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The Supreme Court May Limit the False Claim Act's Scope

Is Implied Certification a Thing of the Past?

By Joseph Savage,
E. Abim Thomas,
Ezekiel L. Hill
and Ashley E. Moore

Over the last 20 years, the Department of Justice (DOJ) and whistleblowers, with the support of many courts, have become increasingly aggressive in pursuing supposed false claims for federal reimbursement under the False Claims Act (FCA), 31 U.S.C. §§ 3729-3733. In 2015, for example, the DOJ reported 737 new FCA matters and recovered more than $3.5 billion in FCA settlements and judgments, including more than $1.9 billion from health care industry defendants.

A key to the recent onslaught has been the development of the "implied certification" theory of false statements — the government vendor makes no direct false statement and provides the goods and/or services, but nevertheless is subject to penalties and possibly treble damages on the theory that the vendor implicitly agreed to obey all rules and regulations that are conditions of payment, and implicitly lied about doing so in submitting a claim. The Supreme Court is is poised to decide the viability of this approach.

Background

The FCA has come a long way since it was enacted in 1863 in response to contractors defrauding the federal government during the Civil War. While the FCA has been repeatedly amended since 1863, the statute still does not define the term "false." Accordingly, in some cases, FCA liability will be premised on

Joseph F. Savage, Jr. is a partner in Goodwin Procter LLP's Securities Litigation & White Collar Defense group. **E. Abim Thomas** is a counsel in the firm's White Collar Crime and Government Investigations, Securities Litigation, and Gaming, Gambling & Sweepstakes practices; **Ezekiel L. Hill** is an associate in the firm's Securities Litigation & White Collar Defense group; and **Ashley E. Moore** is an associate in the firm's Litigation department.

factually false claims, those that incorrectly describe the goods or services provided or, perhaps, not provided. Liability has also been premised on legally false claims under express and implied certification theories. Under the express certification theory, liability is based on the claim's express false statement certifying compliance with a statute, regulation or contractual provision that is a condition of payment. Under the implied certification theory, liability arises from the claim's implied false statement of compliance.

The Supreme Court recently granted certiorari in *Universal Health Services, Inc. v. United States ex rel. Escobar* (No. 15-7) to consider: 1) whether the implied certification theory is viable; and 2) if so, whether a reimbursement claim is false under that theory if the reimbursee fails to comply with a statute, regulation or contractual provision that does not state that it is a condition of payment. In the underlying case, *United States ex rel. Escobar v. Universal Health Services, Inc.*, 780 F.3d 504 (1st Cir. 2015), the *qui tam* plaintiffs, parents of a mental health clinic patient who died of a seizure, argued that the clinic violated the FCA (and a parallel state law provision) because in seeking government reimbursement, the clinic impliedly and falsely represented its compliance with certain state regulations regarding staff licensing and supervision, even though the regulations were not expressly designated as preconditions to reimbursement.

The U.S. Court of Appeals for the First Circuit, while eschewing labels, endorsed the implied certification theory and concluded that the theory could be applied even if the statute, regulation or contractual provision that was violated was not expressly designated a condition of payment as "whether a given requirement constitutes a precondition to payment is a fact-intensive and context-specific inquiry, involving a close reading of the foundational documents, or statutes and regulations, at issue." *Id*. at 512-13 (citation and internal quotation marks omitted). The First Circuit opinion epitomizes the expansion of the FCA as the court, faced with tragic circumstances, relied upon the alleged violation of state regulations not cited by either party as the potential basis for liability.

The controversial implied certification theory was born in 1994 when an FCA claim was brought against a business, that had been awarded a contract under the Small Business Administration's minority-owned business program, entered into a prohibited agreement with a subcontractor that was not minority-owned. *Ab-Tech Constr., Inc. v. United States*, 31 Fed. Cl. 429 (1994). The court concluded that the defendant's claims for payment amounted to "implied certification … of its continuing adherence to the requirements of participation in the … program." *Id*. at 434. Since then, the implied certification theory has been accepted, rejected and modified such that government contractors now operate under a patchwork of FCA liability regimes. The U.S. Courts of Appeal for the Seventh and Fifth Circuits have rejected the implied certification theory. The First, and the U.S. Courts of Appeal for the Second, Third, Fourth, Sixth, Ninth, Tenth, Eleventh and D.C. Circuits, have endorsed it, though

they have split as to whether the condition of payment must be explicitly designated as such, with the First, Fourth and D.C. Circuits concluding that it need not.

As a result, a government contractor who violates some regulations in performance of the contract may face no FCA liability in some jurisdictions and the potential for multimillion dollar penalties and damages in others.

The 'Quasi-Criminal Nature of FCA Violations'

This liability patchwork is especially troubling in light of "the quasi-criminal nature of FCA violations," *United States ex rel. Atkins v. McInteer*, 470 F.3d 1350, 1360 (11th Cir. 2006), including potentially substantial penalties (up to $11,000 per false claim), treble damages and a determination that the defendant has defrauded the federal government. Obviously, the Constitution requires that a criminal statute make clear that which it criminalizes, and a statute that is quasi-criminal should make the basis of liability more than merely quasi-clear.

Also troubling is the fact that the DOJ has no mechanism to impose uniformity in light of the role of private relators in pursuing FCA cases, with or without the DOJ's intervention. In jurisdictions that permit the implied certification theory of liability, and particularly in those that also do not require that the violated statute, regulation or contract provision state explicitly that it is a condition of payment, these *qui tam* plaintiffs increasingly stretch the boundaries of potential liability. Any violation of statute, regulation or contract provision can potentially be used as a basis for possible FCA liability, making FCA exposure virtually automatic for larger government contractors operating in heavily regulated fields such as health care.

As some courts rejecting the implied certification theory have observed, it threatens to displace the role of government agencies in evaluating and adjudicating violations of their regulations, instead empowering *qui tam* private plaintiffs to do so. For example, while only the federal government may enforce the Food, Drug and Cosmetic Act (the FDCA), permitting the FDA to exercise its discretion as to enforcement of the FDCA's provisions in shaping its regulatory regime, the implied certification theory permits private plaintiffs to bring what amount to private enforcement actions for violations that the FDA would not pursue. In this way, the implied certification theory threatens to rewrite not only the FCA but other federal statutes.

This result has no apparent grounding in the FCA's text, history or underlying legislative purpose. The FCA was neither intended nor designed as a tool for imposing liability for violations of federal regulations, but rather was intended to stop the "plundering of the public treasury" through claims for "nonexistent or worthless goods." *United States v. McNinch*, 356 U.S. 595, 599 (1958).

Reshaping the FCA's Qui Tam Provisions

Universal Health is just the latest chapter in Congress and the courts' lengthy back and forth in reshaping the FCA's *qui tam* provisions. *See, e.g., United States ex*

rel. Springfield Terminal Ry. Co. v. Quinn, 14 F.3d 645, 649 (D.C. Cir. 1994) ("Seeking the golden mean between adequate incentives for whistle-blowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant information to contribute of their own, Congress has frequently altered its course in drafting and amending the *qui tam* provisions since initial passage of the FCA over a century ago."). For example, in 1943, Congress responded to the Supreme Court's decision in *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943) by amending the FCA to, among other things, prohibit *qui tam* actions based on information already known to the government. In 1986, when Congress believed that the courts' interpretation of this amendment had rendered the *qui tam* action ineffective, it again amended the FCA to, among other things, allow a *qui tam* plaintiff to proceed based on information already known to the government if the plaintiff was the source of the information.

Congress also amended the FCA in 2009 and 2010, in part in response to judicial interpretations restricting *qui tam* plaintiffs. *See, e.g., Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280 (2010).

Conclusion

If the Supreme Court is unwilling to void the implied certification theory in its entirety, it might nonetheless substantially cabin the theory by deciding that it only reaches conditions of payment that are expressly designated as such. By putting the focus back on the claim for payment, rather than a court's generalized discomfort with a regulatory violation, such a decision would increase the predictability of FCA liability, permitting government contractors to determine with far greater certainty whether their actions may give rise to penalties and damages. And where the government contractor is on clear notice of conditions of payment, the notion of an implied certification of compliance with such conditions becomes substantially more reasonable.

This would also permit the federal government to shape *qui tam* actions going forward, as regulations that were not designated as conditions of payment could not serve as the basis for FCA liability. Congress and federal agencies could amend statutes and regulations with an eye toward clearly defining the FCA liability they intended, and providing clear notice of the basis for substantial penalties.

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