

Tribal Employees Cannot Shake FCA Claims Pleaded with Particularity When Sued in Their Personal Capacities

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by Caitlin L.D. Hull

Seven years after filing their initial complaint, a Montana federal court ruled that plaintiffs' FCA action—at least on some claims and against some defendants—may finally proceed. *Cain v. Salish Kootenai Coll., Inc.*, No. CV-12-181-M-BMM, 2019 U.S. Dist. LEXIS 26955 (D. Mont. Feb. 20, 2019).

In 2012, plaintiffs, as relators in a *qui tam* action, alleged that a tribal college, its board of directors, and various employees violated the FCA by submitting falsified student grades, retention data, and other records to the Department of Health and Human Services (“DHS”) and the Indian Health Service in order to receive federal education grants. The district court twice dismissed the FCA claims against Salish Kootenai College—before and after an appeal to the Ninth Circuit—finding that the tribal college was an extension of the sovereign tribe, and therefore not a “person” subject to the FCA. The court also dismissed plaintiffs' claims against the individual defendants without prejudice, finding that plaintiffs had failed to satisfy Rule 9(b)'s heightened pleading requirements.

Plaintiffs filed an amended complaint against the several defendants, which “repeat[ed] multiple paragraphs and insert[ed] a separate name into each allegation” to demonstrate each defendant's alleged involvement with the false representations made to the DHS and Indian Health Service. Defendants again moved to dismiss, arguing that: (1) they could not be sued for conduct related to their official capacities; and (2) plaintiffs' repetitive fraud allegations still failed to meet Rule 9(b)'s particularized pleading requirements with respect to each individual defendant.

The court first concluded that, like federal employees sued in their personal capacities, tribal employees cannot hide behind the sovereign immunity of their employer to shield themselves from personal liability “for their alleged fraudulent conduct arising out of actions they took in their official capacities.” The court then held that plaintiffs' repetitive, fill-in-the-defendant pleading style satisfied Rule 9(b) because:

The crux of the Amended Complaint, and what likely saves it, is that Plaintiffs allege that

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Individual Defendants all acted in similar manners, all had similar involvements, and were all warned by Plaintiffs. The collective warning implies that the Individual Defendants' [sic] possessed collective knowledge, collectively acted, and collectively omitted specific information in the applications submitted that gave rise to the alleged fraud against the United States Government.

Combined with allegations that each defendant was involved in two different fraudulent schemes, details of which were described within the amended complaint to answer the who, what, when, where, and how of the scheme, the court found that the redundant pleading satisfied Rule 9(b)'s particularity requirements and denied the defendants' motion to dismiss.

The Montana federal court's decision is notable for at least two reasons. First, it holds, under these particular alleged facts, that tribal employees can be sued in their individual capacities for violations of the FCA. Second, it permits repetitive, fill-in-the-defendant-style pleadings and allegations of "collective knowledge" to satisfy Rule 9(b)'s heightened pleading standard, even as to individual defendants sued in their personal capacities, where the allegations of the fraudulent schemes are sufficiently detailed. As the court recognized, "the practice does not constitute a failure *per se*," so long as the allegations sufficiently state the "who, what, when, where, and how" to meet the particularized pleading requirements of Rule 9(b).