

Second Circuit Emphasizes Heightened Pleading Standard for Qui Tam FCA Suits

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by Jack Huerter

The Second Circuit Court of Appeals recently emphasized the heightened pleading standard that a relator in a *qui tam* False Claims Act (“FCA”) suit must satisfy to avoid dismissal under Rule 12(b)(6). *United States ex rel. Gelbman v. City of New York*, Case No. 18-3162, 2019 U.S. App. LEXIS 30889 (2d Cir. Oct. 17, 2019).

In *Gelbman*, the relator, a former information specialist for the New York State Department of Health (“NYSDOH”), filed a complaint against New York City (“the City”) and the New York City Health and Hospital Corporation (“HHC”) under the FCA claiming more than \$14 billion in fraudulent billings. *United States ex rel. Gelbman v. City of New York*, Case No. 14-cv-771, 2018 U.S. Dist. LEXIS 169435 (S.D.N.Y. Sept. 30, 2018). The relator alleged that he, in his former position with the NYSDOH, participated in regular meetings for approximately 9 years in which representatives from the City and the NYSDOH “conspired to manipulate and rig” the manner in which Medicaid claims were processed through an automated computer screening tool. *Id.* at *5. Upon observing the alleged scheme, the relator alleged he pressed his supervisor to explain why certain Medicaid claims were being paid despite not meeting the requisite criteria, to which his supervisor responded that the payments were necessary to avoid the City’s “financial ruin” and “political problems [in] the administration.” *Id.*

In his complaint, the relator included specific details of the alleged scheme. Specifically, the relator described five types of false claims the City allegedly caused the State to pay – untimely claims, claims lacking valid prior approval, duplicative claims, provider ineligible claims, and claims already paid by other insurance. *Id.* at *5-6. For each type of claim, the relator provided at least one “exemplar claim,” which included payment information such as dates, amounts, and the edit codes used in the claims processing platform. *Id.* at *6. According to the relator, each of these five categories of claims had been routinely flagged as “edits” by the online processing system as ineligible claims but were nevertheless submitted by the City to the federal government for reimbursement. *Id.*

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Despite these details, the district court dismissed the complaint for failing to satisfy the particularity requirements imposed by Rule 9(b). The court noted that “[t]he crux of Relator’s allegations is that certain edit codes . . . were applied to claims that various New York City medical providers submitted to Medicaid.” *Id.* at *19. The court concluded *inter alia* that this allegation, even when coupled with detail about the edit code and exemplar claims, was insufficient to plead fraud because the relator failed “to allege how the existence of an edit rendered the claim false or why the claim was not ultimately entitled to payment.” *Id.*

On appeal, the Second Circuit Court of Appeals affirmed the district court’s decision. *Gelbman*, 2019 U.S. App. LEXIS 30889. Even though the relator alleged irregularities in the City’s Medicaid claim process to support his fraud theory, coupled with corroborating evidence, the Second Circuit concluded that the “flagged edits” that suggested fraud were not sufficient to meet the Rule 9(b) standard. That claims were flagged as ineligible prior to their submission for payment did not necessarily mean the claims were fraudulent. *Id.* at *7-8. For instance, the flag itself might have been error later discovered and corrected, or the underlying problem that caused the flag may have been addressed prior to submission. *Id.* Thus, to adequately plead FCA claims under the relator’s theory, the relator needed to allege how the online payment processing system was rigged or who in particular carried out the rigging to cause the fraudulent submissions to close the missing link in his theory and establish “the eligibility status of the Medicaid claims *at the time* of their submission to the federal government.” *Id.* at *7 (emphasis in original). The relator did neither. For this reason, among others, the Court affirmed the dismissal of the FCA claims because it was “left to speculate as to the specific design and implementation of a scheme that purportedly defrauded the federal government of more than \$ 14 billion over the course of six years.” *Id.* at *9-10.

As evidenced by the Second Circuit’s decision in *Gelbman*, where “there’s smoke, there’s fire” is an adage not applicable to many claims asserted under the FCA. The decision serves as a reminder that the FCA’s heightened pleading standards operate to winnow out claims that do not plead the alleged fraud with particularity by specifying the fraudulent statements, who made them, where and when they were made, and why the statements were fraudulent. *Id.* at *6-7.