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Seventh Circuit Allows FCA Claim Based on Inferences of Fraud to Proceed; Claims Based Only on Personal Opinions Dismissed

Summary

In *United States ex rel. Presser v. Acacia Mental Health Clinic, LLC*, 836 F.3d 770 (7th Cir. 2016), the Seventh Circuit addressed Rule 9(b)'s application to a False Claims Act ("FCA") complaint, elaborating on when it considers a relator's allegations sufficiently particular to meet Rule 9(b)'s heightened pleading standard when a relator does not have access to the particular claims being submitted to the government for payment.

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Background

In October 2011, Relator Rose Presser, an experienced nurse and nurse practitioner, began working for Defendant Acacia Mental Health Clinic, LLC ("Acacia"), owned by Defendant Abe Freund. *Id.* at 773. Presser alleged that Acacia was engaged in four practices, all of which purportedly resulted in the submission of false claims to the federal government and to Wisconsin. First, in order to receive medication, patients were required to consult a minimum of four individuals—a receptionist, a medical nurse practitioner, a psychotherapist, and another nurse practitioner—and were billed for each of these consultations. *Id.* Presser alleged that these four consultations were not all medically necessary. *Id.* Second, for these assessments, Acacia required the receptionist, the medical nurse practitioner, and Presser (a different nurse practitioner) to use a code for full psychological assessments with therapists or psychiatric professionals, despite the fact that these assessments were not being conducted. *Id.* Third, during each visit patients were required to be screened for drugs in their urine. *Id.* Presser alleged these screenings were ineffective and unnecessary. *Id.* Fourth, patients were required to attend appointments that Presser alleged were medically unnecessary, both to obtain prescription refills and if the patients had not been seen for a minimum of 30 days. *Id.* at 773–774.

On January 18, 2013, Presser filed a complaint. After Defendants moved to dismiss, Presser amended her complaint, and Defendants moved to dismiss again. On July 15, 2014, Defendants' Motion to Dismiss Presser's amended complaint was granted for failure to state a claim with particularity, as required by Fed. R. Civ. P. 9(b). *United States ex. rel. Presser v. Acacia Mental Health Clinic, LLC*, 13-CV-71-JPS, 2014 U.S. Dist. LEXIS 9590 (E.D. Wis. July 15, 2014). The Seventh Circuit affirmed in part and reversed in part, and remanded to allow Presser's claims with regard to the use of an improper billing code to proceed to discovery. 836 F.3d at 773.

Seventh Circuit's Decision

To establish liability under the FCA, a relator must prove three things: "(1) that the defendant made a statement in order to receive money from the government; (2) that the statement was false; and (3) that the defendant knew the statement was false." *Id.* at 777. In order to protect defendants from being wrongly accused, all claims alleging fraud—including FCA claims—are subject Rule 9(b)'s heightened pleading requirements. *Id.* at 775–76 (quoting Fed. R. Civ. P. 9(b)). The Seventh Circuit describes this as requiring that "the who, what, when, where, and how of the fraud—the first paragraph of any newspaper story"—be pled with particularity. *Id.* at 773 (internal quotation marks and citation omitted).

Even though Presser did not allege with particularity the Defendants actual submission of false claims to the government, the Seventh Circuit held that other circumstances alleged with specificity by Presser sufficiently pled this element of the FCA: “the alleged facts necessarily led one to the conclusion that the defendant[s] had presented claims to the Government.” *Id.* at 778. Because as a nurse practitioner Presser lacked access to billing, she could not plead with particularity Acacia’s actual submission of bills to the government. *Id.* Instead, she alleged that almost all Acacia’s patients received Medicare and that Acacia’s allegedly fraudulent practices were applied to all patients. *Id.* Under these circumstances, the Seventh Circuit held the complaint had sufficiently alleged the submission of claims. *Id.* The Seventh Circuit allowed Presser’s allegations surrounding the use of the incorrect billing code to proceed.

Proof of Fraud Other Than Relator’s Subjective Evaluation Must Be Provided

The Seventh Circuit upheld the district court’s dismissal of Presser’s three other theories of liability. In so doing, the panel held that Presser’s FCA claims based on allegations of medically unnecessary treatment failed because Presser did not provide “medical, technical, or scientific context” explaining why the treatment was allegedly unnecessary. *Id.* at 780. A relator’s personal opinion that treatments are unnecessary is not sufficient. *Id.* “Presser’s subjective evaluation, standing alone, is not a sufficient basis for a fraud claim.” *Id.* at 781.

Implication

The Seventh Circuit’s held here that under the circumstances present in this case, the submission of specific false claims was adequately pled without pleading details of the specific claims themselves. The applicability of this approach to other cases, however, may be quite limited, since the court’s reasoning here appears to have been driven by other alleged facts that allowed the court to bridge a gap that cannot typically be crossed.

If you have any questions or would like to discuss the foregoing or any related matter, please contact the Ropes & Gray attorney with whom you regularly work, or an attorney in our [False Claims Act](#) practice.