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Sixth Circuit Rules That Relators Are Not Entitled to a “Relaxed” Rule 9(b) Standard

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In a recent blow to relators, the Sixth Circuit held that courts cannot “relax” the heightened pleading requirements of Federal Rule of Civil Procedure 9(b) in False Claims Act (FCA) cases. Rule 9(b) requires that the “circumstances constituting fraud” be pled with “particularity.”

Some courts have held that a “relaxed” Rule 9(b) standard should be applied where relators lack access to all of the facts necessary to enable them to plead fraud with particularity. In *United States ex rel. Hirt v. Walgreen Company*, No. 16-6232, 2017 WL 359661 (6th Cir. Jan. 25, 2017), however, the Sixth Circuit clarified one of its earlier opinions and explained that there is no basis for relaxing the heightened pleading requirements of Rule 9(b) in FCA cases.

In *Hirt*, the relator was the owner of two pharmacies who alleged that a competing pharmacy offered \$25 gift cards to entice customers to have their prescriptions filled at its pharmacy instead, which Hirt claimed was in violation of the Anti-Kickback Statute (42 U.S.C. § 1320a-7b(b)). Hirt further alleged that the competing pharmacy then submitted the resultant prescription drug claims to Medicare and Medicaid in violation of the FCA.

The District Court granted the pharmacy’s motion to dismiss for, among other reasons, failure to plead fraud with particularity as Rule 9(b) requires. On appeal, the Sixth Circuit affirmed the lower court with a decision that explained why relators may not claim that they are entitled to a “relaxed” version of Rule 9(b).

The Sixth Circuit held that the relator’s complaint was deficient because it did not identify any false claims that the defendant pharmacy allegedly submitted. As the court explained, “[t]he identification of at least one false claim with specificity is ‘an indispensable element of a complaint that alleges a [False Claims Act] violation in compliance with Rule 9(b).’” *Id.* at *2. The relator also failed to allege the name of any customers who switched pharmacies, or any facts concerning claims submitted for patients who switched pharmacies. *See id.* The

court was left to infer from the allegations that the gift cards induced customers to move their business to the competing pharmacy, that the competing pharmacy filled prescriptions for those customers, and that it then submitted claims to Medicare or Medicaid for filling the prescriptions. “But inferences and implications are not what Civil Rule 9(b) requires. It demands specifics – at least if the claimant wishes to raise allegations of fraud against someone.” *Id.* In sum, the relator failed to allege facts with particularity necessary to establish that “actual false claims” “in all likelihood exist.” *Id.*

The Sixth Circuit acknowledged that, in *United States ex rel. Bledsoe v. Community Health Systems, Inc.*, 501 F.3d 493, 504 (6th Cir. 2007), it discussed the possibility of “relaxing” the Rule 9(b) particularity requirement if a plaintiff, through no fault of his own, “cannot allege the specifics of actual false claims that in all likelihood exist.” Other courts have allowed relaxing Rule 9(b) under those circumstances. The court now rejected the concept of a relaxed Rule 9(b) pleading standard:

We have no more authority to “relax” the pleading standard established by Civil Rule 9(b) that we do to increase it. Only by following the highly reticulated procedures laid out in the Rules Enabling Act can anyone modify the Civil Rules, whether in the direction of relaxing them or tightening them. To the extent the words of Civil Rule 9(b) need elaboration, and it’s not obvious that they do, the most that can be said is that ‘particular’ allegations of fraud may demand different things in different contexts.

Hirt, 2017 WL 359661, at *2.

Whether a relator must identify particular false claims in order to satisfy Rule 9(b) is an issue that arises in many False Claims Act cases. The Sixth Circuit has now clarified that relators are not entitled to a relaxed Rule 9(b) standard. A relator who cannot identify particular false claims must allege sufficient facts, with sufficient particularity, to establish that actual false claims “in all likelihood exist.”

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