

NEW 11TH CIRCUIT CASE: FRAUD WITH PARTICULARITY

Last week, the 11th Circuit Court of Appeals issued its unpublished ruling in *US ex rel. Mastej v. Health Management Associates, Inc.* At issue was whether the relator's Third Amended Complaint adequately pled fraud with particularity, as required by Fed.R.Civ.Pro. 9(b).

Mastej was an Health Management Associate ("HMA") executive from 2001 to February 2007. In that role, he attended monthly meetings and participated in discussions "in which Medicare and Medicaid patients and billing were discussed." In February 2007, Mastej left HMA to work as CEO of a subsidiary facility.

Mastej alleged that the defendants violated the Stark Law and the Anti-Kickback Statute by giving free trips to golf outings on private jets and paying above-market rates for unnecessary call coverage to neurosurgeons all in exchange for Medicare and Medicaid referrals to the HMA facilities. Said violations, he alleged, made any payments, even for medically necessary services, non-payable. He alleged false claims were submitted in (a) the filing of interim claim forms for patients; (b) the filing of annual cost reports; and (c) a reverse false claim allegation based upon the submission of those forms and reports.

The defendants moved to dismiss based upon Fed.R.Civ.P. 9(b), which requires that claims of fraud be pled "with particularity." Specifically, the defendants noted that Mastej did not identify a single specific claim for a patient or a specific date of a particular claim.

The court began its analysis by noting that an FCA relator may not merely describe a scheme to defraud but must also describe sufficient detail to show an actual false claim was submitted to the government. It then agreed with the defendants that the complaint did not show a specific false claim submitted to the government.

Having found that Mastej failed to plead fraud with particularity by identifying specific claims, the court then considered whether he otherwise offered sufficient indicia of reliability to survive the motion to dismiss. In the 11th Circuit, Rule 9(b) motions are considered "on a case-by-case basis," and there are ways to demonstrate such reliability other than identifying specific claims.

The court found that Mastej, as a corporate insider who participated in discussions about claims to and payments by Medicare and Medicaid, pled fraud with sufficient particularity through 2007. However, the court refused to extend that knowledge beyond the time he left HMA and went to work for an HMA subsidiary. The court did not accept the assumption that HMA's deeds were ongoing, but said he had "not provided the required indicia of reliability for his general allegation that the Defendants submitted false claims for referred patients to the government *after* Mastej stopped working for the Defendants." (emphasis in original.)

The ruling is of interest for two reasons. First, it continues the 11th Circuit's nuanced view of Rule 9(b), favoring identification of specific fraudulent claims, but allowing case-by-case analysis to demonstrate other indicia of reliability. Second, and perhaps more interesting, it did not allow a *qui tam* relator to claim knowledge during a specific time period then extrapolate that time beyond the actual knowledge. Given the specificity of the court's ruling, it should be unlikely that discovery beyond the 2007 period would be permitted. This alone would place a significant limit on the ability of relators to turn a small amount of information into a large amount of recovery.

If you have any questions or would like more information on this topic, please contact **David B. Honig** at (317) 977-1447 or dhonig@hallrender.com or your regular Hall Render attorney.