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Validating Value: What Does Circle C Construction Mean for Health Care FCA Cases?




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Editor's Intro: *The Sixth Circuit Court of Appeals earlier this year ruled that a defendant wasn't liable for damages equal to its reimbursements from a government contract despite having falsely certified it appropriately paid its workers in connection with the contract. Instead, the ruling signaled that total damages in False Claims Act cases shouldn't be presumed to equal the full value of reimbursements unless the government establishes that the false certification diminished the value of the goods or services provided. Attorneys from Hogan Lovells analyze the recent Sixth Circuit case and discuss what the ruling means for FCA health care cases.*

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On February 4, 2016, the Sixth Circuit validated the true meaning of ''benefit of the bargain'' when calculating damages in a construction False Claims Act (''FCA'') case.

In *United States ex rel. Wall v. Circle C Constr., LLC*,[1] the defendant was found liable of falsely certifying that it had paid its workers wages that complied with the Davis-Bacon Act, when its subcontractor had in fact underpaid some of its electricians.

The government argued that its damages were roughly $260,000, the entire amount that the government paid for the electrical work.

This theory prevailed in the district court but the Sixth Circuit rejected it in *Circle C*, finding that actual damages were simply the total underpayment of wages about $10,000.

In doing so, it reaffirmed that damages under the FCA are the difference in value between what the government bargained for and what the government received.[2]

The court refused to accept the government's ''fairyland'' damages. It explained, ''in the real world the government could not forever withhold all payments to a

[1] *United States ex rel. Wall v. Circle C Constr., LLC*, 2016 BL 30895, 6th Cir., No. 14-6150, 2/4/16.

[2] *Id.*

contractor for [electrical] work. . . [and continue to] turn[ ] on the lights every day. Actual damages by definition are damages grounded in reality.''[3]

Circle C follows a similar decision out of the D.C. Circuit in 2010. In *United States v. Science Applications International Corp. (''SAIC'')*, the court found that the government only can recover the full value of payments where it ''proves that it received no value from the product delivered,''[4] and refused to adopt an irrebuttable presumption that services rendered are categorically worthless because they were tainted by the false certification.[5]

Since the Supreme Court endorsed the benefit-of-the-bargain analysis in FCA cases,[6] courts have struggled to calculate damages for false certifications where the plaintiffs typically claim that they would have paid nothing at all for the services or goods had they known of the defendant's false certification.

In rejecting this ''taint'' theory, the Sixth Circuit has sent a clear message to FCA plaintiffs that the value of the services or goods rendered will not be ignored when calculating damages.

What Has the Government Bargained for Through Federal Health Care Programs?

So what does this mean for health care providers? In the world of construction, it can be easy to determine damages. And, as Judge John M. Rogers warned in his concurring opinion, *Circle C* was a clear case because the amount of the additional wages that should have been paid (under the Davis-Bacon Act) is readily ascertainable in market terms.

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Yet the court made clear that damages must be grounded in reality; where money can remedy the breach, no more can the government presumptively recover damages greater than that remedy.[7]

The *Circle C* decision is not limited to FCA cases based on violations of the Davis-Bacon Act. Rather, in combination with the *SAIC* opinion, it underscores that damages in FCA claims against hospitals, hospice providers, and all health care providers may not be presumed to be the full value of the reimbursement claims.

Even where the value of services is not easily determined,[8] it is the government's burden to prove that ''it in fact got less than what it bargained for.''[9]

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The D.C. Circuit has extended *SAIC* to an FCA case challenging Medicaid reimbursement claims. In *United States ex rel. Davis v. District of Columbia*,[11] a relator alleged that the District of Columbia submitted Medicaid reimbursement claims for services provided to disabled students without adequate documentation.

The relator argued that damages under the FCA included the entire amount the federal government paid to the District of Columbia Public Schools (''DCPS'') for the relevant year because the government would have paid nothing had it known DCPS did not keep the required documentation.

The D.C. Circuit applied *SAIC* and strived to ''put the government in the same position it would have been in were the defendant's claims not false.''[12]

Because the relator did not allege that any services DCPS sought reimbursement for were not provided, the D.C. Circuit concluded that: ''The government got what it paid for and there are no damages.''[13]

In so holding, the *Davis* court noted that *SAIC* instructed that the proper measure of damages was ''the difference in value between 'services tainted by potential conflict' and the untainted services promised.''[14]

It found that the defect alleged in *Davis* (that documentation supporting valid claims was not properly presented) ''in no way calls into question the value of the medical care provided by DCPS.''[15]

The *Davis* court's focus on the impact of the underlying false certification on the value of the service provided to the government is consistent with the *Circle C* decision.

The *Circle C* court acknowledged that the impact of a false certification on the value of what the government

[3] *Id.* at 617-618.

[4] *United States v. Sci. Applications Int'l Corp.*, 2010 BL 287300, 626 F.3d 1257, 1279 (D.C. Cir. 2010) (''SAIC'').

[5] *Id.* at 1280.

[6] *United States v. Bornstein*, 423 U.S. 303, 316 n.13 (U.S. 1976)

[7] *Circle C*, 813 F.3d at 618.

[8] *SAIC*, 626 F.3d at 1280 (recognizing the difficulty the jury will face in calculating the value of services tainted by potential conflict).

[9] *Circle C*, 813 F.3d at 618.

[10] *SAIC*, 626 F.3d at 1279.

[11] 2012 BL 120178, 679 F.3d 832 (D.C. Cir. 2012).

[12] *Id.* at 839.

[13] *Id.* at 840.

[14] *Id.* (citing *SAIC* 626 F.3d at 1280).

[15] *Id.*

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got for its money may vary based on the nature of the underlying regulatory violation.

There, the electrical work delivered to the government was neither worthless ''because they were dangerous to use'' nor due to some ''unalterable moral taint.''[16]

However, the *Circle C* court noted that there may be cases where an unalterable moral taint could render the services or goods worthless to the government, such as in the case of a product produced using child labor or through illegal trade with Iran.[17]

The D.C. Circuit and Sixth Circuit have thus both focused on the impact of an underlying regulatory violation on the value of what the government received to determine FCA damages.

This approach stands in contrast with the Seventh Circuit's decision in *United States v. Rogan*.[18] There, the defendant's medical center paid physicians for patient referrals, in violation of the Stark Amendment to the Medicare Act and the Anti–Kickback Act.[19]

The Seventh Circuit affirmed the district court's damages award, which included the *full* value of reimbursement claims submitted for all patients for whom an illegal referral fee was paid.[20]

The *Rogan* court explicitly stated that it was unimportant that ''most of the patients for which claims were submitted received some medical care—perhaps all the care reflected in the claim forms,'' and made no attempt to account for legitimate medically necessary services rendered, for which the government would be responsible in the ordinary course.[21]

The *SAIC* decision attempted to distinguish *Rogan*, noting that unlike in *Rogan*, the services in *SAIC* were provided directly to the government.[22]

Yet, two years later the D.C. Circuit clearly rejected the third-party distinction in *Rogan*, stating in its *Davis* opinion that ''[u]nder the Medicaid program, the federal government pays for specified services to be provided to eligible recipients.''[23]

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The *Davis* court has correctly surmised that the distinction drawn by the *Rogan* court is at odds with basic contract law, as two parties may contract for the provision of services to a third party. ''Medicaid is a contract between a service provider and the government, in which the Medicaid recipient is a third-party beneficiary.''[24]

Because providers owe a duty of performance to both the government and the patient, it cannot be said that no benefit is conferred upon the government when a provider renders services to a patient under these programs. So too with Medicare.

What Impact Does a Regulatory Violation Have on Value of Service Provided to the Government?

Emerging FCA case law suggests that the government has the burden to establish how a false certification diminishes the value of goods or services provided to the government (or to a third party beneficiary).

Recent decisions suggest that courts will examine the purpose of the law or regulation that was violated to determine the impact on the benefit of the government's bargain.

In *Davis*, for example, the court reasoned that the ''purpose of [the regulation requiring] maintaining documentation is to ensure that the government pays only for services actually rendered.''[25]

Where there was no dispute that services paid for were in fact provided, ''the maintenance of documents to prove that they were [provided] has no independent monetary value.''[26]

Thus, in this case, the regulatory violation did not have an impact on value of the services provided.

No More Fairyland Damages?

The era of fairyland damages may be coming to an end. Nevertheless the importance of establishing the value of what a health care company provides to the government may be doubly or triply important.[27]

The government can no longer assume that any false certification related to certain medical services renders them worthless, thereby threatening to bankrupt health care providers with excessive damages.

The courts in *Circle C* and *SAIC* implicitly adopted the netting theory advanced by other circuits. Under that theory, damages are multiplied pursuant to the FCA only after subtracting the value of what the gov-

[16] *Circle C*, 813 F.3d at 618.
[17] *Id.* at 619.
[18] 2008 BL 32415, 517 F.3d 449 (7th Cir. 2008).
[19] *Id.* at 452–53.
[20] *Id.* at 453; *see also United States v. Mackby*, 221 F. Supp. 2d 1106, 1112 (N.D. Cal. 2002) aff'd, 68 F. App'x 776 (9th Cir. 2003) (explaining that the amount the government paid in response to the false claims is an appropriate measure of damages).
[21] *Id.* at 453.
[22] *SAIC* at 1279.
[23] *Davis*, 679 F.3d at 840.
[24] *Spectrum Health Continuing Care Grp. v. Anna Marie Bowling Irrecoverable Trust Dated June 27, 2002*, 410 F.3d 304, 315 (6th Cir. 2005).
[25] *Davis*, 679 F.3d at 840.
[26] *Id.*
[27] *See* 31 U.S.C. § 3729(a)(1)(G) (trebled damages); *see also* 31 U.S.C. § 3729(a)(2)(C) (doubled damages).

ernment received and the value of any loss that was successfully mitigated.[28]

If the government alleged that a defendant provided medically unnecessary services, netting would require the government to offset the damages by the cost of the treatment before any FCA multiplier is applied.

The government can no longer assume that any false certification related to certain medical services renders them worthless, thereby threatening to bankrupt health care providers with excessive damages.

To do so would not only be unjust, it also would ignore the established value of medical care.

[28] *United States v. Anchor Mortgage Corp.*, 2013 BL 77094, 711 F.3d 745, 749 (7th Cir. 2013).

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