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Fifth Circuit Limits Liability under the False Claims Act for "Certifications" and Offers a New Framework

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In *U.S. ex rel. Steury v. Cardinal Health, Inc.*, the Fifth Circuit affirmed dismissal, again, of a *qui tam* complaint alleging that the defendants violated the False Claims Act (FCA) by selling faulty intravenous (IV) pumps to the U.S. Department of Veterans Affairs (VA). In the first appeal, *Steury I,* the Fifth Circuit affirmed dismissal of the *qui tam* complaint because the facts alleged did not support an "implied certification" theory, which has yet to be adopted in the Fifth Circuit. The court reasoned that the FCA is not a general enforcement device for federal statutes, regulations, and contracts, and only those breaches of contract that are tied to prerequisites for payment can sustain an FCA claim. On the plaintiff's second appeal before the Fifth Circuit, the court again declined adopting a theory of "implied certification" FCA liability, and instead re-emphasized that only those certifications which the Government makes a condition of payment can be the basis of an FCA claim. The decision is good news for those contracting with the Government, reaffirming that—at least in the Fifth Circuit—the breach of a contract provision unrelated to payment cannot be the foundation for an FCA lawsuit.

The whistleblower alleged that the IV pumps the defendants sold to the VA were defective because they sometimes introduced air into IV lines, which could potentially cause death. The whistleblower argued that this flaw violated the warranty of merchantability provisions of the Federal Acquisition Regulations (FAR) and that by selling the pumps to the VA, the defendants impliedly certified that the goods were free from defect. In line with its earlier decision, the Fifth Circuit found these allegations inadequate because the warranty of

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merchantability was not a prerequisite to payment. The FAR specifically allowed the Government to accept goods that violated the warranty of merchantability, and therefore any link between payment and any merchantability certification—express or implied—was broken. In doing so, the Fifth Circuit carefully cabined FCA liability to only those certifications that are directly connected to payment by the Government. The Fifth Circuit also rejected the whistleblower's "worthless goods" theory of liability, reasoning that there was not a sufficient showing in the complaint that any of the pumps sold over a nine-year period was found to be deficient or worthless.

A concurring opinion by Judge Higginson took a different approach to the whistleblower's implied-certification allegations. In his view, ideas such as prerequisites to payment and "express" and "implied" certifications have displaced the proper inquiry mandated by the FCA statute. The proper inquiry, according to Judge Higginson, turns on whether a claim for payment is "false" or "fraudulent" under a common sense understanding of those terms. A claim for payment is "false" when it involves a factual assertion capable of confirmation or contradiction that was untrue when it was made, and a claim for payment is "fraudulent" when the defendant creates a false impression in the mind of the other party with the intent to deceive. This approach to FCA liability, according to Judge Higginson, eliminates the avenues of liability under theories of "implied certification" that are prone to abuse.

Applying this alternative reasoning, Judge Higginson found the whistleblower's complaint insufficient to state an FCA claim. The whistleblower failed to allege that the defendants knew of the product defects but, with intent to deceive, sought to collect payment from the Government anyway. Therefore, the claim could not have been "fraudulent." In rejecting any notion that the claims were "false," Judge Higginson stated that the claims for payment presented to the Government contained no untrue statements capable of verification. For this reason, the whistleblower's complaint was deficient.

Overall, the Fifth Circuit's opinion in *Steury II* reaffirms that the FCA does not reach every inaccuracy or every minor contract breach. Instead, a contractor's certification can only serve as the basis for an FCA suit if it is a prerequisite for payment—regardless of whether the certification is express or implied.