D.C. Circuit Confirms Broader Applicability Of Net Loss Approach To FCA Damages Calculations

Damages To Federal Health Care Programs Under The False Claims Act Are Reduced By The Value Of The Goods Or Services Provided By Defendant

Last week, the D.C. Circuit held in *United States of America, ex rel. Davis v. District of Columbia*, that in suits under the False Claims Act ("FCA") alleging false claims for Medicaid reimbursement, the calculation of damages must take into account the value of the medical services actually received. The D.C. Circuit's May 15 opinion held that the allegedly false feature of the Medicaid reimbursement claims at issue—the provider's failure to retain required documentation—did not affect the value of the services received, and therefore the government had suffered no damages. The relator's recovery would thus be limited to a share of any statutory penalties.

In rejecting the relator's argument that the measure of damages to Medicaid should be the full value of the claims paid by the government, the *Davis* decision represents an important application of the D.C. Circuit's leading 2010 decision in *United States v. Science Applications Intern. Corp.* ("*SAIC*"). *SAIC* established that the calculation of the government's loss in an FCA suit against a National Regulatory Commission contractor that failed to disclose conflicts of interest must take into account the value of the services the contractor had provided to the NRC. In *SAIC*, DOJ had argued—like the relator did in *Davis*—that the damage to the government was the full value of the claims paid. *SAIC* suggested in dicta that its net loss approach may not apply in cases where the benefit provided by the defendant went to a third party. *Davis*, however, confirms that the approach to calculating loss established by *SAIC* applies more broadly, including in those FCA cases that involve the provision of benefits, such as medical services, to parties other than the government payor.

Davis may impact the way damages are calculated in implied-certification FCA cases involving Medicare and Medicaid claims, where appropriate medical care is often provided regardless of the failure to comply with some statute or rule that is a precondition of payment. Under this rationale, the D.C. Circuit would consider the value of the goods or services received by the federal program's beneficiaries, which could reduce the alleged loss to the government and any potential treble award. In an analogous situation, the Seventh Circuit has held—in the context of FCA claims based on alleged violations of the Anti-kickback statute—that the value of services actually provided should not be taken into account when calculating the government's loss.

Davis Further Holds That The Supreme Court's Decision In Rockwell Abrogates The D.C. Circuit's Reading Of The FCA's "Original Source" Provision

Davis is also notable because it holds that the Supreme Court's 2007 decision in *Rockwell International Corp. v. United States*, overruled the D.C. Circuit's interpretation of the FCA's original source provision in *United States ex rel. Findley v. FPC-Boron Employees' Club*, thereby reducing a longstanding conflict among the circuits. The FCA's pre-2010 "public disclosure bar" precludes *qui tam* suits "based upon" the "public disclosure of allegations or transactions" unless the relator is an "original source" of the information and disclosed it to the government before filing suit. In *Findley*, the D.C. Circuit had held that a relator qualifies as an "original source" if he provided his information to the government not only before filing suit but prior to *any* public disclosure. The district court in *Davis* found that the relator did not meet this requirement but the D.C. Circuit reversed, holding that *Findley*'s rationale had been undermined by *Rockwell*, which clarified that a relator can be an original source "even if the publicly disclosed information came from someone else." Because *Findley* (together with a Sixth Circuit decision) occupied one side of a multi-sided circuit split regarding the original source provision, *Davis* may reduce the likelihood that the Supreme Court would grant review to resolve that circuit split.