The Devil is in the Details: Sixth Circuit Rejects Casual Allegations of Fraud in Affirming Dismissal of *Qui Tam* Action

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The Sixth Circuit recently outlined the contours of Federal Rule of Civil Procedure 9(b)'s heightened pleading standards in the context of *qui tam* actions under the False Claims Act (FCA), and explained why a FCA plaintiff must identify an alleged false claim to comply with the rule. Rule 9(b) unambiguously requires a claimant to plead fraud in detail, but circuit courts are divided concerning the application of Rule 9(b) to FCA cases. Some circuits—most notably the Fifth Circuit—have relaxed the standard under limited circumstances, holding that a relator need not identify the exact false claims underlying the action if the relator alleges "particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted." *United States ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 190 (5th Cir. 2009). Although that language sounds sufficiently demanding on paper, courts applying the Fifth Circuit's approach have sometimes allowed questionable allegations of fraud to proceed to discovery. As a result, a defendant may find itself entangled in costly litigation on the basis of nothing more than speculative allegations of false claims. In contrast, the Sixth and Eleventh Circuits correctly require relators to plead the details of at least one false claim with specificity. The Sixth Circuit recently explained the sound reasoning behind this requirement in *United States ex rel. Hirt v. Walgreen Co.*

In *Hirt*, the relator, who owned a pharmacy that competed with Walgreen Company (Walgreens), alleged that Walgreens violated the FCA by offering store gift cards to Medicare and Medicaid recipients to get their business. The relator's theory: when Walgreens submitted to the government the prescription-drug claims by Medicare and Medicaid recipients who paid for the prescriptions with the store gift cards, Walgreens violated both the Anti-Kickback Statute and the FCA. Walgreens moved to dismiss the case, and the district court, holding that the relator failed to state his fraud claims with particularity as required by Rule 9(b), granted the motion.

In affirming the district court's dismissal, the Sixth Circuit homed in on the fatal flaw of the relator's complaint: it included only general allegations regarding Walgreens' gift card scheme and stopped short of identifying a single false claim with particularity. The relator failed to identify any customer by name or initials and did not specify the dates on which the relevant prescriptions had been filled or when Walgreens submitted the allegedly false claims to the government. The court held, "[t]he identification of at least one false claim with specificity is 'an indispensable element of a complaint that alleges a [False Claims Act] violation in compliance with Rule 9(b).'" Because these essential elements were absent from the complaint and were instead left to the court's inference, the court held that the complaint fell short of stating a claim, as Rule 9(b) precludes any such inference.

But the *Hirt* court recognized circumstances in which Rule 9(b)'s requirements might be "relaxed."[1] The panel stated that the aim of Rule 9(b) is to ensure that a relator provides the

[1] Judge Sutton, writing for the court, was careful to note that "[o]nly by following the highly reticulated procedures laid out in the Rules Enabling Act can anyone modify the Civil Rules." The opinion also clarified that, in discussing

"factual predicates necessary to convince [the court] that 'actual false claims' 'in all likelihood exist.'" To that end, the court reasoned that a relator can satisfy the standard without identifying a specific false claim only when the relator alleges facts demonstrating that he or she has personal knowledge of the defendant's billing and claims-submission procedures. For example, the court noted its previous decision in *United States ex rel. Prather v. Brookdale Senior Living Communities, Inc.*, 838 F.3d 750 (6th Cir. 2016), which involved a relator whose job duties included reviewing her company's Medicare claims documentation for compliance with insurance guidelines and then delivering the claims to the billing department to be submitted for payment. According to the *Hirt* court, allegations like those in *Prather* are sufficient to ensure the court of the likelihood that false claims have been submitted to the government. But if a relator fails to identify a specific false claim and lacks detailed personal knowledge of billing procedures, courts in the Sixth Circuit will rightly infer that the relator is guessing about what the claims say—which is wholly is inconsistent with the purpose of Rule 9(b)—and dismiss their claims.

a "relaxed" rule 9(b) standard, the court was merely stating that "'particular' allegations of fraud may demand different things in different contexts."