

April 22, 2009

False Claims Act: New Rules for Pleading?

In a case that will undoubtedly be embraced by relators, the United States Court of Appeals for the Fifth Circuit recently allowed a lawsuit brought under the False Claims Act (“FCA”) to proceed even though the relator did not know certain details about the invoices he alleged were fraudulently submitted to the government. In *United States ex rel. Grubbs v. Kanneganti*, the Fifth Circuit reversed a district court’s decision to dismiss an FCA claim for failure to allege fraud in sufficient detail. Although relators will argue that the decision opens the door for many more FCA lawsuits to survive early dismissal, the decision does not signal—as relators hope—that courts are abandoning heightened scrutiny.

In *Grubbs*, the relator—a psychiatrist employed by a Beaumont, Texas hospital—alleged that his employer engaged in a scheme to fraudulently bill Medicaid and Medicare for services that were not rendered. The relator alleged that shortly after he began working at the hospital, the chairman of his department and another psychiatrist solicited his participation in the ongoing scheme to bill “on call” time spent monitoring patients remotely as though he was conducting face-to-face visits. He contended that, during his first weekend on call, the nursing staff attempted to help him bill consistent with the scheme his colleagues had described. Allegedly, the relator reported the activity to a hospital administrator but learned that the administrator was aware of the conduct and seemingly condoned it.

The relator’s lawsuit was dismissed at an early stage of the proceedings because he was not able to provide enough detail about the allegedly fraudulent invoices submitted to the government. Specifically, the court determined that the relator did not provide the dates of fraudulent invoices and failed to identify the person who actually submitted the claims. On appeal, however, the Fifth Circuit held that the case could go forward because the detailed allegations about the fraudulent scheme, when coupled with an explanation of how the hospital’s standard billing mechanisms likely produced fraudulent invoices, satisfied the pleading rules that require factual details about fraud.

Attorneys representing relators will herald the Fifth Circuit’s decision in *Grubbs* to assert that it signals a shift among federal courts generally, and the Fifth Circuit in particular, to allow more FCA lawsuits to survive beyond the early dismissal stage and proceed into discovery. Although this case, together with pending legislation amending the False Claims Act, might ease the way for more FCA lawsuits, a belief that *Grubbs* forecasts significantly relaxed scrutiny of FCA actions is not warranted. The Fifth Circuit reiterated that the heightened pleading requirement of Federal Rule of Civil Procedure 9(b) continues to apply “with bite” in FCA cases. Additionally, the Fifth Circuit limited its decision to cases in which the relator is unable to provide details about the invoices submitted to the government. In those circumstances where a relator—due to position or availability of information—has an ability to allege detailed facts about the allegedly-fraudulent bills, courts might continue to require that those facts be alleged in detail. In those cases where a relator is not required to allege detailed facts about actual invoices submitted for payment, the Fifth Circuit continues to require sufficiently-detailed factual allegations to explain how operation of standard billing procedures *likely*—not just *possibly*—resulted in the submission of fraudulent bills to the government.

[*United States ex rel. Grubbs v. Kanneganti*](#), No. 07-40963 (5th Cir. Apr. 8, 2009).

For more information, please contact:

[Sarah Teachout](#)

214.651.5038

sarah.teachout@haynesboone.com

[Bill Morrison](#)

214.651.5018

bill.morrison@haynesboone.com

[Paul Searles](#)

214.651.5197

paul.searles@haynesboone.com

[Brian McKay](#)

214.651.5199

brian.mckay@haynesboone.com