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Minimum Pleading Requirements Needed to Prosecute Alleged Medicare Fraud

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A physician's scheme is to bill Medicare for unnecessary or unperformed services. A former employee is aware of the scheme and decides to blow the whistle, but lacks access to the billing records. Can a legally sufficient False Claims Act (FCA)[1] complaint be drafted without the specific information on an invoice (*i.e.*, date actually billed, invoice number, patient, amount charged, and service billed)?

In other words, is a copy of a bill necessary, or is it enough to describe the scheme with particularity? This article explores the conflicting case law addressing this question, and concludes that the U.S. Circuit Court of Appeals for the Fifth Circuit's holding in *United States ex rel. Grubbs v. Kanneganti*[2] exemplifies the best-reasoned approach to the pleading requirements for presentment.

As discussed within, *Grubbs* also illustrates an alternative basis of FCA liability—which does not require presentment—premised on making or using a false record. Regardless of presentment, any person is liable under the FCA who ''knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim.''[3]

Moreover, although *Grubbs* held that ''[u]nder all sections of the False Claims Act, the defendant must act with the purpose of getting a false claim paid by the government,''[4] the FCA was amended shortly after *Grubbs* was decided so as to no longer require an intent to induce government payment.

Thus, as to at least one available theory of liability under the amended FCA, in order to avoid dismissal, it would appear that a *qui tam* relator no longer needs detailed knowledge of whether a bill was actually submitted with intent to induce Government payment.

Rules of Pleading

Fed. R. Civ. P. (''Rule'') 8(a) requires only a short and plain statement of grounds for relief sufficient to place the defendant on fair notice of the claim. Rule 8 has recently been interpreted by the Supreme Court to require ''factual plausibility,''[5] thereby overturning the Court's previous admonition that ''a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.''[6]

Moreover, a heightened degree of factual specificity is required by Rule 9(b) with respect to allegations of fraud. For example, each element of common law fraud (*i.e.*, false statement of material fact, intent that recipient rely on false statement; belief by recipient of truth, and detrimental reliance) must be supported by detailed facts.

Typically, this is stated in terms of the ''who, what, where, when and how.'' The requirements of Rule 9(b) apply to ''fraud statutes'' such as the FCA.[7]

[1] 31 U.S.C. §§ 3729-3733.
[2] 565 F.3d 180 (5th Cir. 2009).
[3] 31 U.S.C. § 3729(a)(1)(B).

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[4] 565 F.3d at 192.
[5] *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).
[6] *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).
[7] *See, e.g., United States ex rel. Clausen v. Laboratory Corp. of America, Inc.*, 290 F.3d 1301, 1308-09 (11th Cir. 2002).

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Clausen Approach

FCA complaints are subject to Rule 12(b)(6) dismissal based on the *Clausen* approach unless the relator sets forth the date billed, invoice number, amount charged, description of service and particulars of presentment.

According to *Clausen*, the purpose of Rule 9(b) is to alert defendants to the precise misconduct charged and protect a defendant's reputation and goodwill against frivolous or unfounded charges of fraudulent conduct.[8] The court expressed concern that baseless allegations could be used to extract settlements.[9] This was found especially true as to FCA claims which in the court's view provided a ''windfall'' for the first to file.[10]

In *Clausen*, the Eleventh Circuit affirmed the dismissal of what it termed a Rule 9(b)-deficient complaint. A company competitor (a ''corporate outsider'') alleged a billing scheme, conveyed to him by a friend, which resulted in a clinical laboratory submitting bills for Medicare and Medicaid reimbursement.

The *Clausen* court held that it is insufficient for a plaintiff merely to describe a scheme in detail without offering ''some indicia of reliability'' in the complaint that an actual false claim for payment was made to the Government.[11] The court stated that presentment of a false claim is the ''*sine qua non* of a False Claims Act violation.''[12]

To plead a presentment claim, the minimum indicia of reliability required to satisfy the particularity standard are the specific contents of actually submitted claims, such as by providing actual bills or dates, and amounts.[13]

A conclusory statement that bills were submitted is insufficient, and when Rule 9(b) applies, pleadings generally cannot be based ''on information and belief.''[14]

The *Clausen* court refused to apply a more lenient standard for gaining access to discovery as is applicable when the evidence of fraud is uniquely within the control of the defendant.[15] The court suggested that the exception did not apply because the information was not uniquely held by the defendant. Citing to *United States ex rel. Russell v. Epic Healthcare Mgmt. Group*,[16] the court noted that such records were also possessed by the Health Care Financing Administration (''HCFA''). *Clausen* thus implied that the *qui tam* relator could obtain the information from HCFA (which became the Centers for Medicare and Medicare Services (''CMS'') on June 1, 2001).

What *Clausen* did not mention is that a request under the Freedom of Information Act (''FOIA'') would trigger § 3730(e)(4) of the FCA, which prohibits FCA actions based on publicly disclosed information unless the relator is an ''original source.'' An agency response to a FOIA request is considered publicly disclosed information.[17]

An ''original source'' is defined by the FCA as someone ''who has direct and independent knowledge of the information on which the allegations are based.''[18] The relator of course, would only need to pursue a FOIA request because of his very lack of direct knowledge of the information. For all practical purposes, even if, against all odds, a FOIA request yielded a timely response, it would risk triggering the public disclosure bar and thereby subject the case to immediate dismissal.

Thus, the rationale against relaxing Rule 9(b) pleading requirements is not answered by reference to the possibility of obtaining the information from the Government.[19]

As a practical matter, the whistleblower may be aware of the scheme, but lacks access to documentation to prove it. Although such information could be obtained in discovery,[20] *Clausen* allows no discovery if billing particulars are not pled, at least as to some examples of actually submitted false claims.

The First Circuit applied the *Clausen* approach in *Karvelas*. This case involved a hospital employee who alleged that the hospital was submitting Medicare claims for services that were provided improperly or not at all, but could not provide details on specific bills.

The First Circuit upheld the dismissal because the complaint failed to meet this standard:

> [A] relator must provide details that identify particular false claims for payment that were submitted to the government. In a case such as this, details concerning the dates of the claims, the content of the forms or bills submitted, their identification numbers, the amount of money charged to the government, the particular goods or services for which the government was billed, the individuals involved in the billing, and the length of time between the alleged fraudulent practices and the submission of claims based on those practices are the types of information that may help a relator to state his or her claims with particularity.[21]

The complaint before the First Circuit lacked details supporting an inference that bills were presented: ''[T]he complaint never specifies the dates or content of any particular false or fraudulent claim allegedly sub-

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[8] 290 F.3d at 1310; 1313 n. 24. The court did not see fit to mention that the FCA itself protects defendants from frivolous lawsuits by virtue of § 3730(d)(4), which provides that attorneys' fees and expenses may be assessed against a losing plaintiff whose action was clearly frivolous, vexatious or ''brought primarily for purpose of harassment.'' *Id.*

[9] *Id.* at 1313 n. 24.

[10] *Id.* This comment is symptomatic of the court's apparent underlying antipathy to FCA lawsuits. A plaintiff's so-called ''windfall'' is the statutorily endorsed incentive to encourage persons to expose fraud and ultimately recover funds to the Treasury. Often those persons with direct knowledge of the scheme and access to relevant billing records are not willing to risk the potential retaliatory actions that may follow from blowing the whistle, notwithstanding the remedy for retaliation. 31 U.S.C. § 3730(h). The vast majority of ordinary citizens desire to preserve their livelihoods, regardless of the potential reward offered by the FCA.

[11] 290 F.3d at 1311.

[12] *Id.*

[13] *Id.* at 1312.

[14] *Id.* at 1310.

[15] *Id.* at 1314 n. 25.

[16] 193 F.3d 304, 308 (5th Cir. 1999).

[17] *See, e.g.*, *United States ex rel. Mistick PBT v. Housing Auth.*, 186 F.3d 376, 383 (3d Cir. 1999), *cert. denied*, 529 U.S. 1018 (2000).

[18] 31 U.S.C. § 3730(e)(4)(B).

[19] *See United States ex rel. Karvelas v. Melrose-Wakefield Hosp.*, 360 F.3d 220, 230 (1st Cir. 2004).

[20] 290 F.3d at 1313 n. 24.

[21] *Karvelas*, 360 F.3d at 232-33.

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mitted for reimbursement by Medicare or Medicaid. It provides no identification numbers or amounts charged in individual claims for specific tests, supplies, or services.''[22] The complaint further failed to identify the individuals involved in the improper billing.[23]

The First Circuit pointed to the Government intervention provision in the FCA as a reason to enhance protection against unfocused discovery. It reasoned that absent details in the complaint about fraudulent bills submitted by defendants, the Government would have to decide whether to intervene on incomplete information.

The *Karvelas* court suggested that *qui tam* relators should not be allowed to use discovery to comply with Rule 9(b) pleading requirements. The court seemed to accept that ''allowing a *qui tam* relator to amend his or her complaint after conducting further discovery would mean that 'the government will have been compelled to decide whether or not to intervene absent complete information about the relator's cause of action.' ''[24] The First Circuit acknowledged that the Government could intervene after discovery,[25] but argued that by then the Government would have lost its opportunity to conduct a confidential investigation on its own time line.

The *Karvelas* court's concern with potentially prejudicing the Governments' right to make an informed decision about whether to intervene seems to be uninformed by a reading of the FCA provisions allowing the Government ample opportunity to serve confidential civil investigative demands prior to making an election under § 3730(b)(2) on whether to intervene in the action.[26] The *Karvelas* holding discourages whistleblowers from coming forward with their knowledge of schemes if they lack direct knowledge of billing detail. The Government may well be intrigued by detailed allegations of false or fraudulent billing schemes, and could issue focused civil investigative demands to obtain the particulars as to actually presented invoices. Given the Government's statutory right to propound civil investigative demands upon receipt of a sealed complaint,[27] the *Karvelas* court's concern is misplaced that a decision on intervention would be based on incomplete information if the complaint lacked details about whether bills were actually presented.

Moreover, once the complaint is unsealed, the purpose of discovery pertaining to the presentment of invoices referenced in the scheme is not to enable the relator to amend his complaint. Rather, the purpose of such discovery is to ascertain facts for proof at trial.

Relying on *Clausen* and *Karvelas*, the Tenth Circuit similarly held that a complaint against a health insurance company for submitting false claims to the HCFA did not meet the particularity requirements of Rule 9(b) because it failed to allege ''the specifics of any actual claims submitted.''[28]

While the First and Tenth circuits have relied on *Clausen*, a different Eleventh Circuit panel moved away from *Clausen's* most exacting language, accepting less billing detail in a case where particular allegations of a scheme offered indicia of reliability that bills were presented. In *United States ex rel. Walker v. R&F Properties of Lake County, Inc.*,[29] the Eleventh Circuit held that a FCA complaint met the requisite particularity based on a nurse practioner's allegations that she ''*believed* [the hospital] submitted false or fraudulent claims'' by billing nurse practioners' services as if performed by a doctor.[30]

The nurse practioner's complaint did not state any details of actually submitted claims, alleging only the scheme that, according to an office administrator, nurse practioner and doctor services were billed identically. These allegations by an ''insider'' to the practice were deemed sufficient to explain why the plaintiff believed false or fraudulent bills were actually submitted.

The court in *Walker* contrasted this situation with *Clausen*, in which a ''corporate outsider'' made speculative assertions that claims '' 'must have been submitted, were likely submitted or should have been submitted to the Government.' ''[31]

Grubbs Approach

The Fifth Circuit in *United States ex rel. Grubbs v. Kanneganti*,[32] held that a FCA complaint can survive dismissal even absent details of an actually presented false claim by alleging particular details of a scheme to submit false claims accompanied by reliable indicia that claims were actually submitted (*e.g.*, dates and descrip-

[22] *Id.* at 233.

[23] Contrary to *Clausen*, the court recognized that Rule 9(b) allegations of fraud may be asserted on ''information and belief.'' *Id.* at 226. However, the complaint must set forth the facts on which the belief is based.

[24] *Id.* at 231 (quoting Boese, *Civil False Claims and Qui Tam Actions* § 4.04[C]).

[25] *See* § 3730(c)(3).

[26] The Government's right to intervene within 60 days after it receives the complaint and written disclosure of material evidence may be extended, without limit, for good cause shown. *See* 31 U.S.C. §§ 3730(b)(2),(3). Information obtained in response to civil investigative demands may be shared with the *qui tam* relator. *Id.* § 3733(a)(1)(D). This, of course, would enable the *qui tam* relator to amend the complaint, Rule 15(a)(1), prior to serving the complaint on the defendant. Depending on the fruits of its investigation, the Government has the right to file its own complaint or amend the relator's complaint to add details or new claims. *Id.* § 3731(c).

[27] 31 U.S.C. § 3733.

[28] *United States ex rel. Sikkenga v. Regence BlueCross BlueShield*, 472 F.3d 702, 727-28 (10th Cir. 2006). *Accord United States ex rel. Roop v. Hypoguard*, 559 F.3d 818, 822 (8th Cir. 2009) (allegations of a systematic practice of submitting fraudulent claims must be supported by some representative examples); *United States ex rel. Bledsoe v. Community Health Sys., Inc.*, 501 F.3d 493, 509-10 (6th Cir. 2007) (allegations of a fraudulent scheme involving numerous transactions over a period of years must be referenced to representative examples).

[29] 433 F.3d 1349 (11th Cir. 2005).

[30] *Id.* at 1360 (emphasis added).

[31] *Id.* (quoting *Clausen*, 290 F.3d at 1311). *But see United States ex rel. Sanchez v. Lymphatx, Inc.*, 2010 U.S. App. LEXIS 3174 (11th Cir. Feb. 18, 2010), *2 (Affirming dismissal, the court found no indicia of reliability: ''[d]espite her assertion that she had direct knowledge of the defendants' billing and patient records, . . . Sanchez failed to provide any specific details regarding either the dates on or the frequency with which the defendants submitted false claims, the amounts of those claims, or the patients whose treatment served as the basis for the claims). The panel in *Sanchez* signaled the Eleventh Circuit's continued adherence to *Clausen*: ''to the extent that *Walker* conflicts with the specificity requirements of *Clausen*, our prior panel precedent rule requires us to follow *Clausen*.'' *Id.*

[32] 565 F.3d 180 (5th Cir. 2009).

tions of recorded, but unprovided, services and a description of the billing system).

The court recognized that, ultimately, the issue is what must be alleged to gain access to the federal discovery apparatus. The court noted that a common law fraud complaint must include ''the time, place and contents of the false representation, as well as the identity of the person making the misrepresentation and what that person obtained thereby.''[33] However, the *Grubbs* court emphasized that the meaning of Rule 9(b) depends on the context. In order to achieve the remedial purpose of the FCA (*i.e.*, encouragement of legitimate efforts to expose fraud), a plaintiff may sufficiently state with particularity the circumstances constituting fraud without including all the details of the ''time, place, contents, and identity'' standard.

As analyzed in *Grubbs*, in contrast to common law fraud, the FCA lacks the elements of reliance and damages.[34] The court interpreted the FCA as having a protective function: the FCA ''*protects* the Treasury from monetary injury. . . . The statute is remedial and exposes even unsuccessful false claims to liability.''[35] A person that presented fraudulent claims that were never paid remains liable for the Act's civil penalty. It is adequate to allege that a false claim was knowingly presented regardless of its exact amount. Based on this analysis, ''the contents of the bill are less significant because a complaint need not allege that the Government relied on or was damaged by the false claim.''[36] Due to these differences and the remedial purpose of the FCA, the *Grubbs* court held that a claim under the FCA need not meet the stringent particularity requirements for pleading common law fraud.

As *Grubbs* correctly observed, ''a procedural rule ought not be read to insist that a plaintiff plead the level of detail required to prevail at trial.''[37]

Stated otherwise, Rule 9(b) should not be interpreted to allow access to discovery only when the complaint already contains enough detail to prevail at trial. In contrast to *Clausen*, the court held that the plaintiff need not allege the exact contents of submitted bills:

> [T]he exact dollar amounts fraudulently billed will often surface through discovery and will in most cases be necessary to sufficiently prove actual damages above the Act's civil penalty. Nevertheless, a plaintiff does not necessarily need the exact dollar amounts, billing numbers, or dates to prove to a preponderance that fraudulent bills were actually submitted. To require these details at pleading is one small step shy of requiring production of actual documentation with the complaint, a level of proof not demanded to win at trial and significantly more than any federal pleading rule contemplates.
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> . . . Stating 'with particularity the circumstances constituting fraud' does not necessarily and always mean stating the contents of a bill. The particular circumstances constituting the fraudulent presentment are often harbored in the scheme. . . . Standing alone, the bills—even with numbers, dates, and amounts—are not fraud without an underlying scheme to submit the bills for unperformed or unnecessary work. It is the scheme in which particular circumstances constituting fraud may be found that make it highly likely the fraud was consummated through the presentment of false bills.[38]

As reasoned by the *Grubbs* court, this standard satisfies Rule 9(b)'s objectives of ensuring the complaint '' 'provides defendants with fair notice of the plaintiffs' 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.' ''[39]

In many cases, the defendants will be in possession of the most relevant records, such as patients' charts, doctors' notes, and internal billing records, with which to defend on the grounds that alleged falsely-recorded services were not recorded, were not billed for, or were actually provided.

> Rule 9(b) also prevents nuisance suits and the filing of baseless claims as a pretext to gain access to a ''fishing expedition.'' A complaint that includes both particular details of a scheme to present fraudulent bills to the Government and allegations making it likely bills were actually submitted limits any ''fishing'' to a small pond that is either stocked or dead. Defendants either have or do not have evidence that the alleged phony services were actually provided; they either have or do not have evidence that recorded, but unprovided or unnecessary, services did not result in bills to the Government. *Discovery can be pointed and efficient, with a summary judgment following on the heels of the complaint if billing records discredit the complaint's particularized allegations.* That is the balance Rule 9(b) attempts to strike.[40]

In an especially trenchant observation, not stated in earlier FCA case law involving Rule 9(b), the court pointedly reminded district judges of their role in supervising discovery. The balance Rule 9(b) attempts to strike ''works best when access to discovery does not inevitably include all discovery's powers but is tailored by the district court to the case at hand. And the detail must be sufficient to allow this tailoring. *Rule 9(b) should not be made to shoulder all the burden of policing abusive discovery. Its balance draws upon the vigilant hand of the district court judge*.''[41]

Grubbs' complaint satisfied Rule 9(b) on his § 3729(a)(1) claim as to the individual doctors. The complaint set out the particular workings of a scheme that was communicated directly to the relator by those perpetrating the fraud. Grubbs described in detail, including the date, place, and participants, the dinner meeting at which two doctors in his section attempted to bring him into the fold of their on-going fraudulent plot.

He alleged his first-hand experience of the scheme unfolding as it related to him, describing how the nurs-

[33] *Id.* at 188.
[34] *Id.* at 189.
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Id.* at 190.
[39] *Id.* at 190 (quoting *Melder v. Morris*, 27 F.3d 1097, 1100 (5th Cir. 1994)).
[40] *Id.* at 191 (emphasis added).
[41] *Id.* (emphasis added).

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ing staff attempted to assist him in recording face-to-face physician visits that had not occurred. Also alleged were specific dates that each doctor falsely claimed to have provided services to patients and often the type of medical service or its code that would have been used in the bill.

Taking the allegations of the scheme and the relator's own alleged experience as true, and considering the complaint's list of dates that specified unprovided services were recorded, amounted to sufficient circumstantial evidence that the doctors' fraudulent records caused the hospital's billing system in due course to present fraudulent claims to the Government.

With a healthy dose of common sense, the *Grubbs* court recognized that ''[i]t would stretch the imagination to infer the inverse; that the defendant doctors go through the charade of meeting with newly hired doctors to describe their fraudulent practice and that they continually record unprovided services only for the scheme to deviate from the regular billing track at the last moment so that the recorded, but unprovided, services never get billed.''[42]

That fraudulent bills were presented to the Government was the logical conclusion of the particular allegations in Grubbs' complaint, even though it lacked exact billing numbers or amounts.

Section 3729(a)(2) - No Presentment Requirements

Grubbs alleged an alternative basis of liability based on § 3729(a)(2). This provision imposes civil liability on any person who ''knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government.''[43] The *Grubbs* court found that the trial court had dismissed these claims based on the error that § 3729(a)(2) had a presentment element:

> The district court dismissed Grubbs' (a)(2) claims for the same reason it dismissed the (a)(1) claims; the complaint failed to allege details of fraudulent bills actually presented to the Government. This was error. As the Supreme Court recently settled [in *Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662, 128 S.Ct. 2123 (2008)]: '[T]he concept of presentment is not mentioned in § 3729(a)(2). The inclusion of an express presentment requirement in subsection (a)(1), combined with the absence of anything similar in subsection (a)(2) suggests that *Congress did not intend to include a presentment requirement in subsection (a)(2)*.'[44]

What § 3729(a)(2) required was that the defendant made a false record or statement for the purpose of getting a false or fraudulent claim paid by the Government. The *Grubbs* court held that ''[f]or this section, the recording of a false record, when it is made with the requisite intent, is enough to satisfy the statute; *we need not make the step of inferring that the record actually caused a claim to be presented to the Government*.''[45]

Grubbs' complaint particularly alleged a specific date of a dinner meeting during which two identified physicians explained how they met with the nursing staff and wrote notes about patients that they only saw on an as-needed basis but billed as daily face-to-face visits. He also alleged that two days later, the nursing staff attempted to assist him in recording physician visits that did not occur.

Similarly, the complaint alleged a specific date that a particular named physician recorded false progress notes in the hospital medical records for fictional hospital visits with a patient. These were deemed sufficient allegations of the circumstances constituting § 3729(a)(2) fraud against specific physicians that should not have been dismissed at the pleading stage.

Fraud Enforcement and Recovery Act of 2009

In May 2009, Congress enacted the Fraud Enforcement and Recovery Act (''FERA''), Pub. L. No. 111-21, 123 Stat. 1617, which, among other changes, amended the language of § 3729(a)(2). Under the new version, recodified as 31 U.S.C. § 3729(a)(1)(B), a person is liable if he ''knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim.'' Section 4(f)(1) of FERA provides that this change ''shall take effect as if enacted on June 7, 2008, and apply to all claims under the False Claims Act that are pending on or after that date.''

By way of example, a person is liable under the FCA for making a false record that is material [''having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property,'' § 3729(b)(4)] to a false claim. In contrast to the earlier version of the FCA, plaintiff need not prove that the defendant *intended* the false statement be material to the Government's decision to pay the false claim.[46]

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[42] *Id.* at 192.

[43] 31 U.S.C. § 3729(a)(2).

[44] *Grubbs*, 565 F.3d at 192-3 (emphasis added) (quoting *Allison*, 128 S.Ct. at 2129.) The Supreme Court in *Allison* stated: ''[w]hat § 3729(a)(2) demands is not proof that the defendant caused a false record or statement to be presented or submitted to the Government but that the defendant made a false record or statement for the purpose of getting 'a false or fraudulent claim paid or approved by the Government.' '' 128 S.Ct. at 2130. Thus, it was not necessary at trial to introduce into evidence the invoices for payment.

[45] 565 F.3d at 193 (emphasis added).

[46] In *Allison*, the Court held that ''it is insufficient for a plaintiff asserting a § 3729(a)(2) claim to show merely that '[t]he false statement's use . . . result[ed] in obtaining or getting payment or approval of the claim,' or that 'government money was used to pay the false or fraudulent claim,' . . . Instead, a plaintiff asserting a § 3729(a)(2) claim must prove that the defendant *intended* that the false record or statement be material to the Government's decision to pay or approve the false claim.'' 128 S.Ct. at 2126 (emphasis added). In *Grubbs*, the court upheld the dismissal of the Hospital because ''there was no indication that the Hospital itself acted with the requisite intent: ''Under all sections of the FCA, the defendant must act with the purpose of getting a false claim paid by the Government. Grubbs did not plead that the Hospital was vicariously liable for the actions of the doctors or nurses. Without an attributed liability theory, no allegations in the complaint allow a reasonable inference that the Hospital had the requisite intent.'' 565 F.3d at 192. If decided under the amended FCA, presumably Grubbs' allegations against the Hospital would survive dismissal.

Overview of the Role of Rule 9(b) – Early Dismissals Should be Disfavored

One of the most popular and effective ways to achieve dismissal of a FCA complaint is to invoke Rule 9(b). Defendants invoke Rule 9(b) as a bulwark against opportunistic and illegitimate lawsuits. Courts have viewed the FCA as an anti-fraud statute, so particularized facts must be pleaded.

Many cases premised on Medicare fraud have been dismissed due to the fatal flaw of lacking particularized allegations that a false or fraudulent invoice was presented for payment.

The *qui tam* relator as either an employee or corporate ''outsider'' may lack direct knowledge of such facts. Although the relator may have described in detail a false or fraudulent billing scheme, discovery is needed to establish such facts. A well-pleaded complaint, however, is the ticket to the federal courts' discovery apparatus.

Many courts have been unwilling to validate the discovery ticket based on general allegations that invoices were presented for payment. These decisions are based on the oft-repeated concerns that the reputation and good will of FCA defendants must be protected and should not be subjected to frivolous strike suits that force settlements due to the high costs of discovery.

Such concerns may well be misplaced. The FCA has a broad remedial purpose and is designed to foster legitimate efforts to expose fraud against the Government. The massive yearly increases in Medicare payments have been accompanied by an increase in false or fraudulent schemes causing untold billions of dollars a year in losses to the Treasury.

Medicare fraud is now widely regarded as rampant. Improper payments do not necessarily reflect fraud, yet the U.S. Department of Health and Human Services FY 2009 Improper Payments Act Report projected the improper Medicare payment amount as between $24.1 billion and $35.4 billion.[47] The purpose of the FCA is to encourage citizens to act as whistleblowers and to assist in exposing fraud against the government.[48] The remedial purpose of the FCA is thwarted by an overly strict interpretation of pleading requirements, which create an unrealistic barrier to such actions. Moreover, the concerns underlying a strict interpretation may be effectively addressed through other means.

The first line of defense against frivolous claims is the FCA itself. It provides that the court may award attorneys' fees and expenses against relators who file frivolous FCA suits or actions that are for the purpose of harassment.[49] Given the potentially steep cost of defense, this is a powerful deterrent to filing claims with no reasonable chance of success.

The next line of defense is a district judge's power to exercise control over case management. Rule 9(b) should not be viewed as the sole means by which to weed-out questionable cases. If a complaint contains particularized allegations of a false or fraudulent billing scheme, the court should allow pointed and efficient discovery.

Focused discovery can be staged, if necessary, to initially focus on production of an appropriate sample of billing records. District judges can help to strike the correct balance between the remedial goals of the FCA and protecting against lawsuit abuse by staying actively engaged in framing the scope and conduct of the discovery process. Potentially meritorious cases should not be prematurely thrown out of court.

Defendants who settle frivolous FCA lawsuits need to examine and self-critique their approach. Such settlements beget more frivolous suits. Competent defense counsel will aid the court in framing limited or staged discovery after which time an appropriate motion for summary judgment can be filed. If the suit is truly frivolous, then attorneys' fees and expenses may be recovered. Rule 9(b) should not be deployed across-the-board to preclude legitimate actions for the sake of protecting defendants who make ill-informed decisions to pay to get rid of suits they deem to be frivolous.

Recent case law and amendments to the FCA further boost the prospects for FCA suits to survive motions to dismiss based on Rule 9(b). While initially taking a highly restrictive approach, at least one Eleventh Circuit panel has since recognized that a complaint may survive dismissal even absent an allegation that a specific bill was presented for payment so long as the complaint contains ''reliable indicia'' that bills were presented pursuant to the scheme.

The Fifth Circuit has gone further to hold that allegations of presentment for payment of specific invoices are unnecessary provided the complaint contains particularized allegations of the scheme itself. Moreover, the Supreme Court recently held that a relator relying on 31 U.S.C. § 3729(a)(2)[amended and recodified as § 3729(a)(1)(B) need not allege or prove that the defendant presented such bills for payment. Such analysis equally applies to the recodified version of this provision.[50] The FCA imposes liability not only on the person who presents a false or fraudulent claim for payment, but also on any person who knowingly makes a false statement material to a false or fraudulent claim.

The recent May 20, 2009 amendments to the FCA further broaden the scope of FCA relief and thereby should relax pleading requirements. Now a relator need not allege or prove that the defendant intended that such bills be paid. Because the false record must only be ''capable of influencing the payment or receipt of money,'' the amended FCA would allow civil penalties without proof of actual payment or approval of the false claims.[51]

Finally, much of the case law supportive of Rule 12(6)(b) dismissals of FCA Medicare fraud suits was decided during the era of liberal *Conley v. Gibson* pleading standards, where virtually any complaint could pass muster. Rule 9(b) played a more important screening role prior to the Supreme Court's adoption of the stricter *Twombly* standard. Now, *qui tam* relators' allegations must assert factual plausibility to these claims for relief.

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[47] ''Titles'' p. 163, available at http://www.hhs.gov/afr/2009allsections.pdf (corresponding to III-13 in report).

[48] *See*, *e.g.*, *United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13, 18 (2d Cir. 1990) (''the purpose of the *qui tam* provisions of the False Claims Act is to encourage private individuals who are aware of fraud being perpetrated against the Government to bring such information forward'') (quoting H.R. Rep. No. 660, 99th Cong., 2d Sess. 22 (1986)).

[49] *See* 31 U.S.C. § 3730(d)(4).

[50] *See id.* at § 3729(a)(1)B.

[51] *Id.* § 3729(a)(1)(B), (b)(4).

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Conclusion

The remedial purposes of the FCA can only be realized if courts refrain from applying overly strict pleading requirements. If false or fraudulent schemes are alleged with particularity, the case should be allowed to proceed to discovery under the close supervision of the court.

The new *Twombly* pleading standard together with the court's vigilant hand in framing the proper scope and conduct of discovery should strike the appropriate balance between the important remedial purposes of the FCA and protection against illegitimate litigation.