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Litigation Law Alert

Ninth Circuit Adopts "Implied False Certification" Theory in False Claims Act Cases

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On August 9, 2010, a panel of the U.S. Court of Appeals for the Ninth Circuit joined five of its sister circuits in expressly adopting the "implied false certification" theory of liability under the False Claims Act ("FCA"), providing an additional arrow in the quivers of *qui tam* relators and whistleblowers in the western United States.

Under the FCA, a person may be liable for submitting "false or fraudulent claim[s] for payment" to the United States government. 31 U.S.C. § 3729(a)(1)(A). Certain federal programs require claims for payment to include an express certification of compliance with federal law, rules, or regulations as a precondition to payment. Thus, if a person submits a false certification as part of a claim for payment, FCA liability may be imposed.

In *Ebeid v. Lungwitz*, No. 09-16122 (9th Cir. Aug. 9, 2010), the Ninth Circuit joined the Second, Sixth, Tenth, Eleventh, and Federal Circuits in expanding liability beyond express certifications of compliance.[1] It determined that "the act of submitting a claim for reimbursement itself implies compliance with governing federal rules that are a precondition to payment." Slip op. at 11254 (internal quotation marks and citation omitted). This is true, according to the court, even if the claim itself does not contain an express certification of compliance. Thus, when "an entity has ***previously*** undertaken to expressly comply with a law, rule, or regulation," FCA liability may still be imposed when a person submits a false "claim for payment even though a certification of compliance is ***not*** required in the process of submitting the claim." *Id.* at 11258 (emphases added).

The Ninth Circuit agreed with the Second Circuit's rationale that extending liability to implied certifications fits with "'Congress' expressly stated purpose that the Act include at least some kinds of legally false claims'" and with "'the Supreme Court's admonition that the Act intends to reach all forms of fraud that might cause financial loss to the government.'" *Id.* at 11255 (*quoting Mikes*, 274 F.3d at 699). However, as with express false certification, liability cannot be imposed unless regulatory compliance is the "*sine qua non* of receipt of [government] funding," and is "material to the government's decision to pay out moneys to the claimant."[2] *Id.* at 11256-57 (internal quotation

marks and citation omitted).

The implied false certification theory frequently arises in false claims actions relating to Medicare billing because Medicare does not require an explicit certification of compliance with each claim for payment submitted. Although the First, Third, Fourth, Fifth, Seventh, Eighth, and D.C. Circuits have yet to endorse the implied false certification theory, no circuit has rejected the theory outright.[3] Given the U.S. Department of Justice's recent focus on healthcare fraud,[4] physician groups, hospitals, and healthcare providers should expect to see an increase in investigations and enforcement actions, both from DOJ and, as the courts continue to expand liability under the FCA, from *qui tam* whistleblowers. Potential defendants should consider reviewing their billing practices to confirm they are compliant with the law.

The full decision can be read here.

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[1] *See United States ex rel. Mikes v. Straus*, 274 F.3d 687, 699 (2d Cir. 2001); *United States ex rel. Augustine v. Century Health Servs., Inc.*, 289 F.3d 409, 415 (6th Cir. 2002); *United States ex rel. Conner v. Salina Reg'l Health Ctr., Inc.*, 543 F.3d 1211, 1217-18 (10th Cir. 2008); *United States ex rel. McNutt v. Haleyville Med. Supplies, Inc.*, 423 F.3d 1256, 1259 (11th Cir. 2005).

[2] In *Ebeid*, the relator argued that the defendant engaged in the unlawful corporate practice of medicine, thus making each and every Medicare claim—which implicitly certified compliance with all applicable laws—somehow false. The court ruled, however, that because the complaint did "not refer to any statute, rule, regulation, or contract that conditions payment on compliance with state law governing the corporate practice of medicine," the relator's claims failed. Slip op. at 11261.

[3] *See, e.g., Rodriguez v. Our Lady of Lourdes Med. Ctr.*, 552 F.3d 297, 303-304 (3d Cir. 2008) (declining to decide whether to adopt implied false certification theory); *United States ex rel. Willard v. Humana Health Plan of Texas, Inc.*, 336 F.3d 375, 382 (5th Cir. 2003) (same); *United States ex rel. Siewick v. Jamieson Science & Eng'g, Inc.*, 214 F.3d 1372, 1376 (D.C. Cir. 2000) (not explicitly adopting but recognizing other courts' application and finding complaint did not satisfy requirement that payment must be conditioned on certification). The Fourth Circuit came the closest to rejecting the theory, calling it "questionable," but ultimately declined to decide whether to permit it. *United States ex rel. Hererra v. Danka Office Imaging Co.*, 91 F. App'x 862, 864 n.3 (4th Cir. 2004).

[4] In 2009, the U.S. Department of Justice and Department of Health and Human Services announced here that "the fight against Medicare fraud has become a Cabinet-level priority" for both DOJ and HHS, and they launched the Health Care Fraud Prevention and Enforcement Action Team task force. U.S. Attorney General Holder also recently commented on DOJ's crackdown on Medicare fraud here.

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