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# Government Contracts Blog

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## Ninth Circuit Weakens Rule 9(b) In False Claims Act Litigation

*By Robert M.P. Hurwitz*

The U.S. Court of Appeals for the Ninth Circuit recently weakened the impact of Federal Rule of Civil Procedure 9(b) in False Claims Act ("FCA") cases. The FCA allows whistleblowers (called "relators") to bring lawsuits against contractors on behalf of the federal government. Relators can receive up to 30 percent of the government's ultimate recovery. This bounty incentivizes relators to bring FCA lawsuits. It also causes some relators to see the FCA as a retirement-advancing lottery, and their complaints often characterize innocent business challenges as fraudulent schemes.

Contractors attempt to eliminate these meritless suits by arguing that the complaints lack sufficient detail. Under Federal Rule of Civil Procedure 9(b), FCA complaints must "state with particularity the circumstances constituting fraud." In fraudulent scheme complaints, the relators recite the proverbial "parade of horribles," overemphasizing perceived inadequacies in billing practices, quality control systems, manufacturing processes, or other system-wide business practices. However, they fail to identify any false claims (such as invoices or certificates of compliance). Instead, they hypothesize that because the contractor had systemic problems, it must have submitted false claims to the government.

Courts of Appeals are split on the viability of fraudulent scheme complaints. The majority reject them because the "submission of a claim is … the *sine qua non* of a False Claims Act violation," and thus the complaint must allege an actual false claim. *United States ex rel. Clauson v. Lab. Corp. of Am., Inc.*, 290 F.3d 1301, 1311 (11th Cir. 2002); *see also United States ex rel. Bledsoe v. Cmty. Health Sys., Inc.*, 501 F.3d 493, 509 (6th Cir. 2007); *United States ex rel. Joshi v. St. Luke's Hosp., Inc.*, 441 F.3d 552, 557 (8th Cir. 2006); *United States ex rel. Karvelas v. Melrose-Wakefield Hosp.*, 360 F.3d 220, 232 (1st Cir. 2004). In cases where many claims are at issue, such as an alleged long-running Medicare fraud, the complaint satisfies Rule 9(b) if it provides actual, representative examples of false claims. Claims are only representative if they are "illustrative of the class of all claims covered by the fraudulent scheme." *Bledsoe*, 501 F.3d at 510-11 (internal quotation marks omitted).

Momentum is shifting, however, and more recent decisions have been willing to accept fraudulent scheme complaints, even if they do not allege any specific false claims. Last month,

the Ninth Circuit joined the Fifth Circuit in holding that "it is sufficient to allege 'particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted.'" *Ebeid v. Lungwitz*, No. 09-16122, slip op. at 11259 (9th Cir. Aug. 9, 2010) (quoting *United States ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 190 (5th Cir. 2009)). Although relators need not identify actual false claims, the complaints must nevertheless link the scheme to the likelihood that the contractor submitted false claims.

This is a costly shift for contractors. Spurious complaints may now survive the motion to dismiss stage, forcing contractors to spend a significant amount of time and money on discovery. It also defeats the FCA's original intent that relators should be insiders with evidence of improper activity. As the Eleventh Circuit stated, "while an insider might have an easier time obtaining information about [the scheme] and meeting the pleading requirements under the False Claims Act, neither the Federal Rules nor the Act offer any special leniency under these particular circumstances to justify [an outsider] failing to allege with the required specificity the circumstances of the fraudulent conduct." *Clauson*, 290 F.3d at 1314.

The Supreme Court recently had the opportunity to clarify how Rule 9(b) applies to scheme liability complaints. However, after the petition for certiorari was filed, Congress amended the public disclosure bar, thus mitigating a major dispute in the case. The Solicitor General asked the court to deny the petition, and it did. Contractors and FCA practitioners will have to wait for a future opportunity to resolve the circuit split on the viability of complaints alleging fraudulent schemes.

For continued discussion of Rule 9(b) in False Claims Act litigation, please see *Meanwhile, Sixth Circuit Remains Firm on Rule 9(b) in False Claims Act Litigation*, also published today.

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