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# The Plight of the Tattletale: How the Eighth Circuit's Relaxing of Rule 9(b) Means More Unpredictability for FCA Whistleblower Claims

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## NOTE

# The Plight of the Tattletale: How the Eighth Circuit's Relaxing of Rule 9(b) Means More Unpredictability for FCA Whistleblower Claims

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

SUZANNE L. SPECKER\*

### I. INTRODUCTION

The False Claims Act (“FCA”) was enacted during the Civil War for the purpose of combatting pervasive fraud by government contractors.<sup>1</sup> The FCA prohibits any person from knowingly “caus[ing] to be presented” to the government false claims for payment or approval.<sup>2</sup> To encourage insiders to report fraud and to improve the FCA’s enforcement, the FCA contains a *qui tam* provision, which permits private persons, known as “relators,” to bring civil actions on behalf of the United States and to claim a sizeable portion of the resulting award.<sup>3</sup>

The FCA’s importance to the federal government cannot be overstated.<sup>4</sup> For fiscal year 2014, the Department of Justice reported a record \$5.69 billion in settlements and judgments from civil fraud and false claims cases.<sup>5</sup> Meanwhile, the FCA continues to serve as the government’s primary mechanism for combatting false claims for funds under government contracts, in-

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1. *United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1265–66 (9th Cir. 1996).

2. *See* 31 U.S.C. § 3729(a)(1)(A) (2012).

3. *See id.* § 3730(b), (d).

4. *See* discussion *infra* Part III.A.

5. *Justice Department Recovers Nearly \$6 Billion From False Claims Act Cases in Fiscal Year 2014*, U.S. DEP’T JUST. (Nov. 20, 2014), <http://www.justice.gov/opa/pr/justice-department-recovers-nearly-6-billion-false-claims-act-cases-fiscal-year-2014>.

cluding Medicare, defense contracts, federally-insured loans and mortgages, and veterans' benefits.<sup>6</sup>

Despite the FCA's tremendous importance and the increasing number of claims brought under the FCA each year,<sup>7</sup> the pleading standard required of a relator bringing suit under the FCA remains an unfortunate source of confusion. Federal appellate courts are sharply divided over whether a whistleblower complaint can survive a motion to dismiss under Federal Rule of Civil Procedure 9(b) if it pleads a fraudulent scheme to submit false claims but fails to plead with particularity that false claims were actually presented to the government, known as "presentment."<sup>8</sup>

The Eighth Circuit's decision in *United States ex rel. Thayer v. Planned Parenthood* addresses this very issue.<sup>9</sup> As this Note argues, the *Thayer* decision not only departs from the Eighth Circuit's previous position within the circuit split, but it also further contributes to the confusing variance of nuances and interpretations that exist regarding how to apply Rule 9(b) to FCA claims.<sup>10</sup> Because the *Thayer* decision arguably increases the muddled confusion of Rule 9(b)'s application to FCA claims, it is imperative that the Supreme Court resolve the circuit split in the near future. In Part II, this Note analyzes the facts and holding of *Thayer*. Next, in Part III, this Note explores the legal background of the FCA and the development and current state of the circuit split surrounding Rule 9(b)'s application to FCA claims. Then, Part IV examines the court's rationale in *Thayer*. Lastly, Part V more closely examines the circuit split, noting the complexity and divergence of the different standards being applied within the circuits that are adopting what appears to be a uniform "relaxed" approach to Rule 9(b). In addition, Part V argues that the Supreme Court should review these inconsistent approaches, and it assesses *Thayer*'s immediate implications for Missouri businesses that contract with the government.

## II. FACTS AND HOLDING

Defendant Planned Parenthood of the Heartland, Inc. ("Planned Parenthood") is a non-profit corporation that provides reproductive healthcare services to patients, including patients who qualify for Title XIX Medicaid.<sup>11</sup> From 1991 to December 2008, Plaintiff Susan Thayer worked as the center manager of Planned Parenthood's Storm Lake, Iowa clinic.<sup>12</sup> Simultaneously

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6. *Id.*

7. *Id.* The number of *qui tam* suits filed annually has increased from approximately 300 suits per year between the years 2000 and 2008 to over 700 suits filed in the years 2013 and 2014. *Id.*

8. See discussion *infra* Part III.B.

9. See *United States ex rel. Thayer v. Planned Parenthood of the Heartland*, 765 F.3d 914, 915 (8th Cir. 2014).

10. See discussion *infra* Part V.A.

11. *Thayer*, 765 F.3d at 915.

12. *Id.*

from 1993 to 1997, Thayer also worked as the center manager of Planned Parenthood's LeMars, Iowa clinic.<sup>13</sup>

In 2008, Planned Parenthood dismissed Thayer.<sup>14</sup> Following her termination, she brought a *qui tam* action against Planned Parenthood in the U.S. District Court for the Southern District of Iowa seeking to recover funds that Planned Parenthood had allegedly obtained in violation of both the federal FCA and the Iowa False Claims Act ("IFCA").<sup>15</sup> In her Complaint, Thayer alleged that all of Planned Parenthood's clinics participated in four fraudulent schemes from early 2006 to December 2008, each of which involved submitting false or fraudulent claims for Medicaid reimbursement to the United States and Iowa governments.<sup>16</sup> These schemes consisted of Planned Parenthood: (1) billing Medicaid for birth control pills that were either prescribed without examinations or were not received by Planned Parenthood patients; (2) billing Medicaid for abortion-related services in violation of federal law and instructing patients who had abortion-related medical complications to provide false information to other medical professionals, which caused those medical providers to unknowingly file Medicaid claims for abortion-related services; (3) billing Medicaid for the entire amount of medical services, even when those services had already been partially paid for by the patients; and (4) engaging in a process known as "upcoding" by billing Medicaid for more expensive services than were actually performed.<sup>17</sup>

Planned Parenthood moved to dismiss the Complaint on three independent grounds.<sup>18</sup> First, it argued that Thayer's Complaint failed to satisfy Federal Rule of Civil Procedure 9(b), which establishes a heightened pleading requirement for fraud cases.<sup>19</sup> Rule 9(b) provides, "In alleging fraud or mistake, a party must state with *particularity* the circumstances constituting fraud or mistake."<sup>20</sup> Relying on the pleading standard articulated by the Eighth Circuit in *United States ex rel. Joshi v. St. Luke's Hospital, Inc.*,<sup>21</sup> Planned Parenthood contended that, to satisfy Rule 9(b), Thayer's FCA Complaint was required to "plead such facts as the time, place, and content of the defendant's false representations . . . including when the acts occurred, who engaged in them, and what was obtained as a result."<sup>22</sup> Planned Parenthood

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13. *Id.*

14. See Sue Thayer, *Thayer: Planned Parenthood's Big Lie*, WASH. TIMES (Jan. 31, 2012), <http://www.washingtontimes.com/news/2012/jan/31/planned-parenhoods-big-lie/>.

15. See *United States ex rel. Thayer v. Planned Parenthood of the Heartland, Inc.*, No. 4:11-cv-00129-JAJ-CFB, slip op. at 1 (S.D. Iowa Dec. 28, 2012), <http://www.adfmedia.org/files/ThayerDismissalOrder.pdf>.

16. *Thayer*, 765 F.3d at 915–16.

17. *Id.*

18. *Thayer*, slip op. at 2.

19. *Id.*

20. FED. R. CIV. P. 9(b) (emphasis added).

21. 441 F.3d 552, 556 (8th Cir. 2006).

22. *Thayer*, slip op. at 4.

argued that Thayer failed to satisfy Rule 9(b)'s specificity requirement because she failed to identify even one specific instance in which Planned Parenthood submitted a false claim to the government, and instead, she merely alleged Planned Parenthood's *general* "schemes" to submit false claims.<sup>23</sup> Second, Planned Parenthood argued that Thayer's claims did not constitute FCA claims because they were only alleged regulatory violations.<sup>24</sup> Third, it argued that Thayer's Second Amended Complaint was improperly filed because it was not filed under seal.<sup>25</sup>

In response to Planned Parenthood's motion to dismiss, Thayer argued that her Complaint provided sufficient detail of Planned Parenthood's alleged fraudulent activities to put the organization on notice of her claims and to allow it to adequately respond to those claims.<sup>26</sup> In addition, Thayer contended that her claims were properly brought under the FCA because they were allegations that Planned Parenthood violated Medicaid regulations.<sup>27</sup> Finally, Thayer argued that the sealing requirement did not apply to complaint amendments.<sup>28</sup>

Although the district court noted that Thayer's allegations were detailed, the court emphasized that none of her allegations provided "a specific false claim that Planned Parenthood allegedly submitted to the government," as required by Rule 9(b) and the *Joshi* pleading standard.<sup>29</sup> As such, the district court granted Planned Parenthood's motion to dismiss.<sup>30</sup>

On appeal, the Eighth Circuit affirmed in part, reversed in part, and remanded for further proceedings, holding that some portions of Thayer's Complaint were pled with sufficient particularity to satisfy Rule 9(b).<sup>31</sup> Specifically, the Eighth Circuit clarified the pleading standard for claims brought under the FCA by expressly adopting the pleading standard of several other circuits.<sup>32</sup> In adopting this new pleading standard, the Eighth Circuit held that a relator may satisfy Rule 9(b) without pleading the circumstances surrounding a specific instance of a false claim, but only if the relator pleads

23. *Id.* at 2.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 7.

30. *Id.* at 9.

31. United States *ex rel.* Thayer v. Planned Parenthood of the Heartland, 765 F.3d 914, 915, 919 (8th Cir. 2014). The Eighth Circuit found that the following allegations were pled with sufficient particularity: Planned Parenthood filed claims in violation of the FCA for: (1) unnecessary quantities of birth control pills in violation of the FCA; (2) birth control pills prescribed without examinations or doctor's orders; (3) abortion-related services; and (4) the entire cost of services that had already been paid, in part or in whole, by patients. *Id.*

32. *Id.* at 918–19.

both “particular details of a scheme to submit false claims” and “reliable indicia that lead to a strong inference that claims were actually submitted.”<sup>33</sup>

### III. LEGAL BACKGROUND

The *Thayer* decision is best understood within the underlying context of the FCA. Accordingly, this Part explores the creation of the FCA in 1863 and its current relevance. This Part concludes with a discussion of the circuit split surrounding the appropriate application of Rule 9(b) to FCA claims and how the circuit split has dramatically shifted over the last year.

#### A. *The False Claims Act*

The FCA provides a civil remedy against “any person” who “knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval” by the U.S. government.<sup>34</sup> Enacted during the Civil War in 1863, the FCA was created to put an end to the selling of defective goods<sup>35</sup> to the military, as well as to fight schemes used to defraud the government.<sup>36</sup> Due to the difficulty of even detecting such fraudulent activity, Congress included a *qui tam*<sup>37</sup> provision in the FCA, designed to encourage private individuals – known as “relators” – to come forward with information about potential fraud by bringing claims under the FCA on behalf of the federal government.<sup>38</sup> If the claim was successful, the relator received a portion of the government’s recovered damages.<sup>39</sup>

In 1986, Congress made significant amendments to the FCA for the purpose of bolstering its power to combat fraud against the government.<sup>40</sup> In addition to increasing the penalty by \$5000 to \$10,000 per violation of the FCA, the amendments provide additional incentives to relators with the explicit purpose of promoting *qui tam* litigation.<sup>41</sup> These incentives include a

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33. *Id.* at 917–18 (quoting *United States ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 190 (5th Cir. 2009)).

34. 31 U.S.C. § 3729(a)(1)(A) (2012).

35. Defective goods were routinely sold to the military during the Civil War, including for example, artillery shells filled with sawdust instead of gunpowder. J. Randy Beck, *The False Claims Act and the English Eradication of Qui Tam Legislation*, 78 N.C. L. REV. 539, 555 (2000).

36. *Id.*

37. *Qui tam* is derived “from a longer Latin phrase, ‘qui tam pro domino rege quam pro si ipso in hac parte sequitur,’ which means ‘[w]ho sues on behalf of the King as well as for himself.’” *Id.* at 541 n.3 (2000) (quoting BLACK’S LAW DICTIONARY 1251 (6th ed. 1990)). This provision was based on the idea that it is easier to incentivize “a rogue to catch a rogue.” *Id.* at 556 n.64.

38. *Id.* at 541.

39. *See id.*

40. *Id.* at 561–62.

41. *Id.*

guarantee to relators of all costs, expenses, and attorneys' fees and as much as thirty percent of the total recovery.<sup>42</sup>

Today, the FCA remains the government's primary tool for fighting false claims for funds under government contracts, including Medicare, defense contracts, federally-insured loans and mortgages, and veterans' benefits.<sup>43</sup> For fiscal year 2014, the Department of Justice reported a record \$5.69 billion in settlements and judgments from civil fraud and false claims cases.<sup>44</sup> Whistleblowers' *qui tam* suits were responsible for nearly \$3 billion of the total \$5.69 billion recovered, and whistleblowers received a combined \$435 million in rewards.<sup>45</sup> Of the \$5.69 billion recovered in 2014, false claims against federally funded healthcare programs, including Medicare and Medicaid, constituted \$2.3 billion.<sup>46</sup>

Following the FCA's 1986 amendments, the number of *qui tam* suits has substantially increased each year.<sup>47</sup> In 1987, for instance, a mere thirty *qui tam* suits were filed, but from 2000 to 2008, between 300 and 400 suits were filed annually.<sup>48</sup> Most recently, in 2013 and 2014, over 700 *qui tam* suits were filed per year.<sup>49</sup> This rapid increase in the number of *qui tam* suits filed each year illustrates the growing importance of consistently applying Rule 9(b) to such claims. Unfortunately, however, the courts' varying applications of Rule 9(b) are anything but consistent and instead, have created a deep circuit split.

### B. *The Circuit Split on the Pleading Standard for FCA Claims*

Because the FCA is an anti-fraud statute, federal appellate courts have long agreed that Rule 9(b) applies to all complaints brought under the FCA.<sup>50</sup> Rule 9(b) requires plaintiffs to "state with particularity the circumstances constituting fraud," a higher pleading standard than what is required of plaintiffs who allege non-fraud claims.<sup>51</sup> Courts repeatedly articulate two main

42. *Id.* at 562.

43. See *Justice Department Recovers Nearly \$6 Billion From False Claims Act Cases in Fiscal Year 2014*, *supra* note 5.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. See *United States ex rel. Clausen v. Lab. Corp. of Am.*, 290 F.3d 1301, 1309–10 (11th Cir. 2002) (quoting *United States ex rel. Clausen v. Lab. Corp. of Am.*, 198 F.R.D. 560, 562 (N.D. Ga. 2000)) (affirming the district court's assertion that Rule 9(b)'s application to FCA claims is "well settled" and "self evident").

51. FED. R. CIV. P. 9(b). In contrast to Rule 9(b), Rule 8(a) merely requires plaintiffs who plead non-fraud claims to provide "a short and plain statement of the claim showing that the pleader is entitled to relief" such that the claim "is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (citing FED. R. CIV.

purposes for Rule 9(b)'s heightened standard: (1) to protect the defendant from baseless claims and (2) to provide adequate notice to the defendant of the plaintiff's claims so that the defendant has a fair opportunity to defend.<sup>52</sup>

Although appellate courts agree that Rule 9(b) applies to FCA claims, they are sharply divided as to the manner in which Rule 9(b) applies.<sup>53</sup> Unfortunately for relators, the act of filing a false claim is the principal element in an FCA action, and yet, many relators lack specific information about whether a false claim was actually filed, unless of course, the relator has access to the defendant's accounting or billing department.<sup>54</sup> To complicate this inconsistency among circuit courts, the relator's failure to satisfy Rule 9(b) is generally a defendant's first defense against an FCA action.

Prior to June 2014, a total of eight courts of appeals were evenly split on the proper application of Rule 9(b) to *qui tam* FCA claims.<sup>55</sup> The First, Fifth, Seventh, and Ninth Circuits followed what has been deemed a "relaxed construction"<sup>56</sup> to Rule 9(b), holding that an FCA complaint may 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" and still satisfy Rule 9(b).<sup>57</sup> Meanwhile, the Fourth, Sixth, Eighth, and Eleventh Circuits followed a stricter approach to Rule 9(b), holding that an FCA complaint must identify "an actual false claim with particularity."<sup>58</sup> In March 2014, the Supreme Court of the United States declined an opportunity to resolve the split by denying certiorari to *United States ex rel. Nathan v. Takeda Pharmaceuticals North America, Inc.*<sup>59</sup>

Since the Supreme Court's denial of certiorari, two recently decided circuit cases have tipped the scales in favor of the relaxed approach to Rule 9(b) while deepening the current split.<sup>60</sup> In June 2014, the Third Circuit addressed the Rule 9(b) issue, as a matter of first impression, in *Foglia v. Renal Ven-*

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P. 8(a)). Rule 8(a) does not require "heightened fact pleading of specifics." *Id.* at 570.

52. *United States ex rel. Thayer v. Planned Parenthood of the Heartland*, 765 F.3d 914, 918 (8th Cir. 2014).

53. *See* Petition for a Writ of Certiorari, *United States ex rel. Nathan v. Takeda Pharm. N. Am., Inc.*, 134 U.S. 1759 (2014) (No.12-1349), 2013 WL 1945156, at \*15.

54. 31 U.S.C. § 3729(a)(1) (2012); *Clausen*, 290 F.3d at 1311 ("The submission of a claim is . . . the *sine qua non* of a False Claims Act violation.").

55. *See* Petition for a Writ of Certiorari, *supra* note 53, at \*15.

56. *United States ex rel. Nathan v. Takeda Pharm. N. Am., Inc.*, 707 F.3d 451, 457–58 (4th Cir. 2013), *cert. denied*, 134 U.S. 1759 (2014).

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

58. *United States ex rel. Bledsoe v. Cmty. Health Sys., Inc.*, 501 F.3d 493, 504 (6th Cir. 2007).

59. 134 S. Ct. 1759 (2014).

60. *See United States ex rel. Thayer v. Planned Parenthood of the Heartland*, 765 F.3d 914 (8th Cir. 2014); *Foglia v. Renal Ventures Mgmt., LLC*, 754 F.3d 153 (3d Cir. 2014).



tures Management, LLC.<sup>61</sup> In *Foglia*, the court articulated the relaxed standard already followed by the First, Fifth, Seventh, and Ninth Circuits: a complaint may 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.”<sup>62</sup> A mere two months later, in *United States ex rel. Thayer v. Planned Parenthood of the Heartland*, the Eighth Circuit was given an opportunity to affirm its previous strict approach to Rule 9(b), as articulated in *United States ex rel. Joshi v. St. Luke’s Hospital*, or to follow the Third Circuit in adopting a more relaxed approach to Rule 9(b).<sup>63</sup>

#### IV. INSTANT DECISION

In *United States ex rel. Thayer v. Planned Parenthood*, the Eighth Circuit held that a relator who brings a *qui tam* action under the FCA may satisfy Rule 9(b)’s requirement to plead fraud with particularity without pleading representative examples of false claims.<sup>64</sup> In so holding, the court distinguished *United States ex rel. Joshi v. St. Luke’s Hospital* from the present case and revised its previously strict interpretation of Rule 9(b)’s application to FCA claims.<sup>65</sup> The Eighth Circuit considered various factors in its decision to depart from its past approach to Rule 9(b): the important distinctions between the relator in *Joshi* and the relator, Thayer,<sup>66</sup> the relationship between Rule 9(b) and the FCA’s success in achieving its purpose,<sup>67</sup> and Rule 9(b)’s purpose of protecting defendants from baseless claims.<sup>68</sup>

The court began its opinion by reviewing *Joshi*’s description of the proper pleading standard under the FCA.<sup>69</sup> The court explained its holding in *Joshi*, which required that a complaint specifically identify the “‘who, what, where, when, and how’ of the alleged fraud” in order to satisfy Rule 9(b)’s particularity requirement.<sup>70</sup> At the same time, the court emphasized that the *Joshi* opinion also stated that, if the relator alleged that the defendant had engaged in a systematic practice or “scheme” of submitting fraudulent claims, then the relator was not required to plead the “specific details of every alleged fraudulent claim,” so long as the relator provided some “representative examples” of the fraudulent conduct, including the time, place, and content of the fraudulent claims and the actors’ identities.<sup>71</sup>

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61. 754 F.3d 153.

62. *Id.* at 155–56 (quoting *Grubbs*, 565 F.3d at 190).

63. *See Thayer*, 765 F.3d at 916–19.

64. *Id.* at 918.

65. *Id.* at 917.

66. *Id.*

67. *Id.* at 918.

68. *Id.*

69. *Id.* at 916–17.

70. *Id.* at 917 (quoting *United States ex rel. Joshi v. St. Luke’s Hosp.*, 441 F.3d 552, 556 (8th Cir. 2006)).

71. *Id.* (quoting *Joshi*, 441 F.3d at 557).

Here, the court turned to Thayer's argument: that although she did not provide any representative examples of the false claims in her complaint, neither Rule 9(b) nor *Joshi* required that representative examples be set forth in every FCA complaint that alleged a scheme of fraudulent claims.<sup>72</sup> Agreeing with Thayer's position, the court held that the representative-examples requirement articulated in *Joshi* did not need to be satisfied with respect to some portions of Thayer's complaint.<sup>73</sup>

The court went on to distinguish the *Joshi* complaint from Thayer's complaint.<sup>74</sup> The court emphasized that, unlike Dr. Joshi, who had no connection to the defendant hospital's billing or claims department and could only speculate as to the false claims being submitted, Thayer's role as center manager for two Planned Parenthood clinics meant that she oversaw Planned Parenthood's billing and claims systems.<sup>75</sup> As a result, she was able to plead personal, first-hand knowledge of Planned Parenthood's false claims.<sup>76</sup> As such, the court concluded, the relaxed approach used by other circuits – that a relator can satisfy Rule 9(b) by pleading both particular details of a scheme to submit false claims and by having “reliable indicia that lead to a strong inference that claims were actually submitted” – was sufficient in Thayer's particular circumstances.<sup>77</sup>

To buttress this conclusion, the court went on to reason that Rule 9(b) should remain “context specific and flexible” so that the Rule will not hinder legitimate efforts to expose fraud under the FCA.<sup>78</sup> The court also considered Rule 9(b)'s purpose: to “protect[] defendants from baseless claims.”<sup>79</sup> The court reasoned that because a relator who lacks sufficient indicia of reliability is more likely to have unfounded allegations, this type of relator must plead representative examples of the alleged false claims to protect the defendant from unfounded claims.<sup>80</sup> In contrast, a relator like Thayer has sufficient indicia of reliability, such as by pleading personal knowledge of the defendant's billing practices and false claims submissions.<sup>81</sup> Thus, relators like Thayer can support their fraud allegations without providing representative examples, thereby still satisfying Rule 9(b)'s objective of protecting defendants against unfounded claims.<sup>82</sup> Concluding its clarification of the pleading standard, the court noted that, to satisfy the “particular details” requirement of its holding, the relator still needed to provide enough detail “to enable the

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72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

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

78. *Id.* at 918 (quoting *Grubbs*, 565 F.3d at 190).

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 918–19.

defendant to respond specifically and quickly to the potentially damaging allegations.”<sup>83</sup>

Finally, the court applied this revised pleading standard to the allegations in Thayer’s complaint.<sup>84</sup> The court found that Thayer sufficiently pled four particular schemes by alleging particular details, such as the names of those who instructed her to carry out the schemes, the two-year time period, the particular clinics that participated in the schemes, and the methods used to carry out the schemes.<sup>85</sup> Due to Thayer’s position as center manager, her access to Planned Parenthood’s centralized billing system, and her personal knowledge of Planned Parenthood’s false claims submissions, the court determined that Thayer’s claims had sufficient indicia of reliability, satisfying Rule 9(b).<sup>86</sup> As a result, the Eighth Circuit reversed the district court’s dismissal of these four allegations, which included that Planned Parenthood filed fraudulent claims for:

- (1) unnecessary quantities of birth control pills, (2) birth control pills dispensed without examinations or without or prior to a physician’s order, (3) abortion-related services, and (4) the full amount of services that had already been paid, in whole or in part, by “donations” . . . from patients.<sup>87</sup>

The court found that Thayer did not satisfy Rule 9(b)’s particularity requirement, however, in two of her allegations: that Planned Parenthood violated the FCA by upcoding and “by causing other hospitals to unknowingly submit claims for abortion-related services.”<sup>88</sup> The court held that Thayer failed to satisfy Rule 9(b) in her upcoding allegation because she did not plead the specific details of the scheme to submit false claims through upcoding.<sup>89</sup> Specifically, the court noted that Thayer made conclusory and generalized upcoding allegations without alleging when or how often the upcoding took place at various clinics, who or how many physicians participated in the upcoding, or what types of services were upcoded.<sup>90</sup> As to the second allegation concerning misleading hospitals into submitting claims for abortion-related services, the court determined that this claim lacked sufficient indicia of reliability because Thayer did not allege that she had personal knowledge of the other hospitals’ billing practices nor that she had access to their billing systems.<sup>91</sup> As such, the court concluded, Thayer could merely speculate as to

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83. *Id.* (quoting United States *ex rel.* Costner v. United States, 317 F.3d 883, 888 (8th Cir. 2003)).

84. *Id.* at 919.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at 920.

90. *Id.*

91. *Id.* at 919–20.

the false claims submitted by the unidentified hospitals.<sup>92</sup> For these reasons, the court affirmed the district court's dismissal of the previous two allegations.<sup>93</sup>

## V. COMMENT

When the Eighth Circuit relaxed its 9(b) pleading standard for FCA claims in *Thayer*, the Eighth Circuit appeared to be joining the majority of circuits in the trend toward a uniform application of a more relaxed 9(b) pleading standard.<sup>94</sup> Upon further examination, however, the Eighth Circuit appears to have only further contributed to the confusion among the relaxed standard circuits, suggesting an even greater need for Supreme Court resolution of the circuit split. First, this Part articulates the divergent nuances and understandings of the relaxed interpretation of Rule 9(b) present in different circuits, as well as the reasons why the Supreme Court should resolve the circuit split. Next, this Part addresses *Thayer*'s more immediate implications for Missouri businesses that contract with the government.

### *A. Uniform in Label Only: The Relaxed 9(b) Standard as a Confused 9(b) Standard*

At first glance, the circuit split over how to apply Rule 9(b) to FCA claims appears to be on the verge of resolving itself. With the Third and Eighth Circuits recently adopting the relaxed pleading standard, the majority of circuits<sup>95</sup> are now following the relaxed standard with only three circuits still following the strict pleading standard.<sup>96</sup> In fact, the Solicitor General has voiced his belief that appellate courts are trending toward a uniform relaxed

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92. *Id.*

93. *Id.* at 920.

94. See discussion *infra* Part V.A.

95. At present, seven circuits are classified as following the “relaxed” interpretation of Rule 9(b) when applied to FCA claims: the First, Third, Fifth, Seventh, Eighth, Ninth, and Tenth Circuits. See *United States ex rel. Duxbury v. Ortho Biotech Prods., L.P.*, 579 F.3d 13, 29–30 (1st Cir. 2009), *cert. denied*, 130 U.S. 3454 (2010); *United States ex rel. Foglia v. Renal Ventures Mgmt., LLC*, 754 F.3d 153, 156–57 (3d Cir. 2014); *United States ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 185 (5th Cir. 2009); *United States ex rel. Lusby v. Rolls-Royce Corp.*, 570 F.3d 849, 854–55 (7th Cir. 2009); *Thayer*, 765 F.3d at 918; *United States ex rel. Ebeid v. Lungwitz*, 616 F.3d 993, 998–99 (9th Cir. 2010); *United States ex rel. Lemmon v. Envirocare of Utah, Inc.*, 614 F.3d 1163, 1172–73 (10th Cir. 2010).

96. At present, three circuits are classified as following the “strict” interpretation of Rule 9(b) when applied to FCA claims: the Fourth, Sixth, and Eleventh Circuits. See *United States ex rel. Nathan v. Takeda Pharm. N. Am., Inc.*, 707 F.3d 451, 456–57 (4th Cir. 2013), *cert. denied*, 134 U.S. 1759 (2014); *Sanderson v. HCA-The Healthcare Co.*, 447 F.3d 873, 877 (6th Cir. 2006); *United States ex rel. Clausen v. Lab. Corp. of Am., Inc.*, 290 F.3d 1301, 1310 (11th Cir. 2002).

standard so that the circuit split “may be capable of resolution without [the Supreme Court’s] intervention.”<sup>97</sup> On closer examination, however, what appears to be a trend toward a uniform relaxed standard is not so uniform after all. Rather than being consistent, the relaxed standard is a muddled, divergent standard with applications that vary drastically between circuits; each circuit applies its own set of nuances and interpretations about which particular circumstances allow for the relaxed pleading standard to satisfy Rule 9(b)’s particularity requirement.

For instance, the Fourth Circuit cannot properly be classified within either the strict standard or relaxed standard camps. With its 2013 decision in *United States ex rel. Nathan v. Takeda Pharmaceuticals North America, Inc.*, the Fourth Circuit adopted its own approach – one that falls somewhere in between the relaxed construction and strict construction of Rule 9(b).<sup>98</sup> On the one hand, the Fourth Circuit specifically voiced its disagreement with the “more relaxed construction of Rule 9(b),” holding that “when a defendant’s actions, as alleged and as reasonably inferred from the allegations, *could* have led, but *need not necessarily* have led, to the submission of false claims, a relator must allege with particularity that specific false claims actually were presented to the government for payment.”<sup>99</sup> At the same time, the Fourth Circuit rejected the alternative strict construction of Rule 9(b) that the relator must *always* plead presentment with particularity.<sup>100</sup> Instead, the Fourth Circuit’s intermediate approach only requires the relator to plead presentment with particularity in cases where there is *some doubt* of presentment.<sup>101</sup> In other words, the Fourth Circuit’s holding can be read as allowing a *qui tam* complaint to plead a lesser standard of particularity *if* the complaint pled allegations sufficient to leave no doubt that the defendant actually submitted the false claims, but in all other cases as requiring a *qui tam* complaint to plead presentment with particularity.<sup>102</sup> As such, the Fourth Circuit’s approach is in a class all its own.

Meanwhile, circuits classified in the relaxed standard camp have very different interpretations of which circumstances are appropriate for the relaxed standard’s application. For example, the First Circuit has only relaxed its particularity standard for complaints alleging that the defendant induced *third parties* to file false claims, rather than alleging that the defendant filed

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97. Brief for the United States as Amicus Curiae, *United States ex rel. Nathan v. Takeda Pharm. N. Am., Inc.*, 134 S. Ct. 1759 (2014) (No. 12-1349), 2014 WL 709660, at \*10–11.

98. 707 F.3d 451, 457 (4th Cir. 2013), *cert. denied*, 134 S. Ct. 1759. In *Takeda*, a sales manager for Takeda Pharmaceuticals brought a *qui tam* action alleging that Takeda used a scheme to market its products for “off-label” uses, and the resulting claims for the products were then reimbursed by Medicaid and Medicare, constituting false claims. *Id.* at 453.

99. *Id.* at 457–58 (emphasis added).

100. *Id.*

101. *Id.*

102. *See id.*

the false claims itself.<sup>103</sup> Further, the First Circuit explicitly limited its application of the relaxed standard to the particular facts at hand, specifically “‘declin[ing] to draft a litigation manual full of scenarios’ of what allegations would be sufficient for purposes of Rule 9(b).”<sup>104</sup> More recently, in *United States ex rel. Ge v. Takeda Pharma. Co., Ltd.*, the First Circuit reaffirmed its stance, noting that the relaxed pleading standard would only be permitted in cases where the complaint alleges that the defendant induced *third parties* to file false claims with the government.<sup>105</sup> This distinction between first-party and third-party false claims represents only one of many divergent nuances among circuits regarding the appropriate application of the relaxed 9(b) standard. In sharp contrast to the First Circuit, other circuits classified in the relaxed camp do *not* restrict the relaxed pleading standard’s application to cases in which the defendant induced third parties to file false claims.<sup>106</sup>

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103. *United States ex rel. Duxbury v. Ortho Biotech Prods., L.P.*, 579 F.3d 13, 29 (1st Cir. 2009), *cert. denied*, 130 S. Ct. 3454 (2010) (emphasis added) (quoting *United States ex rel. Rost v. Pfizer, Inc.*, 507 F.3d 720, 733 (1st Cir. 2007), *overruling recognized by United States ex rel. Wilson v. Bristol-Myers Squibb, Inc.*, 750 F.3d 111, 113 (1st Cir. 2014)) (noting the “distinction between a qui tam action alleging that the defendant made false claims to the government, and a qui tam action in which the defendant induced *third parties* to file false claims with the government” and also noting that only in the third party-type of qui tam action can a relator “satisfy Rule 9(b) by providing ‘factual or statistical evidence to strengthen the inference of fraud beyond possibility’ without necessarily providing details as to each false claim”).

104. *Id.* at 31–32 (quoting *United States ex rel. LeBlanc v. Raytheon Co.*, 913 F.2d 17, 20 (1st Cir. 1990)) (holding that relator pharmaceutical salesman’s *qui tam* complaint satisfied Rule 9(b) by doing more than merely suggesting that fraud was possible, but by also setting forth allegations of kickbacks that resulted in the submission of false claims by eight specified healthcare providers, the dates and amounts of the false claims filed with the Medicare program by each provider, and the number of claims filed for one month by one particular hospital).

105. *United States ex rel. Ge v. Takeda Pharm. Co., Ltd.*, 737 F.3d 116, 123–24 (1st Cir. 2013), *cert. denied*, 135 S. Ct. 53 (2014).

106. There are examples of cases in which the “relaxed” standard was applied to claims of first-party presentment, rather than being restricted to claims of third-party presentment. *See, e.g.*, *United States ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 191–92 (5th Cir. 2009) (holding that relator’s complaint satisfied Rule 9(b) as to the individual doctor defendant’s first-party false claims, despite not pleading the exact contents of the alleged false claims submitted to the government); *United States ex rel. Lemmon v. Envirocare of Utah, Inc.*, 614 F.3d 1163, 1172–73 (10th Cir. 2010) (holding that relator’s complaint satisfied Rule 9(b) as to the defendant waste management company’s first-party false claims, despite not pleading “the actual presentment of a false claim for payment”); *United States ex rel. Lusby v. Rolls-Royce Corp.*, 570 F.3d 849, 854 (7th Cir. 2009) (holding that relator’s complaint satisfied Rule 9(b) as to the defendant engine manufacturer’s first-party false claims, despite not pleading the actual “invoices and representations that Rolls-Royce submitted to its [government] customers”); *United States ex rel. Foglia v. Renal Ventures Mgmt., LLC*, 754 F.3d 153, 157 (3d Cir. 2014) (holding that relator’s complaint satisfied Rule 9(b) as to the defendant healthcare provider’s first-party false claims, despite not

The factual circumstances under which the relaxed standard is permitted also vary among circuits, and whether the relaxed standard is deemed sufficient for Rule 9(b) purposes appears to sometimes depend on the relator's level of access to the billing department and the actual false claims.<sup>107</sup> Some circuits specifically note that the relator's *lack of access* to the necessary billing records needed to satisfy the presentment element of Rule 9(b) further supports allowing a relaxed standard so that relators can use other means to prove presentment, besides alleging the specific contents of a representative false claim that they cannot access in the first place.<sup>108</sup> In contrast, the Eighth Circuit found the very existence of the relator's personal access to defendant's billing department and records to be persuasive in finding that the relator satisfied Rule 9(b)'s particularity requirements without alleging a specific false claim because the relator's access to the billing department constituted sufficient indicia of reliability to satisfy the relaxed pleading standard.<sup>109</sup>

Interestingly, in contrast to the Third and Seventh Circuits giving a pass to relators because they *lacked* access to the defendant organization's billing practices, the Eighth Circuit seemingly gave a pass to Thayer because she had *so much access to* and knowledge of the defendant organization's billing practices.<sup>110</sup> Thayer's increased first-hand knowledge should arguably increase, rather than decrease, the level of specificity required of her to satisfy Rule 9(b)'s pleading standard.

These are only a few of the inconsistencies present among circuit courts deemed to be following the same relaxed pleading standard for purposes of Rule 9(b). The dramatic variance between circuits' applications of this relaxed standard suggests that it is even more unlikely that the circuit split will resolve itself. Instead, only the Supreme Court's review can ensure that the Rule 9(b) pleading standard is uniformly applied to *qui tam* cases, regardless of where the *qui tam* cases are filed.

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pleading presentment of the actual false claims submitted to the government); *United States ex rel. Thayer v. Planned Parenthood of the Heartland*, 765 F.3d 914, 918 (8th Cir. 2014) (holding that relator's complaint satisfied Rule 9(b) as to some of the defendant healthcare provider's first-party false claims, despite not pleading "representative examples" of actual false claims).

107. *See, e.g., Foglia, LLC*, 754 F.3d at 158.

108. There are examples of cases in which the court found the relator's lack of access to be persuasive in allowing a relaxed pleading standard of presentment. *See, e.g., id.* ("This conclusion is further supported by the fact that Renal, and only Renal, has access to the documents that could easily prove the claim one way or another—the full billing records from the time under consideration."); *Lusby*, 570 F.3d at 854 (reversing the district court's ruling that because the relator did not have at least one of defendant's billing packages, the relator failed to satisfy Rule 9(b)'s particularity requirement, and noting, instead, that because "a relator is unlikely to have those documents unless he works in the defendant's accounting department, the district court's ruling takes a big bite out of *qui tam* litigation" and was incorrect).

109. *Thayer*, 765 F.3d at 918.

110. *Compare Foglia*, 754 F.3d at 158, and *Lusby*, 570 F.3d at 854, with *Thayer*, 765 F.3d at 918.

The inconsistent application of the relaxed pleading standard among circuits is only one of many reasons why the Supreme Court should resolve the circuit split. In addition, the critical importance of this area of law also weighs in favor of Supreme Court review.<sup>111</sup> First, the FCA continues to be the government's primary mechanism for fighting fraud.<sup>112</sup> The dramatic recoveries obtained by the federal government in *qui tam* suits further indicate the importance of this area of law to the government's continuing ability to combat fraud.<sup>113</sup> At present, geographically *where* an FCA claim is filed could be the determining factor in whether the government survives a motion to dismiss its FCA claims. For instance, in a circuit that follows the strict pleading standard, the government's case will be dismissed if the relator has detailed knowledge of a fraudulent scheme but lacks "independent access to records such as prescription invoices" or where the relator lacks access to obtaining the requisite documents because "privacy laws . . . pose a barrier to obtaining such information without court involvement."<sup>114</sup> Furthermore, the number of filed *qui tam* suits has increased considerably with each year since 1987, suggesting that the FCA will only continue to grow in importance in the future.<sup>115</sup>

In addition to the importance of the FCA's uniform and predictable application to the government's ability to combat fraud, the deepening circuit split on how to apply Rule 9(b) to FCA claims constitutes a central issue in *qui tam* litigation, not to mention an issue that arises repeatedly and frequently.<sup>116</sup> The importance of resolving Rule 9(b)'s proper application to FCA claims should come as no surprise; as the Fifth Circuit noted, "Rule 9(b) has long played [an important] screening function, standing as a gatekeeper to discovery, a tool to weed out meritless fraud claims sooner [rather] than later."<sup>117</sup> Furthermore, the presentment of a false claim element has long been deemed the *sine qua non* of a FCA violation, "without which 'there is simply no actionable damage to the public fisc.'"<sup>118</sup> As such, Rule 9(b) is the first

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111. See discussion *supra* Part III.A.

112. See discussion *supra* Part III.A.

113. See discussion *supra* Part III.A.

114. United States *ex rel.* Nathan v. Takeda Pharm. N. Am., Inc., 707 F.3d 451, 458 (4th Cir. 2013), *cert. denied*, 134 S. Ct. 1759 (2014). The Health Insurance Portability and Accountability Act of 1996 ("HIPPA") is one example of a privacy law that would constitute an obstacle to a relator's ability to obtain specific false claims billing or prescription records to satisfy Rule 9(b)'s particularity requirements. Pub. L. No. 104-191, 110 Stat. 1936 (1996).

115. See discussion *supra* Part III.A.

116. See, e.g., United States *ex rel.* Thayer v. Planned Parenthood of the Heartland, 765 F.3d 914 (8th Cir. 2014) (suggesting the frequent and repeated nature of how to properly apply Rule 9(b) to FCA claims).

117. United States *ex rel.* Grubbs v. Kanneganti, 565 F.3d 180, 185–86 (5th Cir. 2009).

118. *Id.* (quoting United States *ex rel.* Clausen v. Lab. Corp. of Am., Inc., 290 F.3d 1301, 1311 (11th Cir. 2002)).



line of defense for defendant organizations, making the uniform application of Rule 9(b) imperative and warranting of Supreme Court review.

*B. Thayer's Immediate Implications for Missouri Businesses That Contract with the Government*

Until the Supreme Court takes up the circuit split on how to apply Rule 9(b)'s pleading standard to FCA claims, *Thayer* will remain the law for the Eighth Circuit. As such, it is important to address *Thayer*'s more immediate implications for Missouri businesses that contract with the government.<sup>119</sup> Although the Eighth Circuit relaxed Rule 9(b)'s pleading standard in *Thayer*, the Eighth Circuit certainly did not eliminate it.<sup>120</sup> Thus, alarmed defense attorneys' allegations that *Thayer* serves to "erode[] fundamental procedural protections guaranteed to FCA defendants" are somewhat exaggerated.<sup>121</sup> For instance, to satisfy Rule 9(b) without pleading representative examples of false claims, the Eighth Circuit held that the relator still must plead sufficient "particular details" of a scheme "to enable the defendant to respond specifically and quickly to the potentially damaging allegations."<sup>122</sup>

In its analysis of whether *Thayer* satisfied this pleading standard, the Eighth Circuit emphasized the importance of the *reliability* of the relator's allegations.<sup>123</sup> Here, the Eighth Circuit found that the reliability of *Thayer*'s allegations was supported by her pleading of the "bases" for her personal knowledge of the fraudulent claims – mainly, her position as center manager, which gave her access to Planned Parenthood's centralized billing system and billing practices.<sup>124</sup> *Thayer*'s bases of personal knowledge paired with the particular details<sup>125</sup> of the alleged scheme were held to satisfy Rule 9(b)'s

119. These implications, of course, also apply to businesses in the other states comprised by the Eighth Circuit: Arkansas, Iowa, Minnesota, Nebraska, North Dakota, and South Dakota. See *Geographic Boundaries of the United States Courts of Appeals and United States District Courts*, PACER, <https://www.pacer.gov/map.html> (last visited Nov. 15, 2015).

120. *Thayer*, 765 F.3d at 918–19.

121. See, e.g., Jacques Smith et al., *Eighth Circuit Joins Handful of Federal Courts of Appeals to Erode Important Defendant Protections in False Claims Act Actions*, HEALTH CARE COUNSEL BLOG (Sept. 10, 2014), <http://healthcarecounselblog.com/articles/eighth-circuit-joins-handful-federal-courts-appeals-erode-important-defendant-protections>.

122. *Thayer*, 765 F.3d at 918–19 (quoting *United States ex rel. Costner v. United States*, 317 F.3d 883, 888 (8th Cir. 2003)).

123. *Id.*

124. *Id.* at 919.

125. The "particular details" alleged in *Thayer*'s complaint included the names of individuals who instructed her to carry it out, the time period during which the schemes occurred, the specific clinics that participated in the schemes, and the particular methods by which the schemes were conducted. *Id.*

particularity requirement.<sup>126</sup> In contrast to the reliability of Thayer's allegations that Planned Parenthood had directly submitted false claims, the Eighth Circuit found Thayer's allegations that Planned Parenthood had induced *third parties* to submit false claims<sup>127</sup> to be too unreliable to satisfy Rule 9(b) because Thayer lacked direct knowledge of the hospitals' billed claims.<sup>128</sup> Finding that these particular claims were mere speculation and lacked the requisite "indicia of reliability," the court dismissed these particular claims.<sup>129</sup>

Although the Eighth Circuit did relax the pleading standard, it still requires relators to satisfactorily plead their claims with both sufficient detail and reliability,<sup>130</sup> and thus, it is unlikely that the *Thayer* decision should cause the level of alarm for Missouri businesses that has been enunciated by defense attorneys.<sup>131</sup> With that said, the relaxing of the standard will allow more *qui tam* claims to survive a motion to dismiss, and logically, this could result in an increase in the number of *qui tam* suits that are filed in the Eighth Circuit and that survive early dismissal. In addition, the novelty of the Eighth Circuit's decision, as well as the previously discussed confusion among the circuits about Rule 9(b), lends itself to increased unpredictability for Missouri businesses defending against False Claims actions. What constitutes "reliable indicia" sufficient to satisfy Rule 9(b) will remain a grey area to be sorted out by future courts. Finally, as with any relaxing of standards, *Thayer* means increased liability exposure for Missouri businesses. Because a whistleblower is no longer required to provide the specific contents of a fraudulent bill actually submitted to the government, the standard that whistleblowers must meet to make it to trial is significantly lower, and more whistleblowers, as well as the federal government, will likely be further empowered to bring more actions under the FCA.

Although defendant businesses' first line of defense – a motion to dismiss for failure to satisfy Rule 9(b) – was weakened by *Thayer*, businesses should take heart in the fact that this line of defense still exists: a portion of Thayer's claims did not survive Planned Parenthood's motion to dismiss, despite the relaxed standard, because those claims still failed to satisfy Rule 9(b)'s particularity requirements.<sup>132</sup> Thus, until the Supreme Court resolves the circuit split, Missouri businesses should carefully re-evaluate their billing practices and dealings with the government in light of the fact that, post-*Thayer*, they conduct their business in a jurisdiction that is seemingly more sympathetic to FCA claims brought by relators and the government than it is to businesses attempting to defend against such claims.

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126. *Id.*

127. For instance, Thayer claimed that hospitals allegedly submitted false claims for abortion-related services without knowing that they were abortion-related services. *Id.*

128. *Id.*

129. *Id.* at 919–20.

130. *Id.* at 918–19.

131. *See, e.g.*, Jacques Smith et al., *supra* note 121.

132. *Thayer*, 765 F.3d at 919–20.

## VI. CONCLUSION

*Thayer* illustrates the inherent confusion surrounding Rule 9(b)'s application to FCA claims and, as discussed, serves to only further contribute to this confusion. Although some, like the Solicitor General, may believe that the circuits are trending toward a uniform standard like that adopted in *Thayer*, closer examination of the relaxed 9(b) approaches employed in these circuits reveals their total lack of consistency and uniformity. Showing no signs of resolving itself, this circuit confusion paired with the increasing importance and relevance of the FCA comprises a strong argument for Supreme Court review.

Regardless of whether the Supreme Court takes up this circuit split in the future, the Eighth Circuit, as well as other circuits, will be left with no other choice than to continue finessing their own unique approaches to Rule 9(b), deepening the current circuit split and the divergent patchwork of standards between circuits. As for businesses that receive government funds, businesses residing in the Eighth Circuit can be sure that they will have a more difficult time defending against FCA claims and, perhaps, can expect an increase in the number of FCA claims filed.