

Eighth Circuit Affirms False Claims Act Dismissal on Rule 9(b) Grounds

The U.S. Court of Appeals for the Eighth Circuit recently affirmed the dismissal of a False Claims Act (“FCA”) complaint in *United States ex rel. Dunn v. North Memorial Health Care* (8th Cir. No. 13-1099, Jan. 9, 2014) for failing to meet the particularity requirements of Rule 9(b). Noting that the complaint failed to identify even a single example of an alleged false claim submitted for reimbursement, the court rejected the relator’s argument that it was sufficient to allege that because of the hospital’s supposed regulatory violations, every claim it submitted over more than a decade was false.

The relator in *Dunn* was a former employee of an independent cardiology physician group that provided services at defendant North Memorial Health Care (“North Memorial”). The relator alleged that the hospital failed to provide physician supervision for its cardiac and pulmonary rehabilitation services as required by Medicare regulations. As a result, the relator contended that the reimbursement claims North Memorial submitted to Medicare for cardiac and pulmonary rehabilitation services were false. North Memorial moved to dismiss the complaint under Rules 12(b)(6) and 9(b). Although the district court granted dismissal under Rule 12(b)(6), the Eighth Circuit affirmed the dismissal under Rule 9(b).

In its concise opinion, the Eighth Circuit reiterated that FCA liability is based on fraudulent claims for payment and not mere regulatory violations. Op. at 4. As a result, relators must plead the specific time, place, and content of the alleged false representations to satisfy Rule 9(b). Op. at 4. Although the relator was not required to allege specific details for every alleged false claim, the court noted that a relator must provide some “representative examples” of fraudulent conduct. The court specifically rejected the proposition that the relator could rely on the “generalized conclusion” that the defendant engaged in “noncompliant conduct” that caused the submission of false claims. Op. at 5. The court further noted that the relator could not overcome Rule 9(b) by alleging broadly that every claim submitted over the relevant timeframe was false. Op. at 5. Accordingly, the court held that the relator’s failure to identify “even one example of an actual false claim submitted to [Medicare] for reimbursement” was fatal to the FCA complaint. Op. at 5.

Implications of the Court’s Decision

The *Dunn* decision reiterates the Eighth Circuit’s position that Rule 9(b) presents a meaningful hurdle that relators must satisfy before proceeding to discovery on an FCA complaint. The application of Rule 9(b) in FCA cases is the subject of a pending petition for review before the Supreme Court. See *United States ex rel. Nathan v. Takeda Pharms., Inc.* (Sup. Ct. No. 12-1349). Although the Supreme Court has not decided whether to step into the Rule 9(b) debate, it has invited the Solicitor General to submit a brief expressing the government’s views on the case. We will continue to monitor the *Nathan* petition and how it may affect Rule 9(b) jurisprudence. If you would like further information, please contact one of the attorneys in our [false claims act](#) practice or the Ropes & Gray attorney who usually advises you.