

In Defense of a Strict Pleading Standard for False Claims Act Whistleblowers

Michael Lockman†

INTRODUCTION

In the last five years, the volume of False Claims Act¹ (FCA) litigation has skyrocketed with over \$20 billion in settlements and judgments.² The FCA imposes civil liability on government contractors who defraud government programs. Most FCA recoveries are realized with the assistance of whistleblowers (“relators”), who act as so-called private attorneys general by filing qui tam suits on behalf of the United States and bringing key information to the attention of the DOJ.³ Relators are rewarded handsomely for their efforts. As the real party in interest, the government must decide whether to intervene and take control of the litigation. If the government declines to intervene, the FCA’s unique public-private enforcement mechanism permits the relator to continue the litigation on the government’s behalf.

The heightened pleading standard of Federal Rule of Civil Procedure 9(b) applies to FCA claims: “In alleging fraud . . . a party must state with particularity the circumstances constituting fraud.”⁴ Since the FCA was resurrected as an enhanced antifraud tool in 1986,⁵ courts have disagreed about what this pleading standard requires from relators who continue their suits without DOJ intervention. A strict interpretation of Rule 9(b)—requiring a relator’s complaint to identify

† BA 2007, The University of Chicago; JD Candidate 2016, The University of Chicago Law School.

¹ 31 USC § 3729 et seq.

² See US Department of Justice, Civil Division, *Fraud Statistics - Overview* *1–2 (Nov 20, 2014), archived at <http://perma.cc/49MA-8VL8>.

³ See id. The phrase “qui tam” is derived from the Latin *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, or “who pursues this action on our Lord the King’s behalf as well as his own.” See *Rockwell International Corp v United States*, 549 US 457, 463 n 2 (2007). Such suits date back to thirteenth-century England. See generally, for example, *Prior of Lewes v De Holt* (Ex 1300), reprinted in 48 Selden Socy 198 (1931).

⁴ FRCP 9(b).

⁵ See False Claims Amendments Act of 1986, Pub L No 99-562, 100 Stat 3153.

representative samples of the allegedly false claims—is falling out of fashion across the circuits. Most courts instead opt for a relaxed standard, refusing to dismiss claims that provide particularized details of a fraudulent scheme along with reliable indicia that false claims were actually submitted. Over the last six years, the Supreme Court has refused three times to resolve this question, and the Rule 9(b) pleading standard continues to be applied inconsistently across the circuits.⁶ This Comment presents and explores new arguments in favor of the strict pleading standard.

This Comment proceeds as follows. Part I presents the FCA's general substantive and procedural framework, as well as Rule 9(b)'s application to FCA litigation. Part II surveys how courts have steadily abandoned the once-popular strict standard, which requires relator complaints to identify the details of specific false claims. Finally, Part III investigates the merits of the strict standard on the basis of the FCA in practice, drawing from recent empirical research on the FCA, theoretical literature on pleading practice, and new data obtained through a 2015 Freedom of Information Act (FOIA) request. This Comment finds that the strict standard best aligns the DOJ's and the relator's incentives, and that it provides the strongest support for systemic efficiency. The new FOIA data are essential to this analysis, as they show that the relaxed standard has had no practical effect on fraud enforcement or recovery. Part III then presents an economic model to demonstrate that the strict standard does not diminish relators' incentives to file high-quality qui tam suits, but rather serves as a much-needed screening mechanism to ensure that the DOJ is not flooded with low-quality tips. This Comment concludes that, counterintuitively, a strict pleading standard deters and punishes fraud more effectively than a relaxed standard.

I. THE FALSE CLAIMS ACT AND RULE 9(B)

Compared to some of the more creative private enforcement schemes of the past,⁷ the FCA's qui tam mechanism appears to be

⁶ See generally *United States v Health Management Associates, Inc.*, 591 Fed Appx 693 (11th Cir 2014), cert denied, 135 S Ct 2379 (2015); *United States v Takeda Pharmaceuticals North America, Inc.*, 707 F3d 451 (4th Cir 2013), cert denied, 134 S Ct 1759 (2014); *United States v Ortho Biotech Products, LP*, 579 F3d 13 (1st Cir 2009), cert denied, 130 S Ct 3454 (2010).

⁷ See, for example, *An Acte for the Punishment of Vagabondes and for the Relief of the Poore and Impotent Parsons*, 1 Edw 6 c 3 (1547) (rewarding whistleblowers who aided

a mild and balanced antifraud tool. However, the FCA's public-private enforcement structure has emerged as an existential threat to government contractors, primarily to those in the health-care and defense sectors.⁸ Advocates extol the private enforcement mechanism's ability to ferret out contractor fraud.⁹ Critics object to the menace of opportunistic whistleblowers, draconian penalties, and ever-expanding substantive theories of liability.¹⁰ This Part introduces the substance and procedure of the FCA and its interaction with Rule 9(b).

A. The False Claims Act

The FCA was originally passed in 1863 to address increasing incidents of defense-contractor fraud during the Civil War.¹¹ It included a *qui tam* provision allowing private parties to bring suit on behalf of the government.¹² Today's FCA provides for civil penalties of \$5,500 to \$11,000 plus treble damages for each FCA violation.¹³ While the FCA covers seven distinct substantive violations, most suits are premised on violations of two statutory provisions: "knowingly present[ing], or caus[ing] to be presented, a false or fraudulent claim for payment or approval"¹⁴—a direct false claim—or "knowingly mak[ing], us[ing], or caus[ing] to be made or used, a false record or statement material to an

in the conviction of loiterers and vagabonds with a bounty as well as with possession of the defendant himself, who was to serve as a personal slave for two years, forced to any "suche wo'ke and Labo' how vyle so ever it be"). King Edward VI admitted in his private journal that this statute was an "extream meesure." C.G. Merewether, *A Sweep among the Cobwebs; or, Curiosities of the Law in Times Past*, in Leicester Literary and Philosophical Society, *Report of the Council Presented to the Annual General Meeting, Assembled, June 1855: And a Selection of Papers Read before the Society since Its Formation* 193, 213 (Leicester 1855).

⁸ See Claire M. Sylvia, *The False Claims Act: Fraud against the Government* §§ 2:14–15 at 65–69 (West 2010).

⁹ See, for example, *False Claims Act: Hearing before the Subcommittee on the Constitution and Civil Justice of the House Committee on the Judiciary*, 113th Cong, 2d Sess 4–6 (2014) ("2014 False Claims Act Hearing") (statement of Representative John Conyers Jr).

¹⁰ See, for example, *id.* at 82–84 (statement of David W. Ogden, Counsel for US Chamber Institute for Legal Reform).

¹¹ See *An Act to Prevent and Punish Frauds upon the Government of the United States*, 12 Stat 696, 698 (1863).

¹² See Cong Globe, 37th Cong, 3d Sess 913, 955–56 (Feb 14, 1863) (Senator Howard) ("The bill offers, in short, a reward to the informer who comes into court and betrays his coconspirator . . . 'setting a rogue to catch a rogue.'").

¹³ 31 USC § 3729(a). The 1986 amendments originally provided for penalties of \$5,000 to \$10,000, but FCA penalties have increased due to inflation. 28 CFR § 85.3(a)(9).

¹⁴ 31 USC § 3729(a)(1)(A).

obligation to pay or transmit money or property to the Government”¹⁵—a reverse false claim. However, the FCA reaches far beyond cases of mere “presentment” and garden-variety fraud: “Congress wrote expansively, meaning to reach all types of fraud, without qualification, that might result in financial loss to the Government.”¹⁶

Until 1986, the FCA had remained largely unchanged since its enactment in the nineteenth century. In response to reports of widespread fraud,¹⁷ Congress amended the FCA in 1986 to strengthen the role of whistleblowers.¹⁸ Specifically, the amendments increased rewards to qui tam relators, permitted relators to continue FCA suits without government intervention, provided for protection against employer retaliation, established a fee-shifting mechanism to reward successful relators with expenses and attorney’s fees, and removed the “information in the possession of the Government” jurisdictional bar.¹⁹ The amendments also increased the statutory penalties (from \$2,000 to a range of \$5,000 to \$10,000), and they replaced double damages with treble damages.²⁰ Since 1986 the government has recovered over \$30 billion through qui tam litigation, and relators have pocketed over \$4.7 billion in statutory bounties.²¹ Fiscal year 2014 proved to be a record year for FCA litigation, with recoveries²² totaling \$5.69 billion—over half of which was collected from qui tam suits.²³ The explosive and continuing growth in qui tam litigation since 1986 may be largely attributable to the enhanced role of whistleblowers, and particularly to the increased bounties promised to relators: 15 to

¹⁵ 31 USC § 3729(a)(1)(G). For the other five statutory violations, see 31 USC § 3729(a)(1)(B)–(F).

¹⁶ *Cook County, Illinois v United States*, 538 US 119, 129 (2003) (quotation marks and citation omitted).

¹⁷ See, for example, General Accounting Office, 2 *Fraud in Government Programs:—How Extensive Is It?—How Can It Be Controlled? A Report to Congress* 7–10 (1981); Erwin Chemerinsky, *Controlling Fraud against the Government: The Need for Decentralized Enforcement*, 58 Notre Dame L Rev 995, 995–96 (1983).

¹⁸ False Claims Amendments Act of 1986, HR 4827, 99th Cong, 2d Sess, in 132 Cong Rec H 22330, 22335 (daily ed Sept 9, 1986).

¹⁹ See *The False Claims Reform Act of 1985*, S Rep No 99-345, 99th Cong, 2d Sess 17–35 (1986), reprinted in 1986 USCCAN 5266, 5282–5300.

²⁰ 31 USC § 3729(a).

²¹ DOJ, *Fraud Statistics* at *1–2 (cited in note 2).

²² As used in this Comment, “recoveries” refers to both settlements and judgments.

²³ See US Department of Justice, Civil Division, *Justice Department Recovers Nearly \$6 Billion from False Claims Act Cases in Fiscal Year 2014* (Office of Public Affairs, Nov 20, 2014), archived at <http://perma.cc/YJ6G-25VQ>.

25 percent of any successful recovery if the government intervenes in the FCA suit, or 25 to 30 percent if the government declines to intervene.²⁴

A unique procedural framework governs the FCA's qui tam provisions. The relator files the suit under seal and delivers a copy to the DOJ together with a written disclosure detailing the relator's evidence and information.²⁵ During the seal period, the DOJ investigates the relator's claims for the purpose of deciding whether to intervene in the suit. Courts routinely grant the DOJ broad extensions of the statutory sixty-day seal period.²⁶ Indeed, the average DOJ investigation under seal lasts nearly six hundred days.²⁷

Another unique feature of the FCA is the relator's ability to continue the suit in the event that the government declines to intervene.²⁸ The DOJ does not intervene in most cases. Recent empirical literature on the FCA notes that the intervention rate dropped from over 40 percent in the early 1990s to approximately 25 percent by 2011, and suggests that the average intervention rate is 27.9 percent.²⁹ A new data set provided by the DOJ in response to a 2015 FOIA request sheds light on this continuing trend.³⁰ The intervention rate has fallen to new lows: the average intervention rate in the ten-year period between 2005 and 2014

²⁴ 31 USC § 3730(d)(1)–(2).

²⁵ 31 USC § 3730(b)(2).

²⁶ See Sylvia, *False Claims Act* § 11:17 at 711 & n 7 (cited in note 8).

²⁷ David Kwok, *Evidence from the False Claims Act: Does Private Enforcement Attract Excessive Litigation?*, 42 Pub Cont L J 225, 246 (2013).

²⁸ See 31 USC § 3730(c)(3).

²⁹ See David Freeman Engstrom, *Public Regulation of Private Enforcement: Empirical Analysis of DOJ Oversight of Qui Tam Litigation under the False Claims Act*, 107 Nw U L Rev 1689, 1718–19 (2013); David Freeman Engstrom, *Harnessing the Private Attorney General: Evidence from Qui Tam Litigation*, 112 Colum L Rev 1244, 1289 (2012). See also Kwok, 42 Pub Cont L J at 239 (cited in note 27) (providing empirical support for an intervention rate of 27 percent).

³⁰ The FOIA data set was provided by the DOJ in February 2015. It includes comprehensive case information from 6,461 qui tam cases—that is, nearly every unsealed qui tam case filed since 1986. The FOIA data set was then loaded into a relational database and SQL queries were used to generate the figures provided in this Comment. It must be noted, however, that nearly 3,500 cases remain under seal and are not part of the data set. Nearly all of these sealed cases were filed in the past few years and remain under investigation. For this reason, wherever possible, this Comment avoids calculating figures based on date of filing and instead utilizes date of election or date of recovery, as these dates guarantee a more representative sample. The FOIA data set and further information regarding the data are available from the author on request.

was 23.4 percent, and the average intervention rate in the five-year period between 2010 and 2014 was 22.4 percent.³¹

DOJ intervention serves as a strong forecast of whether a qui tam suit will succeed. The FOIA data set shows that from 2005 to 2014, 89.5 percent of intervened cases resulted in a recovery but only 6.8 percent of declined cases were similarly successful.³² While net recovery amounts in declined cases have experienced a slight uptick, this increase is attributable to merely a handful of high-value outlier settlements and does not change the fact that the recovery rate of declined cases has been steadily falling since the 1990s.³³ Not only do declined cases have a languid recovery rate, but also the FOIA data set shows that the median dollar-value recovery in winning declined cases is less than one-third the median dollar-value recovery in winning intervened cases.³⁴ As a result, recoveries in declined cases have amounted to less than 4 percent of the FCA's total recoveries since 1986.³⁵

When the DOJ does intervene, it takes the lead in the suit, and the government's complaint in intervention supersedes the relator's complaint.³⁶ As the operative pleading, the complaint in intervention is generally not entitled to the flexibility afforded to relators under a relaxed pleading standard, because the

³¹ These figures represent the total number of intervened cases out of the total number of cases, measured by the year in which the election decision was made. These generated figures avoid the right-censoring distortion that would result from calculating the intervention rate based on case filing year. The distortion would be right censored because an election decision is made more quickly in declined cases than in intervened cases, and thus an analysis based on case filing year would be overpopulated with declined cases and underpopulated with intervened cases. For an example of related data subject to this right-censoring problem, see David Freeman Engstrom, *Private Enforcement's Pathways: Lessons from Qui Tam Litigation*, 114 Colum L Rev 1913, 1961–62 (2014).

³² These figures represent the average recovery rates for intervened and declined cases from 2005 to 2014. The recovery-rate numerators are pegged to case recovery dates, and the denominators are pegged to case recovery dates (for successful claims) or case “end dates” (for unsuccessful claims). By avoiding measurements based on filing date or election date, the generated figures ensure that the recent data are not distorted through right censoring. Open cases that have not returned a recovery, cases under investigation, and cases under seal are not included in these calculations. For similar calculations of recovery rates based on 2009 and 2011 FOIA requests, see Kwok, 42 Pub Cont L J at 241 (cited in note 27); Engstrom, 107 Nw U L Rev at 1720–21 (cited in note 29).

³³ See Engstrom, 107 Nw U L Rev at 1721–22 (cited in note 29).

³⁴ The FOIA data show that the median recovery for declined cases is 32.2 percent the size of the median recovery for intervened cases from January 2002 to January 2015. Median recoveries are a more accurate benchmark than mean recoveries, because mean recoveries are heavily skewed by several high-value outlier recoveries.

³⁵ See DOJ, *Fraud Statistics* at *1–2 (cited in note 2).

³⁶ See John T. Boese, 1 *Civil False Claims and Qui Tam Actions* § 4.05 at 4-232 to -235 (Wolters Kluwer 4th ed 2011 & Supp 2015).

government's involvement in the suit alleviates information-asymmetry concerns.³⁷ Furthermore, the DOJ's complaint in intervention is often the product of months or years of investigations, interviews, subpoenas, and discussions with defense counsel. Thus, in practice, the relaxed standard never has the opportunity to apply to intervened suits, for two related reasons. First, the strong success record of intervened suits is no accident: the DOJ intervenes only when it has first gathered evidence of the false claims underlying the allegations and is thus able to survive a motion to dismiss under either a relaxed or strict iteration of the pleading standard. Second, when the DOJ intervenes, almost all defendants settle, and most do so rather quickly. The FOIA data indicate that over 97 percent of all successful intervened suits result in a settlement—not a judgment—and that over half of such suits settle within ten days of the intervention election, thereby obviating the need for the application of Rule 9(b).³⁸

B. Rule 9(b)

Rule 9(b) states that “[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake.”³⁹ Despite some academic criticism leveled against Rule 9(b) generally,⁴⁰ as well as in the FCA context

³⁷ See, for example, *United States v Kellogg Brown & Root, Inc.*, 903 F Supp 2d 473, 486–87 (ED Tex 2011) (finding the Government's complaint noncompliant with Rule 9(b) and not discussing potential information asymmetry); *In re Cardiac Devices Qui Tam Litigation*, 221 FRD 318, 336 (D Conn 2004) (finding the Government's complaint sufficient because it provided the defendants with fair notice of the substance of the claims against them). For a discussion of how the relaxed standard seeks to resolve concerns of information asymmetry, see Part II.B.

³⁸ As indicated above in note 30, the FOIA data set and further information regarding the data are available from the author on request. See also James B. Helmer Jr., *False Claims Act: Whistleblower Litigation* 1017, 1023–27, 1036–38 (Bloomberg BNA 6th ed 2012) (describing defendants' incentives to settle quickly). This pattern of quick settlements following intervention raises additional questions beyond the scope of this Comment. For example, it suggests that in many cases the DOJ and the defendant began negotiating settlement eventualities prior to intervention. Thus, it is not clear whether intervention is actually driving settlement, or whether—perhaps to limit the relator's bounty, perhaps to safeguard DOJ control over the final settlement, or perhaps to ensure that the DOJ gets proper credit for the recovery—settlement is driving intervention.

³⁹ FRCP 9(b).

⁴⁰ See generally, for example, Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 Ind L J 119 (2011); Christopher M. Fairman, *An Invitation to the Rulemakers — Strike Rule 9(b)*, 38 UC Davis L Rev 281 (2004).

specifically,⁴¹ all courts agree that Rule 9(b) applies alongside Rule 8(a)(2) plausibility pleading in an FCA suit.⁴² This standard generally requires an FCA plaintiff to allege the time and place of the fraud, its content and consequences, and what the defendant gained.⁴³ In other words, the complaint must identify the “who, what, when, where, and how” of the alleged fraud.⁴⁴

The roots of Rule 9(b) lie in ancient pleading practice. Fraud was a disfavored action both at common law and in code pleading jurisdictions, and was thus subjected to a heightened pleading standard.⁴⁵ American courts have required particularized pleading of fraud since the late eighteenth century.⁴⁶ The commonly cited purposes of the particularity requirement are: (1) protection of the defendant’s reputation,⁴⁷ (2) deterrence of frivolous and strike suits,⁴⁸ (3) prevention of fraud suits in which the dispositive facts are learned through discovery,⁴⁹ (4) offering the defendant particularized notice so that he can adequately

⁴¹ See, for example, Helmer, *False Claims Act* at 575–78 (cited in note 38) (arguing that Rule 9(b) should not apply to FCA claims at all because “[a]n FCA case is not a fraud case”). See also Charis Ann Mitchell, Comment, *A Fraudulent Scheme’s Particularity under Rule 9(b) of the Federal Rules of Civil Procedure*, 4 Liberty U L Rev 337, 365–66 (2010) (arguing that Rule 9(b) should not be applied to a qui tam complaint under the FCA, because “fraud is not required for a violation of the FCA”).

⁴² See Boese, 2 *Civil False Claims* § 5.04 at 5-64 & n 229, 5-81 (cited in note 36) (noting that beyond particularity, “plausibility is required of FCA allegations, and facts must be pled that make fraud not just conceivable, but plausible”).

⁴³ See Charles Alan Wright and Arthur R. Miller, 5A *Federal Practice and Procedure* § 1297 at 74 (West 3d ed 2004). See also, for example, *United States v Medco Health Solutions, Inc.*, 671 F3d 1217, 1222 (11th Cir 2012).

⁴⁴ *DiLeo v Ernst & Young*, 901 F2d 624, 627 (7th Cir 1990).

⁴⁵ See Jeff Sovern, *Reconsidering Federal Civil Rule 9(b): Do We Need Particularized Pleading Requirements in Fraud Cases?*, 104 FRD 143, 144–46 (1985).

⁴⁶ See, for example, *Wharton’s Executors v Lowrey*, 2 US (2 Dall) 364, 365 (CC D Pa 1796) (“[T]he fraud being denied on oath, and unsupported by any species of evidence, the complainant ought not to be permitted to harass the defendant.”); *United States v Watkins*, 28 F Cas 419, 428 (Cir Ct DC 1829) (requiring “positive and precise averments,” which “state what was pretended; and that what was pretended was false; and wherein and in what particular it was false”).

⁴⁷ See, for example, *Segal v Gordon*, 467 F2d 602, 607 (2d Cir 1972) (“Rule 9(b)’s specificity requirement stems . . . from the desire to protect defendants from the harm that comes to their reputations or to their goodwill when they are charged with serious wrongdoing.”).

⁴⁸ See, for example, *United States v Laboratory Corp of America, Inc.*, 290 F3d 1301, 1316–17 (11th Cir 2002) (Barkett dissenting) (invoking Rule 9(b) as a bar to “spurious charges or frivolous lawsuits”).

⁴⁹ See, for example, *United States v Rogan*, 2002 WL 31433390, *3 (ND Ill) (naming the prevention of “fishing expeditions” as one of Rule 9(b)’s purposes).

prepare his response pleading,⁵⁰ and (5) judicial reluctance to reopen completed transactions.⁵¹

Particularized pleading serves an essential function in the FCA context. Rule 9(b) first becomes relevant when the suit is unsealed—that is, after the DOJ makes its intervention decision—and the defendant has his first opportunity to appraise the allegations and file a motion to dismiss. Once unsealed and publicized, FCA suits may cause a corporate defendant's stock price to drop, or they may result in layoffs and lost business opportunities.⁵² In multiyear DOJ investigations, civil investigative demands and subpoenas may cause defendants to incur millions of dollars in legal fees before the complaint is ever unsealed.⁵³ Furthermore, the privatization of enforcement through the use of relators has incentivized armies of opportunistic plaintiffs to file suit, of which 16 percent are repeat relators.⁵⁴ Meritless FCA suits impose significant financial burdens on the taxpayer by wasting the DOJ's investigative resources and increasing the costs of government programs and contracts.⁵⁵

A further justification for particularized pleading in the FCA context is the presumption that the government possesses the documents needed to make its case. Classic misrepresentation cases presumed that a defrauded party should be able to provide the particulars of an allegedly fraudulent transaction because the party had a direct role in that transaction.⁵⁶ When an FCA defendant contracts directly with a government agency, the affected agency should be able to easily provide the DOJ with its records of the transaction. However, this presumption becomes problematic when the government claims, for example, that a

⁵⁰ See, for example, *Laboratory Corp.*, 290 F3d at 1310 (“The particularity rule serves an important purpose in fraud actions by alerting defendants to the precise misconduct with which they are charged.”).

⁵¹ See, for example, *Stearns v Page*, 48 US 819, 828–29 (1849) (discussing how a court will “exercise great caution in sustaining bills which seek to disturb” settled accounts, and invoking the particularity requirement as a means to help the court ensure that it is “not committing another, and perhaps greater, mistake” in reopening a completed transaction).

⁵² See Pamela H. Bucy, *Private Justice*, 76 S Cal L Rev 1, 63 (2002).

⁵³ For more information on investigations prior to unsealing, see Part III.B.

⁵⁴ See Engstrom, 112 Colum L Rev at 1288–98 (cited in note 29); Christina Orsini Broderick, Note, *Qui Tam Provisions and the Public Interest: An Empirical Analysis*, 107 Colum L Rev 949, 975 (2007) (noting that “78% of qui tam suits were frivolous”).

⁵⁵ See Todd J. Canni, *Who's Making False Claims, the Qui Tam Plaintiff or the Government Contractor? A Proposal to Amend the FCA to Require That All Qui Tam Plaintiffs Possess Direct Knowledge*, 37 Pub Cont L J 1, 11–12 (2007).

⁵⁶ See Fairman, 38 UC Davis L Rev at 288–89 (cited in note 40).

pharmaceutical company's fraudulent off-label marketing or upcoding⁵⁷ caused third parties to submit false Medicare claims for reimbursement.⁵⁸ Here, in the absence of a straightforward presentment claim, the government may understandably have a more difficult time identifying the specific false claims.⁵⁹

Rule 9(b) is traditionally applied on a case-by-case basis that depends on the context of the suit, the complexity of the transaction, the parties' relationship, and the difficulty of preparing adequate responsive pleadings based on the complexity of the allegations.⁶⁰ Yet courts are divided on the exact height of the Rule 9(b) hurdle for claims that relators bring on their own after the DOJ declines to intervene.

II. DECLINED: THE PLEADING STANDARD APPLIED TO RELATORS

While it was once a topic of contention, all courts have ultimately agreed that Rule 9(b) applies to FCA suits.⁶¹ Since the FCA was enacted, courts have placed particular emphasis on the importance of Rule 9(b) in protecting qui tam defendants from potentially meritless suits.⁶² At its most basic level, Rule 9(b) demands dismissal of complaints that fail to establish the "time, place, persons, and fraudulent nature of the alleged acts."⁶³ Some courts have termed these requirements as "journalistic,"⁶⁴ demanding the identification of the "who, what, when, where, and

⁵⁷ See *United States v Community Health Systems, Inc.*, 501 F3d 493, 497 n 2 (6th Cir 2007) (defining "upcoding" as "the practice of billing Medicare for medical services or equipment designated under a code that is more expensive than what a patient actually needed or was provided").

⁵⁸ See Boese, 1 *Civil False Claims* § 2.01[C] at 2-31 to -34 (cited in note 36).

⁵⁹ See 31 USC § 3729(a)(1)(A) (providing for liability when an individual "knowingly presents . . . a false or fraudulent claim for payment or approval"); Helmer, *False Claims Act* at 158-60 (cited in note 38).

⁶⁰ See, for example, *United States v Kanneganti*, 565 F3d 180, 188 (5th Cir 2009) (emphasizing that "Rule 9(b)'s ultimate meaning is context-specific, and thus there is no single construction of Rule 9(b) that applies in all contexts") (quotation marks and citation omitted); Boese, 2 *Civil False Claims* § 5.04[B] at 5-84 to -84.1 (cited in note 36).

⁶¹ See *United States v Bombardier Corp and Envirovac, Inc.*, 286 F3d 542, 551-52 (DC Cir 2002) ("Every circuit to consider the issue has held that, because the False Claims Act is self-evidently an anti-fraud statute, complaints brought under it must comply with Rule 9(b).").

⁶² See, for example, *United States v Epic Healthcare Management Group*, 193 F3d 304, 309 (5th Cir 1999) ("A special relaxing of Rule 9(b) is a *qui tam* plaintiff's ticket to the discovery process that the statute itself does not contemplate.").

⁶³ Boese, 2 *Civil False Claims* § 5.07[B] at 5-70 to -71 (cited in note 36).

⁶⁴ *United States v Associated Anesthesiologists of Springfield, Ltd.*, 2014 WL 4198199, *12 (CD Ill).

how” of the fraud.⁶⁵ Other courts have described Rule 9(b) as a requirement that complaints must, “at a minimum, set forth the time, place and specific content of each alleged act of fraud.”⁶⁶ The most frequently stated judicially created interpretation is that a sufficient fraud complaint requires “the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby.”⁶⁷

This Part describes the general features and procedural consequences of two interpretations of Rule 9(b) that form the center of a circuit split. When the DOJ declines intervention and the relator chooses to bring the suit alone, some courts have fashioned a strict standard that requires the relator’s complaint to identify representative samples of the allegedly false claims with a high degree of detail.⁶⁸ In contrast, other courts have applied a relaxed standard that treats representative samples as merely one way to meet the particularity requirement. Insider relators may also meet Rule 9(b)’s heightened pleading standard by “alleging particular details of a *scheme* to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted.”⁶⁹

As might be expected with any context-based pleading standard, these vaguely defined standards have delivered wildly inconsistent results.⁷⁰ As an additional complication, the FCA’s various substantive violations implicate varying types of proof and different degrees of information asymmetry; thus, the respective pleading standards are further nuanced depending on the underlying substantive violation. The intercircuit survey in this Part reveals that the circuit split is eroding in favor of the relaxed standard.

⁶⁵ *DiLeo v Ernst & Young*, 901 F2d 624, 627 (7th Cir 1990).

⁶⁶ *United States v California Medical Review, Inc*, 723 F Supp 1363, 1372 (ND Cal 1989).

⁶⁷ *United States v Takeda Pharmaceuticals North America, Inc*, 707 F3d 451, 455–56 (4th Cir 2013).

⁶⁸ See, for example, *United States v St Luke’s Hospital, Inc*, 441 F3d 552, 557 (8th Cir 2006).

⁶⁹ *United States v Kanneganti*, 565 F3d 180, 190 (5th Cir 2009) (emphasis added).

⁷⁰ For a comparative overview of the inconsistent application of plausibility pleading, see Alex Reinert, *The Impact of Ashcroft v. Iqbal on Pleading*, 43 Urban Law 559, 564–77 (2011) (“[T]he lower courts’ treatment of *Iqbal* is hardly a model of consistency.”).

A. The Strict Approach: Representative Samples Required

The strict pleading standard is best understood as a stringent, bright-line adherence to the time, place, and manner requirements of fraud allegations. Under the strict standard, a complaint that merely describes a fraudulent scheme or alleges fraud on information and belief does not survive a particularity challenge. Rather, the strict pleading standard requires that complaints allege particularized details of specific false claims—or representative samples thereof—that were allegedly submitted to the government for payment. Courts began experimenting with this bright-line requirement in the late 1990s.⁷¹ It has been employed over the past decade by the Second, Fourth, Sixth, Seventh, Eighth, and Eleventh Circuits.⁷² Currently, only the Second, Fourth, and Eleventh Circuits continue to apply some consistent version of a strict pleading standard.⁷³ The justifications for this approach are broad and primarily premised on best serving Rule 9(b)'s objectives.⁷⁴

First, courts have noted that the strict standard is the only means to provide adequate notice to defendants of the exact allegations leveled against them.⁷⁵ A large corporate FCA defendant, for example, may regularly file hundreds of thousands of claims with the government. Without knowing exactly which claims are allegedly false, the defendant cannot prepare a

⁷¹ See, for example, *United States v Allina Health System Corp*, 1997 US Dist LEXIS 21402, *33–34 (D Minn) (“Plaintiffs must provide some representative examples of the fraud which detail the specifics of who, where and when.”).

⁷² See, for example, *United States v Community Health Systems, Inc*, 501 F3d 493, 510–11 (6th Cir 2007) (“In order for a relator to proceed to discovery on a fraudulent scheme, the claims that are pled with specificity must be characteristic example[s].”) (quotation marks omitted); *St Luke’s Hospital*, 441 F3d at 557 (“[The relator] must provide some representative examples of [the defendants’] alleged fraudulent conduct, specifying the time, place, and content of their acts and the identity of the actors.”); *United States v Laboratory Corp of America, Inc*, 290 F3d 1301, 1311 (11th Cir 2002) (finding a “fatal flaw” in the complaint’s failure to allege “specific claims” or “specific information about the actual submission of claims”).

⁷³ See, for example, *United States v Americare, Inc*, 2013 WL 1346022, *3 (EDNY) (collecting cases); *Takeda Pharmaceuticals*, 707 F3d at 455–56; *United States v Medco Health Solutions, Inc*, 671 F3d 1217, 1225 (11th Cir 2012) (“[A] relator must identify the particular document and statement alleged to be false, who made or used it, when the statement was made, how the statement was false, and what the defendants obtained as a result.”).

⁷⁴ See, for example, *Takeda Pharmaceuticals*, 707 F3d at 456; *Community Health Systems*, 501 F3d at 510.

⁷⁵ See, for example, *United States v Pfizer, Inc*, 507 F3d 720, 733 (1st Cir 2007) (noting that although the relator “raise[d] facts that suggest[ed] fraud was possible,” there was not enough specificity “to give notice to Pfizer of the false claims”).

meaningful responsive pleading and is placed on uneven footing going into discovery.⁷⁶ Furthermore, detailed pleading is necessary in order for the defendant to accurately assess whether the complaint can be dismissed on jurisdictional grounds.⁷⁷

Second, a lurking danger exists that is unique to FCA suits. Beyond the burden of high litigation costs, FCA defendants are also exposed to the threat of a corporate death sentence. Under the Federal Acquisition Regulation,⁷⁸ agency officials have broad discretion to temporarily debar or permanently suspend a government contractor after a finding of FCA liability.⁷⁹ Many FCA defendants in the defense and health-care sectors almost certainly could not exist without the government as a contractual partner. Due to this monopsonistic relationship, even a temporary debarment can irreparably cripple a government contractor. In fact, most FCA settlements include Corporate Integrity Agreements to prevent the defendant's exclusion from federal health-care, defense, or other acquisition programs.⁸⁰ This "settle or die" dynamic seems to have played a key role in the FCA's success. The threat of debarment accounts for an "*in terrorem* increment of the settlement value," a factor which also played a central role in the establishment of plausibility pleading in *Bell Atlantic Corp v Twombly*.⁸¹ To this extent, a strict interpretation of Rule 9(b) protects FCA defendants from baseless allegations, which, if left unchecked, could threaten a defendant's very existence.

Third, courts have noted that the FCA was not designed to punish every type of fraud; "liability under the Act attaches only to a claim actually presented to the government for payment, not

⁷⁶ See Part III.B.1.

⁷⁷ See Boese, 2 *Civil False Claims* § 5.04[B] at 5-80.1 to -81 (cited in note 36).

⁷⁸ 48 CFR § 1 et seq.

⁷⁹ See 48 CFR § 9406-2(a)–(b). See also Kate M. Manuel, *Debarment and Suspension of Government Contractors: An Overview of the Law Including Recently Enacted and Proposed Amendments* *4–7 (Congressional Research Service, Jan 6, 2012), archived at <http://perma.cc/Y97W-2FYB>. See also Helmer, *False Claims Act* at 1016 & n 1 (cited in note 38).

⁸⁰ See Statements of David Ogden, former Deputy Attorney General 2009–10 at the US Chamber of Commerce Legal Summit (C-SPAN, Oct 24, 2012), online at <http://www.c-span.org/video/?309024-4/federal-regulations> (visited July 19, 2015) (Perma archive unavailable) (detailing how this risk completely distorts the litigation process). See also, for example, Sarah Westwood, *HHS Still Doing Business with Firm That Twice Defrauded Medicare* (Washington Examiner, Nov 15, 2014), archived at <http://perma.cc/Q39U-DY7H>.

⁸¹ 550 US 544, 558 (2007) (quotation marks omitted).

to the underlying fraudulent scheme.”⁸² In this respect, courts have referred to a false claim as the sine qua non of an FCA violation.⁸³ Accordingly, particularized allegations of an FCA violation must include the details of at least one of the claims underlying the defendant’s potential liability.

A recent case from the Seventh Circuit displays the strict standard in action. In *United States v Ukrainian Village Pharmacy, Inc.*,⁸⁴ the United States declined to intervene in the qui tam suit of Yury Grenadyor, a disgruntled pharmacist in Chicago.⁸⁵ His relator complaint alleged that his employer, a pharmacy network, had been continuously violating the FCA by providing kickbacks to loyal customers in the form of Russian-language TV guides and tins of roe and sprats, as well as by categorically waiving co-pays in violation of Medicare and Medicaid competition guidelines.⁸⁶ Unfortunately for Grenadyor, his complaint failed to allege any particularized details of claims that had allegedly been submitted for payment.⁸⁷ The court dismissed Grenadyor’s claims under the strict pleading standard even though the eventual submission of a false claim was the logical conclusion of the fraudulent scheme as alleged. The court noted that “[t]o comply with Rule 9(b) Grenadyor would have had to allege either that the pharmacy submitted a claim to Medicare (or Medicaid) on behalf of a specific patient who had received a kickback, or at least name a Medicare patient who had received a kickback.”⁸⁸ Without explanation and without announcing a clear rule, Judge Richard Posner ignored Seventh Circuit precedent applying the relaxed standard⁸⁹ and instead cited to sister-circuit precedent employing the strict standard.⁹⁰

⁸² *Takeda Pharmaceuticals*, 707 F3d at 456. See also *United States v McNinch*, 356 US 595, 599 (1958) (“[T]he False Claims Act was not designed to reach every kind of fraud practiced on the Government.”).

⁸³ See, for example, *Laboratory Corp.*, 290 F3d at 1311.

⁸⁴ 772 F3d 1102 (7th Cir 2014).

⁸⁵ *Id.* at 1104.

⁸⁶ *Id.* at 1104–07.

⁸⁷ See *id.* at 1107.

⁸⁸ *Ukrainian Village Pharmacy*, 772 F3d at 1107.

⁸⁹ See *United States v Rolls-Royce Corp.*, 570 F3d 849, 854 (7th Cir 2009) (“We don’t think it essential for a relator to produce the invoices (and accompanying representations) at the outset of the suit.”).

⁹⁰ *Ukrainian Village Pharmacy*, 772 F3d at 1107, citing *Community Health Systems*, 501 F3d at 504, and *Laboratory Corp.*, 290 F3d at 1311–12.

B. The Relaxed Approach: Representative Samples Not Required

The relaxed approach, first explored in the late 2000s, maintains that the “use of representative examples is simply one means of meeting the pleading obligation.”⁹¹ In other words, a complaint is sufficient under Rule 9(b) if it alleges “particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted.”⁹² This nuanced standard appears to require a high degree of particularity regarding the *scheme*, coupled with a lower degree of particularity regarding the actual *submission* of false claims. The “indicia of reliability” factor originally evolved from the Eleventh Circuit’s description of Rule 9(b)’s requirements⁹³ and has since transformed into a device that effectively lowers the pleading standard for relators with insider knowledge of the defendant’s allegedly fraudulent practices. The First, Fifth, and Ninth Circuits were the first appellate courts to apply the relaxed approach in the late 2000s.⁹⁴

These circuits—along with others that have recently adopted the relaxed approach—have offered several broad justifications for the relaxed standard that comport well with the “liberal ethos” of modern pleading practice.⁹⁵ First, courts have noted that unlike the government, many relators simply have no way to access the key particularized information that is needed to provide detailed allegations of specific false claims. Accordingly, the strict standard is too harsh on relators because this information tends

⁹¹ *Ebeid v Lungwitz*, 616 F3d 993, 998 (9th Cir 2010).

⁹² *Id* at 998–99.

⁹³ *Laboratory Corp*, 290 F3d at 1311 (“[I]f Rule 9(b) is to be adhered to, some indicia of reliability must be given in the complaint to support the allegation of an *actual false claim* for payment being made to the Government.”).

⁹⁴ See, for example, *United States v Ortho Biotech Products, LP*, 579 F3d 13, 30 (1st Cir 2009) (refusing to dismiss a complaint that identified the participants of a scheme as well as where, when, and how the scheme occurred); *Kanneganti*, 565 F3d at 190 (emphasizing that Rule 9(b) is necessarily “context specific and flexible”); *Ebeid*, 616 F3d at 998–99 (adopting the relaxed standard). The United States District Court for the District of Columbia likewise employs the relaxed standard. See, for example, *United States v CDW Technology Services, Inc*, 722 F Supp 2d 20, 26 (DDC 2010) (“[A] plaintiff need not allege the *existence* of a request for payment with particularity.”) (quotation marks omitted).

⁹⁵ Richard L. Marcus, *The Revival of Fact Pleading under the Federal Rules of Civil Procedure*, 86 Colum L Rev 433, 439 (1986).

to be exclusively in the defendants' hands.⁹⁶ Second, courts have sought to craft a pleading standard that supports what they believe to be Rule 9(b)'s primary goal: notice.⁹⁷ These courts find that the relaxed approach can fulfill Rule 9(b)'s objective of providing defendants with adequate notice, while still allowing relators to proceed to discovery despite a failure to identify the specific claims that may ultimately prove the fraud.⁹⁸ Third, courts have reasoned that the relaxed pleading standard best comports with the goals underlying the FCA, and that an overly strict application of Rule 9(b) "undermines the FCA's effectiveness as a tool to combat fraud against the United States."⁹⁹ Fourth, courts have noted that requiring complaints to detail the time, place, and content of any alleged fraudulent representations parallels the elements of common-law fraud, and that these requirements may not be inflexibly superimposed on FCA claims.¹⁰⁰ Finally, courts have considered it unreasonable to require allegations of representative examples of false claims, on the grounds that such a requirement would be tantamount to asking the relator to offer the same proof at the pleading stage that he would need to prevail at trial.¹⁰¹

A leading case from the Fifth Circuit shows how the relaxed standard functions in practice. The United States declined to intervene in the *qui tam* suit of Dr. James H. Grubbs, a

⁹⁶ See, for example, *Rolls-Royce*, 570 F3d at 854 ("Since a relator is unlikely to have [certain] documents unless he works in the defendant's accounting department, the [requirement of representative examples] takes a big bite out of *qui tam* litigation.").

⁹⁷ See *United States v American Healthcorp, Inc*, 977 F Supp 1329, 1333 (MD Tenn 1997) (applying the Rule 9(b) pleading requirements while "[k]eeping in mind that the primary purpose of the pleading standard is to ensure Defendants receive notice of the charges against them").

⁹⁸ See, for example, *Foglia v Renal Ventures Management, LLC*, 754 F3d 153, 156–57 (3d Cir 2014); *Kanneganti*, 565 F3d at 190.

⁹⁹ *Foglia*, 754 F3d at 156, quoting Brief for the United States as Amicus Curiae, *United States v Takeda Pharmaceuticals North America, Inc*, Docket No 12-1349, *10 (US filed Feb 25, 2014) (available on Westlaw at 2014 WL 709660) ("*Takeda* Brief"). See also *Kanneganti*, 565 F3d at 190 (suggesting that the strict standard adopted by opposing circuits may be "stymieing legitimate efforts to expose fraud").

¹⁰⁰ See, for example, *Kanneganti*, 565 F3d at 188–89 ("[A] claim under the False Claims Act and a claim under common law or securities fraud are not on the same plane in meeting the requirement of 'stat[ing] with particularity' the contents of the fraudulent misrepresentation.").

¹⁰¹ See, for example, *id* at 189–90 ("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.").

psychiatrist employed at a hospital in Beaumont, Texas.¹⁰² Dr. Grubbs's relator complaint alleged that shortly after he was hired, his employers divulged a fraudulent billing scheme to him and solicited his participation by asking him to record patient visits that had not occurred.¹⁰³ Over the course of a year, Dr. Grubbs witnessed the fraudulent scheme proceed. Yet, applying the strict standard, the district court dismissed his second amended complaint because it failed to allege sufficiently particularized details of the false claims submitted to Medicaid for reimbursement, such as the precise dollar amounts, billing numbers, and other specific contents of the bills.¹⁰⁴

The Fifth Circuit reversed, finding that the "time, place, contents, and identity standard is not a straitjacket for Rule 9(b)."¹⁰⁵ In regard to Grubbs's § 3729(a)(1)(A) presentment claim, the court noted that in contrast to common-law fraud and securities fraud, the FCA contains no reliance requirement and exposes even unsuccessful false claims to liability.¹⁰⁶ Thus, because a jury could find that an FCA violation had occurred without ever knowing the actual amount that the government had been overcharged, a relator does not need to plead such particulars in his complaint.¹⁰⁷ Accordingly, the Fifth Circuit held that "a relator's complaint, if it cannot allege the details of an actually submitted false claim, may nevertheless survive by alleging particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted."¹⁰⁸

C. The Erosion of the Circuit Split

Over the course of the past ten years, the circuit split has eroded in favor of the relaxed standard. Furthermore, the courts that have adhered to the strict standard have applied it inconsistently.¹⁰⁹ For example, the Eighth Circuit recently abandoned its adherence to the strict standard by noting that relators who can "plead[] details about the defendant's billing

¹⁰² *Id.* at 183–85.

¹⁰³ *Id.*

¹⁰⁴ *Kanneganti*, 565 F3d at 185, 190.

¹⁰⁵ *Id.* at 190 (quotation marks omitted).

¹⁰⁶ *Id.* at 189.

¹⁰⁷ See *id.* at 188–90.

¹⁰⁸ *Kanneganti*, 565 F3d at 190.

¹⁰⁹ For an overview of this inconsistent application, see *Takeda* Brief at *11–14 (cited in note 99).

practices and plead[] personal knowledge of the defendant's submission of false claims" may be excused from the strict standard.¹¹⁰ Likewise while the Sixth Circuit has not yet departed from the strict standard,¹¹¹ it has indicated that the pleading standard may be relaxed "when the relator has personal knowledge that the claims were submitted by Defendants . . . for payment."¹¹² The pleading standard as applied by the Sixth and Eighth Circuits can thus be understood as a means of distinguishing between insider and outsider relators. Approximately 25 percent of relators are outsiders such as competitors, partners, subcontractors, or outside investigators. Courts may not perceive such outsider relators as those for whom the qui tam provisions were originally enacted.¹¹³ The Third and Tenth Circuits have also abandoned the strict standard.¹¹⁴ Likewise, the Eleventh Circuit, once a bastion of the strict standard,¹¹⁵ recently tempered its pleading rule, noting that "alternative means are also available to satisfy [Rule 9(b)]."¹¹⁶ The pleading standard remains an open question in the Seventh Circuit, and despite Seventh Circuit precedent suggesting

¹¹⁰ *United States v Planned Parenthood of the Heartland*, 765 F3d 914, 918 (8th Cir 2014) (adopting the relaxed standard for relators with firsthand, personal knowledge of the defendant's billing and claims systems).

¹¹¹ See, for example, *Community Health Systems*, 501 F3d at 510 (holding that a complaint that merely pleads a false scheme with particularity does not comply with Rule 9(b)'s requirements).

¹¹² *Chesbrough v VPA, PC*, 655 F3d 461, 471 (6th Cir 2011) (quotation marks omitted).

¹¹³ For an in-depth analysis of the most common relationships between relators and defendants, see Engstrom, 112 Colum L Rev at 1288–98 (cited in note 29).

¹¹⁴ See *Foglia*, 754 F3d at 156–57. Compare *United States v Regence BlueCross BlueShield of Utah*, 472 F3d 702, 727 (10th Cir 2006) ("[The complaint must be] linked to allegations, stated with particularity, of the actual false claims submitted to the government.") (quotation marks omitted), with *United States v Envirocare of Utah, Inc*, 614 F3d 1163, 1172 (10th Cir 2010) ("[The complaint] need only show the specifics of a fraudulent scheme and provide an adequate basis for a reasonable inference that false claims were submitted as part of that scheme.").

¹¹⁵ See, for example, *Hopper v Solvay Pharmaceuticals, Inc*, 588 F3d 1318, 1326 (11th Cir 2009). See also *Medco Health Solutions*, 671 F3d at 1225 ("[A] relator must identify the particular document and statement alleged to be false, who made or used it, when the statement was made, how the statement was false, and what the defendants obtained as a result.").

¹¹⁶ *United States v Health Management Associates, Inc*, 2014 WL 5471925, *8–10 (11th Cir) (noting that "a relator with direct, first-hand knowledge of the defendants' submission of false claims gained through her employment with the defendants may have a sufficient basis for asserting that the defendants actually submitted false claims").

adherence to the relaxed standard,¹¹⁷ “[d]istrict courts in the Seventh Circuit have applied both competing interpretations.”¹¹⁸

Some circuits have carved out their own middle grounds. The Fourth Circuit recently held that if the “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.”¹¹⁹ In other words, unless the relator can plead particularized firsthand knowledge of an “integrated scheme in which presentment of a claim for payment was a necessary result,” a complaint lacking specific examples of allegedly false claims will fail to meet the Rule 9(b) threshold.¹²⁰

The First Circuit’s nuanced relaxed standard also bears mentioning. This pleading standard distinguishes between allegations that a defendant filed false claims and allegations that a defendant induced *third parties* to file false claims.¹²¹ With regard to the latter, a relator may satisfy Rule 9(b) by providing factual or statistical evidence but need not necessarily provide particularized details concerning each false claim.¹²²

* * *

While not exhaustive, this Part has provided a bird’s-eye view of how courts treat relator complaints that fail to allege either the detailed particulars of specific false claims or representative samples of the alleged fraud.¹²³ The trend is clear: courts are moving away from the inflexibility of the strict standard and are expanding the ways by which a relator’s complaint may sufficiently state a claim. However, the nuanced standards announced by the circuits present a number of questions: What concrete effect has the relaxed pleading standard had on the war on fraud? What practices and behaviors of the DOJ and the relator’s bar do the two pleadings standards incentivize? And if the relaxed standard paves the road to recoveries, then *why* did

¹¹⁷ See *Rolls-Royce*, 570 F3d at 854 (“We don’t think it essential for a relator to produce the invoices (and accompanying representations) at the outset of the suit.”).

¹¹⁸ *Associated Anesthesiologists*, 2014 WL 4198199 at *12.

¹¹⁹ *Takeda Pharmaceuticals*, 707 F3d at 457.

¹²⁰ *Id.* at 461.

¹²¹ See, for example, *Ortho Biotech*, 579 F3d at 29.

¹²² See *id.*

¹²³ For a thorough analysis and history of the Rule 9(b) pleading standard in FCA litigation, see Boese, 2 *Civil False Claims* § 5.04 at 5-64 to -116.2 (cited in note 36).

the DOJ object to a proposed 2007 FCA amendment that would have exempted qui tam complaints from Rule 9(b)'s heightened pleading standard altogether?¹²⁴

III. HOW A STRICT STANDARD SERVES THE FCA'S OBJECTIVES

Almost all scholarship addressing this circuit split has vigorously defended the relaxed standard, relying on the basic proposition that a relaxed standard yields more recoveries and thus contributes to stronger fraud enforcement and deterrence.¹²⁵ The analysis undertaken by prior scholarship has rested primarily on drawing thin lines in the nebulous and shifting landscape of FCA fact patterns. This Comment seeks to analyze the circuit split using an entirely different framework and methodology.

This Part investigates the merits of the strict standard on the basis of the FCA in practice, drawing on theoretical literature on pleading practice and new empirical data obtained through a 2015 FOIA request.¹²⁶ Specifically, this Part argues that the strict standard best aligns the incentives of the DOJ and relators and that it avoids the systemic inefficiencies of a relaxed standard. The new FOIA data set contributes to this analysis by showing that the relaxed standard has had no demonstrable effect on fraud deterrence, enforcement, or recovery. This Part also introduces a model that demonstrates that the strict standard does not diminish relators' incentives to file high-quality qui tam suits. Rather, the strict standard serves as a much-needed

¹²⁴ See generally Keith B. Nelson, Principal Deputy Assistant Attorney General, Letter to the Honorable John Conyers Jr, Chairman of the Committee on the Judiciary, US House of Representatives (July 15, 2008), archived at <http://perma.cc/U6HZ-W66E>.

¹²⁵ See, for example, Helmer, *False Claims Act* at 575–78 (cited in note 38); Vann Bentley, Note, *Getting Particular: Finding the Appropriate False Claims Act Pleading Standard Post-Nathan v. Takeda Pharmaceuticals*, 13 Georgetown J L & Pub Pol 129, 141 (2015) (claiming that the strict standard is inconsistent with the text of the FCA as well as with Rule 9(b)); Emily T. Chen, Note, *Depressing Diagnosis: Stringent Particularity Requirement of the Rule 9(b) Pleading Standard as a Critical Bar to Off-Label Promotion Fraud Whistleblowers*, 36 Cardozo L Rev 333, 340 (2014) (“[A] stringent particularity pleading requirement presents a prohibitively high bar for healthcare fraud whistleblowers.”); Aaron Rubin, Comment, *To Present Bills or Not to Present? An In-Depth Analysis of the Burden of Pleading in Qui Tam Suits*, 8 Seton Hall Cir Rev 467, 503 (2012) (advocating the First Circuit’s balance between the “stringent bill presentment standard” and the “precariously lax standard” in *Kanneganti* and *Rolls-Royce*); Mitchell, Comment, 4 Liberty U L Rev at 340 (cited in note 41) (“This [relaxed] standard fulfills the purposes of imposing particularized pleading, while also satisfying the purposes underlying the FCA itself.”).

¹²⁶ See note 30 and accompanying text.

screening mechanism to ensure that the habitually resource-constrained DOJ is not flooded with low-quality tips. Moreover, the model's findings have broader implications for FCA reform in general. This Comment concludes that, counterintuitively, a strict Rule 9(b) standard deters and punishes fraud more effectively than its relaxed counterpart.

A. The Relaxed Standard Has Not Aided Fraud Enforcement

In the mid-2000s, several circuits began applying strict pleading standards.¹²⁷ Then, in the late 2000s, the First, Fifth, and Ninth Circuits became the first to adopt a relaxed standard.¹²⁸ By the early 2010s, most circuits had adopted some version of the relaxed standard. Given the distinct shifts in the pleading rules across the circuits, one might expect corresponding variations in case outcomes.

The FOIA data set, however, shows that the respective standard of each circuit appears to have had no significant effect on actual case outcomes. Table 1 depicts the total number of declined qui tam suits that successfully obtained recoveries; these totals are broken down by circuit and by a series of four-year time periods extending from 1999 to 2014. The tallies of total successful declined suits are accompanied by a specific recovery rate in percentage form, depicting how many declined suits obtained a recovery out of the total number of declined qui tam complaints for each circuit and time period.¹²⁹

¹²⁷ See Part II.A. See also Sylvia, *False Claims Act* §§ 10:58–59 at 606–25 (cited in note 8).

¹²⁸ See note 94 and accompanying text.

¹²⁹ The numerators are based on the date on which recovery was obtained, and the denominators are based either on the date on which recovery was obtained (for successful declined claims) or on the case's "end date" (for unsuccessful declined claims). By avoiding measurements based on filing date or election date, these generated figures ensure that the recent data are not distorted through right censoring. See notes 31–32.

TABLE 1. TOTAL SUCCESSFUL DECLINED SUITS AND RECOVERY RATES PER TIME PERIOD AND CIRCUIT

	1999–2002		2003–2006		2007–2010		2011–2014		Total
1st Cir	0	0.0%	0	0.0%	2	8.3%	6	10.5%	6.7%
2d Cir	5	14.3%	3	8.6%	6	10.9%	6	7.5%	9.8%
3d Cir	8	13.8%	5	11.6%	6	9.4%	7	7.1%	9.8%
4th Cir	13	19.7%	4	6.3%	7	11.9%	5	4.4%	9.6%
5th Cir	7	8.6%	1	1.0%	11	9.9%	7	5.1%	6.0%
6th Cir	6	8.6%	4	6.9%	6	6.9%	7	4.9%	6.4%
7th Cir	4	11.1%	5	8.8%	7	12.1%	10	12.3%	11.2%
8th Cir	6	9.0%	1	2.3%	5	10.9%	4	4.7%	6.6%
9th Cir	14	9.2%	10	6.9%	13	8.2%	8	4.5%	7.1%
10th Cir	10	20.0%	2	4.1%	0	0.0%	6	12.0%	7.3%
11th Cir	10	8.5%	7	5.6%	10	7.6%	13	6.8%	7.1%
DC Cir	2	7.4%	2	6.7%	3	10.7%	4	5.6%	7.0%
Total	85	10.9%	44	5.7%	76	8.3%	83	6.5%	

The first and most obvious observation is the low number of successful declined suits. Since 1999, fewer than 300 declined FCA suits have been successful out of a total of 3,819 declined suits. While the total number of winning declined suits has recovered somewhat from a tumble in the mid-2000s, the overall recovery rate has been in steady decline since the early 1990s.¹³⁰ The low absolute number of recoveries is not new information; however, it has never before been catalogued in a manner that permits cross circuit comparisons.

For the purpose of more closely analyzing the effects that the relaxed and strict standards have had on case outcomes over the past decade, the following two tables provide a circuit-specific breakdown of recovery rates for declined claims in the Fifth Circuit (before and after *United States v Kanneganti*,¹³¹ decided on April 8, 2009) and the Ninth Circuit (before and after *Ebeid v Lungwitz*,¹³² decided on August 9, 2010). For both tables, the recovery rates of declined claims from the Second, Eighth, and Eleventh Circuits serve as an experimental control or benchmark.¹³³

¹³⁰ See Engstrom, 107 Nw U L Rev at 1718–20 (cited in note 29).

¹³¹ 565 F3d 180 (5th Cir 2009).

¹³² 616 F3d 993 (9th Cir 2010).

¹³³ The Second, Eighth, and Eleventh Circuits serve as the control group, as they represent the clearest and longest-lasting application of the strict standard. While the United States Court of Appeals for the Second Circuit has not indicated where it stands in the circuit split, the district courts of the Second Circuit have applied a strict standard

TABLE 2. RECOVERY RATES FOR DECLINED CLAIMS (TOTAL SUCCESSFUL DECLINED SUITS IN PARENTHESES) IN THE FIFTH CIRCUIT AND IN STRICT-STANDARD CIRCUITS IN PRE-*KANNEGANTI* AND POST-*KANNEGANTI* TIME PERIODS

		Pre- <i>Kanneganti</i> Recovery Rate of Declined Claims (recovery date from 1/1/1999 to 4/8/2009)	Post- <i>Kanneganti</i> Recovery Rate of Declined Claims (recovery date from 4/9/2009 to 12/31/2014)
Strict Standard	2d Cir	11.7% (12)	7.7% (8)
	8th Cir	5.8% (8)	7.8% (8)
	11th Cir	7.1% (22)	6.8% (18)
Relaxed Standard	5th Cir	6.3% (15)	5.6% (11)

TABLE 3. RECOVERY RATES FOR DECLINED CLAIMS (TOTAL SUCCESSFUL DECLINED SUITS IN PARENTHESES) IN THE NINTH CIRCUIT AND IN STRICT-STANDARD CIRCUITS IN PRE-*EBEID* AND POST-*EBEID* TIME PERIODS

		Pre- <i>Ebeid</i> Recovery Rate of Declined Claims (recovery date from 1/1/1999 to 8/9/2010)	Post- <i>Ebeid</i> Recovery Rate of Declined Claims (recovery date from 8/10/2010 to 12/31/2014)
Strict Standard	2d Cir	10.7% (13)	8.2% (7)
	8th Cir	5.9% (9)	7.6% (7)
	11th Cir	6.8% (25)	7.4% (15)
Relaxed Standard	9th Cir	7.7% (34)	5.8% (11)

almost unanimously since at least 2005. See, for example, *United States v Americare, Inc.*, 2013 WL 1346022, *3 (EDNY) (collecting cases); *United States v Sikorsky Aircraft Corp.*, 2005 WL 1925903, *3–4 (D Conn). More recently, the Eighth Circuit relaxed its pleading standard in *United States v Planned Parenthood of the Heartland*, 765 F3d 914 (8th Cir 2014). However, the Eight Circuit serves as a particularly good benchmark, because it applied a strict standard without interruption between 2006 and 2014. See, for example, *In re Baycol Products Litigation*, 732 F3d 869, 880 (8th Cir 2013).

The shocking observation, intimated by Table 1 and made clear in Tables 2 and 3, is the apparent absence of a correlation between a circuit's pleading standard and its respective case outcomes. Contrary to the claims of its proponents, the relaxed standard—at least as applied in the Fifth and Ninth Circuits—has not ushered in a host of meritorious claims brought by relators without government intervention.

Table 2 shows that while the circuits applying a strict standard witnessed an overall drop in the recovery rates of declined claims over the second time period, the Fifth Circuit witnessed a similar drop in the success rate of such cases. Furthermore, the Fifth Circuit's absolute post-*Kanneganti* recovery rate of 5.6 percent is noticeably lower than the rates of its sister circuits. Turning to Table 3, the Eighth and Eleventh Circuits actually saw an increase in recovery rates of declined claims across the two time periods. In contrast, the recovery rate of declined claims in the Ninth Circuit suffered a drop post-*Ebeid*—similar to the drop in the Fifth Circuit post-*Kanneganti*. And also similar to the Fifth Circuit, the Ninth Circuit's absolute post-*Ebeid* recovery rate of 5.8 percent is lower than that of its stricter sister circuits.

The primary observation derived from the cross circuit data is that the relaxed pleading rule, at least when measured in terms of case outcomes, does not appear to be doing much work. The import of these figures is strengthened by consideration of the fact that relators' counsel likely perform an additional gatekeeping function.¹³⁴ To that extent, even if Tables 1–3 were to show a positive correlation between a relaxed pleading standard and recovery rates, such a correlation could be partially attributable to self-selection bias. For example, a relator in the Fifth Circuit is more likely to proceed after declination on the basis of nonparticularized allegations than a similarly situated relator in the Second Circuit.

Although these results appear quite compelling and beckon further analysis, a note of caution is in order. These findings are *not* meant to serve as hard proof regarding the merits or failings of either pleading standard. Rather, they serve as granular anecdotal evidence within the scope of this Comment's larger claims. Formal statistical and regression analyses are unavailing

¹³⁴ See William H.J. Hubbard, *Two Models of Pleading* *7 (Oct 21, 2013), archived at <http://perma.cc/2542-7EMK> (describing the gatekeeping function of attorneys, who apply their resources to claims with the highest perceived merit).

for three reasons. First, the time periods used in Tables 2 and 3 may have inaccurately captured some cases that had Rule 9(b) rulings prior to the cut-off date and outcomes after the cut-off date. The cross circuit comparisons are provided to compensate for the fact that each circuit's individual before-and-after recovery rates may be misleading. Second, measuring a time series may result in spurious regressions—correlation may be mistaken for causation, particularly when the subject matter is fraught with manifold variables. Finally, the limited sample size of successful declined suits deprives any formal analysis of strong statistical value. For example, had four or five more declined claims succeeded post-*Kanneganti* in the Fifth Circuit or post-*Ebeid* in the Ninth Circuit, the results would be skewed in the opposite direction. To this extent, it bears repeating that the declined case recovery rates are meant to serve merely as anecdotal evidence.¹³⁵

Despite these statistical limitations, this anecdotal evidence provides several takeaways regarding the relationship between the performance of declined claims under various pleading standards. First, these findings suggest that if the relaxed pleading standard is doing any work, it is occurring on an entirely different plane than litigation outcomes. Second, given the absence of a correlation between pleading standards and case outcomes, the results suggest that the merits of the pleading standards ought to be assessed from alternative viewpoints—for example, by investigating how the pleading standards affect systemic efficiency and the incentives of FCA actors.

B. Information Sharing, Incentives, and Gamesmanship

One of the most significant justifications offered for relaxing the pleading standard is a concern that the particularized details are exclusively within the defendant's control and knowledge.¹³⁶ However, the recently expanded use of Civil Investigative Demands (CIDs) and the new statutory framework for information sharing between the DOJ and relators raise doubts regarding the actual degree of information asymmetry in FCA litigation.

¹³⁵ For information related to the difficulties of measuring FCA litigation in general, see Engstrom, 107 Nw U L Rev at 1716, 1718–19 nn 88, 92 (cited in note 29); Kwok, 42 Pub Cont L J at 238–40 (cited in note 27). See also Helmer, *False Claims Act* at 1079–80 (cited in note 38).

¹³⁶ See Sylvia, *False Claims Act* § 10:58 at 614–15 & n 19 (cited in note 8).

1. CIDs and information sharing.

The Fraud Enforcement and Recovery Act of 2009¹³⁷ (FERA) enhanced the government's ability to investigate a potential FCA violation while the complaint remains under seal—that is, before the DOJ elects to intervene.¹³⁸ The DOJ has the authority to conduct CIDs at any point *prior* to intervention as a form of pre-election discovery.¹³⁹ Thus, the road map for an FCA complaint is as follows: the relator files a complaint under seal, the DOJ investigates the defendant for months or years using CIDs and other pre-election discovery tools, the DOJ then elects whether to intervene, and if it does, the complaint is subsequently unsealed and served on the defendant. Although the relator's complaint is meant to supplement the DOJ's information by identifying the fraud underlying the claims and explaining how they are false, a well-pleaded *qui tam* complaint should ideally point the DOJ in the direction of the allegedly false claims. Whereas plaintiffs in other settings use complaints to signal the strength of their claims to defendants in an attempt to reach mutually beneficial settlements,¹⁴⁰ an FCA relator's complaint primarily seeks to signal its strength to the government and aid the government's investigation.

The CID powers were originally passed to “enable the Government to determine whether enough evidence existed to warrant the expense of filing suit, as well as to prevent the potential defendant from being dragged into court unnecessarily.”¹⁴¹ The CID discovery powers are broad and include the power to demand production of documents, oral testimony, and answers to interrogatories.¹⁴² CIDs now supplement the DOJ's preexisting means to obtain documentary

¹³⁷ Pub L No 111-21, 123 Stat 1617, codified in various sections of Titles 18 and 31.

¹³⁸ 31 USC § 3733(a)(1). FERA did not alter the substantive CID powers, but rather corrected a procedural blockade: the Attorney General no longer needs to personally sign off on each use of a CID but may now delegate the CID powers. The DOJ accordingly redelegate CID powers to all US Attorneys. See generally US Department of Justice, Redlegation of Authority of Assistant Attorney General, Civil Division, to Branch Directors, Heads of Offices and United States Attorneys in Civil Division Cases, 75 Fed Reg 14070 (2010), amending 28 CFR § 0.160 et seq.

¹³⁹ See 31 USC § 3733(a)(1).

¹⁴⁰ See Hubbard, *Two Models of Pleading* at *6–7 (cited in note 134) (“[A] factually and legally detailed complaint is the strongest signal that a plaintiff can send that he has front-loaded the costs of legal and factual investigation.”).

¹⁴¹ *False Claims Amendments Act of 1986*, HR Rep No 99-660, 99th Cong, 2d Sess 26 (1986).

¹⁴² See 31 USC § 3733(f)–(h).

evidence through grand jury subpoenas, Inspector General subpoenas, authorized investigative demands under the Health Insurance Portability and Accountability Act of 1996,¹⁴³ and subpoenas under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989.¹⁴⁴

The DOJ is sufficiently incentivized to take advantage of the CID powers. This is because if the government fails to intervene, any later claims it wishes to bring with respect to the alleged fraud are precluded.¹⁴⁵ Moreover, if the DOJ fails to intervene and the relator loses the suit, neither a second relator nor the United States may bring a repeated suit on the same claims.¹⁴⁶ Indeed, the DOJ thoroughly investigates every qui tam complaint it receives, as required by statute.¹⁴⁷

In the last five years, the expanded CID powers under FERA have offered the government and relators a new strategic informational advantage in FCA litigation. The use of CIDs has increased more than twentyfold since FERA was implemented, with nearly one thousand CIDs issued per year.¹⁴⁸ CIDs are a form of administrative subpoena,¹⁴⁹ and thus the Federal Rules of Civil Procedure (FRCP) do not govern their issuance or form.¹⁵⁰ While

¹⁴³ Pub L No 104-191, 110 Stat 1936, codified in various sections of Titles 26, 29, and 42.

¹⁴⁴ Pub L No 101-73, 103 Stat 183. See also Suzanne E. Durrell, *The Relator's Role in False Claims Act Investigations: Towards a New Paradigm* *10 (TAF Conference Report, 2012), archived at <http://perma.cc/M4LH-VGP2>.

¹⁴⁵ See *United States v City of New York, New York*, 556 US 928, 936 (2009).

¹⁴⁶ See *United States v Rolls-Royce Corp*, 570 F3d 849, 853 (7th Cir 2009).

¹⁴⁷ See 31 USC § 3730(a) ("The Attorney General diligently shall investigate a violation under section 3729."). See also Michael Lawrence Kolis, Comment, *Settling for Less: The Department of Justice's Command Performance under the 1986 False Claims Amendments Act*, 7 Admin L J Am U 409, 444 & n 162 (1993) (noting the extensive amount of time that Civil Division attorneys spend investigating qui tam complaints).

¹⁴⁸ See US Department of Justice, *Acting Assistant Attorney General Stuart F. Delery Speaks at the American Bar Association's Ninth National Institute on the Civil False Claims Act and Qui Tam Enforcement* (June 7, 2012), archived at <http://perma.cc/CG7H-KQUU> (noting that almost nine hundred CIDs issued in 2011—more than ten times the number of CIDs issued in the two years prior to FERA's enactment); *Protecting American Taxpayers: Significant Accomplishments and Ongoing Challenges in the Fight against Fraud*, Hearing before the Senate Committee on the Judiciary *7 (Jan 26, 2011), archived at <http://perma.cc/4MWN-HMKZ> (statement of Tony West, Assistant Attorney General for the Civil Division of the Department of Justice) ("[D]uring the fourth quarter of 2010, Department attorneys requested authority to issue over 500 CIDs, which [was] more than six times the number of CIDs requested during the two preceding years combined."). These figures do not include the number of informal disclosures that are taking place.

¹⁴⁹ See *United States v Witmer*, 835 F Supp 201, 205 (MD Pa 1993).

¹⁵⁰ See Boese, 2 *Civil False Claims* § 5.07[A] at 5-161 (cited in note 36). See also *United States v Markwood*, 48 F3d 969, 982 (6th Cir 1995) ("[The FRCP] were written for

the CID powers do not permit the production of materials that would be protected from disclosure under the FRCP,¹⁵¹ and while CID recipients may petition to set aside CID requests that are noncompliant with the FCA or with “any constitutional or other legal right or privilege,”¹⁵² CIDs are a type of nonreciprocal, one-sided discovery that can continue for years and can cost FCA targets millions in CID compliance costs.¹⁵³ That is, while the DOJ may investigate and obtain expansive access to an FCA defendant, the defendant has no reciprocal ability to respond with its own discovery requests.

The CID authority was originally interpreted to include a general prohibition on sharing such information with relators or relators’ counsel.¹⁵⁴ Yet FERA broadened the information-sharing powers of the DOJ, allowing any information obtained through CIDs to be shared with relators.¹⁵⁵ Relators are now broadly permitted to incorporate particularized information from CID findings in their amended complaints for the purpose of complying with Rule 9(b).¹⁵⁶ Unlike grand jury testimony, which Federal Rule of Criminal Procedure 6(e) prohibits from disclosure,¹⁵⁷ CID testimony may be shared with and used by relators in the event of declination.¹⁵⁸ The information shared by the DOJ that was acquired through interagency inquiries and

post-complaint litigation. Most of the [FRCP] are simply inapplicable to the pre-complaint enforcement of an administrative subpoena.”).

¹⁵¹ See 31 USC § 3733(b)(1).

¹⁵² 31 USC § 3733(j)(2).

¹⁵³ See Kathleen McDermott and Holly C. Barker, *Modern False Claims Act Practice – It Ain’t the Same Since It All Changed* *2 (American Health Lawyer’s Association, Oct 2012), archived at <http://perma.cc/TH54-PUNH>. See also *United States v Witmer*, 835 F Supp 208, 221–22 (MD Pa 1993) (describing the breadth of the CID powers).

¹⁵⁴ See Boese, 2 *Civil False Claims* § 5.07[A] at 5-163 & n 597 (cited in note 36).

¹⁵⁵ See 31 USC § 3733(a)(1) (“Any information obtained . . . under this section may be shared with any qui tam relator if . . . it is necessary as part of any false claims act investigation.”).

¹⁵⁶ See, for example, *United States v Genentech, Inc*, 720 F Supp 2d 671, 680 (ED Pa 2010) (finding “no authority . . . barring amendments based on discovery the relator obtained from the Government”). See also *United States v Continental Common, Inc*, 553 F3d 869, 873 & n 6 (5th Cir 2008); *United States v Laboratory Corp of America, Inc*, 290 F3d 1301, 1314 & n 25 (11th Cir 2002); *United States v Organon USA Inc*, 2011 WL 794915, *1 (D Mass).

¹⁵⁷ FRCP 6(e).

¹⁵⁸ See Karen F. Green and James J. Fauci, *Testify First, Know Why Later: Responding to Civil Investigative Demands for Testimony in False Claims Act Cases* *301, 306 (Financial Fraud Law Report, April 2014), archived at <http://perma.cc/5RW2-WW8J> (noting that testimony obtained through CIDs may be used at trial under the hearsay exception of Federal Rule of Evidence 801(d)(2)). See also Durrell, *Relator’s Role* at *11 (cited in note 144).

CID discovery should strongly aid the relator in identifying specific false claims.¹⁵⁹

2. Interpreting declination in light of the expanded CID powers.

There are four common interpretations of DOJ declination. First, it might signify that the case is meritless. That is, intervention might serve as a “merits-signaling” device.¹⁶⁰ Second, DOJ intervention might be random and the higher success rates in intervened cases might be due to the DOJ’s leverage. That is, intervention might serve as a “merits-making” device.¹⁶¹ Third, declination might correlate with the DOJ’s shielding of politically connected companies.¹⁶² Fourth, intervention might be driven by a cost-benefit analysis particularly affected by the DOJ’s resource constraints, in which case declination would not signal that the case is meritless.¹⁶³

Recent empirical scholarship has found no support for the view that intervention is an arbitrary “merits-making” decision or a politicized decision.¹⁶⁴ While the DOJ has stronger merit-screening abilities than often assumed,¹⁶⁵ there are a vast number of strategic and resource-bound factors that often control an

¹⁵⁹ Section 6002 of the Patient Protection and Affordable Care Act (also known as the “Physician Payments Sunshine Act”) has also provided relators with a new tool. Pub L No 111-148, 124 Stat 119, 689 (2010), codified at 42 USC § 1320a-7h. In September 2014, the Centers for Medicare & Medicaid Services published an online database in compliance with the Physician Payments Sunshine Act. See Centers for Medicare & Medicaid Services, *Open Payments*, archived at <http://perma.cc/6H4V-JVZA>. The database includes the details of payments by the pharmaceutical and medical supply industries to hospitals or doctors. This database should provide relators with particularized information to bolster the allegations in their complaints.

¹⁶⁰ Engstrom, 107 Nw U L Rev at 1693–94 & n 17, 1706, 1712 & n 71 (cited in note 29) (listing cases and scholarship). See also Sean Elameto, *Guarding the Guardians: Accountability in Qui Tam Litigation under the Civil False Claims Act*, 41 Pub Cont L J 813, 826 (2012); Broderick, Note, 107 Colum L Rev at 975 (cited in note 54).

¹⁶¹ Engstrom, 107 Nw U L Rev at 1689, 1694–95 & n 18 (cited in note 29).

¹⁶² See id at 1695 & n 19.

¹⁶³ See id at 1694 n 17, 1732. The DOJ faces continual budgetary and resource limitations. See Durrell, *Relator’s Role* at *2 (cited in note 144).

¹⁶⁴ Engstrom, 107 Nw U L Rev at 1749–50 (cited in note 29) (concluding that the DOJ is not “solely a merits maker that arbitrarily places the enormous weight of the government behind cases and drives them to settlement,” but rather that the DOJ has a strong ability to “screen cases on merit grounds”).

¹⁶⁵ See id (“The analysis mostly rejects heated claims that DOJ decisionmaking has a partisan political cast or is unconnected to case merit.”).

intervention election.¹⁶⁶ These findings suggest that if the DOJ uncovers particularized information related to the alleged fraud but elects not to intervene, it will employ the information-sharing provisions of the FCA in one of two ways.

First, perhaps the DOJ uncovers particularized information related to the fraud but larger social, political, or financial considerations warrant declination.¹⁶⁷ In such cases, the DOJ exercises a function that private relators cannot perform. As gatekeeper, the DOJ may decline to intervene when the suit, for example, would cause irreparable damage to a key government contractor, expose the affected agency to reputational damage, or reap a short-term windfall at the cost of long-term inefficiency.¹⁶⁸ Unlike the DOJ, the relator will bring suit when his expected return exceeds his private expected cost, “even where the *social* cost of enforcement . . . exceeds the social benefit.”¹⁶⁹ While the DOJ as a public enforcer is able to exercise the tool of discretionary nonenforcement, relators by their very nature are interested in little more than the bounty and whatever intangible personal or moral gain they seek.¹⁷⁰ This leads to a social loss.¹⁷¹

¹⁶⁶ See *id.* at 1733–37 (finding DOJ resource constraints to be one of the strongest factors negatively affecting the likelihood of intervention, along with “judicial threats to its ability to police collusive settlements, or the defendant’s identity”).

¹⁶⁷ See *id.* at 1715.

¹⁶⁸ See Engstrom, 107 Nw U L Rev at 1735 (cited in note 29) (finding that the DOJ is 7 percent less likely to intervene in suits against Fortune 100 companies and 8 percent less likely to intervene in suits against top defense contractors).

¹⁶⁹ *Id.* at 1697. See also Engstrom, 112 Colum L Rev at 1254 (cited in note 29).

¹⁷⁰ Courts have upheld DOJ dismissal of *qui tam* suits as long as the reason for dismissal is rationally related to a legitimate purpose, such as promoting goodwill among industry competitors and regulators, preventing leaks of classified information, protecting national security, and conserving enforcement resources. See *DOJ’s Quid Pro Quo with St. Paul: A Whistleblower’s Perspective*, Joint Hearing before the Subcommittee on Economic Growth, Job Creation and Regulatory Affairs of the Committee on Oversight and Government Reform and the Subcommittee on the Constitution and Civil Justice of the Committee on Judiciary, 113th Cong, 1st Sess 56, 62 (2013) (statement of Shelley R. Slade, Partner, Vogel, Slade & Goldstein, LLP).

¹⁷¹ See William M. Landes and Richard A. Posner, *The Private Enforcement of Law*, 4 J Legal Stud 1, 38–41 (1975) (noting that “enforcer nullification” and “discretionary nonenforcement”—tools unavailable to private enforcers—play an important role in limiting social loss); Ben Depoorter and Jef De Mot, *Whistle Blowing: An Economic Analysis of the False Claims Act*, 14 Sup Ct Econ Rev 135, 151–61 (2006) (examining the social loss in the under- and overprovision of whistleblowing litigation and the socially suboptimal private timing of whistleblowing). See also Steven Shavell, *The Social versus the Private Incentive to Bring Suit in a Costly Legal System*, 11 J Legal Stud 333, 333–39 (1982) (modeling the divergence between the private and social incentives to bring suit); Kolis, Comment, 7 Admin L J Am U at 435–39 (cited in note 147) (evaluating how the *qui tam* regime disrupts the optimal level of fraud enforcement).

In such cases, the DOJ may decline to share any CID or interagency findings with the relator or may even exercise its statutory right to terminate the suit.¹⁷²

Second, perhaps the DOJ investigation uncovers some instances of fraud, yet the cost of intervening—including the lost opportunity costs related to the investigation from the constant stream of new and potentially high-value tips coming in from whistleblowers—outweighs the expected value of an asserted claim, discounted by the probability of recovery.¹⁷³ As a welfare-maximizing agency, the DOJ still profits greatly from postdeclination litigation. Although few declined cases succeed, the DOJ is still incentivized to provide the relator with any particularized results of CID and interagency findings uncovered during its investigation, and to thereby reclaim some value from the sunk costs of its investigation. Such information can bolster the factual particularity of the relator's amended complaint and can thereby increase the likelihood of recovery. It follows that the expanded CID usage under the FERA amendments may provide high-quality claims with sufficient firepower to survive motions to dismiss when the DOJ declines intervention for resource-constraint reasons.¹⁷⁴ Thus, this expanded system of pre-election investigations gives new reasons to doubt the concerns of information asymmetry that are pivotal to the application of the relaxed pleading standard.¹⁷⁵

3. The dangers of proxy and capture.

When considering the FOIA data showing that a relaxed pleading standard has had no positive effect on case outcomes as applied in the Fifth and Ninth Circuits,¹⁷⁶ it is instructive to examine the kind of strategic—and potentially unwanted—behaviors that a relaxed standard incentivizes. If courts apply a pleading standard to declined claims that is more relaxed than the standard applied to intervened claims, the DOJ may treat this

¹⁷² See 31 USC § 3730(c)(2)(A).

¹⁷³ See Engstrom, 107 Nw U L Rev at 1694 n 17 (cited in note 29) (describing courts that conclude declination is driven at least in part by a cost-benefit analysis).

¹⁷⁴ See Laura Hough, Note, *Finding Equilibrium: Exploring Due Process Violations in the Whistleblower Provisions of the Fraud Enforcement and Recovery Act of 2009*, 19 Wm & Mary Bill Rts J 1061, 1080–81 (2011) (“Whereas, before, the relator would not have had the full advantage of Government resources . . . now the relator . . . acting as a private party, has a plethora of additional information to use in its case.”).

¹⁷⁵ See Part II.B.

¹⁷⁶ See Part III.A.

as an invitation for gamesmanship by using relator counsel as a proxy enforcer. The Eleventh Circuit noted this concern directly: “Permitting a *qui tam* relator to go forward with his complaint, when we would not allow the government to proceed, might encourage the government to evade its [pleading] burden by merely recruiting a willing relator to file a *qui tam* action.”¹⁷⁷ There are three situations in which proxy enforcement may constitute a viable strategy: (1) when the DOJ believes that a *qui tam* complaint has merit, but the costs of investigation and intervention outweigh the suit’s expected value; (2) when the DOJ is unable during its investigation to acquire the facts necessary to make particularized allegations; or (3) when the DOJ wishes to conserve resources by forgoing a thorough investigation into a case of questionable merits. In these three situations, the DOJ could simply provide an insider relator with as much information as it *was* able to gather through CIDs or interagency queries, instruct relator counsel to continue the suit past the motion to dismiss, and potentially intervene after the relator was able to clear the relaxed pleading hurdle on the basis of his insider status.¹⁷⁸

This argument assumes that courts do not treat declination as an unequivocal signal that the relator’s claims lack merit. As noted earlier, declination may result from a variety of factors, such as the DOJ’s well-known resource constraints.¹⁷⁹ Due to the fear of negative precedent and other concerns, the DOJ has been increasingly filing “statements of interest” in declined cases.¹⁸⁰ Such filings serve to inform the court of its stance on any substantive issues at stake in the case and may include an explanation that its limited resources forced it to decline intervention—thereby concealing the scent of low merit.

This argument also assumes that a level of collaboration exists between the DOJ and relator counsel to such a degree that proxy enforcement constitutes a viable strategy. Although

¹⁷⁷ *United States v McInteer*, 470 F3d 1350, 1360 (11th Cir 2006). See also Depoorter and De Mot, 14 Sup Ct Econ Rev at 150 (cited in note 171) (noting the government’s incentive to free ride and avoid litigation costs by declining intervention).

¹⁷⁸ If the DOJ declines to intervene, the FCA permits the DOJ, on a showing of good cause, to intervene at a later time after expiration of the seal period. 31 USC § 3730(c)(3). See also Boese, 1 *Civil False Claims* § 4.05[A] at 4-231 to -232 (cited in note 36).

¹⁷⁹ See Engstrom, 107 Nw U L Rev at 1712–15 (cited in note 29).

¹⁸⁰ See Boese, 1 *Civil False Claims* § 4.05[D] at 4-238 (cited in note 36). See also Marc S. Raspanti and Meredith S. Auten, *Why Is Qui Tam Litigation Often So Difficult to Resolve?* *24–25 (American Health Lawyers Association, Sept 2011), archived at <http://perma.cc/7PP3-ABV4>.

regulatory capture certainly exists between industry players and the affected agencies, a different type of regulatory capture occurs at the decisionmaking level relevant to the pleading analysis. In its FCA enforcement, the DOJ frequently does business with the same repeat law firms.¹⁸¹ Relator counsel and the DOJ are partners in a multibillion-dollar industry, and a battle-ready relator's bar has emerged in the last two decades to reap the profits of whistleblowing.¹⁸² Strikingly, a highly experienced relator counsel is 30 percent more likely to obtain DOJ intervention than the average relator counsel.¹⁸³ Even more striking is the intervention rate in suits in which the relator is represented by counsel who previously worked for the DOJ. The government intervenes in 52.7 percent of the *qui tam* suits represented by former DOJ attorneys, more than double the average intervention rate.¹⁸⁴

These two figures might initially suggest that the government is *not* employing the proxy strategy of delegating enforcement to experienced counsel via declination. However, these figures may counterintuitively indicate a *sub rosa* delegation, given that intervention is often conditioned on an experienced firm's promises of providing resources to aid the investigation.¹⁸⁵ Everybody wins: the experienced counsel takes the lead in the resource-intensive suit, and in exchange the DOJ's intervention serves a merits-signaling function to the judge in the parties' efforts to extract a settlement. The parties are likely sophisticated enough to know when and where the opposite strategy will work to their advantage—that is, when declination (or delayed intervention) is the best approach in a circuit that relaxes its pleading standard for an insider relator's declined suit. On the one hand, one might wonder why the DOJ would ever

¹⁸¹ For data illustrating the robust repeat play, see Engstrom, 112 Colum L Rev at 1299, 1302 (cited in note 29). See also David Kwok, *Coordinated Private and Public Enforcement of Law: Deterrence under Qui Tam* *15 (Feb 8, 2010), archived at <http://perma.cc/AVZ9-LYUG>.

¹⁸² See Raspanti and Auten, *Qui Tam Litigation* at *23 (cited in note 180).

¹⁸³ See Engstrom, 112 Colum L Rev at 1299 (cited in note 29) (finding an intervention rate of 37.1 percent for counsel that had brought at least forty prior cases).

¹⁸⁴ See *id.* at 1306.

¹⁸⁵ See Engstrom, 107 Nw U L Rev at 1728 & n 110 (cited in note 29). See also Kwok, *Coordinated Private and Public Enforcement of Law* at *15 (cited in note 181) (noting that the DOJ sometimes conditions its intervention on the participation of a *specific* *qui tam* specialist firm); Durrell, *Relator's Role* at *7, 13 (cited in note 144) (noting how the role of relator counsel has expanded in recent years to include major responsibilities related to both investigation and postintervention litigation).

experiment with a strategy that risks potentially meritorious legal claims by sending them to run the booby-trapped gauntlet of declination: relator counsel may ineffectively enforce the claims, a motion to dismiss may deliver a fatal deathblow to the suit, or declination may send an unequivocal signal to the defendant that it should not settle. On the other hand, as the number of qui tam suits continues to rise, necessity may compel the DOJ to seek out such strategies when intervening in every case is simply not economically feasible.

Finally, it is important to identify why such delegation and gamesmanship are actually undesirable in the fight against fraud. First, while the relationship between the DOJ and relator counsel described above does not fit into traditional definitions of regulatory or agency capture, it is still problematic as it may lead to inefficient enforcement.¹⁸⁶ As described, highly experienced relator counsel is 30 percent more likely—and former DOJ insiders are over 100 percent more likely—to obtain DOJ intervention than the average relator counsel.¹⁸⁷ One could imagine that these correlations are due in part to such relator-side counsel's skill in identifying high-merit cases and signaling accordingly to the DOJ. Shockingly, however, the average recovery amount obtained by former DOJ insiders is nearly half the average recovery amount obtained by noninsider counsel.¹⁸⁸ This result suggests that the DOJ is utilizing intervention to serve the interests of favored relator counsel to the detriment of the public interest. Such nepotism and capture within the context of the FCA is particularly disturbing because it is precisely these qui tam enforcers who were originally "thought to be best equipped to serve, as many champions of private enforcement hope, an agency-forcing or anticapture role."¹⁸⁹ Regarding the pleading standard, the agency capture suggests that at least vis-à-vis experienced relator counsel and former DOJ insiders, the DOJ may be vigorously taking advantage of the FCA's

¹⁸⁶ Regulatory capture typically focuses on the relationship between a regulator or agency and the industry that it regulates, and thus it is not a perfect analogy to the FCA context. However, as the relator's bar and the DOJ have been working together in the fight against fraud for nearly thirty years, the line between capture and collaboration is a fine one. One fitting definition in this context notes that captured agencies are "persistently serving the interests of regulated industries to the neglect or harm of more general, or 'public,' interests." Paul J. Quirk, *Industry Influence in Federal Regulatory Agencies* 4 (Princeton 1981).

¹⁸⁷ See notes 183–84 and accompanying text.

¹⁸⁸ See Engstrom, 112 Colum L Rev at 1306–07 (cited in note 29).

¹⁸⁹ *Id.* at 1252 & n 24.

information-sharing provisions.¹⁹⁰ This casts great doubt on the claims of information asymmetry underlying the evolution of the relaxed standard.¹⁹¹

Second, while delegation may be an effective form of collaborative enforcement, it exploits the FCA's fee-shifting provisions in a manner unintended by the legislature. Unlike the DOJ, a relator can collect "reasonable attorneys' fees and costs" from the defendant in the event of judgment or settlement,¹⁹² which incentivizes the DOJ to allow a trusted and experienced relator counsel to take the lead in what appears to be a slam dunk case.¹⁹³ This practice permits counsel to shoulder the costs of a multimillion-dollar investigation,¹⁹⁴ which is eventually recouped from the defendant. Such gamesmanship disrupts the intended amount of FCA liability as calculated by Congress in crafting the provisions governing penalties and treble damages. Nothing in the legislative record suggests that Congress envisioned the investigative work to be shouldered by anyone other than the government.¹⁹⁵ While such delegation practices help the DOJ save overhead costs and add another thumb to the scales of settlement, they also bear tones of lawlessness and at the very least implicate a concerning lack of accountability.¹⁹⁶

C. A Strict Standard Does Not Diminish the Relator's Filing Incentives

In a 2014 amicus brief, the Solicitor General argued that requiring *qui tam* complaints to identify specific false claims "would not meaningfully assist the government's enforcement

¹⁹⁰ See Part III.B.1 and Part III.B.2.

¹⁹¹ See Part II.B.

¹⁹² 31 USC § 3730(d)(1)–(2).

¹⁹³ While there are strong, crosscutting incentives for the DOJ to pursue such cases, delegation may become or may already be an economic necessity as the number of filed *qui tam* complaints grows each year. For an overview of relator counsel's expanding role in FCA investigations, see generally Durrell, *Relator's Role* (cited in note 144).

¹⁹⁴ See Mathew Andrews, Note, *The Growth of Litigation Finance in DOJ Whistleblower Suits: Implications and Recommendations*, 123 Yale L J 2422, 2434 & n 68 (2014) (citing instances of multimillion-dollar attorney's fees).

¹⁹⁵ See, for example, HR Rep No 99-660 at 17 (cited in note 141) ("[T]he bill creates a pre-lawsuit discovery mechanism, Civil Investigative Demands, to increase the Government's ability to investigate False Claims Act cases.") (emphasis added).

¹⁹⁶ See Jill E. Fisch, *Class Action Reform, Qui Tam, and the Role of the Plaintiff*, 60 L & Contemp Probs 167, 194 (1997) ("One reason we care about [relator] interference [with the executive branch's enforcement priorities] is accountability. *Qui tam* suits, like citizen environmental and taxpayer suits, pose the question of whether it is legitimate or advisable to delegate law enforcement power to those outside the political system.").

efforts” but rather would “discourage the filing of *qui tam* suits by relators—like those in [*Kanneganti*] and [*Rolls-Royce*—who would otherwise have the means and the incentives to expose frauds against the United States.”¹⁹⁷ This Section presents a model that refutes the Solicitor General’s proposition¹⁹⁸ and leads to three findings. First, the model demonstrates that a strict standard will not diminish relators’ incentives to file *qui tam* suits. Second, it shows that a relaxed standard may incentivize a socially suboptimal number of new relators to file suit. Finally, the model indicates that there is a heavily diluted relationship between the pleading standard applied to declined suits and the value of the suit at the time of filing. That is, the pleading standard has only a muted effect on a relator’s decision to blow the whistle.

1. The model.

A relator will sue when the expected value of the suit (V) is greater than the expected cost of suing (c)—that is, when:

$$V \geq c. \tag{1}$$

c equals the relator’s total tangible and intangible cost of blowing the whistle, including potential unemployment, stigma and damage to his psyche, and expenditure of time and energy. Yet due to a relator’s unfamiliarity with civil procedure, the pleading standard cannot conceivably affect his decision to engage counsel. Because relator counsel functions as the first screen to weed out low-merit cases,¹⁹⁹ counsel’s incentives provide a stronger analytical reference point. Counsel will pursue a relator’s case when the expected value of intervention (V_i) plus the expected value of declination (V_d) is greater than costs

¹⁹⁷ *Takeda* Brief at *16 (cited in note 99). See also *Kanneganti*, 565 F3d at 191 (noting that the strict standard “discourages whistleblowers . . . from coming forward”); *Foglia v Renal Ventures Management, LLC*, 754 F3d 153, 156–57 (3d Cir 2014) (relying extensively on the *Takeda* Brief in adopting the relaxed standard).

¹⁹⁸ This model builds off of existing theoretical literature on pleading. See William H.J. Hubbard, *A Fresh Look at Plausibility Pleading*, 83 U Chi L Rev *10–25 (forthcoming 2016), archived at <http://perma.cc/U7ET-273K>. For an FCA-specific economic model, see Depoorter and De Mot, 14 Sup Ct Econ Rev at 153–56 (cited in note 171) (finding that the divergent incentives of relators and the DOJ lead to socially suboptimal fraud enforcement).

¹⁹⁹ See Anthony J. Casey and Anthony Niblett, *Noise Reduction: The Screening Value of Qui Tam*, 91 Wash U L Rev 1169, 1215 n 169 (2014) (“[C]ontingency fees for lawyers can operate as a screening mechanism. . . . While the precise mechanism is different, the screening effect is similar to that of *qui tam*.”).

incurred until the time the DOJ elects to intervene or decline (c_0)—that is, when:

$$V_I + V_D \geq c_0. \quad (2)$$

V_I equals the expected proceeds in the event of intervention (P_I) minus the expected net costs of intervention (NC_I), and V_D equals the expected proceeds in the event of declination (P_D) minus the expected net costs of declination (NC_D). That is:

$$V_I = P_I - NC_I. \quad (3)$$

$$V_D = P_D - NC_D. \quad (4)$$

P_I equals the expected recovery in the event of intervention (R_I), discounted by counsel's contingency fee (ϕ), the statutory bounty in the event of intervention (B_I), the probability of recovery in the event of intervention (π_I), and the probability of intervention (I). Analogously, P_D equals the expected recovery in the event of declination (R_D), discounted by counsel's contingency fee (ϕ), the statutory bounty in the event of declination (B_D), the probability of recovery in the event of declination (π_D), and the probability of declination (D). That is:

$$P_I = \phi B_I \pi_I R_I I. \quad (5)$$

$$P_D = \phi B_D \pi_D R_D D. \quad (6)$$

Constants exist for most terms. The DOJ intervenes in only 23.4 percent of all *qui tam* suits.²⁰⁰ There is an 89.5 percent chance of recovery in the event of intervention, and a 6.8 percent chance of recovery in the event of declination.²⁰¹ Successful intervened claims generate an average statutory bounty of 17 percent, and successful declined claims generate an average bounty of 25 percent.²⁰² Firms that specialize in FCA whistleblower suits

²⁰⁰ The average intervention rate from 2004 to 2014 was 23.4 percent. See note 31. Although this figure might suggest that counsel is ill equipped to screen the merits of *qui tam* cases, it should be noted that many complaints are voluntarily dismissed after filing. Relators may abandon their cases upon learning that the DOJ is already investigating the FCA target or that a jurisdictional bar prevents the suit from moving forward. See Andrews, Note, 123 Yale L J at 2435–36 (cited in note 194). This result strengthens the model's findings because a higher *de facto* intervention rate increases the value of litigating an intervened suit as compared to the value of litigating a declined case.

²⁰¹ See note 32 and accompanying text.

²⁰² See Kwok, *Coordinated Private and Public Enforcement of Law* at *14 (cited in note 181).

charge a standard contingency fee of 40 percent.²⁰³ Finally, the FOIA data set shows that the median declined recovery is only 32.2 percent of the value of the median intervened recovery.²⁰⁴

TABLE 4. EXPECTED LITIGATION CONSTANTS FOR INTERVENED AND DECLINED CASES

	Probability of Intervention/ Declination (<i>I/D</i>)	Probability of Recovery (<i>π</i>)	Statutory Bounty (<i>B</i>)	Contingency Fee (<i>φ</i>)	Recovery Measured in Terms of <i>R_I</i>
Intervention	23.4%	89.5%	17%	40%	100%
Declination	76.6%	6.8%	25%	40%	32.2%

Applying these constants as the discounted values in Equations 5 and 6, the expected proceeds in the event of intervention (P_I) equal 0.01424 times the expected value of recovery in an intervened case (R_I), and the expected proceeds in the event of declination (P_D) equal 0.00167 times the expected value of recovery in an intervened case (R_I). These values of P_I and P_D can be applied to Equations 3 and 4 as follows:

$$V_I = 0.01424R_I - NC_I. \quad (7)$$

$$V_D = 0.00167R_I - NC_D. \quad (8)$$

To put this into context, approximately 90 percent of the expected proceeds from an FCA suit are derived from the possibility of intervention, and 10 percent of the expected proceeds are derived from the possibility of declination. However, the varying costs associated with both intervention and declination create a further divide between the value of intervention and the value of declination. These net postelection costs, NC_I and NC_D , can be broken down. The FCA contains a fee-shifting provision that rewards relator counsel with litigation costs in the event of successful recovery.²⁰⁵ Thus, the cost of

²⁰³ See Engstrom, 112 Colum L Rev at 1281–82 & n 136 (cited in note 29).

²⁰⁴ These figures reflect the median recovery amounts obtained in settlements from 2002 to 2014, as reflected in the FOIA data. Median recovery amounts, rather than mean amounts, are a more accurate benchmark as mean amounts are heavily skewed by several high-value outlier recoveries.

²⁰⁵ See 31 USC § 3730(d)(1)–(2). Notably, the FCA expressly awards attorney's fees and expenses for both judgments and settlements. See Boese, 1 *Civil False Claims* § 4.09[A] at 4-312.1 to -315 (cited in note 36).

litigating together with the DOJ (c_I) will be incurred only when the intervened suit fails, and thus must be discounted both by 89.5 percent (π_I) and by the probability of intervention (I). The expected amount of c_0 that will be returned through the FCA's fee-shifting provisions if the suit succeeds must be subtracted from NC_I , and also discounted by the probability of intervention (I). Analogously, the cost of litigating alone (c_D) will be incurred only when the declined suit fails, and thus must be discounted both by 6.8 percent (π_D) and by the probability of declination (D). The expected amount of c_0 that will be returned through the FCA's fee-shifting provisions if the declined suit succeeds must be subtracted from NC_D and also discounted by the probability of declination (D). That is:

$$NC_I = I(1 - \pi_I)c_I - I\pi_I c_0. \quad (9)$$

$$NC_D = D(1 - \pi_D)c_D - D\pi_D c_0. \quad (10)$$

Applying the constants from Table 4, the total expected net costs of intervention (NC_I) and declination (NC_D) are as follows:

$$NC_I = 0.025c_I - 0.209c_0. \quad (11)$$

$$NC_D = 0.714c_D - 0.052c_0. \quad (12)$$

The expected net total costs of intervention (NC_I) and declination (NC_D) can be inserted into Equations 7 and 8 as follows:

$$V_I = 0.01424R_I - (0.025c_I - 0.209c_0). \quad (13)$$

$$V_D = 0.00167R_I - (0.714c_D - 0.052c_0). \quad (14)$$

The model nears completion. As shown in Equation 2, counsel will sue when the expected value of intervention (V_I) plus the expected value of declination (V_D) is greater than the cost incurred until DOJ election (c_0). Applying the previously demonstrated measurements of V_I and V_D in terms of the estimated recovery (R_I) and costs of litigation (c_0 , c_I , c_D), counsel will sue when:

$$(0.01424R_I - (0.025c_I - 0.209c_0)) + (0.00167R_I - (0.714c_D - 0.052c_0)) \geq c_0. \quad (15)$$

Some preliminary findings can be made regarding the model presented in Equation 15. First, as previously noted, the expected

proceeds from intervention ($0.01424R_i$) dwarf the expected proceeds from declination ($0.00167R_i$) at a ratio of approximately nine to one. Second, the low amount of costs associated with intervention increases its financial attractiveness. That is, in the event of intervention, the likelihood of recovery—and thus the likelihood that fees and expenses are returned through the FCA's fee-shifting provisions—means that counsel's pre- and postintervention costs are both heavily discounted. By comparison, the pre- and postdeclination costs are only slightly discounted through the prospect of fee-shifting due to the low recovery rate in declined suits.

2. Complications.

The model has two general complications. First, counsel's investment of resources in a suit is not a binary on-off switch. Rather, depending on how warmly the DOJ receives the relator's complaint—for example, with provisional promises of intervention—counsel may invest more or fewer resources during the pre-election investigation. For example, if the DOJ agrees to intervene on the condition that the relator undertake a significant portion of the investigation, counsel will naturally invest such resources. This explains the phenomenon of seven-figure preintervention investigations shouldered by relator counsel.²⁰⁶ By delegating investigative efforts to relator counsel in a strong case, the DOJ and relator counsel are able to game the FCA's fee-shifting provisions.²⁰⁷

This shortcoming, however, does not seriously affect the model's findings. As explained below,²⁰⁸ the model shows that a strict pleading standard will almost never discourage relators from filing a suit in the first place. That later case developments may encourage or discourage counsel from investing additional resources does not change the fact that when the model's conditions are fulfilled, counsel will—at a minimum—file a complaint under seal and bring the fraud allegations to light.

The second complication relates to the questionable exogeneity of the constants used in the model and following hypotheticals, specifically the intervention and recovery probabilities and the statutory bounty. For example, by investing

²⁰⁶ See note 194. See also generally Durrell, *Relator's Role* (cited in note 144).

²⁰⁷ See Part III.B.

²⁰⁸ See Part III.C.3 and Part III.C.4.

more resources, counsel can augment the expected probability of intervention as well as the expected statutory bounty. Likewise, the use of exogenous constants means that the model employs the faulty assumption that relator counsel cannot gauge a case's strength without the advice of the DOJ.

These constants are treated as exogenous for the purposes of both the model and the following hypotheticals in order to make the model tractable.²⁰⁹ The model can be used to analyze the effect of changes to the pleading standard on hypothetical wealth-maximizing counsel. These effects can then be aggregated to the entire population of the relator's bar, for whom the aforementioned *average* constants may be larger or smaller in each individual case. However, the model's value lies not in its ability to predict under what financial conditions the relator will sue. Rather, the model's primary value is descriptive: it depicts the uneven relationship between the high value of intervention on one side and the low value of declination on the other. By all accounts, any value added to the suit through declination seems to be merely a rounding error in counsel's calculation of whether to file a qui tam suit.

3. Two hypotheticals.

Two hypotheticals demonstrate how the model stated in Equation 15 functions, using the median and mean recovery amounts in winning cases of \$1.4 million and \$17.5 million, respectively.²¹⁰ Of course, gauging the expected value of any individual relator's claim is a difficult exercise. For example, the relator may exaggerate his claim, counsel may suffer from its own myopic optimism, or the estimated number of FCA violations—which is pivotal to a settlement calculation—may be unknown. These hypotheticals make the conservative assumption that counsel's costs of litigation for all cost periods are identical ($c_0 = c_1 = c_D$).²¹¹

²⁰⁹ For a discussion of the use of assumptions to make descriptive economic models tractable, see Kenneth G. Dau-Schmidt, *Economics and Sociology: The Prospects for an Interdisciplinary Discourse on Law*, 1997 Wis L Rev 389, 394–98.

²¹⁰ See Engstrom, 112 Colum L Rev at 1289 (cited in note 29).

²¹¹ This cost assumption is conservative because it undervalues the cost of litigating after declination. c_D is likely much higher in reality due to necessary amendments to the complaint and motion practice. Further, if the case moves to discovery or trial, c_D may increase astronomically.

In the first case, counsel estimates an expected recovery at the median recovery amount of \$1.4 million and estimates costs of \$15,000 for each cost period. Applying the model from Equation 15, counsel will sue when:

$$(0.01424R_I - (0.025c_I - 0.209c_0)) + (0.00167R_I - (0.714c_D - 0.052c_0)) \geq c_0. \quad (16)$$

$$(\$22,696) + (-\$7,592) \geq \$15,000$$

Here counsel will accept the relator's case because the expected value of intervention (\$22,696) exceeds the pre-election cost (c_0). For such low-stakes claims, any decrease to the probability of recovery in the event of declination (π_D)—for example, by applying a strict Rule 9(b)—will not affect counsel's filing decision, because the expected value of postdeclination litigation is already nonpositive at the time of filing.

Note that the negative expected value of postdeclination litigation (-\$7,592) does not decrease the suit's value and has no effect on the filing decision when the expected value of intervention is greater than the pre-election costs (c_0). If the value of declination remains negative at the time of election, counsel can simply dismiss the case if the DOJ declines intervention.²¹² Indeed, approximately 25 percent of declined cases are voluntarily dismissed by relators following declination.²¹³ This result suggests that declination is a type of "option" that the relator buys into when he decides to file.²¹⁴ In this manner, counsel is able to preemptively cap all potential declination losses at zero.

In the second hypothetical case, counsel estimates an expected recovery at the mean recovery amount of \$17.5 million. This hypothetical assumes increased litigation costs of \$30,000 for each cost period.²¹⁵ That is, counsel will sue when:

$$(0.01424R_I - (0.025c_I - 0.209c_0)) + (0.00167R_I - (0.714c_D - 0.052c_0)) \geq c_0. \quad (17)$$

$$(\$254,720) + (\$9,365) \geq \$30,000.$$

²¹² See Helmer, *False Claims Act* at 622 (cited in note 38) (claiming that for relators and their counsel, *qui tam* stands for "quit in the a.m." in the event of declination); id at Appendix 4 (presenting a Representation Agreement that reserves the right to withdraw in the event of declination).

²¹³ See Kwok, *Coordinated Private and Public Enforcement of Law* at *13–14 (cited in note 181).

²¹⁴ For background on option models of litigation, see generally Bradford Cornell, *The Incentive to Sue: An Option-Pricing Approach*, 19 J Legal Stud 173 (1990).

²¹⁵ See note 211 and accompanying text.

Here, not only will counsel bring the suit, but the expected value of litigating a declined suit (\$9,365) adds value to his cost-benefit analysis. However, even if V_D were nonpositive, V_I would still greatly outweigh counsel's pre-election costs (c_0).

In this higher-stakes claim, it is worth exploring how a strict Rule 9(b) standard would affect the expected proceeds in the event of declination (P_D). For example, imagine that a strict standard decreases the probability that a declined suit will obtain a recovery (π_D) by 10 percent.²¹⁶ Applying this to Equation 17, V_D would be decreased to \$6,265, a difference of \$3,100. That is, if a strict standard decreases the probability of a declined claim successfully obtaining a recovery by 10 percent, then the total value of the suit at the time of filing is accordingly diminished by 1.2 percent.²¹⁷ There is thus a heavily diluted relationship between the degree to which the strict pleading standard decreases the probability of recovery and the degree to which it decreases the value of filing the qui tam suit. In other words, most of the value of the suit that is created or destroyed by changes to the probability of recovery in the event of declination never enters into counsel's calculations at the time he decides to accept the relator's case.

This diluted relationship suggests that neither the strict nor relaxed pleading standard will significantly affect a relator's decision to blow the whistle. By filing a qui tam complaint under seal, the relator immediately opens the door to a fishing trip that requires neither particularity nor plausibility nor notice. Yet rather than casting his own nets, he entrusts the fishing to a third party, and a master angler indeed: the DOJ. The DOJ's ability to subject an FCA target to years of unbridled preintervention discovery, unencumbered by the bounds of permissible discovery practice under the Federal Rules of Civil Procedure, allows the relator to hitch his rowboat to a proverbial *Pequod*.²¹⁸

²¹⁶ This assumption is not grounded in the FOIA data but merely serves as an illustration. The findings of the cross circuit data presented in Part III.A show that a strict standard does *not* necessarily decrease the likelihood that a declined suit will obtain a recovery at all.

²¹⁷ That is, the difference of \$3,100 represents a total value of 1.2 percent of the suit's total expected value of \$264,085.

²¹⁸ Herman Melville, *Moby-Dick; or, the Whale* 69 (Norton 1976) ("A cannibal of a craft, tricking herself forth in the chased bones of her enemies.").

4. Relator behavior and efficient enforcement.

As illustrated by Equation 17, even larger-scale decreases to the expected value of declination (V_D) will not affect counsel's filing decision when the expected value of intervention (V_I) is not within a narrow margin above or below the pre-election costs (c_0). And as illustrated by Equation 16, when the expected value of intervention (V_I) does indeed approach a narrow range of the pre-election costs (c_0), the expected value of declination (V_D) will be nonpositive and thus irrelevant. Changes to counsel's cost structure do not affect this important finding. Even when pre-election costs (c_0) greatly exceed postdeclination costs (c_D), counsel still benefits from filing, at the very least, a low-cost complaint. Given that counsel's investment of resources is not a binary on-off switch, it is difficult to imagine any cost structure under which even the strictest of pleading standards would deter the filing of *qui tam* suits.

In many ways, the model's findings are intuitive. The pleading standard for declined complaints hardly disturbs the calculus that is already in place: counsel first and foremost seeks intervention. The effect of a strict standard is not felt at the time of filing but instead when intervention is declined and counsel ponders the costs of continuing an uphill battle. At that stage, the whistleblower has already done his job: he has brought his fraud allegations to the attention of the DOJ.

The model suggests that the Solicitor General was incorrect in his claim that the strict standard will "discourage the filing of *qui tam* suits."²¹⁹ A relator with a high-merit suit will file regardless of whether he believes he will be able to allege the particulars of specific false claims. Given the extensive framework for preintervention discovery in the form of CIDs and the merits-signaling effect of government intervention, a strict pleading standard will not discourage relators from bringing fraud information to the attention of the DOJ and filing suit on behalf of the government.

Moreover, recent scholarship has demonstrated that increasing whistleblower rewards may counterintuitively impair the DOJ's enforcement abilities.²²⁰ Increased bounties lead to an overprovision of lower-quality whistleblower tips, which

²¹⁹ *Takeda* Brief at *16 (cited in note 99).

²²⁰ See, for example, Casey and Niblett, 91 Wash U L Rev at 1185–89 (cited in note 199).

effectively swamp the DOJ's enforcement activities with a glut of low-quality information.²²¹ The steady increase in the average investigation period of each qui tam complaint over the past decades is likely attributable to the momentous increase in qui tam filings.²²² Like moderate and finely tuned bounty amounts, a strict pleading standard for declined claims serves as a screening mechanism. Although the strict pleading standard does not decrease the filing rate as demonstrated above, a relaxed pleading standard may cause an unwanted overprovision of qui tam complaints. This is because although a decrease to the expected value of declination (V_D) will not decrease the frequency of high-merit qui tam complaints, an increase to V_D adds directly to the financial incentive to file in those cases in which V_D is positive at the time of filing. By increasing the value of suits in the whistleblower-compensation model, the relaxed standard may indirectly elicit an increased amount of lower-quality information from whistleblowers, who may or may not have meritorious claims. Although the DOJ is more receptive to carefully pleaded complaints, it will not per se refuse to intervene in a qui tam complaint that does not comply with Rule 9(b).²²³ This new influx of information adds further pressure to the already resource-constrained DOJ—which is required by the FCA to “diligently” investigate every qui tam complaint²²⁴—and in turn impairs efficient fraud enforcement.

The FOIA data set provides a preliminary view of such an effect by comparing the raw number of qui tam filings before and after the relaxed standard was adopted in the Fifth and Ninth Circuits.²²⁵ The following table provides a circuit-specific breakdown of qui tam filings during the two three-year periods of 2007–2009 and 2011–2013.²²⁶ For both tables, the filing tallies in

²²¹ See id at 1175.

²²² For an illustration of the momentous increase in filings since 1986, see Engstrom, 114 Colum L Rev at 1993 & fig 8 (cited in note 31).

²²³ See Brian D. Howe, Note, *Conflicting Requirements of Notice: The Incorporation of Rule 9(b) into the False Claims Act's First-to-File Bar*, 113 Mich L Rev 559, 578 (2015) (“A pleading deficiency in a meritorious case should not and will not automatically preclude the government from intervening in the action.”).

²²⁴ 31 USC § 3730(a). For an overview of the DOJ's resource constraints, see note 163.

²²⁵ For a similar examination of recovery rates before and after the relaxed standard was implemented, see Part III.A.

²²⁶ The *Kanneganti* decision on April 8, 2009, likely did not have an immediate effect on filings that were already being prepared by relator's counsel in 2009. Tables 5 and 6 utilize the 2007–2009 time period with the hope of capturing a trend that is more likely

the Second, Eighth, and Eleventh Circuits during the two time periods will serve as an experimental control or benchmark.

TABLE 5. CIRCUIT-SPECIFIC QUI TAM FILINGS BEFORE AND AFTER
KANNEGANTI AND *EBEID*

	Pre- <i>Kanneganti</i> and Pre- <i>Ebeid</i> Filings (2007–2009)	Post- <i>Kanneganti</i> and Post- <i>Ebeid</i> Filings (2011–2013)	Change
2d Cir	69	49	–34.8%
8th Cir	57	56	–1.8%
11th Cir	145	105	–30.0%
Strict Total	271	210	–24.7%
5th Cir	95	75	–22.1%
9th Cir	130	111	–18.5%
Relaxed Total	225	186	–20.0%

Before analyzing these figures, it should be noted that unlike the figures generated in Part III.A, these figures are based on date of filing, and thus the 2011–2013 figures are right censored. Although qui tam filings have been increasing steadily in recent years,²²⁷ the 2011–2013 column underreports the number of case filings because the FOIA data set includes only those cases that have been unsealed—that is, those cases in which an election decision had been made by the time the FOIA data set was provided in February 2015. However, this shortcoming in the data is resolved by comparing the changes in filings across the circuits.

While the hard statistical value of these figures may be limited, they function as anecdotal evidence to show that the pleading standard may indeed have induced a larger number of qui tam filings in the relaxed circuits than in the strict circuits. The 4.7 percent difference observed between the changes in filing rates in the relaxed circuits (–20.0 percent) and strict circuits (–24.7 percent) may be indicative of larger trends that will be observable only once a larger segment of the FCA litigation is unsealed and analyzed using a later FOIA data set. To further analyze the potential developments in relator activity, Table 6 presents the circuit-specific intervention rates for cases filed during the same three-year time periods.

attributable to the changes in pleading standard, rather than other, unrelated changes in the development of FCA litigation.

²²⁷ See DOJ, *Fraud Statistics* at *1–2 (cited in note 2).

TABLE 6. CIRCUIT-SPECIFIC INTERVENTION RATES BEFORE AND AFTER *KANNEGANTI* AND *EBEID*

	Pre- <i>Kanneganti</i> and Pre- <i>Ebeid</i> Intervention Rate (2007–2009)	Post- <i>Kanneganti</i> and Post- <i>Ebeid</i> Intervention Rate (2011–2013)
2d Cir	36.2%	24.4%
8th Cir	15.8%	5.4%
11th Cir	18.6%	14.6%
Strict Total	22.5%	14.2%
5th Cir	13.7%	6.8%
9th Cir	18.5%	6.6%
Relaxed Total	16.4%	6.7%

The results are startling. The intervention rates in the Fifth and Ninth Circuits plummeted after the relaxed pleading standard was adopted. While the right-censoring concerns addressed in regard to Table 5 persist here,²²⁸ the figures still suggest two mutually nonexclusive conclusions regarding relator practices and the DOJ's investigative practices. First, it is possible, as the model predicts, that the relaxed standard has indeed incentivized a large number of lower-quality claims. In this regard, the shockingly low intervention rates in the Fifth and Ninth Circuits may indicate that the post-*Kanneganti* and post-*Ebeid* *qui tam* complaints in these circuits include an overabundance of meritless claims.

Second, the low intervention rates in the Fifth and Ninth Circuits may also indicate that the United States Attorneys' Offices in the Fifth and Ninth Circuits have been overwhelmed by a plethora of complaints that are not pleaded with sufficient particularity to permit efficient and quick investigation. Beyond the relaxed standard's effect on swamping the DOJ with low-quality information, this standard may also cause inefficient shifts in counsel's behavior. Unlike the relaxed standard, the strict standard incentivizes counsel to use the complaint and the relator's disclosure statement for the primary purpose of helping the government pinpoint the location of the false claims. Notably, the DOJ itself expressed hesitation regarding exempting *qui tam* complaints from Rule 9(b) altogether for this very reason. In 2008 the DOJ voiced strong opposition to a proposed FCA amendment

²²⁸ That is, because investigations of cases in which the DOJ ultimately intervenes take longer, the intervention rate based on *case filing year*—as opposed to election year—results in an overpopulation of declined cases and an underpopulation of intervened cases.

that would relieve relators of the requirement of identifying specific false claims at the pleading stage, because relator complaints “that fail to allege fraud with adequate particularity can waste the Government’s investigative resources.”²²⁹ Although the relaxed pleading standard is not as drastic a relaxation as eliminating Rule 9(b)’s application altogether, the same logic applies: every marginal degree by which the pleading standard is relaxed results in a marginal increase to the DOJ’s expenditure of investigative resources. To this extent, the low intervention rates in the Fifth and Ninth Circuits may indicate that a far larger percentage of qui tam complaints filed between 2011 and 2013 remain under investigation in these circuits than in the Second and Eleventh Circuits. Not only does this result in inefficient fraud enforcement, but also it costs taxpayers millions as it permits the fraudulent practices to continue during the government’s delayed investigation.

Beyond its use as an interpretive tool for the Rule 9(b) circuit split, the model presents broader implications for FCA reform in general. Because postdeclination litigation plays a comparatively diminished role in counsel’s decision to file a suit—and in some cases even has a negative expected value—advocates for FCA reform must seek judicial and legislative adjustments elsewhere in the litigation timeline.²³⁰ That is, none of the levers on the declination side of litigation appears to have any desirable influence on the predeclination behavior of relators. The cross circuit FOIA data presented in Part III.A support this finding. Given how few declined cases have actually succeeded—even in circuits with the most liberal applications of Rule 9(b)—it is

²²⁹ See Nelson, Letter to the Honorable John Conyers Jr at *12 (cited in note 124). See also US Department of Justice, *FY 2016 Budget Request* *4, archived at <http://perma.cc/JM7G-9MET> (seeking a \$1 million budget increase to handle “the increasing number of whistleblower cases”).

²³⁰ See, for example, *False Claims Act Correction Act of 2009*, HR Rep No 111-97, 111th Cong, 1st Sess 17 (2009). The Act sought to codify the relaxed pleading standard by amending 31 USC § 3731 with the following language:

In pleading an action brought under section 3730(b), a person shall not be required to identify specific claims that result from an alleged course of misconduct if the facts alleged in the complaint, if ultimately proven true, would provide a reasonable indication that one or more violations of section 3729 are likely to have occurred, and if the allegations in the pleading provide adequate notice of the specific nature of the alleged misconduct to permit the Government effectively to investigate and defendants fairly to defend the allegations made.

Id at 17.

surprising how much attention the pleading standard has received from courts and scholars.

CONCLUSION

In some respects, one might consider the pleading standard emblematic of the False Claims Act's search for the "golden mean" between enforcement and efficiency.²³¹ In this light, the pleading standard is but one cog in a far-larger mechanical scale, "balanc[ing] the need to encourage qui tam actions against the need to prevent parasitic suits."²³² Yet this Comment shows that in other important respects the pleading puzzle is little more than a procedural red herring. Judges seesaw in the application of their circuits' respective iterations of the standard, closing and opening the gateway to discovery depending on poorly defined niceties of a case's factual constellation. Notwithstanding judicial pronouncements of finely tuned pleading standards, the data set shows what little effect the varying standards have had on case outcomes across the circuits.

This Comment contributes to existing scholarship by proposing new macrolevel lines of analysis and questioning the degree of information asymmetry in declined cases. While each individual qui tam complaint should not be lambasted as meritless if it fails to meet the strict standard, courts should recognize the larger costs of allowing such complaints to proceed to discovery. The threats of socially suboptimal fraud enforcement, warped actor incentives and gamesmanship, and systemic agency inefficiency should make courts think twice before tossing the strict pleading standard of Rule 9(b) into the wastebasket of procedural history.

²³¹ *Graham County Soil and Water Conservation District v United States*, 559 US 280, 294 (2010).

²³² *United States v Ortho Biotech Products, LP*, 579 F3d 13, 27 (1st Cir 2009), citing *United States v Becton Dickinson & Co*, 21 F3d 1339, 1354–55 (4th Cir 1994).

