

1999-2000

**NATIONAL HEALTH LAW
MOOT COURT COMPETITION**

Transcript of Record
Docket No. 99-1650

SUPREME COURT OF THE UNITED STATES

October Term, 1999

UNITED STATES EX REL. CAROL HATHAWAY,

Petitioner,

v.

ILLIANA STATE HOSPITAL, INC.,

Respondent.

SPONSORS:

Southern Illinois University School of Law

*Southern Illinois University School of Medicine,
Department of Medical Humanities*

American College of Legal Medicine

**IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLIANA**

United States Ex Rel.)	
Carol Hathaway,)	
Plaintiff)	
)	
)	Civil No. 98-CV-1972
v.)	
)	
Illiana State Hospital, Inc.,)	
Defendant.)	

MEMORANDUM OF OPINION AND ORDER

Jonathan P. Carter, District Judge

Plaintiff, Carol Hathaway (“Hathaway”), on behalf of herself and the United States brings this qui tam action against Defendant, Illiana State Hospital, Inc., (“ISH”) for violation of the Federal Civil False Claims Act, 31 U.S.C. § 3729 et seq. (the “FCA”). The lawsuit involves allegedly false or fraudulent claims for medical benefits submitted for payment by Defendant to the Medicare program. Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the Defendant moved to dismiss for failure to state a claim for which relief may be granted. Because matters outside the pleadings were presented to this court in considering this motion, the court treats the motion as one for summary judgment under Rule 56. Defendant’s motion is granted.

FACTS

ISH is a 150-bed hospital owned and operated by the state of Illiana, located in Shytown, a city of approximately 25,000 residents. From 1980 to 1997, Hathaway was employed by ISH as a medical records transcriptionist and billing technician. The only other hospital in Shytown is Holy Covenant Hospital, a privately owned 250-bed hospital located across town from ISH.

In the fall of 1994, Hathaway became aware of an illegal kickback arrangement between ISH and Carianne Weaver, M.D., a cardiovascular surgeon. In 1994, when Weaver decided to relocate from Los Angeles to Shytown, both ISH and Holy Covenant actively recruited her to their medical staffs. Weaver gained staff privileges only at ISH, where she was appointed Medical Director of Cardiology. Weaver quickly became well known in the community for performing a high volume of complex and expensive cardiac procedures at ISH. One year after her arrival in Shytown, ISH built a state-of-the-art cardiac operating suite to accommodate Weaver’s patients.

According to evidence presented at the subsequent criminal trial, Hathaway became aware of the illegal kickback scheme on her lunch hour in the hospital cafeteria, when she overheard Weaver in a discussion with ISH Chief Executive Officer, Douglas Ross. In that conversation, Hathaway testified, Weaver demanded \$250,000 as salary for her medical directorship position. In response, Ross replied, “If you admit all of your patients to ISH, you’ll get your \$250,000, and we’ll pay for your monthly trips to Belize.” She testified that Weaver laughed, replying, “With the amount of time I put in as Medical Director, my salary comes out to \$100,000 per hour, plus benefits!” Hathaway further testified that Ross admonished Weaver to “keep this between us” because none of the members of the board of directors or administration were aware of their secret arrangement. When Weaver and Ross left, Hathaway found a crumpled piece of paper on the table and discovered it was a photocopy of an agreement between Weaver and Ross outlining the terms of their secret arrangement. The agreement was also entered into evidence at the subsequent criminal trial to bolster Hathaway’s testimony.

Shortly thereafter, Hathaway complained to her supervisors that she was wary about providing assistance in billing for services provided by ISH under its agreement with Weaver. Within a week she was terminated from her employment, and immediately sought legal counsel. Hathaway’s counsel filed the instant action against ISH and Weaver for violation of the FCA. Under 31 U.S.C. § 3730 (“the “Qui Tam Provision”), a private citizen or “relator” may file a complaint on behalf of his or herself and on behalf of the United States government. Under the Qui Tam Provision, the complaint remains under seal for at least sixty days while the government decides whether to pursue the action along with the relator.

The U.S. government opted not to join the qui tam lawsuit in the instant action, and instead pursued a criminal action against Weaver and ISH for violation of the Medicare Anti-Kickback Statute, 42 U.S.C. § 1320a-7b(b). The Anti-Kickback Statute generally prohibits the solicitation or payment of remuneration in exchange for referrals for medical services reimbursed by Medicare. This court found ISH and Weaver guilty of multiple violations of the Anti-Kickback Statute; the court sentenced Weaver to prison for five years and imposed a \$5 million fine on ISH. *See* Central Dist. Illiana, Docket No. 97-0014 (Jan. 4, 1998).

This qui tam action is pursued by Hathaway on behalf of herself and the government, and includes 800 counts of “knowingly presenting a false or fraudulent claim” to the government for payment, in violation of 31 U.S.C. § 3729(a)(1). Hathaway asks for civil penalties of \$10,000 for each of the 800 allegedly false reimbursement claims.

ANALYSIS

Hathaway brings this qui tam action under the FCA, in the name of the United States pursuant to 31 U.S.C. § 3730(b)(1), asserting that ISH was involved in a scheme in which Weaver received payments in exchange for referring her Medicare and Medicaid patients exclusively to ISH in violation of the federal Anti-Kickback Statute, 42 U.S.C. § 1320a-7b(b). The issue presented in the Defendant’s motion is whether the Plaintiff has alleged facts upon which this court could find that ISH’s claims were false or fraudulent.

In order to present a claim under the FCA, a plaintiff must satisfy the following factors:

- (1) the defendant presented a claim for payment to an agent of the United States;
- (2) the claim was false or fraudulent;
- (3) the defendant knew the claim was false or fraudulent; and
- (4) the United States suffered damages as a result of the false or fraudulent claim.

Young-Montenay, Inc. v. United States, 15 F.3d 1040 (Fed. Cir. 1994).

Defendant argues that the claims submitted for Weaver's services were not false or fraudulent because they otherwise "clean claims." Based upon the affidavit of its Chief Operating Officer, Dr. Elizabeth Corday, filed with the court, Defendant argues that because the claims at issue were not inflated, were for services that were in fact rendered, and involved services that were in fact medically necessary, the claims are not "false or fraudulent" under the FCA. Hathaway does not dispute Dr. Corday's affidavit and agrees that, but for the kickback scheme with Dr. Weaver, the claims submitted would have been properly payable.

Hathaway claims that each of the 800 claims submitted to Medicare by ISH for the hospital portion of services performed by Weaver is a false or fraudulent claim. In essence, Hathaway argues that each and every claim related to services performed by Weaver is tainted by the kickback scheme, and therefore is "false or fraudulent" in violation of the FCA. In support of her position, Hathaway cites *United States ex rel. Roy v. Anthony*, 914 F. Supp. 1504 (S.D. Ohio 1994), which denied the defendant's 12(b)(6) motion under similar facts, stating that the plaintiff's assertion that claims submitted in the midst of continuing violations of the Anti-Kickback Statute created "a tenuous connection between the [Anti-Kickback] Statute and the False Claims Act, but the connection is sufficient to overcome the burden of a 12(b)(6) motion." *Id.* at 1506. I disagree, and find that the connection between the two statutes, if any, is simply too tenuous.

This court holds that Hathaway has failed to allege that any of the claims submitted for payment to the federal government were false or fraudulent in violation of the FCA. This issue is one of first impression in this Circuit. I find the Fifth Circuit's decision in *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899 (5th Cir. 1997) persuasive when it stated that "claims for services rendered in violation of a statute do not necessarily constitute false or fraudulent claims under the FCA." *Id.* at 902.

I note an important public policy consideration to support the court's holding. As recent outrageous settlement agreements and large-scale investigations into health care entities demonstrate, the government has a vast arsenal of statutory weapons with which to combat fraud in health care. The FCA and the Anti-Kickback Statute are different statutes with different intent requirements and different elements. A violation of one act should not necessarily implicate the other.

The legislative history of the Anti-Kickback Statute and the FCA demonstrate that Congress did not intend for these statutes to be used together. I believe that Congress intended that the Anti-Kickback Statute provide the sole remedy with respect to the Medicare and Medicaid programs for the abuses it describes. Therefore, the Anti-Kickback Statute must be the sole remedy, even if the FCA may also apply. See *Brown v. General Servs. Admin.*, 425 U.S. 820 (1976); Robert Salcido, *Mixing Oil and Water: The Government's Mistaken Use of the Medicare Anti-Kickback Statute in False Claims Act Prosecutions*, 6 Ann. Health L. 105 (1997).

Summary judgment is granted in favor of Defendant.

CONCLUSION

Defendant's motion for dismissal pursuant to Federal Rule 12(b)(6) which is treated by the court as a Motion for Summary Judgment under Federal Rule 56 is granted. The court therefore directs the Clerk of the Court to enter judgment for Defendant and that Plaintiff take nothing.

SO ORDERED.

DATE: January 4, 1999

/s/ Jonathan P. Carter
Honorable Jonathan P. Carter

**IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT**

No. 98-1972

United States Ex Rel. Carol Hathaway,

Plaintiff -Appellant

v.

Illiana State Hospital, Inc.,

Defendant-Appellee.

Appeal from the United States District Court
for the Central District of Illiana
Civil No. 98-CV-1972 – Jonathan P. Carter, District Judge

Argued May 14, 1999 – Decided June 10, 1999

Before, BENTON, Chief Judge, GREENE and BOULET, Circuit Judges.

BENTON, Chief Judge. This action comes before the court on plaintiff's appeal of the district court's summary judgment for defendant pursuant of the Federal Rules of Civil Procedure in plaintiff's qui tam action based on the False Claims Act, 31 U.S.C. § 3729 (the "FCA").

I. FACTS

The district court's opinion adequately sets forth the facts of this case. The plaintiff, Carol Hathaway ("Hathaway"), brought a qui tam action on behalf of herself and the United States against defendant, Illiana State Hospital ("ISH"), for alleged violations of the federal False Claims Act. Hathaway discovered an illegal kickback scheme between ISH and Dr. Weaver, one of its leading physicians. Both ISH and the Weaver were convicted in a criminal proceeding in the central district of Illiana. Hathaway argues in her complaint that all claims submitted in relation to procedures performed by Weaver are false or fraudulent under the FCA because they were made pursuant to an illegal kickback scheme.

The district court, treating ISH's Rule 12(b)(6) motion as a motion for summary judgment under Rule 56 granted summary judgment for ISH. The court held that the relationship between the anti-kickback statute and the FCA is too tenuous and did not state a legal claim.

II. ANALYSIS

A. SUBJECT MATTER JURISDICTION

In this appeal, the defendant has raised for the first time the issue of subject matter jurisdiction under the Eleventh Amendment. It is well settled that any party, or the court *sua sponte*, may raise issues of subject matter jurisdiction at any time during litigation, even on appeal. See *Louisville & Nashville RR Co. v. Mottley*, 211 U.S.149 (1908).

The defendant, ISH, argues that the complaint should be dismissed for lack of subject matter jurisdiction, contending that (1) states and their instrumentalities are not “persons” that can be liable under the False Claims Act, 31 U.S.C. § 3729(a); and (2) that the imposition of civil liability for submitting false claims to the federal government would violate the sovereign immunity provisions of the Eleventh Amendment to the U.S. Constitution. This is a case of first impression in the Thirteenth Circuit, and we choose to follow the precedent set by the Second Circuit in *United States ex rel. Stevens v. the State of Vermont Agency of Natural Resources*, 162 F.3d 195 (2d Cir. 1998), and hold that subject matter jurisdiction is proper in this instance.

ISH argues, essentially, that because it is owned and operated by the State of Illiana, it is immune from civil liability under the FCA. ISH’s reasoning is that, as a state, it should not be considered a “person” capable of violating the Act. The term “person” is not defined in the Act; therefore, we must resort to statutory construction. In construing the FCA, we must consider the purpose and context of the statute, as well as the legislative history and plain meaning. *Sims v. United States*, 359 U.S. 108, 112 (1959). (“Whether the term ‘person’ when used in a federal statute includes a State cannot be abstractly declared, but depends upon its legislative environment”).

We hold that Congress intended to include states in the definition of “person” in the FCA for several reasons. First, states have brought numerous lawsuits as qui tam plaintiffs. See, e.g. *United States ex rel. Wisconsin v. Dean*, 729 F.2d 1199 (7th Cir. 1984); *United States ex rel. Hartigan and State of Illinois v. Palumbo Bros., Inc.*, 797 F.Supp. 624 (N.D. Ill. 1992). The FCA states that a “person” may bring a claim as a qui tam plaintiff. FCA § 3730(b). The statute also uses the term “person” to describe who may be a defendant in § 3730(a). We hold that because the states are “persons” for purposes of pursuing a qui tam claim, they must also be considered “persons” for purposes of defending such a claim. See *Stevens*, 162 F.3d at 205 (“Absent some indication to the contrary, we normally infer that in using the same word in more than one section of a statute – or indeed twice within the same section, as in subsections (a) and (b) of §3730 – Congress meant the word to have the same meaning.”). Therefore, the state of Illiana through its instrumentality, ISH, is a proper defendant in this qui tam action.

We next address the Eleventh Amendment issue. ISH argues that Hathaway, as a qui tam plaintiff, is barred by the Eleventh Amendment from instituting an action against the sovereign state of Illiana, citing *United States ex rel. Foulds, v. Texas Tech University*, 171 F.3d 279 (5th Cir. 1999). We disagree. Although the federal government has not opted

to intervene in the false claims action, the federal government is, in fact, the real party in interest in the litigation.

Furthermore, even when, as here, the federal government chooses not to intervene in the qui tam action, the statute grants the federal government significant control over the litigation. Further, qui tam lawsuits are designed to remedy wrongs against the federal government. Finally, the federal government will receive at least 70% of any monetary relief resulting from a qui tam action. Therefore, we agree with the Second Circuit's decision in *Stevens*, and hold that a qui tam action is in essence an action by the United States, regardless of whether the federal government exercises its right to intervene. Therefore, the instant action is not barred by the Eleventh Amendment and subject matter jurisdiction in this court is proper.

B. ANTI-KICKBACK STATUTE

We affirm the district court's grant of summary judgment for defendant. We agree with the defendant's assertion that all claims submitted by the hospital were "clean claims" and were not fraudulent under the meaning of the FCA, merely by virtue of the existence of a kickback scheme prohibited by 42 U.S.C. §1320a-7b(b).

CONCLUSION

We hold that subject matter jurisdiction in this court is proper, but we affirm the district court's summary judgment for defendant.

The judgment of the district court is affirmed.

No. 99-1650

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1999

UNITED STATES EX REL. CAROL HATHAWAY,

PETITIONER

V.

ILLIANA STATE HOSPITAL, INC.,

RESPONDENT.

ORDER GRANTING CERTIORARI

Upon consideration of the Petition for Certiorari the Court hereby **GRANTS** the petition on the following issues:

1. Whether subject matter jurisdiction is proper in the federal courts in a qui tam action under the federal False Claims Act, 31 U.S.C. § 3729 et seq., when the federal government has declined to intervene.
2. Whether the existence of an illegal kickback in violation of the federal Medicare Anti-Kickback Statute, 42 U.S.C. § 1320a-7b(b), creates a cause of action under the federal False Claims Act, 31 U.S.C. § 3729 et seq.

IT IS SO ORDERED.

DATE: July 15, 1999