

SEVENTH CIRCUIT: "INFORMATION AND BELIEF" INSUFFICIENT UNDER 9(B)

In *U.S. ex rel. Grenadyor v. Ukrainian Village Pharmacy, Inc. et al.*, the Seventh Circuit affirmed a trial court's dismissal of a whistleblower's complaint for its failure to provide sufficient specificity regarding the alleged fraud. In the opinion, Judge Posner drives a stake through the heart of a common boilerplate phrase with clarity and precision that makes a refreshing read for legal and non-legal readers alike.

THE CASE

The relator was a pharmacist working at the Defendant's pharmacy. The relator alleged that the Defendant violated federal and state law by waiving Medicare and Medicaid co-pays, providing gifts to customers, and charging the government for medications that were never picked up by customers.

The theories of fraud rested upon the pharmacy's certification of a standard form for participation in government healthcare programs and the pharmacy's alleged failure to reimburse the Government for medications ordered but never picked up by customers.

The trial court dismissed the complaint with prejudice for failure to allege specific instances of fraud and the basis for that knowledge after the relator had been given four opportunities to fix these shortcomings. The Relator appealed, and the Seventh Circuit affirmed the trial court's dismissal.

THE DECISION

Rule 9(b) requires plaintiffs and whistleblowers to provide a higher-than-normal level of specificity in their complaints "[b]ecause a public accusation of fraud can do great damage to a [defendant] before the [defendant] is . . . exonerated in litigation." (*Grenadyor* at 5-6). For False Claims Act cases, this requires facts that make the fraud plausible: who committed the fraud, when, where, what was the fraudulent conduct, and how did the relator learn of it. (*Grenadyor* at 6). Failure to do so generally results in a dismissal with leave to amend the allegations to fill in the gaps.

Here, after repeated attempts to fill in the gaps, the relator's complaint remained insufficient. In part, the relator's complaint relied upon a frequent and often meaningless statement: "upon information and belief." (*Grenadyor* at 11). Though many attorneys in FCA actions rely upon this as if it is an incantation that satisfies their Rule 9(b) obligations, the Court disagreed, noting that it can mean that allegations are based upon nothing more than rumors or speculation. (*Grenadyor* at 11). Rule 9(b)'s requirements are more stringent than innuendo and relators who invoke this boilerplate protection risk dismissal.

Here, the Court recited repeated failures of the relator to satisfy Rule 9(b)'s requirements. After finding that the four attempts to solve the shortcomings of his complaint failed, the Court held that the trial court was properly within its discretion to dismiss the case without leave to amend.

THE IMPACT

This decision is a well-written opinion that is crystal clear on the requirements for pleading fraud with sufficient particularity. Defendants must be represented by counsel that is familiar with these more stringent requirements for fraud actions and adept at forcing whistleblowers to carry their burden at the earliest stage of litigation.

Should you have any questions regarding the False Claims Act or defense against whistleblower actions, please contact:

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