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NEWSLETTER

Seventh Circuit Holds "Implied Certifications" Do Not Create False Claims Act Liability and Deepens Circuit Split

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The U.S. Court of Appeals for the Seventh Circuit recently rejected the "implied certification" theory of liability under the False Claims Act (FCA) in *United States v. Sanford-Brown, Limited,* No. 14-2506 (7th Cir. June 8, 2015), a decision that has broad implications for government contractors worried about the reach of the FCA and widens a circuit split on the issue.

The case involved a for-profit educational institution, Sanford-Brown College, that entered into a Program Participation Agreement (PPA) with the U.S. Secretary of Education as a part of obtaining federal educational subsidies. The PPA required compliance with a variety of statutory and regulatory regimes, including Title IV of the Higher Education Act. The relator, Sanford-Brown's former Director of Education, alleged that the defendants engaged in recruiting and retention practices that violated Title IV regulations, which in turn meant that the PPA was being violated, and for that reason, defendants were no longer eligible for any of the subsidies they received. The relator argued that the resulting claims for subsidies, which numbered in the thousands, were false claims under two theories.

First, the relator argued that the PPA was a false record in support of a claim for payment under 31 U.S.C. § 3729(a)(1)(B) because Sanford-Brown did not abide by its commitments in that agreement. The Seventh Circuit rejected this theory, finding that the relator provided no evidence whatsoever that Sanford-Brown had entered into the PPA knowing that it would not comply and intending to defraud the government, and "promises of future performance do not become

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false due to subsequent non-compliance."

Second, the relator argued that Sanford-Brown presented false or fraudulent claims for payment or approval under 31 U.S.C. § 3729(a)(1)(B). Under this theory, Sanford-Brown's initial certification in the PPA promising to comply with the Title IV restrictions meant that each request for payment acted as an implied certification that it was continuing to do so. The key question was whether the requirements of the PPA were merely "conditions of participation" that the Department of Education could enforce administratively or also "conditions of payment" that made each request for subsidies fraudulent when the defendants were no longer complying with the PPA's terms. The Seventh Circuit held that the myriad statutory and regulatory requirements in the PPA were conditions of participation and if an educational institution signed the PPA in good faith, then subsequent violation of its requirements did not create false claims.

The court made clear that this holding was a rejection of the so-called "doctrine of implied false certification" that treats an invoice submitted to the government as an implicit certification that the contractor has complied with all possible applicable regulations and performance requirements incorporated in the contract. The Court explained, "we conclude that it would be... unreasonable for us to hold that an institution's continued compliance with the thousands of pages of federal statutes and regulations incorporated by reference into the PPA are conditions of payment for purposes of liability under the FCA. Although a number of other circuits have adopted this so-called doctrine of implied false certification,... we decline to join them." This ruling is good news for government contractors, who are generally subject to a web of statutory and regulatory requirements in any government procurement. Now, at least in the Seventh Circuit, a contractor's failure to meet all contractual and regulatory requirements does not automatically make claims for payment under the related contract "false."

In holding that merely requesting payment does not imply compliance with a contract and the regulatory requirements it incorporates, the Seventh Circuit hardened a circuit split on this issue. Most U.S. Court of Appeals have held that, at least in some circumstances, requesting payment creates an implied representation that the entity is continuing to comply with the obligations on which the request is based. However, this approach to FCA liability risks making every contract dispute into a FCA matter, as any knowing breach of contract requirements could make claims for payment "false." The Seventh Circuit joined the Fifth Circuit in declining to recognize such a doctrine of "implied certification." Until now, the Seventh Circuit had refrained from taking one side or the other on the issue, but now its position is clear.

This growing divide could result in intervention by the U.S. Supreme Court to clarify the boundaries of FCA liability. Circuit splits are always a cause of concern to the high court, and in recent years the Supreme Court has shown that it is willing to shape the boundaries of FCA jurisprudence. Just this last term, the Supreme Court in *Kellogg Brown & Root Services, Inc. v. United States ex rel. Carter,* 135 S. Ct. 1970 (2015), resolved a circuit split by ruling that successive *qui tam* actions are permitted under the FCA. The court in *Carter* also restored the proper function of the FCA statute of limitations provisions by holding that the Wartime Suspension of Limitations Act does not apply to civil FCA claims, even without a circuit split on that issue. It could be that implied certification, now the subject of a clear circuit split, will be the next aspect of the FCA on which the Supreme Court weighs in.