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CIVIL FALSE CLAIMS ACT: D.C. Circuit Reinforces *SAIC* Decision in False Certification Case, Rejecting FCA Damages Claim in Case Based on Lack of Supporting Documentation

In late 2010, the United States Court of Appeals for the D.C. Circuit issued a seminal decision rejecting the government's damages theory in a civil False Claims Act "false certification" case. In *United States v. Science Applications International Corp.* ("*SAIC*"), while affirming false certification (there was an alleged violation of conflict of interest rules) as a basis for falsity under the FCA, the appellate court nonetheless ruled that the district court erred in instructing the jury, in assessing damages, not to place any value on the actual services SAIC provided under the contract. *See SAIC,* 626 F.3d 1257 (D.C. Cir. 2010). *See also* FraudMail Alert No. 10-12-06. In *SAIC*, the Justice Department argued, and the jury agreed, that the FCA damages were three times the full amount paid under the contract ($1,973,839.61), even though the actual breach of contract damages were only $78. This groundbreaking decision essentially held that the Supreme Court's decision in *United States v. Bornstein*, 423 U.S. 303 (1976) governs all FCA damages calculations, even in cases based on false certifications.

Last week, the D.C. Circuit reinforced and expanded that damages holding. In *United States ex rel. Davis v. District of Columbia,* No. 11-7039, 2012 WL 1673655 (D.C. Cir. May 15, 2012), the court rejected a *qui tam* relator's claim that the government would not have paid anything for Medicaid services that were provided to special education students by the D.C. Public Schools. Relator's theory was that the Schools' claims to Medicaid were false because they failed to comply with a requirement to maintain documents supporting claimed services. In affirming the dismissal of relator's damages claim, the court noted that there was no allegation that the services paid for were not actually provided, found that the documentation requirement had no monetary value, and held that the government suffered no harm as a result of the failure to comply with the documentation requirement. The *Davis* and *SAIC* decisions, as well as other recent decisions rejecting claims for astronomical penalties where no damages have been proven, show that courts are aware of the high stakes in FCA allegations, and are focusing on the actual impact of the underlying false claims, rather than imposing grossly disproportionate damages that ignore the actual benefits obtained by the government from the conduct at issue.

Factual and Procedural Background in *Davis*

The relator's firm in *Davis* had prepared the D.C. Public Schools' Medicaid claims for several years, but was replaced by another firm in 1998. According to the complaint, the relator's firm kept the supporting

documentation for 1998, and the new firm submitted the Schools' 1998 Medicaid reimbursement claim without the required documentation. Relator filed a *qui tam* suit alleging that (1) the submission of the 1998 reimbursement claim without supporting documentation violated the FCA, and (2) the United States would not have paid the claim if it had known that the documentation was missing.

The district court dismissed the relator's treble damages and conspiracy claims that asserted that the damages were the entire amount that the government paid in 1998 without alleging that United States actually suffered any economic loss as a result of the alleged false claim:

> No reading of plaintiff's Complaint, no matter how generous, reveals an allegation of damages. According to plaintiff, defendants were entitled to receive $60 million in Medicaid reimbursement. And, again according to plaintiff, defendants submitted a $60 million cost claim. Unless plaintiff himself falsely inflated the reimbursement figure—which the Court will assume he did not—the government paid what the plaintiff says the government owed. Nor does plaintiff's allegation that defendants improperly directed the $60 million reimbursement into the District's general treasury account amount to an allegation of damage to the government.

Davis, 591 F. Supp. 2d 30, 39 (D.D.C. 2008) (internal citations omitted). The district court also held that the relator was not an original source of the publicly disclosed allegations, based on an implied original source requirement set forth in *United States ex rel. Findley v. FPC-Boron Employees' Club,* 105 F.3d 675 (D.C. Cir. 1997) that required the relator to provide his information to the government prior to any public disclosure.

The D.C. Circuit reversed the district court's ruling on the original source issue, applying the Supreme Court's reasoning in *Rockwell International Corp. v. United States,* 549 U.S. 457 (2007) to overrule *Findley*'s implied original source requirement. The circuit court's decision on damages, however, is much more important to future FCA litigation.

The D.C. Circuit's Damages Analysis

The framework for determining FCA damages as set forth by the D.C. Circuit in *SAIC* emphasized that both causation and harm to the government are required elements of FCA damages:

> To establish damages, the government must show not only that the defendant's false claims caused the government to make payments that it would have otherwise withheld, **but also that the performance the government received was worth less than what it believed it had purchased.**

SAIC, 626 F.3d at 1279. (Emphasis added). The court ruled that the district court erred in giving the jury an instruction that restricted the damages calculation to the actual amount of payments that the government made to SAIC. Instead, the proper measure of damages, according to the court, should have been the difference between the value of services tainted by SAIC's undisclosed conflict of interest and the conflict-free services that were promised, and the jury should have been instructed to take into account the value of the services that the government received from SAIC.

In *Davis,* the D.C. Circuit applied and extended the *SAIC* damages framework. At the outset, the court noted that there was no allegation that the defendant had failed to provide the services paid for. Moreover, the "sole defect" in *Davis* had no impact on the services or their value to the government:

> the defect in this case in no way calls into question the value of the medical care provided by [the Schools]. The purpose of maintaining documentation is to ensure that the government pays only for services actually rendered. Because all agree that the services paid for were provided, the maintenance of documents to prove that they were has no independent monetary value.

Davis, 2012 WL 1673655, at *7. The court gave a common sense application to damages calculations under the FCA:

> A server's failure to bring a receipt after dinner causes no harm when you know you've been properly charged. The same is true here: The government got what it paid for and there are no damages.

FCA Penalties Without Damages

While the D.C. Circuit noted in *Davis* that the relator could be eligible to share in penalties assessed against the Schools, this type of FCA recovery—penalties without damages—has been called into question recently. *See United States ex rel. Bunk v. Birkart Globistics GmbH & Co.,* No. 1:02 CV1168 (ALT/TRJ), 2012 WL 488256 (E.D. Va. Feb. 14, 2012) (concluding that the mandated penalty was grossly disproportional to the harm caused by defendants, principally because no economic harm to the government was established and the invoice did not reflect defendants' level of culpability).

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