2019 IL App (1st) 181560-U

No. 1-18-1560

Third Division
June 28, 2019



IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

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| THE STATE OF ILLINOIS *ex. rel.* ESTATE OF RICHARD FEINGOLD,<br><br>Plaintiff-Appellant,<br><br>v.<br><br>CONVATEC, INC. and 180 MEDICAL, INC.,<br><br>Defendants-Appellees. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | Appeal from the Circuit Court of Cook County.<br><br>No. 16 CH 14087<br><br>Honorable Raymond W. Mitchell, Judge, presiding. |

JUSTICE COBBS delivered the judgment of the court.
Presiding Justice Fitzgerald Smith concurred in the judgment.
Justice Ellis concurred in the judgment only.

**O R D E R**

¶ 1 *Held*: The circuit court properly dismissed plaintiff's complaint for lack of standing. Under the Illinois Insurance Claims Fraud Prevention Act, plaintiff and his Estate are not an "interested person."

¶ 2 Plaintiff-relator, Richard Feingold, brought suit under the *qui tam* provision of the Illinois Insurance Claims Fraud Prevention Act (the Act), 740 ILCS 92/1 *et seq.* (West 2014), against ConvaTec, Inc. ("ConvaTec") and 180 Medical, Inc. ("180 Medical")(collectively, the

defendants). In his amended complaint, Feingold alleged that defendants perpetrated insurance fraud in violation of the Act by supplying a more expensive intermittent catheter product than the one originally ordered by his physician. Feingold claimed that this was part of a broader "up-coding" scheme by the defendants that raised the price of intermittent catheters as well as the price of health insurance in Illinois. On June 29, 2018, the circuit court granted defendants' motion to dismiss pursuant to the Code of Civil Procedure (Code). See 735 ILCS 5/2-619.1 (West 2016). For the reasons that follow, we affirm.

¶ 3 I. BACKGROUND

¶ 4 ConvaTec is a medical device manufacturer that is incorporated in Delaware with its principal place of business in New Jersey. 180 Medical, Inc. is a medical equipment supplier and wholly owned subsidiary of ConvaTec which is incorporated and based in Oklahoma. Both conduct business transactions throughout the State of Illinois.

¶ 5 In 2013, Feingold underwent surgery and required the use of intermittent catheters. His urologist, Dr. Justin J. Cohen, sent a "New Patient Physician Order" form for the catheters to 180 Medical. The order form, which was created by 180 Medical, had three order options: "catheter with insertion supplies," "catheter with lubricant only," and "other." Dr. Cohen selected "catheter with lubricant only" option. 180 Medical replied to the order by forwarding a second form, titled "Physician's Plan of Care and Orders." The Plan of Care form provided an order for catheter with insertion supplies, instead of the catheter with lubricant only which was originally selected by Dr. Cohen. Dr. Cohen signed the form, confirming an order for catheter with insertion supplies. 180 Medical then supplied Feingold with catheters with insertion supplies and billed his insurer, Blue Cross Blue Shield Anthem ("Blue Cross"). Blue Cross paid 180 Medical's claim for the catheters.

¶ 6 On October 27, 2016, Feingold filed a complaint against defendants under seal and provided notice to the Illinois Attorney General and Cook County State's Attorney as required under the Act. See 740 ILCS 92/15(a),(b) (providing that the State of Illinois must be given an opportunity to prosecute or intervene in the cause of action.). Both the Attorney General and Cook County State's Attorney declined to intervene in the suit. Feingold proceeded personally against the defendants, filing a one-count amended complaint on May 3, 2017.

¶ 7 In his amended complaint, Feingold alleged that "180 Medical has filed thousands of fraudulent claims with private insurance companies for having supplied intermittent catheters to residents of Illinois and others." Feingold alleged that insurers generally bill catheters under one of two codes (A4351 and A4353), which mirrors billing codes used by Medicare. The main difference between the codes is whether the catheter comes with an insertion kit. Under billing code A4351, insurers reimburse approximately $2.00 per catheter without a kit but reimburse about $8.00 for catheters with a kit under code A4353. Another difference is that Medicare's Local Coverage Determination (LCD) requires that a patient satisfy certain criteria in order to bill under code A4353 and receive the higher reimbursement. In other words, a supplier like 180 Medical may not file a claim for reimbursement under A4353 unless it is documented that the patient meets at least one of the following conditions: (1) "resides in a nursing facility;" (2) "is immunosuppressed;" (3) "has radiologically documented vesico-ureteral reflux while on a program of intermittent catheterization;" (4) "is a spinal cord injured female with neurogenic bladder who is pregnant," or (5) is prone to urinary tract infections.

¶ 8 Feingold claims that he did not satisfy any of the prerequisites for receiving a catheter with insertion kit, and that defendants' "up-coding" was part of a broader insurance fraud scheme. Feingold claims that "[s]ince at least June of 2014, Defendant ConvaTec has represented (in its products catalog) to providers that its intermittent hydrophilic catheter was properly billable to insurance under the A4353 code without qualifying said representation solely to instances when the patient met at least one of the enumerated medical necessity conditions specified." With respect to 180 Medical, Feingold alleged that "[s]ince at least January of 2013, Defendant 180 Medical filed claims with private companies under A4353 code *** [when it] knew or should have known that the catheter kits were not medically necessary and the patients did not meet at least one of the enumerated conditions specified in the LCD."

¶ 9 Defendants filed a combined motion to dismiss under section 2-619.1 arguing that: (i) alleged conduct could not have happened in Illinois and thus was not subject to Illinois law; (ii) Feingold failed to allege facts indicating that defendants filed false claims, and therefore failed to plead fraud with particularity; (iii) Feingold lacked standing to sue; and (iv) the ICFA's vesting of the Executive Branch's law enforcement function in a private relator violates the separation of powers provision of the Illinois Constitution.

¶ 10 On June 29, 2018, the circuit court granted defendants' motion to dismiss Feingold's amended complaint with prejudice. In so doing, the court only addressed defendants' argument as to standing, finding the issue to be dispositive. The court noted that a "relator in a *qui tam* action usually has standing as a result of the government's partial assignment of its own damages claim to the relator." However, in the present case, the court noted that "if any injury in fact is alleged, it is to Blue Cross Blue Shield Anthem, not Illinois." The court also

pointed out that "the allegation that insurance fraud[,] in general[,] drives up the health care costs borne by Illinois does not state a distinct and palpable injury to the state." As such, "[i]n the absence of an injury in fact to the [S]tate, Illinois would not have a damages claim that it could assign to Feingold."

¶ 11 The court further held that Feingold did not have a personal interest in the claim because "the amended complaint alleges that [Blue Cross], as opposed to Plaintiff, paid the insurance claims submitted by Defendants" and that Feingold "is not an interested person merely from the interest he would have in the proceeds of this action, were it successful." Feingold timely appealed.

¶ 12 II. ANALYSIS

¶ 13 On appeal, the Estate[1] argues that the circuit court erred in holding that it did not have standing under the Act because (1) the State suffered an "injury in fact" to its sovereignty based on violation of its laws and could assign its claim to the Estate; and (2) Feingold is an "interested person" under section 15(a) of the Act.

¶ 14 Defendants reject the Estate's arguments and request that this court affirm the circuit court's ruling. Alternatively, defendants argue that this court should affirm the dismissal even if we find that the Estate has standing because other grounds exist for dismissal. Defendants assert that dismissal is warranted under sections 2-615 and 2-619 because the amended complaint: (1) failed to plead facts indicating fraud or that defendants filed false claims, and (2) the relevant conduct alleged could not have occurred in Illinois, and therefore is not subject to Illinois law.

¶ 15 A. The Act

[1] On August 18, 2018, Feingold passed away and this court subsequently granted a motion to substitute the Estate of Feingold ("Estate") as a party to the action.

¶ 16 The Illinois General Assembly adopted the Insurance Claims Fraud Prevention Act (the "Act") in 2001, imposing civil penalties for fraud against private insurance companies. 740 ILCS 92/1 *et seq.* (West 2014). The Act was modeled after the California statute (see Cal. Ins. Code § 1871.7 (West 2014)) and therefore, the language of the Act and the California statute are nearly identical. Section 5(b) of the Act creates a private cause of action against any person who violates any provision of the Act and the criminal code relating to insurance fraud. 740 ILCS 92/5(b) (West 2014).

¶ 17 The Illinois legislature provided two ways to enforce the Act. First, the legislature provided for the traditional means of enforcement by the "Sate's Attorney of the county, in which the conduct occurred or the Attorney General." *Id.* § 10. Second, acknowledging that, on its own, the executive branch would be unable to fully police insurance fraud, the legislature allowed for the enforcement by private citizens by authorizing actions in the name of the State. *Id.* § 15(a). Specifically, the Act includes a *qui tam* enforcement provision allowing private parties with information about insurance fraud to sue for civil penalties. *Id.* Section 15(a) of the Act provides that "[a]n interested person, including an insurer, may bring a civil action for a violation of this Act for the person and for the State of Illinois." *Id.*

¶ 18 Although *qui tam* actions allow private citizens to initiate enforcement actions against wrongdoers who cause injury to the public, the State is the real party in interest in *qui tam* actions. See 740 ILCS 92/20 (West 2014); *State ex. rel. Saporia v. Mortgage Electronic Registration Systems*, Inc., 2016 IL App (3d) 150336, ¶ 18. "When a legislative body enacts provisions enabling *qui tam* actions, that act carries with it an understanding that in such suits it is the government, and not the individual relator, who has suffered the injury resulting from the violation of the underlying law and is therefore the real plaintiff in the action." *U.S. ex*

*rel. Hall v. Tribal Dev. Corp.*, 49 F.3d 1208, 1212 (7th Cir. 1995). A "*qui tam* plaintiff" or "relator" is likened to private attorney generals who stand in the shoes of the State. *Lyons v. Ryan*, 324 Ill. App. 3d 1094, 1107-08 (2001).

¶ 19 B. Standard of Review

¶ 20 Prior to addressing the issue of standing and the merits of this appeal, we note that defendants filed a combined motion to dismiss under section 2-619.1 which permits a party to combine a section 2-615 motion to dismiss with a section 2-619 motion to dismiss. See 735 ILCS 5/2-615, 2-619, 2-619.1 (West 2014). A section 2-615 motion challenges the legal sufficiency of a complaint based on defects appearing on the face of the complaint and does not raise affirmative factual defenses. *Sandolm v. Kuecker*¸ 2012 IL 111443, ¶ 54; *Illinois Graphics Co. v. Nickum*, 159 Ill.2d 469, 484 (1994).

¶ 21 In contrast, a section 2-619 motion admits the legal sufficiency of the complaint, but asserts an affirmative matter that acts to defeat the plaintiff's claim. *Patrick Engineering, Inc. v. City of Naperville*, 2012 IL 113148, ¶ 31. When ruling on a motion to dismiss under either section 2-615 or section 2-619, it is proper for a court to accept all well-pleaded facts in the complaint as true and draw all reasonable inferences from those facts in favor of the nonmoving party. *Edelman, Combs & Latturner v. Hinshaw Culbertson*, 338 Ill. App. 3d 156, 164 (2003). This court's review of a dismissal under either section 2-615 or section 2-619 is *de novo. Lutkauskas v. Ricker*, 2015 IL 117090, ¶ 29. Like section 2-619 motion to dismiss which presents a question of law, an order dismissing a complaint for lack of standing also presents a question of law. Thus, our review is *de novo. Scachitti v. UBS Financial Services*, 215 Ill. 2d 484, 493 (2005); *Wexler v. Wirtz Corp.*, 211 Ill. 2d 18, 23 (2004).

¶ 22 C. Standing

¶ 23 On appeal, the Estate contends that the circuit court erred in finding that it did not have standing under the Act for two main reasons: (1) the State suffered an "injury in fact" to its sovereignty based on violation of its laws and could assign its claim to the Estate; and (2) Feingold is an "interested person" under section 15(a) of the Act. We agree with the Estate that the State suffers an injury when its laws are violated and could assign an injury to its sovereignty to a third party. However, we disagree with the Estate's contention that Feingold was an "interested person" under the Act. Therefore, the Estate cannot act as an assignee of the State to enforce the statute.

¶ 24 Standing requires some injury in fact to a legally recognizable interest. *Greer v. Illinois Housing Development Authority*, 122 Ill. 2d 462, 492 (1988). The claimed injury may be actual or threatened, and must be: (1) "distinct and palpable," (2) "fairly traceable" to the defendant's actions, and (3) "substantially likely to be prevented or redressed by the grant of the requested relief." *Id.* at 492-93. Standing ensures courts decide actual, specific controversies and not abstract questions or moot issues. *People ex rel. Madigan v. Burge*, 2012 IL App (1st) 122842, ¶ 31. The plaintiff need not "allege facts establishing that he [or she] has standing to proceed" but "[r]ather it is the defendant's burden to plead and prove lack of standing." *Wexler*, 211 Ill. 2d at 22.

¶ 25 In addressing the issues raised on appeal, we find this court's decision in *State of Illinois ex rel. David P. Leibowitz v. Family Vision Care, LLC, et al.*¸ 2019 IL App (1st) 180697 to be instructive. [2] In *Leibowitz,* Marie Cahill worked for an optometry practice. *Leibowitz,*

[2] We note that this court filed its opinion in the *Leibowitz* case on March 12, 2019, after briefing in this appeal had concluded. The Estate filed a motion for leave to submit this case as supplemental authority, which we granted.

2019 IL App (1st) 180697, ¶ 7. Cahill learned that an optometrist working there falsely claimed that she owned the practice so that the practice could receive payments from Vision Service Plan (VSP), a health insurance company. *Id.* "VSP only covered claims from optometrists who had 'majority ownership and complete control' of their medical practice." *Id.* Plaintiff, the trustee for Cahill's bankruptcy estate, sued the defendant on behalf of Cahill's estate, as a relator under the *qui tam* provision of the Act. *Id.* ¶ 9. The two main issues before the *Leibowitz* court were "(i) whether the State can assign to a third party an injury to its sovereignty and (ii) whether the third party can derive standing from that injury absent monetary damages to the state[.]" *Id.* ¶ 1.

¶ 26 The *Leibowitz* court held that a "State suffers an injury to its sovereignty when its laws are violated." *Id.* ¶ 23. The court noted that the "State has an interest in protecting the public from insurance fraud and the authority to enact laws to prevent it." *Id.* The court then analyzed our supreme court's holding in *Scachitti v. USB Financial Services*¸ 215 Ill. 2d 484 (2005), which addressed standing in *qui tam* litigation in the context of the False Claims Act ("FCA"). The *Leibowitz* court noted that there is "no cognizable injury in fact suffered by the relator" in a *qui tam* case. *Id.* (citing *Scachitti*¸ 215 Ill. 2d at 508). However, a relator has standing as a partial assignee of the State's claim. *Id.; Scachitti*, 215 Ill. 2d at 508 (citing *Vermont Agency of Natural Resources v. United States ex. re. Stevens*, 529 U.S. 765,773 (2000)( holding "the doctrine that the assignee of a claim has standing to assert the injury in fact suffered by the assignor" is an adequate basis for *qui tam* relator standing because "[t]he FCA can reasonably be regarded as effecting a partial assignment of the Government's damages claim")). As such, a *qui tam* claim constitutes a partial assignment of the State's claim under the *qui tam* provisions of the Act, permitting a private person to "bring a civil

action for violation of [the Act] for the person and for the State." *Id.* (quoting *Scachitti*¸ 215 Ill. 2d at 508). Therefore, the relator's complaint alleging an injury in fact sufficed to confer standing on the relator.

¶ 27 Here, the Estate argues that the State has standing because of the injury to its sovereign interest and therefore, under *Scachitti*, the Estate also has an interest, as an assignee of the State's interest to bring the suit. The Estate further asserts that the *qui tam* provision empowers a private relator to sue on behalf of the State, regardless of a personal financial stake or "proprietary interest."

¶ 28 Defendants argue that the Estate has no standing because unlike the Illinois and federal FCA claims at issue in *Scachitti* and *Vermont Agency*, the Act's *qui tam* provision cannot be "regarded as effecting a partial assignment" because the State has no claim for damages. Defendants point to the language in *Vermont Agency* that the FCA can reasonably be "regarded as effecting a partial assignment of the Government's *damages* claim." (Emphasis added.) *Vermont Agency*, 529 U.S. at 773.

¶ 29 Defendants further contend that the text of the False Claims Act and the Act also show this difference. Specifically, defendants note that a person who violates the Illinois False Claims Act is liable for a civil penalty "plus 3 times the amount of *damages* which the State sustains because of the act of that person," and the relator may recover up to "30% of the proceeds of the action or settlement." (Emphasis added.) 740 ILCS 175-3(a)(1), 4(d)(2)(West 2014). In contrast, a person who violates the Act is subject to a civil penalty "plus an *assessment* of not more than 3 times the amount of each claim for compensation under a contract of insurance," and the law permits a relator to recover not "less than 30% of the proceeds of the action or settlement of the claim," with no upper limit. (Emphasis added).

740 ILCS 92/5(b), 25(a)-(b)(West 2014). In essence, defendants are arguing that use of the word "assessment" rather than "damages" indicates that the Act was not intended to allow private parties to litigate a violation on the State's behalf. Rather, they are penalties the state can assess based on the violation of its laws and its sovereign interest to combat fraud. Lastly, defendants argue that neither *Scachitti* nor *Vermont Agency* directly address whether a *qui tam* relator would have standing if the law at issue did not involve a "proprietary injury" (i.e., actual damages) to the government. According to defendants, this is because both the state and Federal FCA statutes contemplate proprietary injury to the sovereign.

¶ 30 We disagree. In *Leibowitz*, this court addressed this very same argument and noted that although both cases hold that the "government's standing rests on the 'injury to its sovereignty based on the violation of its laws,' as well as the 'proprietary' injury suffered in False Claims Act cases, 'the plain language of the Act and its purpose support a finding that the State need not have suffered monetary damages to confer standing on a relator.'" (Internal citations omitted.) *Leibowitz*, 2019 IL App (1st) 180697, ¶ 29. The court reasoned that section 15(a) provides "[a]n interested person, including an insurer, may bring a civil action for violation of this Act for the person and for the State of Illinois." *Id.* As such, the Act does not require the State to have incurred actual damages for an "interested person" to bring a civil action on behalf of the State. Moreover, the Act's purpose "involves combating insurance fraud, not recouping damages." *Id.* "Requiring the State to assign damages to a relator would defeat the purpose of the Act as it would preclude the relator from bringing a claim on the State's behalf." *Id.*

¶ 31 Additionally, we find defendants' contention that allowing a private party to sue on behalf of the State would undermine the standing requirement and open a floodgate of

litigants collecting fees to be without merit. As this court in *Leibowitz* pointed out, "a plaintiff may bring *qui tam* claim only if (1) the State authorizes the relator to sue on behalf of the State and the relator; and (2) the State retains control of the litigation. The Act requires both. Further, for the Act- a statute designed for the purpose of deterring insurance fraud- to have an effect, witnesses of potentially fraudulent insurance claims, like [Feingold], must be able to bring a complaint." *Id.* ¶ 31.

¶ 32 Therefore, if the Estate and Feingold qualify as "interested person" under section 15 of the Act, they may act as an assignee of the State to enforce section 5 of the statute.

¶ 33 C. "Interested Person"

¶ 34 The Estate contends the circuit court erred when it found Feingold was not an "interested person" under the Act. The Estate argues, *inter alia*, that Feingold is an "interested person" by virtue of his status as a *qui tam* relator. We agree with defendants that this is a circular argument as the phrase "interested person" defines who may be a *qui tam* relator. We further note that unlike other *qui tam* statutes such as the Illinois False Claims Act, 740 ILCS 175/4, *et seq.* which allows "a person" to file suit on behalf of the State, the Act allows the filing of a suit only by an "interested person." 740 ILCS 92/15, *et seq.*

¶ 35 The Act does not define the term "interested person, so we apply the rules of statutory construction to "ascertain and give effect to the intent of the legislature." *Lockhart v. Cook Cty. Officers Electoral Bd.*, 328 Ill. App. 3d 838, 842-43 (2002). "When a statute does not define a term, the court will assume that the word has its ordinary and popularly understood meaning." *People v. Stork*, 305 Ill. App. 3d 714, 723 (1999).

¶ 36 Defendants urge this court to use the definition of "interested person" in the Probate Act of 1975, which defines an "interested person" as "one who has or represents a financial

interest, property right or fiduciary status at the time of reference which may be affected by the action, power or proceeding involved." 755 ILCS 5/1-2.11 (West 2014). Specifically, defendants contend that the definition plainly indicates that an "interested person" is one whose substantive rights may be affected by the outcome of the proceeding and is consistent with California body of law.[3] However, the meaning or definition of a term cannot be blindly transferred from one context to another. See *Cohen v. Chicago Park District*, 2017 IL 121800, ¶ 22 ("[c]are must be taken when importing the definition of a term from one statute to another, since 'the context in which a term is used obviously bears upon its intended meaning.'")(quoting *People ex rel. Illinois Department of Labor v. E.R.H. Enterprises, Inc.*, 2013 IL 115106, ¶ 29)). We find that the Probate Act and the Act have very different objectives and, therefore provides limited guidance as to what the Act means by "interested person." As such, we turn to the ordinary and popular understood meaning of the term. "Interested" is commonly defined as "being affected or involved." Merriam-Webster's Collegiate Dictionary (11th ed. 2009).

¶ 37 We believe that the circuit court correctly recognized that Feingold is not an "interested person." Feingold was not directly affected by the alleged fraud. He was not required to pay more for the different catheter as it was Blue Cross that paid for the difference in the insurance claims under the higher billing code. In its brief, the Estate contends that Feingold is an "interested person" because "[p]atients have an interest in redressing fraud that causes them to receive the wrong medical care" and that the circuit court "simply ignore[d] his

[3] Defendants cite to three California cases in defining "interested person." None of these cases define the term in the context of the identical California Fraud Prevention statute or involve *qui tam* actions. See *Torres v. City of Yorba Linda*, 13 Cal. App. 4th 1035 (Cal. App. 1993)(involving challenge to city's development project); *Calif. Dept. of Consumer Affairs v. Superior Court*, 245 Cal. App. 4th 256 (Cal. App. 2016)(challenging a regulation by consumer affairs agency); *Chiatello v. City & County of San Francisco*, 189 Cal. App. 4th 472 (Cal. App. 2010)(challenging amendment to municipal payroll tax).

obvious interest in receiving proper medical care." However, we find that claims of being directly affected by improper medical care would serve as a cause of action under a different statute but not this Act. We further note that Feingold does not allege that he was medically harmed or injured by receipt of the alleged improper catheter.

¶ 38 Moreover, we do not find him to be "involved," which would have qualified him as an "interested person." We note that the facts in *Leibowitz*, which warranted a finding that Cahill was an "interested person," are not present in this case. Specifically, the court in *Leibowitz* considered Cahill's status as an employee in its analysis of an "interested person." Cahill had worked as an office administrator for the defendant handling insurance billing practices. The trustee of her estate later filed a one-count complaint against the defendant alleging violation of section 5 of the Act. The complaint alleged that the defendant engaged in fraud by certifying its eligibility for VSP insurance payments and accepting payments to which it was not entitled.

¶ 39 In this case, Feingold was not an employee or former employee of defendants. He was not involved in any step of the processes related to defendants' insurance billing practices. Rather, he was a patient that came to require the use of intermittent catheters supplied by defendants. Feingold's allegations of insurance fraud arise not from his own experience dealing with defendants, either as an employee, direct customer, or insurance company, but solely because he received an order which was approved by his physician, but was a different catheter than the one originally prescribed.

¶ 40 Having found that Feingold is not an interested person under the Act, we conclude that the circuit court properly dismissed the amended complaint for lack of standing. We need not address whether the dismissal is warranted for other reasons.

¶ 41 III. CONCLUSION

¶ 42 For the reasons stated, we affirm the judgment of the Circuit Court of Cook County.

¶ 43 Affirmed.