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Whistleblower's Delight: An Evaluation of the Third Circuit Decision in *Foglia v. Renal Ventures*

Patrick Venter
Boston College Law School, patrick.venter@bc.edu

WHISTLEBLOWER'S DELIGHT: AN EVALUATION OF THE THIRD CIRCUIT DECISION IN *FOGLIA v. RENAL VENTURES*

Abstract: In 2014, in *Foglia v. Renal Ventures Management LLC*, the U.S. Court of Appeals for the Third Circuit evaluated the pleading requirements needed to satisfy Rule 9(b) of the Federal Rules of Civil Procedure, within the context of False Claims Act complaints. The Third Circuit concurred with the First, Fifth, and Ninth Circuits and determined that it is necessary to provide only reliable indicia that leads to a strong inference of a scheme to submit false claims. This is in opposition to the holdings of some Circuits, which have required complaints to allege specific times, places, contents of acts, and identity of actors. This Comment argues the Third Circuit applied the correct standard because the requirement of advanced specificity at the initial pleading stage presents an unreasonable hurdle to whistleblowers seeking discovery.

INTRODUCTION

The U.S. Department of Justice's prosecution of the False Claims Act ("FCA") has been an important aspect of the government enforcement landscape in recent years.[1] Congress developed the FCA to identify and prevent the submission of fraudulent claims for reimbursement made to the U.S. government through the implementation of citizen whistleblowers.[2] After a citizen

[1] *See* 31 U.S.C. § 3729 (2012) (listing acts for which liability could be imposed under the False Claims Act statute); *see also, e.g.*, *Justice Department Recovers Nearly $6 Billion from False Claims Act Cases in Fiscal Year 2014*, U.S. DEP'T OF JUSTICE (Nov. 20, 2014), http://www.justice.gov/opa/pr/justice-department-recovers-nearly-6-billion-false-claims-act-cases-fiscal-year-2014, *archived at* https://perma.cc/XVG6-TCTP?type=image (acknowledging that 2014 marked a new record recovery under the FCA); *Justice Department Recovers $3.8 Billion from False Claims Act Cases in Fiscal Year 2013*, U.S. DEP'T OF JUSTICE (Dec. 20, 2013), http://www.justice.gov/opa/pr/2013/December/13-civ-1352.html, *archived at* https://perma.cc/3X8Y-BSYW?type=image (describing 2013 as a banner year for civil fraud recoveries, including $2.6 billion in health care fraud recoveries); *Justice Department Recovers Nearly $5 Billion in False Claims Act Cases in Fiscal Year 2012*, U.S. DEP'T OF JUSTICE (Dec. 4, 2012), http://www.justice.gov/opa/pr/2012/December/12-ag-1439.html, *archived at* https://perma.cc/W9HY-BHVP?type=image (highlighting the 2012 recoveries as a symbol of the Obama administration's commitment to fraud prevention and recovery of civil claims); *Justice Department Recovers $3 Billion in False Claims Act Cases in Fiscal Year 2011*, U.S. DEP'T OF JUSTICE (Dec. 19, 2011), http://www.justice.gov/opa/pr/2011/December/11-civ-1665.html, *archived at* https://perma.cc/52LV-P3QL?type=image (expressing the integral role played by whistleblowers in allowing for unveiling of fraudulent activities and civil remedies to reclaim fraudulent reimbursements).

[2] *See* 31 U.S.C. §§ 3729–3733 (prohibiting a person or entity from knowingly presenting to the U.S. government a false or fraudulent claim for payment, and allowing for an individual to bring suit on behalf of the U.S. government); Daniel Long, Comment, *Last Call: According First-Filed Qui Tam Complaints Greater Preclusive Effect Under* Batiste*'s Narrow Interpretation of the First-to-File Rule*,

files a claim, the responsibility then falls to the Attorney General to investigate the alleged violation and determine whether to bring a civil action.[3]

As a response to a plaintiff's claim in FCA litigation, defendants have an opportunity to present a defense under Federal Rule of Civil Procedure 12(b)(6) that the plaintiff failed to state a claim upon which relief could be granted.[4] Generally, the rules of pleading must state a general claim for relief and present allegations which are plausible on their face.[5] When evaluating FCA complaints which allege fraud, the plaintiff's claims are required to meet an elevated standard requiring particularity.[6] In 2013, in *Foglia v. Renal Ventures Management LLC* (*Foglia II*), the U.S. Court of Appeals for the Third Circuit held that in order to meet the heightened pleading requirement outlined in Rule 9(b), a plaintiff only needed to allege facts that establish a strong inference that false claims were submitted.[7]

This Comment argues that the Third Circuit set an appropriate bar for plaintiffs to reach discovery for false claims.[8] Part I of this Comment addresses the requirements of an FCA complaint, the various ways in which circuit courts have interpreted the particularity requirement of Rule 9(b), and the factual background in *Foglia*.[9] Part II discusses the decision in *Foglia II* and the "strong inference" standard applied to the facts of the case by the Third Circuit.[10] Part III argues that the Third Circuit was correct in declining to interpret

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54 B.C. L. REV. E. SUPP. 161, 161–62 (2013), http://lawdigitalcommons.bc.edu/bclr/vol54/iss6/13/, *archived at* http://perma.cc/9XNS-BXTD.

[3] *See* 31 U.S.C. § 3730(a) (delegating to the U.S. Attorney General the responsibility of investigating alleged violations and bringing civil action under 31 U.S.C. § 3730).

[4] *See* FED. R. CIV. P. 12(b)(6) (delineating plaintiff's failure to state a claim upon which relief can be granted as an assertable defense); Lovelace v. Software Spectrum Inc., 78 F.3d 1015, 1021 (5th Cir. 1996) (affirming district court's dismissal of securities fraud claims when facts alleged failed to indicate that the defendant engaged in conscious fraudulent behavior).

[5] *See* FED. R. CIV. P. 8(a)(2) (establishing the general rules of pleading in Civil Procedure); Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 547 (2007) (holding that allegations made by plaintiffs of parallel anti-competitive conduct were insufficient to meet the standards of Rule 8(a)(2) because the presented facts were insufficient to state a claim for relief that was plausible on its face); *see also* Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009) (providing courts the discretion to use judicial experience and common sense in making determinations as to whether a plausible claim for relief is stated in a given complaint).

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

[7] 754 F.3d 153, 158 (3d Cir. 2014) (adopting a lenient pleading standard that requires plaintiff to plead only facts sufficient to establish a strong inference that false claims were submitted).

[8] *See infra* notes 50–63 and accompanying text; *see also Foglia II*, 754 F.3d at 153 (establishing the requirement that plaintiff, in pleading sufficient particularity, must allege details of scheme and reliable indicia that support a strong inference that false claims were submitted).

[9] *See infra* notes 12–32 and accompanying text.

[10] *See infra* notes 33–49 and accompanying text.

Rule 9(b) in a manner that would have required all plaintiffs to produce complaints with an unreasonable level of specificity related to the alleged fraud.[11]

I. Factual Requirements Needed to Constitute a False Claim and Background of *Foglia* Case

Due to the fact that the financial payouts for FCA claims are often enormous, adopting an appropriate standard for determining the required factual specificity for an FCA pleader is critical.[12] Section A of this Part describes the types of claims and the standard of pleading required by the Federal Rules of Civil Procedure.[13] Section B analyzes the differing interpretations held by different circuits.[14] Finally, Section C presents a brief factual background of *Foglia*.[15]

A. Federal False Claims Act Includes Legally Fraudulent and Factually False Claims, And Requires Heightened Level of Pleading

The FCA prohibits the submission of false or fraudulent claims to the government and authorizes private individuals bringing a lawsuit on behalf of the government to retain a portion of any resulting damages award.[16] An FCA claim must allege that the defendant submitted either a legally fraudulent or

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[11] *See infra* notes 50–63 and accompanying text; *see also Foglia II*, 754 F.3d at 153 (noting that it is hard to reconcile the text of the FCA with the more particular standard required by various circuits).

[12] *See* United States *ex rel.* Thorpe v. GlaxoSmithKline PLC, No. CIV. A. 03-10641-RWZ, 2012 WL 5361036, at *1 (D. Mass. Nov. 1, 2012) (acknowledging the multimillion dollar payout to whistleblowers stemming from FCA complaints against GlaxoSmithKline and subsequent settlement of contested civil claims); Peter Loftus, *Invoking Anti-Fraud Law, Louisiana Doctor Gets Rich*, Wall St. J., July 24, 2014, http://www.wsj.com/articles/invoking-anti-fraud-law-louisiana-doctor-gets-rich-1406169003, *archived at* https://perma.cc/EG4J-9UF2?type=pdf (profiling a Louisiana doctor who has received $38 million in government rewards for his efforts as a whistleblower over the course of two decades); *Glaxo to Plead Guilty, Will Pay $3 Billion Stemming from Drug Marketing*, LexisNexis Legal Newsroom (July 2, 2012), http://www.lexisnexis.com/legalnewsroom/litigation/b/litigation-blog/archive/2012/07/02/glaxo-to-plead-guilty-will-pay-3-billion-stemming-from-drug-marketing.aspx, *archived at* https://perma.cc/ZFN2-QFNS?type=image (noting that GlaxoSmithKline's settlement included a $2 billion payment related to FCA complaints alleged by plaintiffs Greg Thorpe and Blair Hamrick); *see also* United States *ex rel.* Clausen v. Lab. Corp. of Am., 290 F.3d 1301, 1301 (11th Cir. 2002) (affirming dismissal of FCA complaint filed by medical testing corporation's competitor on the basis that the claims alleged by plaintiff were insufficient to show particularity of scheme to engage in duplicative testing and unnecessary billing).

[13] *See infra* notes 16–21 and accompanying text.

[14] *See infra* notes 22–26 and accompanying text.

[15] *See infra* notes 27–32 and accompanying text.

[16] 31 U.S.C. § 3729(a)(1)(G) (2012) (establishing civil liability of at least $5,000 plus three times the amount of damages sustained by the government for any individual who knowingly makes false statement or record to the government); Foglia v. Renal Ventures Mgmt. LLC (*Foglia I*), 830 F. Supp. 2d 8, 14 (D.N.J. 2011) (noting that the FCA employs qui tam actions to empower private individuals to bring a lawsuit on behalf of the government in exchange for a right to a portion of resulting damages award).

false claim.[17] A factually false claim is related to reimbursement request for an incorrect description of goods or services provided.[18] A legally false claim is when a recipient of government funds has certified compliance with a statute or regulation as a condition of payment, yet knowingly failed to comply with that same statute or regulation.[19]

In a complaint alleging a violation of the FCA, a claimant must meet the higher pleading requirements set by Rule 9(b) as opposed to a general pleading standard required by Rule 8(a).[20] Rule 9(b) requires a party pleading a special matter, such as fraud, to state with particularity the circumstances constituting fraud or mistake.[21]

B. Circuit Split Related to Required Level of Particularity

In regards to Rule 9(b) pleading generally, the Third Circuit has held that it requires plaintiffs to plead alleged fraud with enough particularity to ensure that defendants are placed on notice of the misconduct with which they are

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[17] *Foglia I,* 830 F. Supp. 2d at 16*; see* United States *ex rel.* Conner v. Salina Reg'l Health Ctr., Inc., 543 F.3d 1211, 1217 (10th Cir. 2008) (holding that the plaintiff-whistleblower's failure to allege a legally fraudulent or legally false claim was fatal to an evaluation of the plaintiff's claim); *see also* United States *ex rel.* Wilkins v. United Health Grp., Inc., 659 F.3d 295, 305 (3d Cir. 2011) (highlighting the distinction between legally and factually false claims).

[18] *See, e.g.*, *Foglia II*, 754 F.3d at 153,157 (identifying claim that dialysis company inflated their use of particular medication to seek fraudulent reimbursement as a factually false claim); *Conner*, 543 F.3d at 1217 (describing factually false claims as straightforward situations wherein the government payee submitted an incorrect description of goods or services provided); Mikes v. Straus, 274 F.3d 687, 703 (2d Cir. 2001) (describing a claim for worthless services as a derivative of factually false claims because it seeks reimbursement for service not provided).

[19] *See, e.g.*, *Conner*, 543 F. 3d at 1211 (holding that hospital's allegedly false certification that it was in compliance with Medicare statutes could not form basis for cause of action); *Mikes*, 274 F.3d at 694, 696–97 (categorizing plaintiff's allegation that Medicare reimbursement claims were not performed in accordance with American Thoracic Society guidelines as a legally false claim); *Foglia I*, 830 F. Supp. 2d at 16, 21 (describing legally false claims as instances where a payee has certified compliance yet knowingly failed to comply with government regulation and finding that plaintiff failed to state a claim under the express or implied false certification theory of legally false claims).

[20] *See* Bly-Magee v. California, 236 F.3d 1014, 1018 (9th Cir. 2001) ("The FCA is an anti-fraud statute. As such, we hold that complaints brought under the FCA must fulfill the requirements of Rule 9(b)—defendants accused of defrauding the federal government have the same protection as defendants sued for fraud in other contexts."). *Compare* FED. R. CIV. P. 8(a) (requiring a short and plain statement of jurisdiction and relief sought), *with* FED. R. CIV. P. 9(b) ("In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.").

[21] FED. R. CIV. P. 9(b). Regarding FCA cases:

> Every major federal court of appeals has held that because the essence of a False Claims Act case is fraud, Rule 9(b) applies to FCA cases. As a result, plaintiffs in FCA cases, whether the government, qui tam plaintiff, or both, must make far more detailed allegation in FCA complaints than in most litigation.

JOHN T. BOESE, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS § 5.04 (2014).

charged, and to safeguard defendants against unsubstantiated charges of fraud.[22]

Within the subset of Rule 9(b) claims pertaining to the FCA, prior to *Foglia*, the Third Circuit had not weighed in on what standard of particularity is required in FCA cases.[23] The various circuit courts have disagreed as to what level of specificity is required in order to satisfy the particularity requirement of Rule 9(b) with regards to FCA claims.[24] The Fourth, Sixth, Eighth, and Eleventh Circuits have required specificity related to time, place, contents of acts, and identity of actors.[25] In contrast, the First, Fifth, and Ninth Circuits have held that it is sufficient for a plaintiff to allege only enough details of a scheme and reliable indicia that leads to a strong inference that false claims were actually submitted.[26]

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[22] Craftmatic Sec. Litig. v. Kraftsow, 890 F.2d 628, 645 (3d Cir. 1989); *see* Seville Indus. Machinery Corp. v. Southmost Machinery Corp., 742 F.2d 786, 791 (3d Cir. 1984) (ruling that plaintiff pleas are designed to safeguard defendant against spurious charge, but that nothing in Rule 9(b) requires information pertaining to date, place, or time).

[23] *Foglia II*, 754 F.3d at 153 (explicitly identifying the court's analysis related to the particularity requirement of FCA claims as a matter of first impression).

[24] *Id.* at 155 (acknowledging the contrast between the standard used by the Fourth, Sixth, Eighth and Eleventh Circuits on one hand, and by the First, Fifth, and Ninth Circuits on the other); *see False Claims Act/Qui Tam Actions*, 26 BUS. TORTS REP. 282, 282 (2014) (commenting on the federal circuit split related to the details required to satisfy particularity requirement, and describing the approach in *Foglia* as more liberal than other courts).

[25] *Foglia II*, 754 F.3d at 155–56 (summarizing the varying interpretations employed by varying circuits in regards to their analysis of Rule 9(b)'s particularity requirement); *see, e.g.*, United States *ex rel.* Nathan v. Takeda Pharm. N. Am., Inc., 707 F.3d 451, 455, 457–58 (4th Cir. 2013) (explicitly disagreeing with the relaxed construction of Rule 9(b) used in some circuits), *cert. denied* 134 S. Ct. 1759 (2014); United States *ex rel.* Bledsoe v. Cmty. Health Sys., Inc., 501 F.3d 493, 510 (6th Cir. 2007) (holding that a fraudulent scheme with a high level of generality reaching discovery would disallow defendants from receiving the protection of notice for charges brought against them); United States *ex rel*. Joshi v. St. Luke's Hosp., Inc., 441 F.3d 552, 557 (8th Cir. 2006) (ruling that allegations of false billing submitted by a doctor did not meet the particularity requirement because details of time, place, content of act, and identity of actors was not provided); *Clausen*, 290 F.3d at 1312, 1315 (determining that claims lacking actual dates and information regarding billing policies did not meet minimum pleading requirements).

[26] *Foglia II*, 754 F.3d at 156 (offering a background summary of the circuits adopting an interpretative approach most similar to the standard eventually adopted by the court); *see, e.g*., Ebeid *ex rel*. United States v. Lungwitz, 616 F.3d 993, 998–99 (9th Cir. 2010) (refusing to embrace a categorical approach that would require examples of false claims to support every allegation and adopting flexible standard that requires only reliable indicia that leads to a strong inference of false claims being submitted); United States *ex rel.* Duxbury v. Ortho Biotech Prods., L.P., 579 F.3d 13, 29–30 (1st Cir. 2009) (applying flexible standard to submission of false claims by eight healthcare providers and determining that adequate information was provided to satisfy 9(b)); United States *ex rel.* Grubbs v. Kanneganti, 565 F.3d 180, 190 (5th Cir. 2009) (rejecting the notion that time, place, contents of acts, and identity of actors are required elements of successfully meeting the particularity standard of 9(b)).

C. Factual Background in Foglia

In 2011, in *Foglia I*, the U.S. District Court of New Jersey evaluated a qui tam claim alleging that Renal Ventures Management ("defendant"), a dialysis care services company, submitted false claims for Medicare funds.[27] This claim was submitted by the whistleblower Thomas G. Foglia ("plaintiff")—a registered nurse at the defendant's dialysis center in Sewell, New Jersey from March 13, 2007 to November 7, 2008.[28]

The plaintiff argued that the defendant improperly used and billed for Zemplar, a prescription medication used to treat kidney disease.[29] The plaintiff also claimed that the defendant violated the FCA by accepting federal funds stemming from the improper administration of dialysis services.[30]

The district court dismissed the plaintiff's second amended complaint, and the plaintiff appealed the dismissal of his claim in relation to the overbilling of Zemplar.[31] The U.S. Court of Appeals for the Third Circuit reversed the district court's dismissal of the factually false claim portion and remanded to the district court for further proceedings.[32]

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[27] 830 F. Supp. 2d at 10. Qui tam provisions exist to give "whistleblowers" the right to file claims on behalf of the U.S. government. Long, *supra* note 2, at 162. "Qui tam" is a Latin term that is part of a longer phrase translating to "who as well sues for the king as for himself sues in this matter." *Id.* (citing BLACK'S LAW DICTIONARY 1368 (9th ed. 2009)).

[28] *Foglia I*, 830 F. Supp. 2d at 10.

[29] *Id.* at 11. Specifically, plaintiff alleged that defendant re-used single dose Zemplar containers for injectable medications, in violation of Food and Drug Administration (FDA) clinical recommendations. *Id.* Plaintiff alleged that defendant submitted factually false claims seeking federal reimbursement for up to fifty vials of Zemplar per day when only twenty-nine to thirty-five were actually used. *Id.* at 12. But, importantly, the plaintiff failed to offer support that both the manufacturer and the FDA clinically recommended providers to discard unused portions of Zemplar containers. *Id.* at 20.

[30] *Id.* at 17–18. Pursuant to the New Jersey Administrative Code, dialysis centers are required to staff their facilities with at least one registered nurse for every nine patients receiving dialysis services, and at least one registered nurse, practical nurse, or trained patient care technician for every three patients receiving dialysis services. N.J. ADMIN. CODE § 8:43A-24.7 (2014); *Foglia I*, 830 F. Supp. 2d at 10–11. The Plaintiff alleged—and listed by date—several occasions of inadequate nurse to staff ratio and other failures to comply with these state regulations. *Foglia I*, 830 F. Supp. 2d at 11. The court noted, however, that the plaintiff failed to identify a rule, regulation, or other source that requires compliance with New Jersey's regulations to obtain payment from the federal government. *Id.* at 20.

[31] *Foglia II*, 754 F.3d at 153, 155. The plaintiff's appeal centered on the reuse of Zemplar vials in order to fraudulently receive an inflated reimbursement from the government—a factually false claim. *Id.* at 157; *see supra* notes 18–19 and accompanying text (describing legally fraudulent and legally false claims as the two types of FCA complaints).

[32] *See Foglia II*, 754 F.3d at 158. In *Foglia*, the factually false claim was related to the amount of Zemplar that was administered to patients. *See id.*

II. Appellate Court Review and Third Circuit's Appropriate Application of 9(b) Interpretation and Strong Inference Approach to *Foglia*

In 2014, in *Foglia v. Renal Ventures Management LLC* (*Foglia II*), the U.S. Court of Appeals for the Third Circuit determined, as a matter of first impression, their interpretation of Rule 9(b)'s particularity requirement for FCA claims.[33] Section A of this Part addresses the Third Circuit's interpretation of Rule 9(b) within this FCA-specific context.[34] Section B of this Part describes the Third Circuit's application of their interpretation to the facts in *Foglia* and the court's conclusion based on that application.[35]

A. Third Circuit Analysis: Required Particularity

The degree of particularity required in an FCA complaint was an issue of first impression for the Third Circuit in this case.[36] One standard of particularity adopted by the Fourth, Sixth, Eighth, and Eleventh Circuits requires that a plaintiff show "representative samples" in the complaint, including specific information regarding time, place, content of the acts, and identity of actors.[37] A different—more plaintiff-friendly standard—has been accepted by the First, Fifth, and Ninth Circuits, which allows general details of a scheme to be sufficient, so long as these details establish for a strong inference that false claims were submitted.[38]

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[33] 754 F.3d 153, 153 (3d Cir. 2014).

[34] *See infra* notes 36–42 and accompanying text.

[35] *See infra* notes 43–49 and accompanying text.

[36] *Foglia II*, 754 F.3d at 153.

[37] *See, e.g.*, *id.* at 155–56 (landscaping the heightened standard of particularity required by the Sixth, Eighth, and Eleventh Circuits); United States *ex rel.* Nathan v. Takeda Pharm. N. Am., Inc., 707 F.3d 451, 455, 457–58 (4th Cir. 2013) (holding that some indicia of reliability must be provided to support the allegation that a false claim was presented to the government), *cert. denied*, 134 S. Ct. 1759 (2014); United States *ex rel.* Bledsoe v. Cmty. Health Sys., Inc., 501 F.3d 493, 510 (6th Cir. 2007) (asserting that a "clear and unequivocal" requirement of 9(b) and the statutory text of the FCA is the allegation of specific false claims); United States *ex rel*. Clausen v. Lab. Corp. of Am., Inc., 290 F.3d 1301, 1312, 1315 (11th Cir. 2002) (holding a failure to allege specificity in regards to if and when improper claims were submitted to the government fatal in evaluating employee's allegations toward medical testing service provider against standard of 9(b)).

[38] *Foglia II*, 754 F.3d at 156; *see, e.g.*, Ebeid *ex rel*. United States v. Lungwitz, 616 F.3d 993, 998–99 (9th Cir. 2010) (holding that details of false claims related by physician against health care businesses were not sufficiently detailed to create reliable indicia leading to a strong inference that claims were actually submitted); United States *ex rel*. Duxbury v. Ortho Biotech Prods., L.P., 579 F.3d 13, 29–30 (1st Cir. 2009) (determining the claims made by sales representatives against pharmaceutical distributing company to satisfy 9(b) because the details of "who, what, where, and when" were provided, although no specific claims were identified); United States *ex rel.* Grubbs v. Kanneganti, 565 F.3d 180, 190 (5th Cir. 2009) (ruling that 9(b) is context-specific and may survive without alleging details of an actually submitted false claim so long as there is reliable indicia that leads to a strong inference of claims actually being submitted).

The Third Circuit noted that the text of the FCA does not require that the exact content of the false claims in question be shown.[39] Additionally, the court determined that the primary purpose of Rule 9(b) is to provide defendants with fair notice of plaintiffs' claims, not to delineate every specific detail of fraud.[40] Therefore, the Third Circuit concluded that requiring particular details of fraudulent acts, including time, place, and identity of actors would create too high of a pleading burden for plaintiffs.[41] Instead, the court joined the First, Fifth, and Ninth Circuits by adopting the requirement that a complaint must allege sufficient details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted.[42]

B. Application of Strong Inference Standard in Foglia

Presuming the allegations as true, the Third Circuit addressed the allegations of fraud made by the plaintiff.[43] First, the court evaluated the details of the complaint purported by the plaintiff, and noted the plausibility of the purported scheme.[44] Specifically, the court noted that Medicare reimburses for a

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[39] *Foglia II*, 754 F.3d at 156; *see* United States *ex rel*. Wilkins v. United Health Grp., Inc., 659 F.3d 295, 308 (3d Cir. 2011) (noting that the Third Circuit has never required that a plaintiff must identify a specific claim for payment at the pleading stage); *see also* 31 U.S C. § 3729(a)–(g) (2012) (addressing the sorts of acts that create liability for False Claims, but not providing particulars related to the required allegations of a False Claim at the pleading stage).

[40] *See Foglia II*, 754 F.3d at 156; *see also* FED R. CIV. P. 9(b); *Ebeid*, 616 F.3d at 999 (holding that a plaintiff must allege enough detail to give a defendant notice of particular misconduct so that the defendant may defend against the charge and not just deny all wrongdoing).

[41] *Foglia II*, 754 F.3d at 156; *see Grubbs*, 565 F.3d at 190 (stating that satisfying Rule 9(b) is context-specific, and a plaintiff may sufficiently state circumstances constituting fraud without meeting any particular court-appointed standard). As further support for this conclusion, the Third Circuit acknowledged that in a brief for a False Claims case, the Solicitor General specifically noted that pleading the details of a specific false claim presented to the government is not a necessary requirement of a viable FCA complaint. *Foglia II*, 754 F.3d at 156 (quoting Brief for the United States as Amicus Curiae at 10–11, *Nathan*, 707 F.3d 451 (No. 12-1349), 2014 WL 709660, at *10–11).

[42] *Foglia II*, 754 F.3d at 157–58 (quoting *Grubbs*, 656 F.3d at 190); *see Ebeid*, 616 F.3d at 998–99 (joining the Fifth Circuit in concluding that under Rule 9(b) it is sufficient to provide details leading to a reasonable conclusion that false claims were actually submitted); *Duxbury*, 579 F.3d at 30 (determining that facts supported a strong inference that false claims were actually submitted to satisfy Rule 9(b)).

[43] *Foglia II,* 754 F.3d at 157; *see* Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992) (declaring that inferences should be drawn in the light most favorable to the non-moving party); Scotece v. Prudential Ins. Co. of America, 322 F. Supp. 2d, 680, 680 (E.D. Va. 2004) (holding that the court's duty in deciding motion to dismiss is to draw all assumptions that are reasonable in favor of the non-moving party). Specifically, plaintiff claimed that defendant submitted inflated receipts to the government pertaining to defendant's use of Zemplar, a prescription medication used to treat kidney disease. *Foglia II,* 754 F.3d at 157–58. As evidence of this, plaintiff provided patient logs that suggested defendant was inaccurately reporting the amount of Zemplar actually used on patients, in order to seek fraudulent reimbursement from the government. *See id.* at 158.

[44] *Foglia II,* 754 F.3d at 158 (acknowledging the fact that the Medicare policy of reimbursing for a full vial of Zemplar, regardless of whether the whole vial is used, was a plausible incentive to fraudulently re-use vials); *see* FED R. CIV. P. 8(a)(2) (establishing the general rules of pleading in Civil

full vial of Zemplar regardless of whether all Zemplar is used and, therefore, there is a fraudulent incentive to re-use Zemplar vials and report to the government that new vials were used for each patient.[45] In addition to this incentive, patient logs showed that less Zemplar was being used than if vials were administered with single uses.[46]

Second, the court viewed the complaint as giving the defendant notice of the specific charges against it, as required by Rule 9(b).[47] The alleged scheme was clear and offered enough specificity to provide the defendant with an opportunity to refute the allegations of fraud.[48] Based on these two observations, the court held that the plaintiff alleged particular details of a scheme to submit false claims, paired with reliable indicia leading to a strong inference that false claims were actually submitted.[49]

III. Establishing a Standard for False Claims Act Complaints to Survive Dismissal

The U.S. Court of Appeals for the Third Circuit's 2014 decision to adopt a lenient pleading standard in *Foglia v. Renal Ventures Management LLC (Foglia II*) should be adopted by other circuits, because it is a sound decision, both from a textual perspective and a policy standpoint.[50] First, the Third Circuit's analysis in *Foglia II* is consistent with a literal interpretation of Rule

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Procedure); Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 547 (2007) (holding that allegations made by plaintiffs of parallel anti-competitive conduct were insufficient to meet the standards of 8(a)(2) because the presented facts were insufficient to state a claim for relief that was plausible on its face); *see also* Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009) (providing courts the discretion to use judicial experience and common sense in making determinations as to whether a plausible claim for relief is stated in a given complaint).

[45] *Foglia II*, 754 F.3d at 158 (detailing the Medicare reimbursement plan for Zemplar vials and acknowledging that the scheme presented by plaintiff is supported by a structural incentive to inflate re-use Zemplar vials and inflate reimbursements).

[46] *See id.*; *supra* note 43 and accompanying text (describing supporting facts under that plaintiff made false claims, including documentation of patient logs).

[47] *Foglia II*, 754 F.3d at 158; *supra* note 22 and accompanying text (noting that it is a requirement of some circuit courts—including the Third Circuit—that plaintiff in pleading fraud generally, must provide enough details to put defendant on notice of the specific conduct being alleged); *see* FED. R. CIV. P. 9(b) ("In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.").

[48] *See Foglia II*, 754 F.3d at 158 (concluding that plaintiff provided sufficient facts to satisfy Rule 9(b) and therefore to survive a 12(b)(6) dismissal motion); *supra* note 45 and accompanying text (recognizing the presence of financial incentives to engage in fraudulent activity within the plaintiff's alleged scheme).

[49] *See Foglia II*, 754 F.3d at 158 (noting that plaintiff provided sufficient facts to meet the pleading requirements of Rule 9(b)); *supra* note 41 and accompanying text (grouping the Third Circuit alongside the First, Fifth, and Ninth Circuits as circuits with a more lenient standard for pleading plausibility in FCA cases).

[50] *See infra* notes 51–63 and accompanying text.

9(b), as well as the text of the FCA: Rule 9(b) provides no requirements for particularity of identifying information, and the text of the FCA offers no indication that this level of specificity is required.[51]

Furthermore, the *Foglia II* decision offers a more reasonable bar to discovery than a standard forcing plaintiffs to allege highly specific details related to time, place, contents of acts, and identity of actors at the pleading stage.[52] Ultimately, because it is a civil provision, a plaintiff alleging an FCA violation must ultimately prove the claim by a preponderance of the evidence.[53] Therefore, in a trial situation, a reasonable jury could analyze a scheme as well as supporting indicia and provide relief, so long as it was determined to be more likely than not that a false claim was submitted.[54]

The Third Circuit decision in *Foglia II*, although acknowledging that the facts presented a "close case scenario," offers a manageable standard for plaintiffs seeking discovery within its jurisdiction.[55] The *Foglia II* court was appropriately persuaded by the construction used by the Solicitor General, who argued that 9(b) may be satisfied without alleging dates and contents of false

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[51] *See* 754 F.3d 153, 156 (3d Cir. 2014) (noting that the text of the FCA does not require the exact content of the false claims in question to be shown); *see also* 31 U.S.C. § 3729 (a)–(g) (2012) (neglecting to offer any specific information as to what level of detail is required in order to satisfy the requirements of the FCA statute); FED R. CIV. P. 9(b) (requiring that plaintiff state with particularity only the "circumstances constituting fraud or mistake"); Aaron Rubin, *To Present Bills or Not To Present? An In-Depth Analysis of the Burden of Pleading in Qui Tam Suits,* 8 SETON HALL CIRCUIT REV. 467, 503 (2012) (applauding the generally relaxed pleading standard in FCA scenarios).

[52] *See* Petition for Writ of Certiorari at 5, United States *ex rel.* Hopper v. Solvay Pharm., 588 F.3d 1318 (2009) (No. 091065), 2010 WL 2771705, at *5 (explaining that decisions which impose a strict interpretation of Rule 9(b) apply an iron grasp far exceeding the intended reach of the Federal Rule, and impose an impossible pleading burden on petitioners). Notably, influential legal scholars Chief Judge Easterbrook and Judge Posner have also identified with the opinion that requiring details of a specific claim weaken the force of qui tam litigation. *Id.* at 4–5 ("As Chief Judge Easterbrook, joined by Judge Posner, noted in *Lusby* . . . the requirement that details of a specific claim must be pled 'takes a big bite out of qui tam litigation.'" (quoting United States *ex rel.* Lusby v. Rolls-Royce Corp., 570 F.3d 849, 854 (7th Cir. 2009))); *see* United States *ex rel.* Grubbs v. Kanneganti, 565 F.3d 180, 189 (5th Cir. 2009) (asserting that if FCA claims are adjudicated under a strict interpretation of Rule 9(b), a plaintiff is required to plead a level of detail commensurate to that required to prevail at trial on the merits).

[53] *See* UMC Electronics Co. v. United States, 249 F.3d 1337, 1338 (Fed. Cir. 2001) (establishing a preponderance of the evidence standard as the required level of proof for False Claims Act and Contract Disputes Act cases).

[54] *See Grubbs*, 565 F.3d at 189–90 (asserting that a reasonable civil jury could determine preponderance standard was met based on inferences and indicia, even if the facts fell short of satisfying the pleading standard for an illegal act).

[55] *See Foglia II*, 754 F.3d at 158 (suggesting that the level of facts provided by plaintiff barely met the requirements to satisfy Rule 9(b)). The Solicitor General has applauded this interpretation of Rule 9(b). Brief for the United States as Amicus Curiae, *supra* note 41, at 10–11 ("Several courts of appeal have correctly held that a qui tam complaint satisfies Rule 9(b) if it contains detailed allegations supporting a plausible inference that false claims were submitted to the government even if the complaint does not identify specific requests for payment.").

claims.[56] The Third Circuit adopted this ideal, with the additional comment that this "nuanced" interpretation favored by the Solicitor General is appropriate, so long as a complaint provides sufficient detail to give defendants fair notice of the plaintiffs' claims.[57]

In contrast, forcing a whistleblower to allege details with such a heightened level of specificity provides an unrealistic bar to discovery, and creates a level of proof that exceeds that required in adjudication at a trial setting.[58] Under a strict application of Rule 9(b) at the pleading stage, situations arise where even in light of compelling statistical probability that fraudulent claims were submitted, a plaintiff is unable to proceed to discovery.[59] As a result, those circuits requiring specificity as to time, place, contents of acts, and identity of actors have established a bar to discovery that exceeds the preponderance of the evidence standard applied at adjudication.[60]

Lastly, it is worth noting that FCA cases typically end in settlement, meaning that the determination of whether Rule 9(b) has been satisfied holds a

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[56] *See* 754 F.3d at 156–57; Brief for the United States as Amicus Curiae, *supra* note 41, at 10–11 (labeling a per se rule requiring dates and contents of false claims as an interpretation that undermines the FCA's effectiveness, and stating that 9(b) may be satisfied without this strict requirement). The Solicitor General noted that even some courts that had initially required satisfaction of the per se requirement have deviated and adopted a more "nuanced" approach. Brief for the United States as Amicus Curiae, *supra* note 41, at 10; *see supra* note 37 and accompanying text (outlining the application of the alternative, strict standard for pleading plausibility used by the Fourth, Sixth, and Eleventh Circuits).

[57] *See Foglia II*, 754 F.3d at 156–57 (commenting that the purpose of Rule 9(b) is to provide defendants with fair notice of plaintiffs' claims, and so long as the relaxed pleading standard satisfies that purpose, it is a sufficient approach); *see also* Sean Wajert, *Class Action on Smoke Detectors Dismissed: All Smoke No Fire*, MASSTORTDEFENSE (Dec. 23, 2014), http://www.masstortdefense.com/tags/rule-9/, *archived at* http://perma.cc/L685-UHZW ("One of the cardinal purposes of Rule 9(b) is to 'provid[e] a defendant fair notice of plaintiff's claim, to enable preparation of [a] defense.'" (quoting DiVittorio v. Equidyne Extractive Indus., Inc., 822 F.2d 1242, 1247 (2d Cir. 1987))).

[58] *See Foglia II*, 754 F.3d at 156; *Grubbs*, 565 F.3d at 189–90 (noting that the exact dollar amount, billing numbers or dates do not need to be provided; requiring these details at pleading is a level of proof not necessarily demanded to win, even at trial); Charis Ann Mitchell, *A Fraudulent Scheme's Particularity Under Rule 9(B) Of The Federal Rules of Civil Procedure*, 4 LIBERTY U. L. REV. 337, 374 (2010) (arguing that when a court demands the relation of a specific claim from a plaintiff, the plaintiff is never able to satisfy that standard); *see also* Fowler v. UPMC Shadyside, 578 F.3d 203, 214 (3d Cir. 2009) (noting that standards of pleading an illegal act do not hold identical requirement as standard required to prove an illegal act).

[59] *See* Petition for Writ of Certiorari, *supra* note 52, at 16 (noting that even in the presence of an illegal marketing campaign that drove Medicaid reimbursements to be tripled, a strict interpretation of Rule 9(b) did not allow for any inference that false claims were submitted; thus, plaintiff could not proceed to discovery).

[60] *See Grubbs*, 565 F.3d at 190 (asserting that plaintiffs should not be required to provide a level of detail that exceeds that required at adjudication); *supra* note 37 and accompanying text (outlining the strict interpretation of requirements needed to survive dismissal, as applied in the Fourth, Sixth, Eighth, and Eleventh Circuits).

heightened significance in the eventual outcome of a specific suit.[61] Applying an unreasonable bar to discovery would detract from the policy goal of the FCA and prevent private citizens from playing an important role in the protection of government funds.[62] For the aforementioned reasons, the Third Circuit's decision in *Foglia II* should serve as a guide both to other circuits, as well as the U.S. Supreme Court, should the Court choose to intervene.[63]

CONCLUSION

The standards established in Federal Rule of Civil Procedure 9(b) as well as the False Claims Act do not delineate a specific level of particularity as being required. Additionally, the preponderance of the evidence standard applied at trial adjudication assumes that juries evaluate evidence and make inferences

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[61] *Latham's Lauer on Defending False Claims Act Cases*, 22 CORP. CRIME REP., Feb. 25, 2008, at 3, *available at* http://www.lw.com/mediacoverage/lathams-lauer-on-defending-false-claims-act-cases, *archived at* https://perma.cc/8UFL-DP3G?type=pdf (noting that FCA cases rarely go to trial, and typically end in a government-negotiated settlement). Because FCA cases almost always settle before trial, the court's decision at the pleading stage ends up determining whether a plaintiff will recover damages, and in a sense becomes a *de facto* adjudication. *See generally id.* (expounding on the idea that there are rarely opportunities for in-court advocacy in FCA cases).

[62] Rubin, *supra* note 51, at 471–72 (noting that Congress believed the only way to stop schemes to defraud public funds was to mobilize private citizens to bring forward civil suits alleging fraud); *see* 31 U.S.C. § 3730(b)(1) (2012) (establishing the role played by private individuals in brining civil actions on behalf of the United States government); S. REP. NO. 99-345, at 1 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5266 (arguing that American taxpayers lose millions of dollars each year as a result of false claims, and modern FCA legislation is needed to protect the defrauded taxpayer); *see also* Erwin Chemerinsky, *Controlling Fraud Against the Government: The Need for Decentralized Enforcement*, 58 NOTRE DAME L. REV. 995, 1014 (1983) (arguing for the desirability of a system based partly on citizen-initiated civil litigation, due to the limited agency resources and motives of prosecutors).

[63] *See supra* notes 50–62 and accompanying text (arguing in support of the Third Circuit's adoption of a lenient pleading standard in *Foglia II*). Although the U.S. Supreme Court has declined to hear FCA cases recently, because of the divergent standards for FCA cases related to 9(b) interpretation, it seems that this issue is ripe for review. *See* Jacques Smith & Michael Dearington, *Catch Me If You Can: The Divergent and Inconstant Pleading Requirements Governing Qui Tam Complaints,* BLOOMBERG BNA (Oct. 18, 2014), http://www.arentfox.com/sites/default/files/HFRA.1014.Arentfox.QuiTam.pdf, *archived at* http://perma.cc/BA2B-DPCN ("[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."); Genna Steinberg, *Third Circuit Adopts Less Rigid Pleading Standard for FCA Claims*, FCA ALERT (June 16, 2014), http://www.fcaalert.com/2014/06/articles/third-circuit-adopts-less-rigid-pleading-standard-for-fca-claims/, *archived at* http://perma.cc/L7E5-6GVL (noting that the Third Circuit decision in *Foglia* deepened the circuit split related to application of Rule 9(b) interpretation, and highlights the need for the Supreme Court to provide guidance). *But see* Ellyn Sternfield, *The Supreme Court Continues to Punt on False Claims Cases*, MINTZ LEVIN HEALTH LAW & POLICY MATTERS (Oct. 7th, 2014), http://www.healthlawpolicymatters.com/2014/10/07/the-supreme-court-continues-to-punt-on-false-claims-cases/, *archived at* http://perma.cc/V9JF-UFY7 (describing the Supreme Court's decision to deny certiorari to settle 9(b) particularity divergence in recent cases).

based on a more-likely-than-not standard. Those circuits with strict interpretations of Rule 9(b) inappropriately require plaintiffs to include a level of specificity in complaints that exceeds that trial standard. The Third Circuit in *Foglia v. Renal Ventures Management LLC* correctly ruled that the presence of facts supporting a strong inference and reliable indicia that false claims were submitted provides sufficient detail to satisfy Rule 9(b)'s requirements.

PATRICK VENTER

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