

A CLOSER LOOK AT THE FCA'S PARTICULARITY AND RETALIATION REQUIREMENTS

In a partial affirmation, the Fourth Circuit weeded out False Claims Act ("FCA") claims made without particularity, requiring relators to "connect the dots" between the alleged false claims and government payment and highlighted the FCA's recently amended "objective reasonableness" standard in reviewing retaliation claims.

BACKGROUND

In 2010, the FCA was amended to include any party that does business with the government or receives reimbursement with federal money. In *U.S. ex rel. Grant v. United Airlines Inc.*,¹ the relator brought a *qui tam* action alleging that the airline defendant violated the FCA by: (1) knowingly presenting fraudulent or false claims for payment;² (2) knowingly making, using or causing a false record material to fraudulent or false claims;³ and (3) unlawfully terminating relator for "lawful acts done ... in furtherance of an FCA action ... or other efforts to stop 1 or more violations of the FCA."⁴

On appeal, the court examined the claims under the Federal Rule's stringent 9(b) pleading standard. There are two ways to successfully plead a case under Rule 9(b): (1) the allegations are made with particularity that specific false claims actually were presented to the government for payment; or (2) the allegations contain a pattern of conduct that would necessarily have led to the submissions of false claims to the government for payment. In this case, the court focused on the latter.

As for the retaliation claims, the court focused on the protected activity the relator engaged in that caused his termination. In order to successfully plead this claim, the court noted that the relator must either point to a "distinct possibility" that FCA litigation will ensue or that the defendant's conduct involved one or more "objectively reasonable" possibilities of an FCA violation.

ANALYSIS

Allegations based on the FCA need to be pleaded with particularity due to the seriousness of the charges and the potential damages the defendant faces. Federal Rule 9(b)'s heightened pleading standard requires relators to draw a connection between the fraudulent claims and government payments.

Here, the court acknowledged that the relator's claims adequately alleged that defendant was engaged in some fraudulent conduct; however, the relator failed to allege how the bills for the fraudulent services were presented to the government or if the bills were even paid by the government. The defendant did not contract directly with the government, so the relator needed to explain the billing structure or point to how or whether the government actually paid for the alleged fraudulent claims. The court observed that the relator's claims left open the possibility that the government was never billed for the services. Because there was a subcontract between the defendant and the government, the subcontractor could have declined to bill the government, or if it did bill, the government could have refused to pay the amount. The court also highlighted that the complaint left open the possibility that any fraudulent repairs were fixed prior to billing the government. Once the defendant made the repairs, the items went to the subcontractor, and, thus, it can be argued that the subcontractors realized the issues and remedied them prior to billing.

The court then focused on the relator's retaliation claims. The relator alleged that due to his efforts in notifying the defendant of possible FCA violations, he was terminated. The court used the "objective reasonableness" standard for determining whether the relator was engaged in protected activity and noted that the relator need only a reasonable belief that the defendant's conduct was going to, or is currently, violating the FCA. Here, the relator alleged that he notified defendant of the possible false claims through emails, which eventually led to an investigation. The court explained this conduct was protected activity under the FCA. When the relator felt the conduct was not remedied, he was terminated for taking pictures of the alleged fraudulent conduct, which then satisfied the additional two elements required for a successful retaliation claim under the FCA - knowledge and defendant taking adverse action as a result.

PRACTICAL TAKEAWAY

Courts understand the damages defendants face when litigating an FCA action and are holding relators to the stringent pleading standards. Claims merely alleging fraudulent conduct and a payment, without more, are insufficient to bring under the FCA. Health care providers need

to remember to take any alleged fraudulent conduct seriously. If a relator can point to a reasonable belief that the health care provider engaged in conduct that could violate the FCA, retaliation claims will likely survive a motion to dismiss.

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[1] *United States ex rel. Grant v. United Airlines Inc.*, 2018 WL 6786134.

[2] 31 U.S.C. § 3729(a)(1)(A).

[3] 31 U.S.C. § 3729(a)(1)(B).

[4] 31 U.S.C. § 3730(h)(1).