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Sixth Circuit order prescribes a high dose of particularity to would-be FCA relators

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The Sixth Circuit recently handed down a decision in *United States v. Wal-Mart Stores E., LP*, 2021 WL 2287488 (6th Cir. June 4, 2021) that highlights several demanding pleading pitfalls that can short-circuit an FCA complaint at the motion to dismiss stage.

The relator,[1] a Wal-Mart pharmacist, suspected that Wal-Mart was filling fraudulent prescriptions for excessive dosages of opiates, resulting in the submission of false claims[2] to government healthcare programs. After surreptitiously obtaining one unidentified patient's records listing that patient's prescriptions and costs over a five-year period, the relator brought his concerns to his supervisor.

Wal-Mart allegedly dismissed his concerns, reprimanded him for stealing the patient's records, and fired him. Thereafter, the relator filed suit, bringing claims for substantive FCA violations, FCA conspiracy, and retaliation. The district court dismissed the complaint in full.

In short, the court explained, a conspiracy claim under the FCA cannot survive without a viable substantive FCA claim.

On appeal, the Sixth Circuit Court's order first hammered home the heightened pleading standard of Federal Rule of Civil Procedure 9(b), which requires claims brought under the FCA to be pled with particularity. The court found that the relator's complaint failed to meet this heightened pleading standard for each element of the FCA.

The court first held that the relator failed adequately to plead presentment of a false claim, rejecting as "mere speculation" the relator's argument that one patient's low out-of-pocket costs suggested the patient had received government reimbursement for a claim submitted by Wal-Mart.

The court also concluded that the relator failed to plead that any claims were false, holding that because the relator had not submitted patient medical information along with the records of the patient prescriptions and payments, it was "impossible" to evaluate whether the doses were actually too high.

As to scienter,[3] the court reasoned that the complaint did not point to anything that would indicate to Wal-Mart that the prescriptions at issue were fraudulent, notwithstanding the large dosages of opiates prescribed.

The Sixth Circuit affirmed dismissal of the relator's FCA retaliation claim by taking a narrow view of what constitutes "protected activity" under the FCA anti-retaliation provision.

Finally, the court held that the relator failed to plead materiality, explaining that if the prescriptions at issue were fraudulent on their face and were submitted to the government, as the relator asserted, the government's decision to pay those claims regardless was "very strong evidence" that the misrepresentations were not material.

Having dispensed with the substantive FCA claims, the Sixth Circuit next held that the relator's FCA conspiracy claim likewise must be dismissed. In short, the court explained, a conspiracy claim under the FCA cannot survive without a viable substantive FCA claim.

The court's holding on this point marks the second court of appeals in recent years (following the uniform view of district courts) to hold categorically that an FCA conspiracy claim cannot stand alone.[4]

Also of note, the Sixth Circuit affirmed dismissal of the relator's FCA retaliation claim[5] by taking a narrow view of what constitutes "protected activity" under the FCA anti-retaliation provision.

The court concluded that to state a retaliation claim, a plaintiff must allege that his employer knew he was bringing or assisting an FCA action and retaliated because of this. It was not enough that the relator alleged he told his superiors about the allegedly false prescriptions he witnessed, nor would it have mattered if other companies had incurred FCA liability for similar conduct.

At bottom, the court held that the FCA retaliation provision only protects actions in pursuit of actually filing an FCA lawsuit. Other courts have taken a much broader approach.[6]

We will be watching to see whether other circuits follow the Sixth Circuit's approach to these issues. If nothing else, the *Wal-Mart* decision serves as a good reminder that many FCA cases can be disposed of at the motion to dismiss stage based on the various pleading hurdles discussed in the opinion.

Notes

[1] https://bit.ly/379u5pW

[2] https://bit.ly/3rFDcYK

[3] https://bit.ly/3BTICnQ

[4] *See United States ex rel. Kasowitz Benson Torres LLP v. BASF Corp.*, 929 F.3d 721 (D.C. Cir. 2019).

[5] https://bit.ly/3iadRmz

[6] *See, e.g., United States ex rel. Grant v. United Airlines Inc.*, 912 F.3d 190, 201-02 (2018); *U.S. ex rel. Karvelas v. Melrose-Wakefield Hosp.*, 360 F.3d 220, 236 (1st Cir. 2004); *Dookeran v. Mercy Hosp. of Pittsburgh*, 281 F.3d 105, 108-09 (3d Cir. 2002); *U.S. ex rel. Yesudian v. Howard Univ.*, 153 F.3d 731, 740 (D.C. Cir. 1998); *Childree v. UAP/GA CHEM, Inc.*, 92 F.3d 1140, 1145-46 (11th Cir. 1996); *Neal v. Honeywell, Inc.*, 33 F.3d 860, 863-64 (7th Cir. 1994).

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