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Navigating The Circuit Split On Implied False Certification

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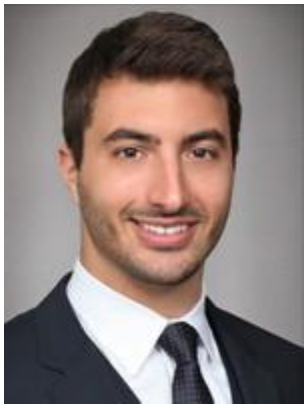

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The U.S. courts of appeals disagree along two, perhaps three, lines over both the scope and validity of the doctrine of implied false certification under the False Claims Act. These divergences mean that motion practice and the potential for underlying liability differ depending upon where qui tam litigation is filed. The U.S. Supreme Court has before it a case that could potentially resolve the issue, and the court continues to deliberate as to whether to accept review.[1]

This article explains the implied false certification doctrine, explores the circuit split, and provides practical guidance for companies facing FCA lawsuits based on allegations of implied false certifications in view of the Supreme Court's potential for future review and the widening split of authority in federal circuit courts.

The False Claims Act and the Doctrine of Implied False Certification

The FCA imposes civil liability when false or fraudulent claims for payment are presented to the government.[2] Among certain prohibited acts, the FCA specifically imposes treble damages, statutory penalties, and attorney fees for the knowing submission of a "false record or statement material to a false or fraudulent claim."[3] FCA exposure touches a broad swath of the U.S. economy, reaching any entity that receives federal funds in various forms including, for example, health care services and supply, medical and pharmaceutical manufacturing, consulting services, higher education, software development, mortgage lending, disaster relief, defense support, athletic scholarships, oil and gas purchasing, and public school lunches. Courts have recognized two types of false claims: (1) factually false claims; and (2) legally false claims.[4] Factually false claims involve an incorrect description of goods or services never provided.[5] Legally false claims are predicated on a false representation of compliance with a federal statute, regulation, or contractual requirement.[6]

Legally false claims can be expressly or impliedly false. An expressly false certification occurs when a claim for payment explicitly certifies compliance with a particular statute, regulation, or material contract provision.[7] Conversely, under the doctrine of "implied false certification," a request for payment implicitly represents compliance with the relevant statutes, regulations, or contract provisions that are material preconditions to payment.[8]

The Circuit Split

Almost every federal circuit court has weighed in on the implied false certification doctrine, with the majority of circuits recognizing the validity of the doctrine to some extent, but providing very differing views as to its application. Recipients of government funds located in the Fourth or D.C. Circuits, where a predominance of FCA cases against government contractors are filed, as well as the First Circuit, face the highest risk. In those circuits, any knowing and material breach or violation of a contract, statute, or regulation that can be viewed as any prerequisite to payment can give rise to liability.[9] The position of these courts has been interpreted to mean that a recipient of government funds violates the FCA if it fails to comply with any material requirement for payment, whether extant in a requisite of program participation, a contract and its hundreds of statements of work, or the myriad of applicable regulatory requirements.[10]

By contrast the Second, Third, Sixth, Ninth, Tenth and Eleventh Circuits apply a narrower view of the doctrine, rejecting liability based on implied certification of compliance with regulations that are conditions of federal government program participation,[11] and instead limiting the application of the doctrine to situations where compliance with the applicable statute, regulation, or contract provision contains an express prerequisite to payment.[12]

The D.C. Circuit views this as a distinction without a difference in many circumstances because even those circuits that apply implied certification to requirements of program participation still impose a materiality requirement.[13] But that distinction is only meaningful at trial and not significantly in motion practice, because courts allow plaintiffs to establish materiality through testimony of what parties understood about requirements of compliance and payment.[14]

The circuit split recently deepened with the Seventh Circuit's potential rejection of the doctrine in United States v. Sanford-Brown Ltd., 788 F.3d 696, 711-12 (7th Cir. 2015) ("Although a number of other circuits have adopted this so-called doctrine of implied false certification, we decline to join them and instead join the Fifth Circuit.").[15]

The Supreme Court Is Carefully Examining Whether To Step In

A certiorari petition is currently pending in the Supreme Court, asking the court to take up the validity and application of the implied certification doctrine.[16] The court has now considered the petition at three of its private conferences — its conferences on Oct. 21, Nov. 9 and Nov. 16, 2015. The court has not yet taken action on the petition but instead has "relisted" it, deferring a decision until a later conference. When a decision is "relisted," it indicates that the court likely is carefully weighing the petition, and the odds of it being granted increase somewhat.[17]

Even if the court does not grant the currently pending petition, the issue is of significant concern and will continue to be litigated, and likely will be the subject of future petitions for certiorari in the Supreme Court.[18] Moreover, the relisting may suggest the court's interest in reviewing the doctrine of implied certification as stated in a future petition.

Key Takeaways and Practical Concerns

The FCA structure of permitting private relators to obtain a bounty on the treble damages remedy has led to a proliferation of qui tam cases in recent years. Case filings in the last two years exceeded 700, double the pace of annual filings from 2000 to 2009.[19] In 2014 alone, the government paid out $435 million to qui tam relator plaintiffs.[20] Nonetheless, qui tam, actions in which the government declines to intervene account for less than 3.6 percent of the total qui tam monetary settlements and judgments.[21] Courts provide a reasonable check on unfounded qui tam cases by requiring that plaintiff relators need meet Rule 9(b) pleading standards and carefully considering motions to dismiss, which are common.

The majority of circuits that apply a more narrow reading of the implied certification doctrine continue this check on unfounded qui tam cases by requiring that complaints clearly articulate a violation of contract or rule that goes directly to a condition of payment and not a condition of program participation. But the minority standard diminishes the effectiveness of this check on meritless FCA cases, putting pressure on defendants to settle to avoid the burden of discovery and the risk of FCA treble damages, penalties and attorney fees. The First, Fourth and D.C. Circuits potentially open the door to claims of technical compliance deficiencies that may be more reflective of breach of contract claims than the prevention of fraud underlying the FCA. These include, for example, a wide-ranging list of potential bases for implied certification from noncompliance with industry standards derived from Medicare regulations to compliance with environmental standards and from alleged noncompliance with standard Federal Acquisition Regulation clauses to detailed record-keeping mandates in Federal Housing Administration guidelines.

In view of the chance that the doctrine of implied certification could be heard by the Supreme Court sometime in the next few terms, no matter where a case is filed, FCA defendants may want to consider motions to dismiss under any and all of the three sets of implied certification doctrines articulated among the courts of appeal. This approach will ensure that these arguments are preserved and that the defendant will receive the benefit of a favorable Supreme Court decision. Nonetheless, the realities of litigation economics may continue to force defendants in First, Fourth and D.C. Circuits to consider settlement, even though those cases might have viable defenses in other circuits.

From a risk management and compliance perspective, those receiving government funds should be able to calibrate risk associated with significantly higher FCA liability as compared to administrative exposure. Courts have distinguished between regulations which are conditions to participation in a government program and those that are conditions for payment.[22] Indeed, courts have noted that conditions of participation and a provider's certification that it has complied with those conditions "are enforced through administrative mechanisms, and the ultimate sanction for violation of such conditions is removal from the government program."[23] Courts have specifically applied this principle to health care providers submitting Medicare claims.[24] However, this principle would seem to apply in similar contexts, such as a payee's certification for participation in FHA lending programs.

But for those companies receiving government funding located in the First, Fourth and D.C. Circuits, violation of government regulations or contracting details of almost any type arguably create the risk of significant judicial money damages on top of the risk of more limited fines and sanctions that regulators could impose. Focus on business practices, training, controls, and risk mitigation need to recognize this increased risk. That means investing in efforts to assure contract or regulatory compliance commensurate with the risk. Businesses operating in the rest of the country still face these same risks, although, at a lower level of magnitude, because of the mandates of non-FCA regulatory compliance and the fact that the Supreme Court could eventually adopt the broader view of the implied certification doctrine.

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