ONE IS NOT ENOUGH: COURT CLARIFIES WHISTLEBLOWER'S BURDEN IN HIGH VOLUME FCA ACTION

The Southern District of Indiana recently held that a whistleblower must present sufficient evidence to support *each alleged false claim*, not just one, to survive summary judgment.[1] This holding is a win for FCA defendants that deal in a high volume of claims submitted to the government—like hospitals—and requires whistleblowers to identify every claim before trial, not just an exemplar.

In *U.S. ex rel. Calderon v. Carrington Mortgage Services, LLC, et al.*, the *qui tam* complaint alleged that the mortgage company falsely certified loans as qualifying for Federal Housing Administration insurance.[2] To support the allegations, the whistleblower alleged that the mortgage company manipulated data and falsely certified compliance to get FHA mortgages approved and then collected the proceeds when those loans defaulted.[3] The mortgage company moved for summary judgment, arguing that the whistleblower must prove her allegations on a claim-by-claim basis before trial.[4] The whistleblower argued that she need only prove one instance of fraud and that her burden for the remaining claims was reserved for trial.[5]

The Court agreed with the mortgage company and held that whistleblowers suing under the FCA "must specifically identify each fraudulent claim submitted to the government."[6] The holding itself is critical, but it's the Court's rationale that will serve FCA defendants well. The Court clarified that summary judgment vets the evidence before trial, and it is necessary to identify the specific claims to preserve time and judicial resources. A failure to do so could lead to "wasted time" at trial.[7]

While this holding clarifies the parties' burdens at summary judgment, the whistleblower's argument was not completely out of line. Generally, where a whistleblower alleges a complex and "far reaching scheme," it is not enough to plead only the broad scheme—the whistleblower must also identify a representative false claim actually submitted.[8] The whistleblower's reliance on that standard fell flat here, though. The parties had moved well beyond the initial pleading stages and instead arrived at summary judgment, the second potential off-ramp from litigation for *qui tam* defendants. With this new stage of litigation comes a new burden for the whistleblower.

This case involved a mortgage company, but hospitals and health systems should see this decision as a potential tool to use in the often complex world of healthcare FCA litigation. Physicians, hospitals and health systems submit thousands upon thousands of claims to the government for reimbursement each year. Now, it is not enough for a whistleblower to allege a broad theory of fraud and coast into trial. Instead, the whistleblower must be able to identify and support each claim before trial—a necessary act according to this court to avoid "wasting time."

If you have any questions, please contact:

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[references]

[1] *United States v. Carrington Mortg. Servs., LLC*, No. 1:16-CV-00920-RLY-MJD, 2020 WL 1320894, at *2 (S.D. Ind. Mar. 12, 2020)

[2] *Id.* at *1.

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id*. at *2.

[8] *U.S. ex rel. Ibanez v. Bristol-Myers Squibb Co.*, 874 F.3d 905 (6th Cir. 2017).

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