



District Court Dismisses Government's False Claims Act Complaint for Failure to Allege Actual False Claims with Particularity

W. Jerad Rissler and Andrew C. Stevens

On January 7, 2016 the United States District Court for the Middle District of Florida took the rare step of dismissing (with leave to amend) the government's Complaint in Intervention in a False Claims Act Case. This case illustrates that allegations of a broad scheme to defraud the government are not, by themselves, sufficient to plead a violation of the False Claims Act. To survive dismissal, complaints must provide detailed facts regarding implementation of the alleged scheme, including facts regarding the submission of actual false claims.

A former emergency medical technician initiated a *qui tam* False Claims Act action against Liberty Ambulance Service, Inc. and several other medical facilities for their Medicare and Medicaid billing practices. *U.S. ex rel. Pelletier v. Liberty Ambulance Service, Inc.*¹, 3:11-cv-587-J-32MCR, Doc. No. 47 ("Order") at 1 (M.D. Fla. Jan. 7, 2016). On June 12, 2015, the U.S. Department of Justice filed its Complaint in Intervention against Liberty, alleging that Liberty was violating the False Claims Act and the Anti-Kickback Statute by creating false "run reports" to ensure payment from the government. In response to these allegations, Liberty filed a motion to dismiss, arguing, among other things, that the government's Complaint did not "demonstrate more than a mere possibility of misconduct" and that the government's "False Claims Act counts [were] not pled with sufficient particularity." *Id.* at 2.

With respect to Liberty's first argument, the district court concluded that the government's Complaint in Intervention alleged violations of the False Claims Act and the Anti-Kickback Statute beyond a "mere possibility" and that its "allegations 'plausibly give rise to an entitlement to relief.'" Order at 3-5 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009)). As to the False Claims Act allegations, the court noted that "[w]hile some of the statements are inconsistent, the overall tenor of the allegations, sworn statements, and other exhibits supports the government's theory that Liberty knowingly and intentionally defrauded the government by submitting false claims for payment in violation of 31 U.S.C. §§ 3729(a)(1), 3729(a)(1)(A), and 3729(a)(1)(B)." Order at 4. Similarly, the court found the allegations of an Anti-Kickback violation sufficient to state a claim, although it recognized that "some of the materials are inconsistent with the government's theory that the relationship between Liberty and Memorial Hospital violated the Anti-Kickback Statute." Order at 4-5.

With respect to Liberty's second argument, the court was more demanding, finding that the government failed to allege fraud with the requisite particularity under Rule 9(b) of the Federal Rules of Civil Procedure (requiring that allegations of fraud be pled with particularity). The court noted that the "government's complaint and supporting materials go into great detail regarding a scheme whose purpose may well have been to secure payment from the government based on false claims." Order at 6. Recognizing that detailed allegations of a scheme cannot make up for the failure to plead actual false claims, the Court continued: "But the allegations stop short of describing what happened once the run reports were submitted to the Liberty office for processing." *Id.* at 6.

Additionally, the court noted that, while the current and former Liberty employees upon whom the allegations of the Complaint were based "were familiar with the need to submit run reports which would be payable by Medicare (even if it allegedly meant the reports must be falsified) ... , none of them were involved with the actual submissions of claims to the government or the receipt of payment from the government." *Id.* at 6. The court noted that the "person who professed the most

¹ http://www.agg.com/files/Uploads/Documents/160114_Pelletier_v_Liberty_Ambulance_Service_Jan_7_Order.pdf

familiarity with the billing process” stated “I know I’d give the billing manager the original and corrected run reports, and what she did with it after that is beyond me.” *Id.* at 6-7 (punctuation omitted).

The court further noted that, although “the government presumably has access to all of [the] records [of claims submitted by Liberty],” none of these documents were attached to its Complaint. *Id.* at 7. Indeed, the court noted that the government allegedly reviewed 400 randomly selected patient “run reports” but provided the details of only one claim for payment submitted to the government. However, as to this one claim (and one other where the government failed to provide billing information), the court noted that the allegations related to the run report “would appear to be contrary to the government’s theory that Liberty made false statements or omitted material information on the run reports about patients’ conditions to secure reimbursements.” *Id.* “Thus,” the court observed, “it is not clear that the only claim for which [the government provided] billing and payment information ... is part of the allegedly unlawful scheme.” *Id.* at 7-8.

Thus, while the court found that the government adequately pled a broad scheme sufficient to raise an entitlement to relief, it nevertheless found that the government’s allegations with respect to the implementation of that alleged scheme—*i.e.*, specific patient examples, including specific examples of claims submitted—did not satisfy Rule 9(b)’s requirement to plead fraud with particularity. Accordingly, the court dismissed the government’s Complaint in Intervention with permission to file an Amended Complaint in Intervention in order to correct these deficiencies.

The court’s Order is a good illustration of the pleading burden—applicable to the government as well as to *qui tam* relators—in a False Claims Act case. It is not enough simply to plead a broad scheme to defraud the government. Rule 9(b) requires detailed facts regarding the implementation of that scheme, including facts regarding the submission of actual false claims.

Authors and Contributors

W. Jerad Rissler

Of Counsel, Atlanta Office
404.873.8780
jerad.rissler@agg.com

Andrew C. Stevens

Associate, Atlanta Office
404.873.8734
andrew.stevens@agg.com

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Atlanta Office

171 17th Street, NW
Suite 2100
Atlanta, GA 30363

Washington, DC Office

1775 Pennsylvania Avenue, NW
Suite 1000
Washington, DC 20006

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