LOOSE UP: BREAKING FREE FROM STRICT “WITH PARTICULARITY” REQUIREMENTS WHEN PLEADING FRAUD FOR QUI TAM ACTIONS BROUGHT UNDER THE FCA

I. INTRODUCTION

During the Civil War era, Congress passed the False Claims Act (“FCA”)1 in response to the growing concern of government contractors submitting fraudulent account statements and shipping defective orders to the government.2 To protect the United States government, the FCA prevents and diminishes fraudulent behavior by government-funded defendants by imposing restitutionary penalties.3 Known as a qui tam action, the FCA allows private persons, referred to as relators, to bring a claim for a penalty of which the federal government is entitled to receive a share.4 A relator benefits from bringing a qui tam action because the FCA entitles the relator to receive up to thirty percent of the penalty the government recovers.5 In order to establish a qui tam action under the FCA, a relator must show that the defendant knowingly presented a false or fraudulent claim for payment to a United States agent.6

In accordance with the Federal Rule of Civil Procedure 9(b) (“Rule 9(b)”),7 there is a heightened pleading requirement for fraud in that such a claim must be pleaded with particularity.8 The purposes of Rule 9(b) are to provide the defendant proper notice of the alleged misconduct, to prevent frivolous suits by plaintiffs, to eliminate undeveloped fraud suits, and to protect the reputation of a defendant.9 Rule 9(b)

2. Ebeid ex rel. United States. v. Lungwitz, 616 F.3d 993, 995 (9th Cir. 2010) (quoting United States ex rel. Hopper v. Anton, 91 F.3d 1261, 1265-66 (9th Cir. 1996)).
3. See 31 U.S.C. § 3729(a)(1) (stating that “[a]ny person who (A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval; (B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim . . . is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000 . . . plus 3 times the amount of damages which the Government sustains because of the act of that person.”).
4. Qui Tam Action, Black’s Law Dictionary (10th ed. 2014); see also United States ex rel. Grubbs v. Kanneganti, 565 F.3d 180, 184 (5th Cir. 2009) (defining private persons bringing qui tam claims as relators).
5. Grubbs, 565 F.3d at 184.
8. See Fed. R. Crv. P. 9(b) (stating “[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake.”).
supplements the standard pleading rule, Federal Rule of Civil Procedure 8(a) ("Rule 8(a)")\(^\text{10}\) which requires a concise statement of the claim with a demand for relief.\(^\text{11}\) According to the Supreme Court of the United States, a Rule 8(a) pleading requires enough facts to raise the right to relief from a speculative level to a plausible level.\(^\text{12}\)

The Federal Rules of Civil Procedure were adopted to minimize the common law pleading requirements.\(^\text{13}\) However, when alleging fraud or mistake under Rule 9(b), a party must present with particularity the circumstances amounting to such fraud or mistake.\(^\text{14}\) The circuit courts agree that *qui tam* actions pleading fraud under the FCA must meet the particularity requirement of Rule 9(b), but the circuits are split on what the particularity requirement entails.\(^\text{15}\) In *qui tam* actions, the United States Courts of Appeals for the Fourth, Sixth, Eighth, and Eleventh Circuits require the relator to plead particular details of the actors, the alleged fraudulent conduct, and when and where the alleged conduct took place.\(^\text{16}\) Comparatively, the United States Courts of Appeals for the First, Fifth, and Ninth Circuits developed a more nuanced approach to Rule 9(b), requiring reliable facts as evidence to support an inference of a fraudulent scheme.\(^\text{17}\)

In *Foglia v. Renal Ventures Management, LLC*,\(^\text{18}\) the United States Court of Appeals for the Third Circuit adopted the reasoning of the First, Fifth, and Ninth Circuits, requiring the relator to plead facts as evidence of a scheme of fraudulent behavior.\(^\text{19}\) In *Foglia*, the relator, Thomas Foglia, brought a *qui tam* action in the United States District Court for the District of New Jersey, claiming his employer, Renal Ventures Management, LLC ("Renal"), violated the FCA.\(^\text{20}\) The

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\(^\text{10}\) Fed. R. Civ. P. 8(a).
\(^\text{11}\) Grubbs, 565 F.3d at 186; see also Fed. R. Civ. P. 8(a) (stating a pleading must contain "(1) a short and plain statement of the grounds for the court's jurisdiction . . . ; (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and (3) a demand for the relief sought . . . .")
\(^\text{13}\) See Padovani v. Bruchhausen, 293 F.2d 546, 549 (2d Cir. 1961) (noting the Federal Rules of Civil Procedure were "designed to eliminate the evils of special pleading, and they should not be brought back under the guise of pre-trial").
\(^\text{15}\) See Foglia v. Renal Ventures Mgmt., LLC, 754 F.3d 153, 155-56 (3d Cir. 2014) (noting "[t]he Fourth, Sixth, Eighth, and Eleventh Circuits have held that a plaintiff must show 'representative samples' of the alleged fraudulent conduct, specifying the time, place, and content of the acts and the identity of the actors[,]" whereas the First, Fifth, and Ninth Circuits require "particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that the claims were actually submitted").
\(^\text{16}\) Foglia, 754 F.3d at 155.
\(^\text{17}\) Id. at 156.
\(^\text{18}\) 754 F.3d 153 (3d Cir. 2014).
\(^\text{19}\) Foglia, 754 F.3d at 156-57.
\(^\text{20}\) Id. at 154-55.
complaint alleged that Renal falsely certified that the company complied with New Jersey’s regulations concerning quality of care, falsely submitted claims for reimbursement for a drug, and reused single-use vials of medicine.21 Specifically, Foglia’s complaint alleged that Renal inflated the price of Zemplar, a prescription drug used to treat chronic kidney disease, when reporting costs to the Centers for Medicare and Medicaid Services.22 The district court granted Renal’s motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) (“Rule 12(b)(6)”),23 reasoning that Foglia failed to state a claim with the requisite heightened level of particularity under Rule 9(b) for claims alleging fraud.24 Foglia appealed to the Third Circuit, which reversed the district court’s holding and concurred with the First, Fifth, and Ninth Circuits that Foglia’s claim of a scheme of fraud was sufficient to meet the standard of Rule 9(b).25

This Note will first review the facts and holding of Foglia.26 This Note will then discuss the facts and holdings of the cases leading to the Foglia decision.27 Finally, this Note will argue that the Third Circuit’s decision in Foglia correctly applied the more nuanced pleading requirement for qui tam claims brought under the FCA.28

II. FACTS AND HOLDING

In Foglia v. Renal Ventures Management, LLC,29 the relator, Thomas Foglia, brought a qui tam claim in the United States District Court for the District of New Jersey alleging violations of the False Claims Act (“FCA”) by his employer, Renal Ventures Management, LLC (“Renal”).30 A qui tam claim under the FCA allows a private party or individual to sue in the name of the United States for injuries to the federal government.31 The FCA imposes liability on any person who knowingly submits a fraudulent claim or record to the United States government for compensation.32

22. Foglia, 754 F.3d at 157.
24. Foglia, 754 F.3d at 155.
25. Id. at 157-58.
26. See infra notes 29-50 and accompanying text.
27. See infra notes 51-90 and accompanying text.
28. See infra notes 91-161 and accompanying text.
29. 754 F.3d 153 (3d Cir. 2014).
32. 31 U.S.C. § 3729(a)(1) (2012). The statutes provides that: [a]ny person who (A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval; (B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim ... is liable to the United States Government for a civil pen-
Foglia worked as a registered nurse with Renal, a company which provides dialysis care. Renal, a dialysis care services company, “provides all forms of dialysis for patients with end-stage renal disease. [Renal’s] services include in-hospital and outpatient hemodialysis, peritoneal dialysis, home dialysis, and a transplant referral program.” Foglia v. Renal Ventures Mgmt., LLC, 830 F. Supp. 2d 8, 10 (D.N.J. 2011).

33. Foglia, 754 F.3d at 154. Renal, a dialysis care services company, “provides all forms of dialysis for patients with end-stage renal disease. [Renal’s] services include in-hospital and outpatient hemodialysis, peritoneal dialysis, home dialysis, and a transplant referral program.” Foglia v. Renal Ventures Mgmt., LLC, 830 F. Supp. 2d 8, 10 (D.N.J. 2011).

34. Foglia, 830 F. Supp. 2d at 10.
35. Id. at 11.
36. Id.
37. Foglia, 754 F.3d at 157.
38. Id.
39. Id.
40. Id.
41. Id. at 155.
42. Foglia, 754 F.3d at 155. Prior to the dismissal of Foglia’s second amended complaint, “Foglia filed an amended complaint, and the District Court granted Renal’s motion for judgment on the pleadings and gave Foglia twenty days to file a second amended complaint.” Id.
properly allege fraud if he pleads details of a defendant’s scheme to report false claims in conjunction with reliable indicia presenting a strong inference that the defendant actually submitted the claims.\footnote{43} The Third Circuit indicated that the holdings of the United States Courts of Appeals for Fourth, Sixth, Eighth, and Eleventh Circuits were too rigid and violated Rule 9(b) in requiring a plaintiff to plead representative examples of the purported fraudulent acts, including the time, location, and content of the conduct and the identity of the actors.\footnote{44}

Following its determination of the requirements for Rule 9(b), the Third Circuit next considered whether Foglia satisfied these requirements.\footnote{45} Reversing the district court’s decision, the Third Circuit determined that Foglia’s complaint gave Renal proper notice of the alleged charges as required by Rule 9(b).\footnote{46} Noting that it would be inadequate to allege merely an opportunity for fraud to form a plausible ground for relief, Foglia’s complaint was sufficient because he asserted several specific facts and allegations of Renal’s behavior.\footnote{47} In determining that Foglia’s complaint sufficiently gave Renal notice, the Third Circuit relied on Foglia’s presentation of Renal’s inventory logs, which indicated that Renal was not using enough vials of Zemplar per day in relation to how many patients were administered the drug.\footnote{48}

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\footnotetext[43]{43. Id. at 156-57 (quoting Grubbs, 565 F.3d at 190).}
\footnotetext[44]{44. Id. at 156; see also United States ex rel. Joshi v. St. Luke’s Hosp., Inc., 441 F.3d 552, 556 (8th Cir. 2006) (determining Rule 9(b)’s particularity requirement is satisfied if a plaintiff pleads “such facts as the time, place, and content of the defendant’s false representations, as well as the details of the defendant’s fraudulent acts . . . .”); United States ex rel. Nathan v. Takeda Pharm. N. Am., Inc., 707 F.3d 451, 455-56 (4th Cir. 2013) (providing that to satisfy Rule 9(b) under the FCA, a plaintiff “must, at a minimum, describe the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby”); United States ex rel. Bledsoe v. Cmty. Health Sys., Inc., 501 F.3d 493, 509, 511 (6th Cir. 2007) (explaining that a plaintiff, in bringing a claim for fraud under the FCA, must present evidence “including general time frame, substantive content, and relation to the allegedly fraudulent scheme, such that a materially similar set of claims could have been produced with a reasonable probability by a random draw from the total pool of all claims”); United States ex rel. Clausen v. Lab. Corp. of Am., Inc., 290 F.3d 1301, 1311 (11th Cir. 2002) (indicating that a claim for fraud under the FCA cannot be sustained by merely alleging a scheme of fraud but requires some indicia of reliability of an actual false claim brought); Brief for the United States as Amicus Curiae, United States ex rel. Noah Nathan v. Takeda Pharm. N. Am., 134 S. Ct. 1759 (2014) (No. 12-1349), 2014 WL 709660 (stating the more heightened pleading standard “is unsupported by Rule 9(b) and undermines the FCA’s effectiveness as a tool to combat fraud against the United States”).}
\footnotetext[45]{45. Foglia, 754 F.3d at 157.}
\footnotetext[46]{46. Id. at 158.}
\footnotetext[47]{47. Id.}
\footnotetext[48]{48. Id.}
\end{footnotes}

Inventory logs maintained by Renal show that, during the month of October 2008, Renal used from 29 to 35 vials of Zemplar per day. Because Renal orders Zemplar in only 5 mcg vials, it would have needed 50 vials of Zemplar each of
Although there was a possibility that Renal was using the vials properly, it was plausible the company was falsely reporting the use of the drug, and accordingly, the complaint gave Renal proper notice of Foglia’s charges.\textsuperscript{49} The circuit court also allowed Foglia’s complaint to proceed, noting that only Renal had access to the full billing records, which alone could prove or disprove Foglia’s claim.\textsuperscript{50}

III. BACKGROUND

A. \textit{United States ex rel. Joshi v. St. Luke’s Hospital, Incorporated: The Eighth Circuit Demanded a Heightened Requirement for Fraud Claims}

In \textit{United States ex rel. Joshi v. St. Luke’s Hospital, Inc.},\textsuperscript{51} Dr. Keshav Joshi, an anesthesiologist at St. Luke’s Hospital, brought a \textit{qui tam} action pursuant to the False Claims Act (“FCA”) against St. Luke’s Hospital and Dr. Mohammed Bashiti, claiming they fraudulently submitted and received reimbursement for anesthesia services from the federal government.\textsuperscript{52} Specifically, the complaint alleged the defendants knowingly billed the Centers for Medicare and Medicaid Services for more prescriptions and supplies than were actually used for patient care.\textsuperscript{53} The United States District Court for the Eastern District of Missouri dismissed Dr. Joshi’s claim for failing to adhere to Federal Rule of Civil Procedure 9(b) (“Rule 9(b)”), as he did not plead fraud with particularity.\textsuperscript{54} Dr. Joshi’s complaint lacked the date of, the extent and content of, and the identity of those involved in the alleged reporting of false claims, and the district court reasoned the pleading was insufficient to provide St. Luke’s Hospital adequate notice to provide a defense.\textsuperscript{55} Dr. Joshi appealed to the United States Court of Appeals for the Eighth Circuit, claiming the district court’s
dismissal of his complaint was in error.\textsuperscript{56} The Eighth Circuit ultimately affirmed the district court’s holding and upheld the more stringent pleading standard when alleging fraud.\textsuperscript{57} The circuit court reasoned that conclusory statements are not enough to satisfy Rule 9(b); instead, Dr. Joshi must allege at least a representative example of the purported fraudulent conduct.\textsuperscript{58} Determining that Dr. Joshi’s complaint was too vague and limited, the Eighth Circuit rejected his request for discovery to satisfy Rule 9(b) as he did not plead enough facts to bring a claim in the first place.\textsuperscript{59} The Eighth Circuit also cited the United States Court of Appeals for the Eleventh Circuit, particularly noting that when a plaintiff does not plead such factual elements of the pleading requirement for fraud, the defendant’s reputation is unnecessarily harmed by the allegations, regardless of whether the claim is true.\textsuperscript{60}

\textbf{B. United States ex rel. Grubbs v. Kanneganti: The Fifth Circuit Utilized a Less Strict Requirement for Pleading Fraud}

In United States ex rel. Grubbs v. Kanneganti,\textsuperscript{61} Dr. Grubbs, as relator for the United States and pursuant to the FCA, brought a \textit{qui tam} action against the hospital at which he was employed, Memorial Hermann Baptist Beaumont Hospital (“the Hospital”), and seven of the hospital’s doctors.\textsuperscript{62} Dr. Grubbs’s complaint alleged fraudulent
billing to the Centers for Medicare and Medicaid Services. The complaint alleged that the doctors invited Grubbs to dinner at which they disclosed their scheme of false reporting to Grubbs and told him of his part in the scheme. In particular, for weekend on-call shifts, the scheme required the doctors to bill the government as if they routinely had every day face-to-face visits with patients, when the doctors actually only visited patients on an as-needed basis. The complaint not only described the scheme, but also included at least one demonstration of false reporting for each doctor. The United States District Court for the Eastern District of Texas dismissed Grubbs's claim, as he did not plead fraud with particularity pursuant to Rule 9(b).

Grubbs appealed the dismissal of his claim to the United States Court of Appeals for the Fifth Circuit. According to the Fifth Circuit, an allegation of fraud under Rule 9(b) only requires a simple, concise, and direct statement of the circumstances amounting to the alleged fraud. In its reasoning, the Fifth Circuit noted that the United States Supreme Court's analysis regarding pleading pursuant to Rule 8(a) directs relief to be plausible, not merely possible. The Fifth Circuit reasoned that the heightened pleading standard for fraud adopted by other circuit courts stemmed from common law, which is inconsistent with the FCA's particularity requirements regarding allegations of fraud. Under common law, the plaintiff alleging fraud must have acted in reliance on the fraudulent misrepresentation and subsequently suffered an injury. Alternatively, the FCA does not require the relator to demonstrate personal reliance or injury, but rather allows a relator to bring a claim alleging

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63. *Grubbs*, 565 F.3d at 183.
64. *Id.* at 184.
65. *Id.*
66. *Id.* at 184-85. The allegation of false billing for each doctor included a paragraph similar to the following: “Dr. Desai billed Medicaid for psychotherapy services on January 8, 2004, CPT Code #90805, which constituted a false claim in that the medical records indicate that no psychotherapy was provided by Desai on that date.” *Id.* at 185.
67. *Id.* at 183.
68. *Id.* at 185.
69. *Id.* at 186.
70. *Id.* Regarding pleading under Rule 8(a), the Supreme Court has stated that “[a]sking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 (2007).
71. *Grubbs*, 565 F.3d at 189. The Fifth Circuit also noted the FCA requires a relator show by a preponderance of the evidence the alleged fraudulent conduct. *Id.* In comparison, in common law fraud claims, a plaintiff must prove the fraud with clear and convincing evidence. UMC Elecs. Co. v. United States, 249 F.3d 1337, 1338-39 (Fed. Cir. 2001).
72. *Grubbs*, 565 F.3d at 188.
injury to the government.\textsuperscript{73} For these reasons, the FCA is remedial rather than damage-based in order to shield the government from financial injury.\textsuperscript{74} The Fifth Circuit provided that the heightened pleading standard is overly strict and discourages whistleblowers with valuable information from coming forward, thereby compromising the government’s ability to intervene.\textsuperscript{75} Furthermore, the Fifth Circuit stated if courts required such details at the pleading stage, the pleading would be just shy of requiring the relator to produce actual documentation, which is a level of proof not required by any current pleading requirement of the Federal Rules of Civil Procedure.\textsuperscript{76} While Rule 9(b)’s requirement to plead fraud with particularity is intended to filter out insufficient claims, its purpose is not to require all factual findings that would be ascertained throughout discovery to be produced at the pleading stage.\textsuperscript{77}

The Fifth Circuit ultimately determined that Dr. Grubbs’s claim articulated the particular workings of a fraudulent scheme, satisfying Rule 9(b); thus, the Fifth Circuit reversed the district court’s dismissal of Dr. Grubbs’s allegations against the doctors.\textsuperscript{78} The Fifth Circuit held that in a \textit{qui tam} action, a relator need only plead particular details of a defendant’s plan to submit false claims in conjunction with reliable facts suggesting that the fraudulent claims were actually presented.\textsuperscript{79} Such a standard comports with the objectives of Rule 9(b).\textsuperscript{80} Moreover, the Fifth Circuit acknowledged that the purpose of the FCA was not to prevent all claims, and the rule must remain context-specific and flexible to achieve its remedial purpose.\textsuperscript{81}

\section*{C. \textit{Ebeid ex rel. United States v. Lungwitz}: The Ninth Circuit Applied the “Scheme Requirement” for Pleading Fraud}

In \textit{Ebeid ex rel. United States v. Lungwitz},\textsuperscript{82} Sadek Ebeid brought a \textit{qui tam} suit under the FCA alleging that Theresa Lungwitz, the owner of multiple health care businesses, submitted false information

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\item \textsuperscript{73} Id. at 184, 189.
\item \textsuperscript{74} Id. at 189.
\item \textsuperscript{75} Id. at 191.
\item \textsuperscript{76} Id. at 190.
\item \textsuperscript{77} Id. at 191. “[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.” Id. at 190.
\item \textsuperscript{78} Id. at 191, 195.
\item \textsuperscript{79} Id. at 190.
\item \textsuperscript{80} Id. Rule 9(b)’s objectives are to “provide[ ] defendants with fair notice of the plaintiffs’ claims, protect[ ] defendants from harm to their reputation and goodwill, reduce[ ] the number of strike suits, and prevent[ ] plaintiffs from filing baseless claims then attempting to discover unknown wrongs.” Id.
\item \textsuperscript{81} Id. at 190.
\item \textsuperscript{82} 616 F.3d 993 (9th Cir. 2010).
\end{enumerate}
\end{footnotesize}
to the Centers for Medicare and Medicaid Services.\textsuperscript{83} The claim focused on the allegations of Lungwitz’s unauthorized practice of medicine and unlawful referrals within her businesses, rendering every Medicare reimbursement during that period fraudulent.\textsuperscript{84} The United States District Court for the District of Arizona dismissed the claim for failure to plead fraud with the heightened particularity standard.\textsuperscript{85} Ebeid appealed to the United States Court of Appeals for the Ninth Circuit arguing that his claim should not be dismissed as his pleading met the particularity requirements of Rule 9(b).\textsuperscript{86}

The Ninth Circuit adopted the Fifth Circuit’s less-strict standard for pleading fraud under the FCA, concluding that allegations of particular details of a defendant’s plan to submit false claims in conjunction with reliable facts suggesting that the fraudulent claims were actually presented are sufficient under Rule 9(b).\textsuperscript{87} However, the circuit court ultimately determined that Ebeid’s complaint did not meet even the less-strict requirement because Ebeid’s pleading must have some amount of specificity.\textsuperscript{88} As Ebeid offered only conclusory allegations without reasonable indicia that false claims were actually submitted, the only defense Lungwitz could have presented was a denial of any misconduct.\textsuperscript{89} Although the Ninth Circuit ultimately held that Ebeid did not meet the standard adopted from the Fifth Circuit, the Ninth Circuit did recognize the less strict requirement for pleading fraud under the FCA.\textsuperscript{90}

\section*{IV. ANALYSIS}

In \textit{Foglia v. Renal Ventures Management, LLC},\textsuperscript{91} the United States Court of Appeals for the Third Circuit correctly applied the less strict pleading requirement for \textit{qui tam} actions brought under the False Claims Act (“FCA”), rather than the more stringent pleading re-

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\item \textsuperscript{83} Ebeid ex rel. United States v. Lungwitz, 616 F.3d 993, 995 (9th Cir. 2010).
\item \textsuperscript{84} \textit{Ebeid}, 616 F.3d at 995.
\item \textsuperscript{85} \textit{Id.} at 998, 1001.
\item \textsuperscript{86} \textit{Id.} at 1001.
\item \textsuperscript{87} See \textit{id. at} 998-99 (joining the Fifth Circuit in determining allegations of “particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted” is sufficient) (quoting \textit{Grubbs}, 565 F.3d at 190-91).\textsuperscript{88}
\item \textsuperscript{88} \textit{Id.} at 999.
\item \textsuperscript{89} \textit{Id.} “Rule 9(b) still requires Ebeid to plead the fraud with some level of specificity. Indeed, even under a relaxed standard, Ebeid must provide enough detail ‘to give [Lungwitz] notice of the particular misconduct which is alleged to constitute the fraud charged that [she] can defend against the charge and not just deny that [she has] done anything wrong.’” \textit{Id.} (quoting United States ex rel. Lee v. SmithKline Beecham, Inc., 245 F.3d 1048, 1051-52 (9th Cir. 2001)).
\item \textsuperscript{90} \textit{Id.} at 998-99, 1001.
\item \textsuperscript{91} 754 F.3d 153 (3d Cir. 2014).
\end{itemize}
quirement applied by other circuit courts. In Foglia, the Third Circuit determined the plaintiff, Thomas Foglia, sufficiently pleaded his claim for fraud under a qui tam action because he alleged particular details of the defendant’s plan to report false claims by contend ing Renal Ventures Management, LLC (“Renal”) over-charged the government for the prescription drug, Zemplar, and re-used single-use vials of the drug. Foglia supported such allegations with patient logs which illustrated that Renal used less Zemplar than would be required had the drug been administered in the proper single-use fashion. The Third Circuit determined Foglia sufficiently pleaded Renal’s potential scheme of fraud because Foglia’s complaint gave Renal proper notice as required by Federal Rule of Civil Procedure 9(b) (“Rule 9(b)). In addition, only Renal had access to the full billing records that could prove whether they were fraudulently billing the government.

This Analysis will argue the heightened pleading requirement for fraud claims brought under the FCA is incorrect, and applying the less strict standard to such claims is more appropriate for two reasons: first, based on the purpose of Rule 9(b), and second, based on the procedural requirements of the FCA. Finally, this Analysis will reason that the Third Circuit’s less strict approach in handling a FCA claim was correct because such a standard facilitates relators’ ability to

92. Compare Foglia v. Renal Ventures Mgmt., LLC, 754 F.3d 153, 156-57 (3d Cir. 2014) (determining that the Rule 9(b) pleading requirement for claims brought under the FCA is sufficient if the plaintiff alleges “particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted”), United States ex rel. Grubbs v. Kanneganti, 565 F.3d 180, 190 (5th Cir. 2009) (adopting the less stringent pleading requirement in noting 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”), and Ebeid ex rel. United States v. Lungwitz 616 F.3d 993, 998-99 (9th Cir. 2010) (joining the Fifth Circuit in determining “it is sufficient to allege ‘particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted’), with United States ex rel. Joshi v. St. Luke’s Hosp., Inc., 441 F.3d 552, 556 (8th Cir. 2006) (stating that claims alleging FCA violations must plead “such facts as the time, place, and content of the defendant’s false representations, as well as the details of the defendant’s fraudulent acts, including when the acts occurred, who engaged in them, and what was obtained as a result”), and United States ex rel. Nathan v. Takeda Pharmas North Am., Inc., 707 F.3d 451, 455-56 (4th Cir. 2013) (determining a complaint “must, at a minimum, describe the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby”).

93. Foglia, 754 F.3d at 157-58.
94. Id. at 158.
95. Id.
96. Id.
97. See infra notes 99-151 and accompanying text.
bring claims in protection of the government yet still thwarts baseless claims.98

A. BASED ON THE PURPOSE OF THE FEDERAL RULE OF CIVIL PROCEDURE 9(B), THE THIRD CIRCUIT CORRECTLY REFUSED TO APPLY THE HEIGHTENED PLEADING REQUIREMENT FOR FRAUD CLAIMS BROUGHT UNDER THE FALSE CLAIMS ACT

The United States Court of Appeals for the Third Circuit in its decision in Foglia v. Renal Ventures Management, LLC,99 determined that Thomas Foglia sufficiently pleaded a potential scheme of fraud by Renal because the complaint gave Renal proper notice, as required by Rule 9(b), and because only Renal had access to the full billing records that could prove whether the defendants were fraudulently billing the government.100 Rule 9(b) merely requires a party alleging fraud to plead with particularity the situation constituting such fraud.101 Foglia based his allegations on patient logs which indicated that Renal improperly used and billed for the drug Zemplar.102 Given the purpose of Rule 9(b), the Third Circuit correctly applied the less-strict standard to Foglia’s complaint.103

The Third Circuit cited a recent amicus curiae brief in which the Solicitor General indicated the heightened pleading standard adopted by the United States Courts of Appeals for the Fourth, Sixth, Eighth, and Eleventh Circuits contradicts Rule 9(b).104 Although Rule 9(b) was enacted with the purpose of requiring a particular pleading standard, it does not require the heightened level of proof the Fourth, Sixth, Eighth, and Eleventh Circuits require; it merely demands a pleading that would provide the defendant with notice of the claims against him.105 The Third Circuit was correct in its reasoning because although Rule 9(b) was enacted to require fraud claims to be pleaded with particularity, the particularity requirement was not in-

98. See infra notes 152-161 and accompanying text.
101. FED. R. CIV. P. 9(b).
102. Foglia, 754 F.3d at 157-58.
103. Compare Grubbs, 565 F.3d at 190 (determining the purpose of Rule 9(b) is ensuring the complaint “provides defendants with fair notice of the plaintiff’s claims, protects defendants from harm to their reputation and goodwill, reduces the number of strike suits, and prevents plaintiffs from filing baseless claims then attempting to discover unknown wrongs”), with Foglia, 754 F.3d at 156 (requiring fraud claims under the FCA to plead “particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted”).
105. Foglia, 754 F.3d at 156-57.
tended to supersede or replace the notice pleading requirement of Federal Rule of Civil Procedure 8(a) (“Rule 8(a)”). Rule 8(a) requires a brief and concise statement of the claim with a demand for relief. The Supreme Court of the United States has interpreted Rule 8(a) as requiring enough factual allegations to raise the right to relief from a level of speculation to a level of plausibility. Rule 9(b) was enacted to require greater particularity in pleading fraud, but it was not intended to replace the notice pleading requirement of Rule 8(a); thus, the Third Circuit correctly applied the less strict pleading standard in allowing Foglia to plead fraud based on reliable indicia of Renal’s fraudulent plan.

The Third Circuit’s decision in Foglia is supported by United States ex rel. Grubbs v. Kanneganti in which the United States Court of Appeals for the Fifth Circuit determined Rule 9(b) was not enacted with the intent to revert back to common law fact pleading, but rather was intended to require a simple statement of the factual circumstances amounting to the alleged fraud. The Fifth Circuit acknowledged that Rule 9(b) was intended to be context-specific, and the heightened pleading standard attempts to create a blanket rule to apply to all claims of fraud, which was not the intent of Rule 9(b). The Fifth Circuit highlighted that the less strict method allows for a more fact-specific approach and allows courts to make a case-by-case determination. The Fifth Circuit illustrated that the heightened pleading standard is rooted in common law fraud, which is exactly what the drafters of the Federal Rules of Civil Procedure intended to replace. The Fifth Circuit further explained the less strict pleading

106. Compare Foglia, 754 F.3d at 156 (citing the United States’ amicus curiae brief stating that the heightened pleading standard is “unsupported by Rule 9(b) and . . . pleading the details of a specific false claim presented to the government is not an indispensable requirement of a viable FCA complaint”), and United States ex rel. Joshi v. St. Luke’s Hosp., Inc., 441 F.3d 552, 556 (8th Cir. 2006) (stating Rule 9(b) requires a higher degree of notice than the notice requirements for other claims), with United States ex rel. Grubbs v. Kanneganti, 565 F.3d 180, 185-86 (5th Cir. 2009) (determining that “Rule 9(b) supplements but does not supplant Rule 8(a)’s notice pleading”).


109. Foglia, 754 F.3d at 157-58; compare id. at 156, (citing the United States’ amicus curiae brief stating that the rigid pleading standard is “unsupported by Rule 9(b)”), with Grubbs, 565 F.3d at 186 (determining that the requirement to plead fraud with “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”).

110. 565 F.3d 180 (5th Cir. 2009).

111. Grubbs, 565 F.3d at 186.

112. Id. at 188.

113. Id.

114. Compare Grubbs, 565 F.3d at 188-89 (acknowledging the common law elements of fraud are, “(1) a material representation was made; (2) the representation was false;
requirement gives defendants adequate notice of the claims, as required by Rule 9(b), because the less strict approach requires plaintiffs to present a scheme of false claims as well as details supporting a strong inference of those claims.115 The less strict pleading requirement is further supported by the fact that defendants are typically the only ones who have access to the most relevant records.116

The United States Court of Appeals for the Eighth Circuit, in United States ex rel. Thayer v. Planned Parenthood of the Heartland,117 followed the reasoning from Foglia and Grubbs and adopted the less strict pleading requirement.118 In its reasoning, the Eighth Circuit distinguished its earlier opinion, United States ex rel. Joshi v. St. Luke’s Hosp., Inc.,119 in stating the plaintiff, Susan Thayer, was dissimilar to Dr. Joshi because she had access to the billing systems of the defendants, whereas Dr. Joshi could merely speculate that the defendants were submitting false claims as he did not have access to the billing system.120 However, the Eighth Circuit in Thayer did not need to distinguish Joshi, but rather should have expressly overruled it based on the purpose of Rule 9(b) to provide a defendant adequate notice of the claims against it.121 A relator bringing a claim for fraud under the FCA must be afforded the less strict pleading standard regardless of his access to billing records.122 Accordingly, the Third Cir-

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115. Grubbs, 565 F.3d at 190-91.
116. Id. at 191.
117. 765 F.3d 914 (8th Cir. 2014).
119. 441 F.3d 552 (8th Cir. 2006).
120. Compare Thayer, 765 F.3d at 917 (applying the less strict pleading standard because the plaintiff had “personal, first-hand knowledge of [the defendant’s] submission of false claims”), with United States ex rel. Joshi v. St. Luke’s Hosp., Inc., 441 F.3d 552, 558 (8th Cir. 2006) (noting the plaintiff’s “vague and limited allegations concerning events occurring in November 1995 do not qualify as representative examples of a scheme . . . .”).
121. Compare Thayer, 765 F.3d at 917 (distinguishing Joshi based on the fact that the plaintiff “was able to plead personal, first-hand knowledge of [the defendant’s] submission of false claims”), with Grubbs, 565 F.3d at 190 (providing that the purpose of Rule 9(b) is ensuring a defendant is afforded with “fair notice of the plaintiff’s claims . . . .”).
122. Compare Thayer, 765 F.3d at 918 (concluding 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.’”), with Grubbs, 565 F.3d at 190 (noting the exact dollar amounts of the fraudulent scheme will surface
cuit, in Foglia, should have applied the less strict standard regardless of Foglia’s access to the billing records, because Rule 9(b) does not demand such a strict standard.\textsuperscript{123}

Congress enacted Rule 9(b) to prevent frivolous claims from being filed and to prevent unfounded claims used as a pretext to gain access to evidence in discovery.\textsuperscript{124} The Fifth Circuit, in Grubbs, reasoned that discovery is efficient because summary judgment is quick to defeat the complaint if billing records fail to support the relator’s allegations.\textsuperscript{125} Rule 9(b) attempts to strike a balance between the allegations and discovery as the rule works best when the district court judge tailors discovery by safeguarding against abusive discovery; this tailoring requires sufficient details in the allegations.\textsuperscript{126} Furthermore, the Fifth Circuit explained that Rule 9(b) was not intended to assume the sole burden of monitoring abusive discovery, rather, its balance rests upon the district judge’s discretion.\textsuperscript{127}

Since Foglia’s \textit{qui tam} action under the FCA was bound by the pleading requirements of Rule 9(b), the Third Circuit correctly applied the less strict pleading standard to Foglia’s \textit{qui tam} complaint.\textsuperscript{128} The

during discovery, which prevents the need to require those particular facts in the pleading stage).

\textsuperscript{123}. Compare Thayer, 765 F.3d at 917 (distinguishing Joshi and applying the less strict standard because the plaintiff had personal access to the defendant’s billing and claims systems), and Foglia, 754 F.3d at 158 (applying the less strict pleading requirement for Foglia because he had access to patient logs), with Grubbs, 565 F.3d at 190 (providing the purpose of Rule 9(b) is merely ensuring the defendant is afforded with “fair notice of the plaintiff’s claims, protects defendants from harm to their reputation and goodwill, reduces the number of strike suits, and prevents plaintiffs from filing baseless claims then attempting to discover unknown wrongs”), and FED. R. CIV. P. 9(b) (requiring a plaintiff claiming fraud to allege “with particularity the circumstances constituting fraud or mistake” but not specifying what “with particularity” was intended to mandate).

\textsuperscript{124}. Grubbs, 565 F.3d at 191.
\textsuperscript{125}. Id.
\textsuperscript{126}. Id.
\textsuperscript{127}. Id. Rather, the purpose of Rule 9(b) is ensuring the complaint “provides defendants with fair notice of the plaintiff’s claims, protects defendants from harm to their reputation and goodwill, reduces the number of strike suits, and prevents plaintiffs from filing baseless claims then attempting to discover unknown wrongs.” Id. at 190; \textit{but see Twombly}, 550 U.S. at 570 (Stevens, J., dissenting) (noting that motions to dismiss were not intended to “combat discovery abuse: ‘In the absence of [an amendment to Rule 9(b)], federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later.’”) (quoting Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168-69 (1993)) (brackets in original).

\textsuperscript{128}. Compare Foglia, 754 F.3d at 156-57 (determining that the Rule 9(b) pleading requirement for claims brought under the FCA is sufficient if the plaintiff alleges “particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted”), with Joshi, 441 F.3d at 556 (stating that claims alleging FCA violations must comply with the particularity pleading requirement under Rule 9(b) by alleging “such facts as the time, place, and content of the defendant’s false representations, as well as the details of the defendant’s fraudu-
Third Circuit's application was correct because Foglia brought a fraud claim against his employer under the FCA and because he was bound by the pleading requirements of Rule 9(b).129 The Third Circuit correctly allowed Foglia the opportunity to present a scheme of fraud because Foglia's complaint provided Renal with sufficient notice to present a defense.130 In particular, Foglia's complaint provided inventory logs which indicated Renal's allegedly fraudulent plan to submit false claims to the government.131 Based on this information, Foglia's complaint provided a strong inference that Renal was engaged in fraudulent conduct.132

A court's analysis during the pleading stage of whether a complaint satisfies the particularity requirement under Rule 9(b) is so fact-specific that a court cannot apply a blanket rule to all fraud claims.133 Rule 9(b) intended the pleading standard to be analyzed on a case-by-case basis, thus giving the court discretion in determining whether a relator met the less strict standard.134 The heightened pleading standard requiring evidence of who, what, where, when, and how the alleged fraud occurred does not alone establish a scheme of fraud.135 Rather, a relator alleging certain details of a plan to submit false claims in conjunction with reliable indicia suggesting a substan-

129. Compare id. at 154-55 (stating Foglia filed a qui tam action under the FCA), with Grubbs, 565 F.3d at 185 (noting "that a complaint filed under the False Claims Act must meet the heightened pleading standard of Rule 9(b) . . . .").

130. Compare Foglia, 754 F.3d at 157-58 (stating that the less strict standard will be applied in analyzing Foglia's complaint), with Grubbs, 565 F.3d at 190-91 (noting that the less strict standard comports with the objectives of Rule 9(b) and gives defendants sufficient notice of the claims).

131. Foglia, 754 F.3d at 157-58.

132. Compare Grubbs, 565 F.3d at 190 (holding "that to plead with particularity the circumstances constituting fraud for a False Claims Act . . . 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"), with Foglia, 754 F.3d at 158 (stating that the allegations presented by Foglia indicate that Renal did not follow procedures).

133. Grubbs, 565 F.3d at 188.

134. Compare id. at 188 (noting that, depending on the claim, "a plaintiff may sufficiently 'state with particularity the circumstances constituting fraud or mistake' without including all the details of any single court-articulated standard—it depends on the elements of the claim at hand"), with Foglia, 754 F.3d at 156-57 (determining that the Rule 9(b) pleading requirement for claims brought under the FCA is sufficient if the plaintiff alleges "particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted").

135. See Grubbs, 565 F.3d at 190 (stating that "[s]tanding 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").
tial inference that fraudulent claims were actually presented sets forth a strong basis that fraudulent conduct occurred.136

B. THE THIRD CIRCUIT CORRECTLY APPLIED THE LESS STRICT
PLEADING STANDARD DUE TO THE PROCEDURAL REQUIREMENTS
UNDER THE FALSE CLAIMS ACT

In Foglia v. Renal Ventures Management, LLC,137 the United States Court of Appeals for the Third Circuit correctly implemented the less strict pleading standard in accordance with the purpose of the False Claims Act (“FCA”) because the pleading requirements for fraud under the FCA lack the common law elements of reliance and damages.138 The Third Circuit also correctly applied the less strict standard to Foglia’s complaint because under the FCA, a relator need only prove to a jury by a preponderance of the evidence that a fraudulent scheme occurred.139

In United States ex rel. Grubbs v. Kanneganti,140 the United States Court of Appeals for the Fifth Circuit explained that fraud under the FCA diverges from common law fraud in that it lacks two of the common law elements, specifically reliance and damages.141 The FCA was enacted to protect the government from fraud; in effect, the relator is not bringing a claim based on his individual injury, but rather, he is bringing a claim on behalf of the government.142 It is not necessary for a complaint to allege reliance by the government or that

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136. Id. “It is the scheme in which particular circumstances constituting fraud may be found that make it highly likely the fraud was consummated through the presentation of false bills.” Id.
137. 754 F.3d 153 (3d Cir. 2014).
138. Compare Foglia v. Renal Ventures Mgmt., 754 F.3d 153, 156-57 (3d Cir. 2014) (allowing Foglia to plead his FCA fraud claim with the less strict pleading requirement), with United States ex rel. Grubbs v. Kanneganti, 565 F.3d 180, 189 (5th Cir. 2009) (determining that “[c]ommon law fraud’s elements of reliance and damages are intertwined with the misrepresentation and heighten the need for attention to the misrepresentation itself. The False Claims Act, in contrast, lacks the elements of reliance and damages. Rather, it protects the Treasury from monetary injury.”).
139. Compare Grubbs, 565 F.3d at 189 (noting that the FCA requires a relator show by a preponderance of the evidence the alleged fraudulent conduct), with UMC Elecs. Co. v. United States, 249 F.3d 1337, 1338-39 (Fed. Cir. 2001) (stating that under the False Claims Act, the government must establish a violation by a preponderance of the evidence as compared with other fraud claims, which must be proven with clear and convincing evidence); see also United States ex rel. Heath v. AT&T, Inc. 791 F.3d 112, 126 (D.C. Cir. 2015) (noting that “to require relators to plead representative samples of claims actually submitted to the government would require relators, before discovery, to prove more than the law requires to be established at trial”).
140. 565 F.3d 180 (5th Cir. 2009).
141. Grubbs, 565 F.3d at 188-89.
142. Id. at 184, 189; see also Ebeid ex rel. United States v. Lungwitz, 616 F.3d 993, 995 (9th Cir. 2010) (noting qui tam actions permit “private persons . . . to bring civil actions on behalf of the United States . . . .”).
the government incurred damage due to a knowingly submitted false claim.\textsuperscript{143} Appropriately, the Fifth Circuit determined that a claim brought under common law fraud differs from a fraud claim brought under the FCA; as such, the requirements for each respective claim necessarily demand different pleading standards.\textsuperscript{144}

The Fifth Circuit further explained the FCA is a civil provision requiring a plaintiff to prove fraudulent presentment by a preponderance of the evidence whereas regular fraud claims require proof of fraud by clear and convincing evidence.\textsuperscript{145} The court indicated fraudulent presentment only requires proof that a claim was false, not the exact contents of the false claim.\textsuperscript{146} The court provided that exact dollar amounts would be revealed through discovery and are only necessary to prove the actual amount of damages, so a plaintiff does not need exact dollar amounts to prove by a preponderance of the evidence that a scheme of fraud is taking place against the government.\textsuperscript{147} Further, the Fifth Circuit reasoned the less strict approach to pleading fraud for FCA claims prevents nuisance suits because it requires both particular details of a scheme to present fraudulent bills to the government, as well as allegations showing the likelihood that the defendant actually submitted fraudulent bills to the government.\textsuperscript{148}

The Third Circuit applied the less strict pleading requirement for fraud claims brought under the FCA.\textsuperscript{149} The Third Circuit was correct because Foglia brought his claims as a relator for the government under the FCA; therefore, Foglia did not have to establish the elements of reliance and damages, which are required under common law fraud pleading standards.\textsuperscript{150} Furthermore, a reasonable jury could find by a preponderance of the evidence that Renal was engaged in

\begin{footnotesize}
\begin{enumerate}
\item Grubbs, 565 F.3d at 189; see also 31 U.S.C. § 3729 (2012) (excluding requirements for reliance and damages when bringing claims under the FCA).
\item Compare Grubbs, 565 F.3d at 189 (stating the FCA is remedial and “lacks the elements of reliance and damages[,]” in contrast with claims brought under common law fraud), with 31 U.S.C. § 3729 (excluding requirements for reliance and damages when bringing claims under the FCA).
\item Compare Grubbs, 565 F.3d at 189 (noting that the FCA requires a relator show by a preponderance of the evidence the alleged fraudulent conduct), with UMC Elecs. Co., 249 F.3d at 1338-39 (stating that under the False Claims Act, the government must establish a violation by a preponderance of the evidence as compared with other fraud claims, which must be proven with clear and convincing evidence).
\item Grubbs, 565 F.3d at 189.
\item Id. at 190. The court reasoned “[t]o require these details at pleading is one small step shy of requiring production of actual documentation with the complaint, a level of proof not demanded to win at trial and significantly more than any federal pleading rule contemplates.” Id.
\item Id. at 191.
\item Foglia, 754 F.3d at 156-57.
\item Compare id. at 154-55 (stating that Foglia brought his claims as a relator for the United States under the FCA), with Grubbs, 565 F.3d at 189 (explaining the remedial nature of the FCA does not require elements of reliance and damages).
\end{enumerate}
\end{footnotesize}
fraudulent conduct considering the scheme alleged in Foglia’s complaint in conjunction with potentially incriminating documents that could only be exposed in the discovery stage.  

C. THE THIRD CIRCUIT CORRECTLY APPLIED THE LESS STRICT PLEADING STANDARD BECAUSE OF THE REMEDIAL PURPOSE OF THE FALSE CLAIMS ACT

Claims brought under the False Claims Act (“FCA”) are brought by private persons, known as relators, on behalf of the government in order to expose fraud. It would be contrary to the intent of the FCA to impose a heightened pleading standard for qui tam actions, as it will inhibit a relator’s ability to file a claim under the FCA alleging fraud. Discovery may be necessary for relators as the defendant is likely in sole possession of the potentially incriminating evidence.

The United States Court of Appeals for the Third Circuit correctly implemented the less strict pleading requirement. The United States Court of Appeals for the Fifth Circuit indicated that the pleading requirements must be flexible to effectuate the remedial purpose of the FCA—to protect the government. In order to accomplish this goal, the FCA permits those with evidence of a scheme of fraud to come forward on behalf of the government. As a relator, Foglia

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151. Compare Grubbs, 565 F.3d at 189-90 (noting that a reasonable jury could find by a preponderance that a defendant was presenting fraudulent bills to the government based on evidence of a scheme), with Foglia, 754 F.3d at 158 (discussing that Renal was in sole possession of the evidence that would prove whether they were fraudulently billing the government).

152. Ebeid ex rel. United States v. Lungwitz, 616 F.3d 993, 995 (9th Cir. 2010). The FCA was intended to “encourage insiders to disclose information necessary to prevent fraud on the government.” Ebeid, 616 F.3d at 999.


154. Compare Ebeid, 616 F.3d at 999 (stating “Rule 9(b) may be relaxed to permit discovery in a limited class of corporate fraud cases where the evidence is within a defendant’s exclusive possession”) (quoting United States ex rel. Lee v. SmithKline Beecham, Inc., 245 F.3d 1048, 1052 (9th Cir. 2001)), with Foglia v. Renal Ventures Mgmt., 754 F.3d 153, 158 (3d Cir. 2014) (noting only Renal was in possession of the billing records that would prove dispositive in determining the claim).

155. Compare Foglia, 754 F.3d at 158 (explaining that because “Renal, and only Renal, had[ ] access to the documents that could easily prove the claim one way or another . . . ,” Foglia’s evidence of a fraudulent scheme was sufficient to survive a motion for failure to state a claim for relief), with United States ex rel. Grubbs v. Kanneganti, 565 F.3d 180, 190 (5th Cir. 2009) (highlighting that the fraudulent plan supported by particular circumstances is more determinative than evidence of bills alone).

156. Id. at 189-90; see also Ebeid, 616 F.3d at 999 (stating the FCA was enacted “to encourage insiders to disclose information necessary to prevent fraud on the government”).

brought suit on behalf of the government pursuant to the FCA in order to expose Renal’s alleged fraud; thus, the Third Circuit correctly applied the less strict pleading requirement. Requiring Foglia to allege the exact dollar amounts, the identity of each participant, and the precise dates of the alleged fraudulent conduct would have undercut the FCA’s commitment to combat fraud. Rather, it was sufficient that Foglia provided evidence of a fraudulent scheme from which the court could infer Renal was engaged in illegal conduct, thereby allowing Foglia’s complaint to proceed to discovery. In applying the less strict pleading standard, the Third Circuit comported with the purposes of the FCA.

V. CONCLUSION

In *Foglia v. Renal Ventures Management, LLC*, the United States Court of Appeals for the Third Circuit required the relator, Thomas Foglia, to plead evidence of a scheme of fraudulent behavior paired with facts constituting evidence of the scheme in a *qui tam* action against his employer, Renal Ventures Management (“Renal”) under the False Claims Act (“FCA”). Foglia’s complaint alleged that Renal falsely certified the company’s compliance with New Jersey’s quality of care regulations, falsely submitted claims for reimbursement for a drug, and reused single-use vials of the drug. The

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158. Compare *Foglia*, 754 F.3d at 154-55 (stating Foglia brought a claim under the FCA on behalf of the government), *with Ebeid*, 616 F.3d at 999 (determining the FCA was intended to “encourage insiders to disclose information necessary to prevent fraud on the government”), and *Grubbs*, 565 F.3d at 190 (explaining the scheme of fraud comprised of particular circumstances is more determinative than the financial statements alone).

159. Compare *Foglia*, 754 F.3d at 155-56 (stating that the heightened pleading standard under the FCA requiring “the time, place, and content of the acts and the identity of the actors . . .” contemplates a level of pleading significantly higher than any required in the federal rules), *with Brief for the United States as Amicus Curiae, United States v. Takeda Pharms. N. Am.,* 134 S. Ct. 1759 (2014) (No. 12-1349), 2014 WL 709660, at *10 (providing the heightened pleading standard applied by other circuits “undermines the FCA’s effectiveness as a tool to combat fraud against the United States”), and Jack A. Meyer, *Fighting Medicare Fraud: More Bang for the Federal Buck* 4-5 (2006) (asserting “[t]he FCA and its whistleblower provisions are central to the federal government’s anti-fraud efforts. They provide the federal government with the insider information it needs to uncover complex business fraud against Medicare and the clout it requires to recover stolen funds and deter future fraud.”).


161. Compare id. at 157-58 (applying the less strict standard in analyzing the sufficiency of Foglia’s complaint), *with Ebeid*, 616 F.3d at 999 (reasoning that the purpose of the FCA is to promote the exposure of fraud on the government by encouraging those with relevant information to come forward).

162. 754 F.3d 153 (3d Cir. 2014).


United States District Court for the District of New Jersey granted Renal’s motion to dismiss in accordance with the Federal Rule of Civil Procedure 12(b)(6) because the court determined Foglia failed to state a claim with the heightened level of particularity required by the Federal Rule of Civil Procedure 9(b) (“Rule 9(b)”), regarding claims alleging fraud. On appeal, the Third Circuit reversed the district court’s holding, determining that Foglia’s claim of a scheme of fraud was sufficient to meet the pleading standard of Rule 9(b).165

In deciding Foglia, the Third Circuit correctly applied the less strict approach for the pleading requirement for fraud in *qui tam* actions under the FCA.167 Based on the purpose of Rule 9(b), courts should apply the less strict pleading requirement to FCA claims rather than the heightened pleading requirement.168 Considering the procedural requirements of the FCA, the less strict pleading requirement should be used.169 Finally, based the FCA’s remedial purpose, the less strict pleading requirement should be applied when analyzing the sufficiency a relator’s complaint.170

Applying the less strict pleading standard for *qui tam* actions brought under the FCA, the United States Court of Appeals for the Third, in addition to the First, Fifth, and Ninth Circuits, allow further protection for the government. Because the procedural requirements for fraud claims brought under the FCA significantly diverge from those of common law fraud claims, it follows that the pleading requirements are inherently different. Although it has been noted that the less strict pleading requirement exposes defendants to dishonest claims and potentially injured reputations, relators must be able to bring claims of fraud pursuant to a more relaxed requirement because the defendants often are in sole possession of the relevant evidence. The less strict pleading requirement should apply for all claims brought by relators under the FCA. In joining the First, Fifth, and Ninth Circuits, the Third Circuit correctly interpreted the purpose of Rule 9(b) to require a heightened pleading standard without imposing a complete bar to allegations of fraud and demonstrated its understanding of the FCA’s commitment to protect the government.

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165. *Foglia*, 754 F.3d at 154.
166. *Id.* at 157-58.
167. *See supra* notes 91-161 and accompanying text.
169. *See supra* notes 137-151 and accompanying text.
170. *See supra* notes 152-161 and accompanying text.