
Third Circuit Adopts Implied False Certification Theory

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On June 30, 2011, a panel of the Court of Appeals for the Third Circuit issued a decision in *United States ex rel. Wilkins v. United Health Group, Inc.*, adopting the implied false certification theory of liability under the False Claims Act (FCA).

The *Wilkins* Case

On July 10, 2008, Charles Wilkins and Daryl Willis ("relators"), former employees of United Health Group and AmeriChoice, filed a *qui tam* action alleging that sales representatives from their former companies violated the FCA by offering illegal kickbacks to physicians in violation of the Medicare Anti-Kickback Statute ("AKS") and failing to comply with Medicare marketing rules. Relators did not identify any specific false or fraudulent claims for payment that the companies made to the federal government. Instead, they alleged that the companies certified each month to "continued compliance with all of the [Medicare] Guidelines and based on such certification [continue] to receive the monthly capitation payment," Am. Compl. at 10, and that defendants were liable under the FCA on that basis alone.

Defendants moved to dismiss the complaint under Federal Rule of Civil

Procedure 12(b)(6) for failure to state a claim and Federal Rule of Civil Procedure 9(b) for failure to plead fraud with particularity. The district court granted the motion to dismiss on 12(b)(6) grounds, holding that the complaint did not identify "even a single claim for payment to the Government." *Wilkins*, 2010 U.S. Dist. LEXIS 47080, at *13. The court rejected relators' AKS-based claims because relators failed to allege that the companies specifically certified compliance with the AKS, or that the Government made payments based on such a certification. *Id.* The district court did not address the 9(b) argument.

Affirming in part and reversing in part, the Third Circuit panel held that FCA liability may exist even though the complaint does not identify a particular false claim, as long as the defendant submitted a claim for payment while in knowing non-compliance with a statute or regulation to which it had certified compliance. *Wilkins*, at *14. The court was careful to explain that a defendant would not be liable for an implied false certification if compliance with the provision at issue is simply a condition for participation in the government program. Liability may exist only if compliance with the particular statute or regulation is a condition for government payment. *Id.* Thus, even though defendants never expressly certified to compliance with AKS, the court reversed the dismissal of relators' AKS-based claims because defendants were required monthly to certify to continued compliance with Medicare guidelines as a prerequisite to eligibility under the Medicare program; AKS was part of those guidelines; and compliance therewith was an express condition of payment. On the other hand, the panel affirmed the dismissal of relators' Medicare marketing regulations-based allegations because compliance with those regulations was only a requirement for Medicare participation — *not* a condition for government payment. *Id.*, at *12.

Implications

The implied false certification theory — now adopted by seven courts of appeal (Second, Third, Sixth, Ninth, Tenth, Eleventh, and District of Columbia) — has expanded the scope of FCA liability. Under the theory, courts have held that an FCA violation may occur without a false claim or a false certification submitted with a claim for payment. Instead, the government or a relator typically must allege: (1) a general certification of compliance with the statutes or regulations regarding the government program at issue; and (2) a later submission of a claim for payment at a time the contractor was out of compliance with the statutes or regulations. Relators have argued that defendants should be liable for violating any statute or regulation that was a condition of participation in the government program; courts that have adopted the theory, however, have been careful to cabin it by requiring that the provision at issue set forth an express condition of payment.