## TRIAL COURT PUSHES BACK ON "FRAUD WITH PARTICULARITY" REQUIREMENT

The Federal District Court for the Middle District of Florida appears to have rejected recent direction from the Eleventh Circuit Court of Appeal to deny a motion to dismiss in a False Claims Act case.

In *United States ex rel. Napoli et al. v. Premier Hospitalists PL, et al.* the whistle-blowers alleged a hospitalist company and its owner violated the False Claims Act through the submission of fraudulent claims to government payers. The *qui tam* relators described the scheme in great detail, but failed to identify with particularity any claims submitted to the government. The trial court denied the defendants' motion to dismiss for failure to plead fraud with particularity, ruling the relator's allegation that she personally observed coding, as well as submission of false claims to Medicare, was sufficient to meet the requirements of Rule 9(b). The court ruled that "there was no per se rule that an FCA complaint must provide exact billing data or attach a representative sample claim,"[1] relying upon an unpublished Eleventh Circuit Court of Appeals case, *United States ex rel. Mastej v. Health Mgmt Assocs., Inc.*[2] The trial court's reliance upon *Mastej* appears to conflict with a recent decision of the Eleventh Circuit clearly stating that *Mastej* misstated the standard for pleading in False Claims Act cases.

In 2002 the Eleventh Circuit Court of Appeals ruled that False Claims Act cases must be plead with specificity pursuant to Rule 9(b),[3] saying that in a FCA complaint, " 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."[4] The court went on to say that a False Claims Act complaint must support the allegation of "an actual false claim for payment being made to the Government."[5]

The next year, the Eleventh Circuit Court of Appeals issued its unpublished opinion in *United States ex rel. Hill v. Morehouse Medical Associates, Inc.*6 In *Hill* the court allowed a relaxed pleading standard where the whistle-blower was a corporate insider without access to detailed information. It ruled that a *qui tam* whistleblower who showed sufficient indicia of reliability, even in the absence of specific claims, could meet the Rule 9(b) fraud with particularity standard.

In 2006, in *United States ex rel. Atkins v. McInteer*,[7] and again in 2010 in *United States ex rel. Sanchez v. Lymphatx Inc.*,[8] the Court of Appeals stated that *Clausen*, a published opinion, supersede *Hill*, and that the *Clausen* specificity requirements must be followed.

In 2012, in a reported case, *United States ex rel. Matheny v. Medco Health Solutions Inc.*,[9] the same court said:

> In order to plead the submission of a false claim with particularity, 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.[10]

This seemed to be a clear return to the *Clausen* standard, requiring pleading of a specific false claim submitted to a government payer.

In 2014, in *United States ex rel. Mastej v. Health Management Associates, Inc., et al.*,11 the court appeared to flip-flop, ruling a relator:

> with direct, first-hand knowledge of the defendant's 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.[12]

Then, in 2016, the Eleventh Circuit Court of Appeals issued its ruling in *United States ex rel. Jallali v. Sun Healthcare Group, et al.*[13] In *Jallali*, the *qui tam* relator asked the Court of Appeals to evaluate its pleading based upon the *Mastej* standard for Rule 9(b), rather than the standard found in *Clausen*. The court affirmed quite clearly that its rules state "(u)npublished opinions are not considered binding precedent, but they may be cited as persuasive authority."[14] *Clausen* was the standard to be followed, not *Mastej*. The court stated:

> Absent an allegation, stated with particularity, that the Defendants presented a false claim for payment to the Government, Jallali has failed to state claim for relief under the FCA.[15]

The court in *Napoli* attempted to thread the needle between *Clausen* and *Hill* by stating it did not find them to be inconsistent. Unfortunately, it relied upon the unpublished *Mastej* opinion to support that conclusion. Defendants' counsel did provide a copy of the *Jallali* decision in a supplemental filing.

There seems little doubt that the Eleventh Circuit Court of Appeals will continue to hew to its rule that unpublished opinion do not supersede the pleading standard it enunciated in *Clausen*. It remains to be seen what will ultimately happen in the *Napoli* case.

If you have any questions regarding this article, please contact David B. Honig at (317) 977-1447 or dhonig@hallrender.com or your regular Hall Render attorney.

[1] *Id*. @ 6.

[2] 591 Fed.Appx. 693, 704 (11th Cir. 2014).

[3] Fed.R.Civ.P. 9(b).

[4] *United States ex rel. Clausen v. Laboratory Corp. of America, Inc.*, 290 F.3d 1301, 1311 (11th Cir. 2002).

[5] *Id*.

[6] No. 02-14429, 2003 WL 22019936 (11th Cir. 2003).

[7] 470 F.3d 1350, 1358 (11th Cir. 2006).

[8] 596 F.3d 1300, 1303 (11th Cir. 2010).

[9] 671 F.3d 1217 (11th Cir.2012).

[10] *Id*. at 1225.

[11] 591 Fed.Appx. 693 (11th Cir. 2014).

[12] *Id.* at 704.

[13] 2016 WL 3564248, (11th Cir. July 1, 2016).

[14] *Id*.

[15] *Id*. at *2.