

The Theory of Implied Certification: Expanding the Scope of False Claims Act Liability for Long-Term Health Care Facilities

Introduction

The United States Attorneys' Office for the Eastern District of Pennsylvania recently announced two civil settlements resolving investigations of the treatment and care of residents in two long-term health care facilities. These settlements, resulting in approximately \$500,000 in penalties, are not the first of their kind, particularly in Southeastern Pennsylvania. What is relatively new, however, is the Government's theory of liability for long-term health care facilities under the False Claims Act, 31 U.S.C. § 3729(a). Referred to as the theory of implied certification, it alleges that a provider's request for payment from the Government, by its submission, is a representation that the provider has fully complied with all applicable rules which are a precondition of payment.

The False Claims Act and the Theory of Implied Certification

The False Claims Act imposes liability on a party who knowingly presents a false or fraudulent claim for payment to the Government. See *Hutchins v. Wilentz, Goldman & Spitzer*, 253 F.3d 176, 182 (3d Cir. 2001) (citing *Young-Montenay, Inc. v. United States*, 15 F.3d 1040, 1043 (Fed. Cir. 1994)). The theory of implied certification speaks to the issue of falsity. Specifically, the theory alleges that a request for payment, by its very submission, implies a certification of compliance with governing federal rules, regulations and contractual provisions that are a precondition to receiving payment. See, e.g. *Mikes v. Strauss*, 274 F.3d 687, 699 (2d Cir. 2001); see also *United States ex rel. Augustine v. Century Health Servs., Inc.*, 289 F.3d 409, 415 (6th Cir. 2002).

Most courts to address this issue have upheld implied certification as a viable theory of liability under the False Claims Act. There is debate, however, as to its scope, particularly in the health care context. The Government advocates that a defendant is liable regardless of whether compliance with the applicable rule or regulation is an express precondition of payment.

While some courts have adopted the Government's view, others have adopted a more restrictive view, particularly in the health care context. Specifically, some courts have ruled that liability under the False Claims Act cannot be based on non-compliance with any medical regulation, but only on non-compliance with those regulations that are a precondition to payment. Otherwise, the Government and qui tam relators could allege that the failure to meet medical standards of care violates the False Claims Act, thereby promoting the federalization of medical malpractice. *Mikes*, 274 F.3d at 699-700. Other courts have limited the theory to situations where compliance with the governing law is "material" to the Government's decision to pay, or, in other words, would the Government pay if it were aware of the noncompliance with the governing law?

The Nursing Home Reform Act Presents Several Potential Sources of Liability

The Government takes an aggressive view of False Claims Act liability, particularly where the governing law requires compliance with subjective standards of care. Under few statutes are there more examples of subjective standards, and therefore potential sources of liability, than the Nursing Home Reform Act

("NHRA"). Through specific criteria for the quality of resident care and its emphasis on the delivery and outcome of patient care, the NHRA is intended to ensure that residents in publicly-subsidized nursing homes maintain the "highest practicable physical, mental and psychological well-being."

For instance, the NHRA sets forth quality of life and care requirements that facilities must meet in order to participate in the Medicare and Medicaid programs. 42 U.S.C. § 1395i-3; 1396r. Under the theory of implied certification, a facility may face False Claims Act allegations if it submits claims for payments for services that were substandard because the facility was not in full compliance with NHRA's requirements. In fact, under the NHRA, the Secretary of Health and Human Services has discretionary authority to deny payments upon a finding that a facility is out of compliance. 42 U.S.C. § 1395i-3(h)(2)(B)(i).

Conclusions

While the imposition of liability under the False Claims Act for failures to comply with the NHRA's quality of life and care requirements is by no means certain, the Government and qui tam relators will likely continue to press the implied certification theory in this area. With these prosecutions will undoubtedly come much-needed refinement of the parameters of the theory of implied certification. However, in many False Claims Act investigations of long-term health care facilities, the Government and the facility have settled before the implied certification theory has been fully litigated.

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