

Northern District of Illinois Dismisses Whistleblower's FCA Suit for Failing to Connect Allegations of Misconduct with Submission of False Claims

January 20, 2017 – FCA Now

by Nathan J. Ebnet

In *United States ex rel. Keen v. Teva Pharmaceuticals USA, Inc.*, relator Janice Keen sued her former employer—the pharmaceutical company Teva—for violations of the FCA. According to Ms. Keen, Teva trained its sales force to misleadingly promote and sell a medicine used to treat muscle spasms. Ms. Keen alleged that Teva's deceptive practices caused physicians to prescribe the medicine in situations for which it was not approved, with the effect that pharmacies submitted false claims to government programs like Medicare and Medicaid.

Ms. Keen's brought her FCA claims pursuant to 31 U.S.C. § 3729(a)(1)(A) and (B). Those provisions provide, in part, that anyone who "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval" by the United States government, or "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim," is liable to the United States government for civil penalties and treble damages.

Teva moved to dismiss Ms. Keen's complaint under Fed. R. Civ. P. 12(b)(6) for failure to state a claim. Among other things, Teva argued that Ms. Keen failed to connect any of her deceptive marketing theories to actual submissions of false claims.

On January 4, 2017, Judge Jorge L. Alonso agreed with Teva and dismissed Ms. Keen's complaint in its entirety. Important to the court's ruling were the pleading standards of Rules 8(a) and 9(b). Judge Alonso emphasized that not only must a complaint be plausible, but any claims asserted under the False Claims Act must also comply with Federal Rule of Civil Procedure 9(b), which requires the pleading party to state with particularity the circumstances constituting fraud. Particularity means information like the identity of the person who made the misrepresentation, the time, place and content of the misrepresentation, and the method by which the misrepresentation was communicated, among other things.

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In Ms. Keen's case, the absence of allegations specifically linking the allegedly misleading promotional materials or sales presentations to the actual submission of false claims to the government was fatal to her claim. Her complaint focused on Teva's allegedly deceptive marketing effort, but failed to allege that a particular pharmacy submitted a false claim for payment to a government payor. Without these allegations, the court concluded that Ms. Keen "failed to state a plausible, non-speculative claim with particularity."

Judge Alonso's opinion and order serves as a reminder that the FCA is not a vehicle for addressing garden-variety breaches of contract or regulatory infractions. Instead, a whistleblower must go farther and describe with particularity how false claims were submitted to the government such that a violation of the FCA is plausible from the face of the complaint.

The case is *United States ex rel. Keen v. Teva Pharmaceuticals USA, Inc.*, 2017 U.S. Dist. LEXIS 518 (N.D. Ill. Jan. 4, 2017).