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Implied False Certification Theory Gains Support In Ninth Circuit

By Robert M.P. Hurwitz

Last month, the U.S. Court of Appeals for the Ninth Circuit extended the breadth of the False Claims Act for actions brought within that Circuit by accepting the implied false certification theory of liability. This is a significant development that increases the risk of doing business with the government and enhances the Government's leverage in negotiations with contractors.

First, some background: the False Claims Act ("FCA") is the government's weapon of choice to combat alleged waste, fraud, and abuse in government contracting. The FCA forbids contractors from submitting false claims (such as inaccurate invoices) or making false statements in support of a claim. The penalties for violating the FCA are harsh: contractors are subject to treble damages and penalties of up to $11,000 per claim.

Certificates of compliance may provide the basis for an FCA action. For example, if a contractor signs a certificate affirming that its products comply with the Buy American Act but they are actually in violation, then the contractor may be subject to FCA liability. This type of situation is called an express false certification.

A more contentious issue is when the contractor does not actually sign a certificate of compliance. Continuing the previous example, suppose the contract requires compliance with the Buy American Act. The contractor provides its deliverables with a basic invoice and does not expressly state that they comply with the Buy American Act. If the contractor is not in compliance, did it make a false statement?

Beginning in 1994, federal courts started imposing liability for so-called implied false certifications. *See, e.g., Ab-Tech Constr., Inc. v. United States,* 31 Fed. Cl. 429 (1994). Under this theory, by submitting an invoice, contractors implicitly certify their compliance with contractual and statutory requirements, thereby triggering FCA liability. Four circuit courts adopted this theory. *See United States ex rel. Conner v. Salina Reg'l Health Ctr., Inc.*, 543 F.3d 1211 (10th Cir. 2008); *United States ex rel. McNutt v. Haleyville Med. Supplies, Inc.*, 423 F.3d 1256 (11th Cir. 2005); *United States ex rel. Augustine v. Century Health Servs., Inc.*, 289 F.3d 409 (6th Cir. 2002); *Mikes v. Straus*, 274 F.3d 687 (2d Cir. 2001). The Ninth Circuit has now joined this trend, finding no difference between express certifications of compliance and

certifications implied through other actions. *See Ebeid v. Lungwitz*, Case No. 09-16122 (9th Cir. Aug. 9, 2010).

Both express and implied certifications of compliance will subject a contractor to liability in the Ninth Circuit if the following elements are satisfied:

1. a false statement or a fraudulent course of conduct;
2. made with actual knowledge, deliberate ignorance, or recklessness;
3. that was "material"; and
4. caused the government to pay money or forfeit money due.

Non-compliance with a contractual, statutory, or regulatory requirement is only material if compliance is a *sine qua non* of receiving government funds. *Ebeid*, slip op. at 11257-58.

Contrary to the Ninth Circuit's assertion, implied false certifications should be treated differently from express false certifications. Under the "express" theory, a contractor is only liable when it improperly signs its name to a certificate. The act of reviewing and signing the certificate warns the contractor that it must have a reasonable belief about the company's compliance. In contrast, the "implied" theory does not warn the contractor of potential liability. Every interaction with the government could be interpreted as an implied statement that it is in perfect compliance with the myriad obligations heaped upon government contractors. Contractors should not be expected to engage in full compliance reviews every time they need to interact with their customers.

Another disturbing element of the implied false certification theory is that it hastens the conversion of the FCA into an all-purpose fraud statute. As noted above, the FCA is a punitive statute which subjects contractors to treble damages and penalties. *See Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 784-86 (2000). The Supreme Court has cautioned that the FCA should not be "transform[ed] … into an all-purpose antifraud statute," *Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662, 128 S.Ct. 2123, 2130 (2008), and "it is equally clear that the False Claims Act was not designed to reach every kind of fraud practiced on the Government." *United States v. McNinch*, 356 U.S. 595, 599 (1958). Unfortunately, the Ninth Circuit believes otherwise, claiming that the FCA "intends to reach all forms of fraud that might cause financial loss to the government." *Ebeid*, slip op. at 12555 (quoting *Mikes*, 274 F.3d at 699). With this perspective, the Ninth Circuit and similarly-minded courts may continue to find new ways to extract settlements from well-intentioned contractors.

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