v. Laboratory Corp. of America* in 2002 likewise held that a relator must plead presentment with particularity under Rule 9(b).[19]

In *Clausen*, the relator alleged that defendant LabCorp violated the federal Anti-Kickback Statute by engaging in various self-referral schemes to conduct testing for long-term-care facilities, which tests were sometimes medically unnecessary, and for billing Medicare and Medicaid for the tests in violation of the FCA.[20]

Although the complaint provided details of the underlying kickback and billing scheme, it alleged presentment in only a conclusory fashion, stating merely that the scheme ''resulted in the submission of false claims.''[21] The court ruled that the complaint lacked particularity under Rule 9(b).[22]

In reaching its decision, the court in *Clausen* expanded upon the Fifth Circuit's explanation that presentment is central to an FCA action: ''Without the *presentment* of . . . a claim, while the practices of an entity that provides services to the Government may be unwise or improper, there is simply no actionable damage to the public fisc as required under the False Claims Act. The submission of a claim is . . . the *sine qua non* of a False Claims Act violation.''[23]

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pleader is entitled to relief,'' meaning ''detailed factual allegations'' are not required, and a plaintiff must plead only enough facts to ''state a claim to relief that is plausible on its face.'' FED. R. CIV. P. 8(a); *see* Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 547, 555, 570 (2007) (''[T]he Court is not requiring heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face. Because the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed.''). An FCA complaint must also meet the plausibility standard set forth in the Supreme Court's decisions in *Twombly* and *Iqbal*. *See id.*; Ashcroft v. Iqbal, 556 U.S. 662, 686-87 (2009).

[14] *See, e.g.*, Lerner v. Fleet Bank, N.A., 459 F.3d 273, 290 (2d Cir. 2006); U.S. *ex rel.* Lemmon v. Envirocare of Utah, Inc., 614 F.3d 1163, 1172 (10th Cir. 2010).

[15] *See infra* Part II.A.

[16] *See infra* Part II.C.

[17] U.S. *ex rel.* Russell v. Epic Healthcare Mgmt. Grp., 193 F.3d 304, 308 (5th Cir. 1999).

[18] *Id.* at 308-09 (citations omitted).

[19] *Clausen*, 290 F.3d at 1310-15. *See also* Corsello v. Lincare, Inc., 428 F.3d 1008, 1012-14 (11th Cir. 2005).

[20] *Id.* 1310-13.

[21] *Id.* at 1305.

[22] *Id.* at 1315

[23] *Id.* at 1311-15. ''Sine qua non'' is Latin for ''without which not,'' meaning ''[a]n indispensable condition or thing; something on which something else necessarily depends.'' *Sine qua non*, BLACK'S LAW DICTIONARY (9th ed. 2009).

Because presentment is critical to an FCA action, the court concluded that it must be pled with particularity:

''Rule 9(b) 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. . . . [A] plaintiff is not expected to actually prove his allegations . . . . But we cannot be left wondering whether a plaintiff has offered mere conjecture or a specifically pleaded allegation on an essential element of the lawsuit.''[24]

Finding the relator's complaint bereft of details evincing presentment—such as copies of bills, claims, payments, amounts of charges, dates of claims, completed claim forms, or billing policies or practices—the court concluded that the complaint failed to link defendant's scheme to the submission of actual false claims, and upheld the lower court's dismissal under Rule 9(b).[25]

The Eleventh Circuit later recognized a limited exception to its rule in *Clausen* where the relator alleges presentment based on personal knowledge of the defendant's billing practices,[26] but its holding in *Clausen* is still good law.[27]

Shortly thereafter, the First Circuit joined the Fifth and Eleventh Circuits in adopting the strict approach to applying Rule 9(b) to *qui tam* complaints.

In its 2004 decision *U.S. ex rel. Karvelas v. Melrose-Wakefield Hospital*, the court relied upon *Russell* and *Clausen* in explaining, ''[n]ot all fraudulent conduct gives rise to liability under the FCA. The statute attaches liability, not to the underlying fraudulent activity or to the government's wrongful payment, but to the 'claim for payment.' . . .''[28] The court held, therefore, that ''a relator must provide details that identify particular false claims for payment that were submitted to the government.''[29]

The court continued, ''[t]he reluctance of courts to permit qui tam relators to use discovery to meet the requirements of Rule 9(b) reflects, in part, a concern that a qui tam plaintiff, who has suffered no injury in fact, may be particularly likely to file suit as a pretext to uncover unknown wrongs.''[30]

Finally, the court in *Karvelas* suggested a relator can plead presentment with particularity by including ''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.''[31] This is not a ''checklist of mandatory requirements,'' the court noted, but ''some of this information for at least some of the claims must be pleaded in order to satisfy Rule 9(b).''[32] As discussed below, the First Circuit later relaxed the standard for complaints alleging third-party submission, but limited its holding to the facts of that case.[33]

Other appellate courts subsequently adopted the approach that a *qui tam* relator must plead presentment with particularity, joining the Fifth, Eleventh, and First Circuits.

In 2006, the Sixth, Eighth, and Tenth Circuits continued the trend in *Sanderson v. HCA-The Healthcare Co.*, *U.S. ex rel. Joshi v. St. Luke's Hospital, Inc.*, and *U.S. ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*.[34] As discussed below, the Eighth Circuit later retreated from the stricter approach in its 2014 decision in

[24] *Clausen*, 290 F.3d at 1311-14 (citations omitted).

[25] *Id.*

[26] *See* U.S. *ex rel.* R&F Props. Of Lake Cnty., Inc., 433 F.3d 1349, 1359-60 (11th Cir. 2005); Hill v. Morehouse Assocs., Inc., No. 02-14429, 2003 WL 22019936 (11th Cir. Aug. 15, 2013) (unpublished opinion).

[27] *See, e.g.*, Hopper v. Solvay Pharms., Inc., 588 F.3d 1318, 1325-27 (11th Cir. 2009) (citing exception in *R&F Props.* but finding *Clausen* applicable).

[28] U.S. *ex rel.* Karvelas v. Melrose-Wakefield Hosp., 360 F.3d 220, 225 (1st Cir. 2005) (quoting U.S. v. Rivera, 55 F.3d 703, 709 (1st Cir. 1995)) (quotation marks omitted). A district court in the Southern District of New York recently opined that, although the Second Circuit has not adopted an approach of its own, it would probably adopt the stricter approach espoused by *Karvelas*. *See* U.S. *ex rel.* Kester v. Novartis Pharms. Corp., No. 11 Civ. 8196(CM), 2014 WL 2324465 (S.D.N.Y. May 29, 2014).

[29] *Karvelas*, 360 F.3d at 232.

[30] *Id.* at 231 (internal quotation marks omitted).

[31] *Id.* at 233.

[32] *Id.* (quoting *Clausen*, 290 F.3d at 1312 n.21).

[33] *See* U.S. *ex rel.* Duxbury v. Ortho Biotech Prods., L.P., 579 F.3d 13, 29-32 (1st Cir. 2009), *cert. denied*, 130 S. Ct. 3454 (2010); *see also infra* Part II.C.

[34] *See* U.S. *ex rel.* Joshi v. St. Luke's Hosp., Inc., 441 F.3d 552, 560-61 (8th Cir. 2006) (lower court ''did not err in refusing to relax Rule 9(b)'s pleading requirements and allow discovery by'' the relator because ''neither the Federal Rules nor the FCA offer any special leniency . . . to justify . . . failing to allege with the required specificity the circumstances of the fraudulent conduct,'' and thus a complaint cannot allege a fraudulent scheme that is ''pervasive and wide-ranging in scope,'' and then argue only that ''the defendants must have submitted fraudulent schemes'' (quoting *Clausen*, 290 F.3d at 561) (citing Corsello v. Lincare, Inc., 428 F.3d 1008, 1011 (11th Cir. 2005) (per curiam))); Sanderson v. HCA-The Healthcare Co., 447 F.3d 873, 877 (6th Cir. 2006) (explaining that the FCA ''does not create liability merely for a health care provider's disregard of Government regulations or improper internal policies unless, as a result of such acts, the provider knowingly asks the Government to pay amounts it does not owe. . . . Rule 9(b) does not permit a False Claims Act plaintiff merely to describe a private scheme in detail but then to allege simply . . . that claims requesting illegal payments must have been submitted, were likely submitted or should have been submitted to the Government.'') (quoting *Clausen*, 290 F.3d at 1311) (internal quotation marks omitted); U.S. *ex rel.* Bledsoe v. Cmty. Health Sys., Inc., 501 F.3d 493, (6th Cir. 2007) (''[T]he claims that are pled with specificity must be characteristic examples that are illustrative of the class of all claims covered by the fraudulent scheme.'' (internal quotation marks omitted)); U.S. *ex rel.* Bledsoe v. Cmty. Health Sys., Inc., 342 F.3d 634, 643 (6th Cir. 2003) (earlier Sixth Circuit FCA decision dismissing under Rule 9(b) and stating, ''[n]otably, the amended complaint failed to set forth dates as to the various FCA violations or any particulars as to the incidents of improper billing Relator supposedly witnessed first-hand''); U.S. *ex rel.* Sikkenga v. Regence Bluecross Blueshield of Utah, 472 F.3d 702, 727 (10th Cir. 2006) (concluding that, unless the underlying wrongful scheme is ''linked to allegations, stated with particularity, of the actual false claims submitted to the government, they do not meet the particularity requirements of Rule 9(b)'' (quoting *Karvelas*, 360 F.3d at 232) (internal quotation marks omitted)).

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Thayer, and the Tenth Circuit seemingly did as well in its 2010 decision in *Lemmon*, but without explicitly overruling *Sikkenga*.[35] The Sixth Circuit, by contrast, maintains the stricter approach, but has not ruled out limited exceptions in the future if there is a strong inference of presentment, such as where the relator has personal knowledge of presentment.[36]

B. Intermediate Approach to Rule 9(b): Relator Must Plead Presentment with Particularity if There Is Any Doubt of Presentment

In *U.S. ex rel. Nathan v. Takeda Pharmaceuticals North America, Inc.*, the Fourth Circuit adopted an intermediate approach, holding that ''when a defendant's actions, as alleged and as reasonably inferred from the allegations, *could* have led, but *need not necessarily* have led, to the submission of false claims, a relator must allege with particularity that specific false claims were presented to the government for payment.''[37]

In FCA actions, ''the critical question is whether the defendant caused a false claim to be presented to the government, because liability under the Act attaches only to a claim actually presented to the government for payment, not to the underlying fraudulent scheme,'' the court explained.[38] ''Therefore, when a relator fails to plead plausible allegations of presentment, the relator has not alleged all the elements of a claim under the Act.''[39] The court added, ''nothing in the [FCA] or in our customary application of Rule 9(b) suggests that a more relaxed pleading standard is appropriate.''[40]

Takeda can best be read as requiring *qui tam* complaints to plead presentment with particularity *unless* the complaint's factual allegations, taken as true, leave no doubt that the defendant or a third party actually submitted claims.

Takeda appears to combine elements of the *Russell-Clausen-Karvelas* approach with the Seventh Circuit's decision in *U.S. ex rel. Lusby v. Rolls-Royce Corp.*

In *Lusby*, the Seventh Circuit conspicuously avoided discussing the Rule 9(b) circuit split, but concluded that a *qui tam* complaint need not allege facts about specific claims where the complaint specifically alleged shipments of products by the defendant and payment for the products by the government.[41] The court reasoned that, in the absence of false claims, the government would not have paid.[42]

To the extent government procurement officers could have accepted and paid for the products at issue in fifty consecutive shipments without the requisite certificates, the court believed the possibility was ''remote.''[43]

Moreover, ''[t]o say that fraud has been *pleaded* with particularity is not to say that it has been *proved* (nor is proof part of the pleading requirement,'' the court explained.[44] In *Takeda*, the court similarly left open the possibility that a *qui tam* complaint can sufficiently plead presentment without citing representative false claims, so long as the complaint leaves no doubt that claims were in fact submitted.[45]

C. ''Relaxed'' Approach to Rule 9(b): Relator Must Only Plead a Fraudulent Scheme and Reliable Indicia Leading to a Strong Inference of Presentment

Since 2009, appellate courts have begun a trend toward a more ''nuanced'' approach, as the U.S. Solicitor General calls it, which arguably relaxes the particularity required of a *qui tam* complaint under Rule 9(b), at least with respect to pleading presentment.

In its 2009 decision *U.S. ex rel. Grubbs v. Kanneganti*, the Fifth Circuit held that a relator may ''survive [dismissal under Rule 9(b)] by alleging particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted.''[46] The *Grubbs* standard seemed inconsistent with the Fifth Circuit's earlier standard set forth in *Russell*,[47] curiously penned by the very same judge just ten years earlier.[48]

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[35] *See* U.S. *ex rel.* Thayer v. Planned Parenthood of the Heartland, No. 13-1654, 2014 WL 4251603, at *3, — F.3d — (8th Cir. Aug. 29, 2014) (quoting U.S. *ex rel.* Grubbs v. Kanneganti, 565 F.3d 180, 190 (5th Cir. 2009)); U.S. *ex rel.* Lemmon v. Envirocare of Utah, Inc., 614 F.3d 1163, 1172 (10th Cir. 2010); *see also infra* Part II.C.

[36] *See* Chesbrough v. VPA, P.C., 655 F.3d 461, 471 (6th Cir. 2011) (''Although we do not foreclose the possibility that this court may apply a 'relaxed' version of Rule 9(b) in certain situations, we do not find it appropriate to do so here. The case law 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.'' (internal quotation marks omitted)).

[37] 707 F.3d 451, 457 (4th Cir. 2013), *cert. denied*, 134 S.Ct. 1759 (2014). The *Takeda* court added that, ''[t]o the extent that other cases apply a more relaxed construction of Rule 9(b) in such circumstances, we disagree with that approach.'' *Id.* at 457-58. *Takeda* was an off-label promotion case where the relator, a sales manager for Takeda Pharmaceuticals, alleged that Takeda engaged in a scheme to market its products for ''off-label'' uses—in other words, to promote its products for to treat conditions for which the products have not been approved by the FDA. *Id.* at 454.

[38] *Id.* at 456.

[39] *Id.* (citations omitted).

[40] *Id.* (citations and internal quotation marks omitted).

[41] U.S. *ex rel.* Lusby v. Rolls-Royce Corp., 570 F.3d 849, 854-55 (7th Cir. 2009) (''We don't think it essential for a relator to produce the invoices (and accompanying representations) at the outset of the suit.'').

[42] *Id.* The court later pointed out in *Leveski v. ITT Educational Services, Inc.* that the *Lusby* decision accords with the court's 1999 decision in *U.S. ex rel. Lamers v. City of Green Bay*, 168 F.3d 1013 (7th Cir. 1999), where the court found it unnecessary for the complaint to prove personal knowledge of false certification because it was clear from the fact that defendant still received federal funding that the defendant falsely certified compliance with regulations. 719 F.3d 818 (7th Cir. 2013).

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

[44] *Id.* at 855.

[45] *Takeda*, 707 F.3d 457.

[46] 565 F.3d 180, 190 (5th Cir. 2009).

[47] *Compare* U.S. *ex rel.* Russell v. Epic Healthcare Mgmt. Grp., 193 F.3d 304, 308 (5th Cir. 1999) (''The conduct to which liability attaches in a False Claims Act suit consists in part of false statements or claims for payment presented to the government. Because such statements or claims are among the circumstances constituting fraud in a False Claims Act suit,

Since 2009, appellate courts have begun a trend toward a more ''nuanced'' approach, as the U.S. Solicitor General calls it, which arguably relaxes the particularity required of a *qui tam* complaint under Rule 9(b), at least with respect to pleading presentment.

But the court ultimately decided that Rule 9(b) should require no more facts than would be necessary to prevail at trial: ''[A] plaintiff must prove presentment by a preponderance of the evidence. Fraudulent presentment requires proof only of the claim's falsity, not of its exact contents. 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 reasonably 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.''[49]

The court added that ''particularity . . . does not necessarily and always mean stating the contents of a bill. . . . It is the scheme in which particular circumstances constituting fraud may be found that make it highly likely the fraud was consummated through the presentment of false bills.''[50] Thus, where ''the complaint sets out the particular workings of a scheme that was communicated directly to the relator by those perpetrating the fraud,'' the court found, ''[t]hat fraudulent bills were presented to the Government is the logical conclusion of the particular allegations in [relator's] complaint even though it does not include exact billing numbers or amounts.''[51]

The same year *Grubbs* was decided, the First Circuit in *U.S. ex rel. Duxbury v. Ortho Biotech Products, L.P.* relaxed its particularity standard applied to *qui tam* complaints, but only with respect to complaints alleging third-party presentment.

The court applied a ''more flexible standard'' to the complaint but explicitly limited its decision to the facts.[52] Because the complaint alleged information about dates and amounts of false claims submitted by third parties, which the defendant allegedly caused the third parties to submit, the court reasoned that the complaint did ''more than suggest fraud was possible'' and satisfied Rule 9(b), although it was a ''close call.''[53]

The court found that the complaint alleged presentment with sufficient particularity by specifically identifying third-party medical providers who submitted claims, and thus creating ''a strong inference that such claims were also [submitted] nationwide.''[54] But the court noted: ''We decline to draft a litigation manual full of scenarios of what allegations would be sufficient for purposes of Rule 9(b). Suffice it to say that we limit our holding to the facts.''[55] Thus, the First Circuit appears to have maintained the strict approach adopted in *Karvelas*.[56]

Shortly after the *Grubbs* and *Duxbury* decisions were handed down by the Fifth and First Circuits, the Ninth and Tenth Circuits applied a relaxed Rule 9(b) standard to *qui tam* complaints.

In *U.S. ex rel. Ebeid v. Lungwitz*, the Ninth Circuit held, ''use of representative examples is simply one means of meeting the pleading obligation. We join the Fifth Circuit in concluding, in accord with general pleading requirements under Rule 9(b), that it is sufficient to allege 'particular details of a scheme to submit false claims paired with reliable indicia that lead to a

these must be pled with particularity under Rule 9(b).''),*with Grubbs*, 565 F.3d at 190 (''[A] relator's complaint, if it cannot allege the details of an actually submitted false claim, may nevertheless 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.'').

[48] Not only did the court's holding seem to depart from *Russell*, but its underlying explanation shifted as well. In *Russell*, the court explained, ''a special relaxing of Rule 9(b) is a *qui tam* plaintiff's ticket to the discovery process that the statute itself does not contemplate.'' 193 F.3d at 308. But in *Grubbs*, the court tacked: ''[T]he exact dollar amounts fraudulently billed will often surface through discovery . . . . 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.'' 565 F.3d at 190. The court attempted to reconcile its two decisions: ''It is true that we have said 'statements or claims are among the circumstances constituting fraud in the False Claims Act suit, and these must be plead with particularity, but this statement only recited Rule 9(b)'s requirement that the circumstances of fraud be pled with particularity; it did not speak to the detail required.'' *Id.* at 188 (quoting *Russell*, 193 F.3d at 308) (footnote omitted).

[49] *Id.* at 189-90. The authors find this explanation unconvincing. Not only does it misconstrue the protective purposes of Rule 9(b), but it also relies upon a remote hypothetical. Although juries sometimes infer facts based on the circumstances in some situations, such as a conspiracy where there is no documentary evidence, in the FCA context, if a plaintiff proves a fraudulent scheme but can muster *no* evidence of presentment at trial—notwithstanding discovery obtained from the defendant, third parties, or the government—a jury is unlikely to infer presentment and find FCA liability.

[50] *Id.* at 190.

[51] *Id.* at 192.

[52] U.S. *ex rel.* Duxbury v. Ortho Biotech Prods., L.P., 579 F.3d 13, 29-32 (1st Cir. 2009) (citing U.S. *ex rel.* Rost v. Pfizer, Inc., 507 F.3d 720, 732-33 (1st Cir. 2007), *cert. denied*, 130 S. Ct. 3454 (2010); *see also Rost*, 507 F.3d at 732 (distinguishing, for particularity purposes, between a situation where the complaint alleges the defendant presented false claims directly, like in *Karvelas*, from a situation where the complaint alleges the defendant caused a third party to present false claims); U.S. *ex rel.* Ge v. Takeda Pharmaceutical Co., Ltd., 737 F.3d 116, 124 (1st Cir. 2013) (''In a qui tam action in which the defendant is alleged to have induced third parties to file false claims with the government, a relator can satisfy [Rule 9(b)] by providing factual or statistical evidence to strengthen the inference of fraud beyond possibility without necessarily providing details as to each false claim.'' (quoting *Duxbury*, 579 F.3d at 29)).

[53] *Duxbury*, 507 F.3d at 30.

[54] *Id.*

[55] *Id.* (internal citations and quotation marks omitted).

[56] *See* U.S. *ex rel.* Karvelas v. Melrose-Wakefield Hosp., 360 F.3d 220, 225 (1st Cir. 2005).

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strong inference that claims were actually submitted.' ''[57]

And in *U.S. ex rel. Lemmon v. Envirocare of Utah, Inc.*, the Tenth Circuit held that a complaint ''need only show the specifics of a fraudulent scheme and provide an adequate basis for a reasonable inference that false claims were submitted as part of that scheme.''[58] The Tenth Circuit did not seek to reconcile this holding with its statement in *Sikkenga* that a complaint must allege an illegal scheme ''linked to allegations, stated with particularity, of the actual false claims submitted to the government,'' leaving some ambiguity as to the appropriate standard.[59]

Finally, in 2014, the Third Circuit in *U.S. ex rel. Foglia v. Renal Ventures Management, LLC*, and the Eighth Circuit in *U.S. ex rel. Thayer v. Planned Parenthood of the Heartland*, adopted the *Grubbs* approach—finally tilting the balance of appellate courts toward the relaxed approach.

In *Foglia*, the Third Circuit held that a complaint must provide ''particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted,'' but that ''[d]escribing a mere opportunity for fraud will not suffice.''[60] The court reasoned that, ''it is hard to reconcile the text of the FCA, which does not require that the exact contents of the false claims in question be shown, with the 'representative samples' standard'' adopted by courts adhering to the stricter approach.[61] Citing the U.S. Solicitor General's brief in *Takeda*, the court also suggested that the stricter approach ''undermines the FCA's effectiveness as a tool to combat fraud against the United States.''[62]

The Eighth Circuit in *Thayer* held the same. Departing from its 2006 decision in *Joshi*, the court adopted the *Grubbs* standard, holding that ''a relator can satisfy Rule 9(b) by 'alleging particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted.' ''[63] The court opined that this standard ''fulfills the objectives of Rule 9(b) 'without stymieing legitimate efforts to expose fraud.' ''[64] Thus, where the relator was a former clinic manager at Planned Parenthood who ''oversaw Planned Parenthood's billing and claims systems, and was able to plead personal, first-hand knowledge of Planned Parenthood's submission of false claims,'' the complaint satisfied Rule 9(b) even without specifically identifying false claims.[65]

III. Prospects for Supreme Court Review

In an era of heightened FCA enforcement, the circuit split concerning how to apply Rule 9(b) in *qui tam* actions under the FCA has created confusion and resulted in varying degrees of defendant protections depending on where the relator files suit.

In March, 2014—prior to the Third and Eighth Circuit's decisions in *Foglia* and *Thayer*—the U.S. Supreme Court had the opportunity to resolve the split by granting certiorari in *U.S. ex rel. Nathan v. Takeda Pharmaceuticals North America, Inc.*[66] Although the Court invited an amicus curiae brief from the U.S. Solicitor General—suggesting the Court considered granting certiorari—the Court ultimately denied the petition, leaving intact the Fourth Circuit's intermediate approach.[67]

In denying review in *Takeda*, the Supreme Court may simply have agreed with the Solicitor General that appellate courts are trending toward a uniform standard such that the split ''may be capable of resolution without [the Court's] intervention.''[68] If true, the subsequent decisions in *Foglia* and *Thayer* further reduce the probability of Supreme Court review.[69]

But a close analysis of the divergent approaches in each circuit paints a different picture than the one envisioned by the Solicitor General. Appellate courts are dramatically split on the appropriate pleading standard and have often muddled or altogether departed from even their own standards. The Supreme Court should therefore resolve the circuit split to ensure uniformity among the circuits in this critical area of the law.

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[57] 616 F.3d 993, 998-99 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 801 (2010).

[58] 614 F.3d 1163, 1172 (10th Cir. 2010) (citing *Duxbury*, 579 F.3d at 29; U.S. *ex rel.* Lusby v. Rolls-Royce Corp., 570 F.3d 849, 854-55 (7th Cir. 2009); U.S. *ex rel.* Grubbs v. Kanneganti, 565 F.3d 180, 190 (5th Cir. 2009)).

[59] *See* U .S. *ex rel.* Sikkenga v. Regence Bluecross Blueshield of Utah, 472 F.3d 702, 727 (10th Cir. 2006) (quoting U.S. *ex rel.* Karvelas v. Melrose-Wakefield Hosp., 360 F.3d 220, 232 (1st Cir. 2005)) (internal quotation marks omitted).

[60] U.S. *ex rel.* Foglia v. Renal Ventures Mgmt., LLC, 754 F.3d 153, 157-58 (3d Cir. 2014) (citing *Grubbs*, 565 F.3d at 190).

[61] *Id.* at 156.

[62] *Id.* (quoting Brief for the United States as Amicus Curiae at 10-11, U.S. *ex rel.* Nathan v. Takeda Pharm. N. Am., Inc., 134 S. Ct. 1759 (2014)).

[63] No. 13-1654, 2014 WL 4251603, at *3, — F.3d — (8th Cir. Aug. 29, 2014) (quoting *Grubbs*, 565 F.3d at 190).

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

[65] *Id.* at *3-4.

[66] 707 F.3d 451, 457 (4th Cir. 2013), *cert. denied*, 134 S. Ct. 1759 (2014).

[67] *Id.*

[68] Brief for the United States as Amicus Curiae at 10-11, U.S. *ex rel.* Nathan v. Takeda Pharm. N. Am., Inc., 134 S. Ct. 1759 (2014).

[69] It is also possible that the Court denied certiorari in part because it planned to resolve a different FCA case of tremendous import, *Kellogg Brown & Root Services, Inc. v. U.S. ex rel. Carter*, which raises fundamental questions about wartime suspension of the FCA's statute of limitations and about the proper functioning of the FCA's first-to-file bar—questions that have similarly divided appellate courts. *See* Kellogg Brown & Root Servs., Inc. v. U.S. *ex rel.* Carter, 710 F.3d 171 (4th Cir. 2013), *cert. granted*, 134 S. Ct. 2899 (2014). The Court granted certiorari in *Carter* in July, 2014. *Id.*