ORAL ARGUMENT NOT YET SCHEDULED

Case No. 09-5385

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

SCIENCE APPLICATIONS
INTERNATIONAL CORPORATION,

Defendant-Appellant.

On Appeal From the United States District Court
For the District of Columbia
1:04-CV-01543-RWR

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

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Certificate as to Parties, Rulings, and Related Cases

A. Parties and *Amici*

All parties, intervenors, and *amici* appearing before the district court in this Court are listed in the Brief for Defendant-Appellant.

The full name of the party that undersigned counsel represents in this case is The Chamber of Commerce of the United States of America ("Chamber").

Pursuant to Circuit Rule 26.1, Chamber states that it has no parent corporation, and no publicly held company owns 10% or greater of any of the Chamber's stock. The general nature and purpose of the Chamber is its function as a business federation representing the interests of an underlying membership of more than 3 million businesses and business organizations of every size, industrial sector, and geographic region. These businesses include government contractors affected by the False Claims Act issues in this case.

B. Rulings Under Review

References to the ruling at issue appear in the Brief for Defendant-Appellant.

C. Related Cases

References to related cases appear in the Brief for Defendant-Appellant.

/s/ James J. Gallagher
James J. Gallagher

Certificate of Counsel

In accordance with Circuit Rule 29(d), undersigned counsel certifies that it would not have been practicable for the Chamber to join the *amicus curiae* brief filed by the National Defense Industrial Association ("NDIA") in support of defendant-appellant because the Chamber has interests that are significantly different from those of the NDIA. The Chamber does not represent the particular interests of any single industry or industry sector. The Chamber instead represents the broad interests of all American businesses because its members include businesses and business organizations of every size and in every industry. The Chamber therefore has a unique perspective on the District Court's interpretation of the "implied false certification" test under the False Claims Act, which made it impracticable for the Chamber to join the other *amicus curiae* brief.

/s/ James J. Gallagher
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Interest of the *Amicus Curiae*

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation.[1] It represents 300,000 direct members and indirectly represents the interests of an underlying membership of more than 3 million businesses and business organizations of every size, industrial sector, and geographic region. A principal function of the Chamber is to represent the interests of its members by filing *amicus* curiae briefs in cases of vital concern to the Nation's business community, including cases raising important questions under the False Claims Act ("FCA"), 31 U.S.C. §§ 3729-3733.

Many of the Chamber's members provide goods and services to the United States under government contracts. Government contracts are subject to thousands of statutory, regulatory and contract requirements. Many government contracts are subject to statutes, regulations or contract provisions that define organizational conflicts of interest ("OCIs") and describe the actions of the contractor and contracting officer that may or should follow the contractor's identification of OCIs. In the case before this court, the District Court adopted a significantly expanded test for "implied certifications" that may be actionable under the FCA.

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[1] All parties have consented to the filing of this brief.

Under the District Court's holding, non-compliance with any of the myriad requirements to which contractors are subject could result in a *post-hoc* and subjective finding by a jury that any "knowing" non-compliance with a statute, regulation or contract provision is also a violation of the False Claims Act. This change to case law on the implied certification theory would create significant and unwarranted risk for all government contractors. The Chamber submits this brief to show the importance of that issue, not just to the parties involved, but to the countless businesses that might be affected by this case.

Summary of Argument

The False Claims Act ("FCA") was not designed to punish every violation of contract, regulation or statute. The Act, by its terms, prohibits "false or fraudulent *claim[s] for payment*" and the use of false records or statements "*to get a false or fraudulent claim paid.*" 31 U.S.C. §3729(a)(1)-(2)(emphasis added). Unlike other statutory remedies for "knowing" contract violations, the FCA is punitive in nature, imposing treble damages and penalties for "false" claims for payment. While the FCA is broadly construed to reach all types of fraudulent claims to the Government for federal funds, the *sine qua non* of conduct actionable under the FCA is a false statement or claim made for the purpose of obtaining a payment from the Government. *See Allison Engine Co., Inc. v. United States ex rel. Sanders,* 128 S. Ct. 2123, 2126 (2008).

The "implied false certification" theory, a judicial gloss on the FCA, provides that where a government contractor's compliance with a statute, regulation or contract requirement is an express condition precedent to payment, and the contractor does not disclose its noncompliance with that requirement, the court may judicially imply a false certification of compliance. The "implied false certification" theory does not apply unless compliance with the statute, regulation or contract is an express condition precedent to payment. Judicial use of the "implied certification" theory has been very limited, precisely because a less

restrictive application of the theory would blur the line between a fraudulent *claim for payment* under the FCA, and other contract violations that are remediable under other statutes, regulations or contract provisions.

In this case, the District Court radically expanded the scope of the implied certification theory. The OCI contract clause and regulation at issue do not state that compliance is a pre-condition to payment, nor do they permit the Government to withhold payment for an OCI violation. Nonetheless, the District Court held that a jury could infer, based on subjective and *post-hoc* evidence, that SAIC's payment vouchers were "false" under the FCA because the vouchers withheld information that the jury later deemed to be "critical" to the Government's decision to pay.

In light of the multitude of contract, regulatory and statutory requirements to which contractors must "turn square corners" every day, this unwarranted extension of the implied certification theory poses significant risk that a contractor's failure to comply with *any* contract requirement, whether or not identified by the contract as a condition of payment, later may be characterized as "critical" or "material" to the contracting officer's decision to pay an invoice. In addition, the District Court's decision would erode the FCA's rigorous scienter requirement.

Argument

I. The Judicial Theory Of False Implied Certification Should Be Limited To Contracts In Which Compliance With A Particular Requirement Is Expressly Identified By Statute, Regulation or Contract As A Condition Precedent To Payment.

The False Claims Act, 31 U.S.C. §3729-3733, imposes liability on persons who knowingly make a false or fraudulent claim for payment, or knowingly use a false statement to get a false or fraudulent claim paid or approved. *Id.* §§3729(a)(1), (a)(2). The False Claims Act was not designed to punish every type of fraud committed upon the Government. "Violations of laws, rules, or regulations alone do not create a cause of action under the FCA. It is the false certification of compliance which creates liability when certification is a prerequisite to obtaining a government benefit." *United States ex rel. Siewick v. Jamieson Sci. & Eng'g, Inc.,* 214 F.3d 1372, 1376 (D.C. Cir. 2000) (citation omitted). A false statement under Section 3729(a)(2),[2] for example, is actionable only where the defendant specifically intended that Government would rely on the

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[2] The Fraud Enforcement and Recovery Act of 2009 ("FERA"), Pub. L. No. 111-21, 123 Stat. 1617, which amended Section 3729(a)(2), does not apply to this action. *United States v. Science Applications International Corp.,* 653 F. Supp. 2d 87 at 94, n.3 (D.D.C. 2009). The District Court's interpretation of the implied certification test, erroneous in this case, also would be erroneous for actions involving FERA's reduced standard for intent.

false statement in making its payment decision. *Allison Engine Co.,* 128 S. Ct. at 2130.

Where a contractor violates a statute, regulation or contract provision, but does not disclose that violation, courts in some circumstances have judicially implied a false certification of compliance. Virtually all courts that have adopted this "implied certification" theory -- including this Court -- have restricted its application to statutes, regulations or contract provisions that expressly require compliance with the requirement at issue as a condition precedent to payment. [3] *See Siewick,* 214 F. 3d at 1376 (D.C. Cir. 2000) ("Courts have been ready to infer certification from silence but only where certification was a prerequisite to the government action sought.") (citation omitted)*; United States ex rel. Schmidt v. Zimmer, Inc.*, 386 F. 3d 235, 245 (3d Cir. 2004) (certification of compliance with health care law was an express prerequisite to entitlement to Medicare payments);[4]

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[3] The "implied certification" theory is confusingly named; some courts apply the term to both express certifications of compliance, and certifications judicially implied by courts. In either instance, however, the heart of the test is whether the contractor's compliance with a statute, regulation or contract provision is an express prerequisite or precondition to payment.

[4] Even where courts have framed the relevant standard for application of the implied certification theory as a "materiality" or a "but-for" analysis, the underlying facts of those cases demonstrate that there was unequivocal information in the statute, regulation or contract showing that a failure to comply fully with the requirement at issue was an express precondition to payment, or would undermine

(*Footnote continued on following page*)

Mikes v. Straus, 274 F. 3d 687, 699-700 (2d Cir. 2001) (false certification theory limited to situations in which "the underlying statute or regulation upon which the plaintiff relies *expressly* states the provider must comply in order to be paid") (emphasis in original); *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.,* 125 F. 3d 899, 902 (5th Cir. 1997) ("where the government has conditioned payment of a claim upon a claimant's certification of compliance with, for example, a statute or regulation, a claimant submits a false or fraudulent claim when he or she falsely certifies compliance with the statute or regulation").

In most reported decisions that do not articulate an express "prerequisite to payment" criterion *per se*, the underlying facts demonstrate that the contractor's representation was indeed an express condition precedent to receiving payment. *See, e.g., United States ex rel. Pogue v. Diabetes Treatment Ctrs. of Am.,* 565 F. Supp. 2d 153, 159 (D.D.C. 2008) (the form for submission of claims signed by the contractor stated that *payment is conditioned on compliance* with laws, regulations and program instructions); *United States ex rel. Barrett v. Columbia/HCA Healthcare Corp.,* 251 F. Supp. 2d 28, 33 (D.D.C. 2003) (noting that anti-kickback

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(*Footnote continued from previous page*)

the fundamental purpose of the contract. *See, e.g., AbTech Constr., Inc. v. United States*, 31 Fed. Cl. 429, 431 (1994) (contract required that contractor provide certification of SBA §8(a) minority status).

statute at issue currently was the subject of a required Medicare certification *expressly confirming the contractor's compliance* with that statute).

The express condition precedent element of the implied certification theory assures that both the Government and the contractor know which of the thousands of contract "requirements" are necessary predicates to getting a payment made, and which requirements are necessary elements of performance but not directly linked to the Government's periodic payment of the contractor's invoices. As noted FCA authority John Boese has observed, the express precondition requirement "properly forces the government to formally identify in advance of a claim submission those requirements that are material to its payment decision and prevents agency employees from making . . . *post-hoc* materiality claims. . . ."
1 John T. Boese, Civil False Claims and Qui Tam Actions, § 2.03(G) at 2-145 (3d ed. Supp. 2009-2).

In this case, SAIC's contracts required it to certify compliance with NRC's OCI regulation prior to contract award, and thereafter to disclose OCIs to the contracting officer upon discovery. Pl. Ex. 8, §§ H(d)(2), K(19). Neither the clause nor the regulation states that compliance is a condition precedent to payment; and the contracts' payment clauses do not require an OCI certification of compliance as a precondition to the periodic payments, but simply call for submission of accurate financial data. In fact, the OCI clause prescribes specific

remedies available to the Contracting Officer, but withholding payment is not among those remedies.

II. The District Court's Ruling Would Permit Reliance On *Post-Hoc* Evidence To Establish The Necessary "Pre-Condition To Payment."

The requirement of the implied certification theory that the contractor's compliance be an express prerequisite to payment is a wise policy that forecloses *post-hoc* and subjective evidence that a contract requirement was "critical" or "material" to the Contracting Officer's decision to pay a claim.[5]

Post-hoc evidence is disfavored by courts and administrative tribunals in many contexts. For example, the Government Accountability Office, which regularly adjudicates OCI claims through its jurisdiction to hear contractor bid protests, affords lesser weight to *post hoc* OCI determinations "because they constitute reevaluations and redeterminations prepared in the heat of an adversarial process, . . . [and] may not represent the fair and considered judgment of the

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[5] The determination whether a contractor's compliance with a particular requirement is a precondition to payment should be determinable from the contract or the language of the specific requirement. In this case, the Government's resort to extrinsic evidence to prove the nexus between SAIC's "implied" statements and the Contracting Officer's decision to pay demonstrates that the contract itself did not disclose any such relationship. The existence of an implied certification should be a legal question for the court. See generally *Ohio Power Co. v. F.E.R.C.*, 744 F. 2d 162, 170 (D.C. Cir. 1984) ("Questions of contract interpretation are issues of law if the interpretation need not derive either from the credibility of extrinsic evidence or from a choice among reasonable inferences drawn from extrinsic evidence").

agency, which is a prerequisite of a rational evaluation." *Boeing Sikorsky Aircraft Support*, B-277263.2, B-277263.3, 97-2 CPD ¶ 91 at 15 (Comp. Gen. Sept. 29, 1997). *See generally American Textile Mfrs. Institute, Inc. v. Donovan,* 452 U.S. 490, 539 (1981) ("[T]he *post hoc* rationalizations of the agency or the parties to this litigation cannot serve as a sufficient predicate for agency action.").

Post-hoc evidence is a particularly serious concern when the contract requirement is not an express precondition to payment of the invoice submitted by the contractor, and the result of *post-hoc* evidence will be an award of a punitive, treble-damage remedy. *See generally Vermont Agency of Natural Res. v. United States ex. rel. Stevens,* 529 U.S. 765, 784 (2000) (FCA damages are punitive in nature). If compliance with a particular statute, regulation or contract provision is a true prerequisite to the Government's payment decision, the direct link between the contractor's implied "false statement" and the contracting officer's payment of a voucher should be objectively determinable from the contract, regulation or statute. To hold otherwise would put contractors unfairly at risk that any noncompliance with a requirement later might be found by a jury to have been "critical" to the contracting officer's payment decision, whether or not any relationship between the requirement and payment was discernable by the contractor at the time. The FCA's requirement for a "knowing submission of a

false claim" effectively would be replaced by "knowing violation."[6] It is well-settled that violation of a statute, regulation or contract provision – even a knowing violation – does not warrant the punitive remedies of the FCA unless the contractor makes a false claim or a false statement about its compliance to get a false claim paid. *See e.g., United States ex rel. Hopper v. Anton*, 91 F. 3d 1261, 1266 (9th Cir. 1996) and *Mikes*, 274 F. 3d at 697. The Chamber of Commerce submits that this Court should reaffirm that a contractor's compliance with a statute, regulation or contract provision is potentially actionable under the FCA only if that compliance is an express condition precedent to payment. *Siewick,* 214 F. 3d at 1376.

III. The FCA Is Not An Appropriate Vehicle For Policing Compliance With OCI Requirements.

The punitive remedies of the FCA are particularly inappropriate where the "violation" at issue is a subjective determination by the contracting officer. An OCI often is in the eye of the beholder; OCI regulations provide contracting officers with considerable discretion in determining both the existence of potential

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[6] The District Court's jury instruction, at 653 F. Supp. 2d at 103-04, collapsed what should have been two discrete legal elements of FCA liability, each with a different standard, into a single determination: (1) Whether SAIC's OCI certifications were "false claims" or "false statements made to get a false claim paid;" and (2) whether the resulting false claims for payment were actionable because they were material to the Government's decisions to pay.

conflicts and the appropriate remedy.[7] For example, contracting officers may determine that an existing conflict can be adequately mitigated by the contractor, or that the conflict cannot be mitigated but nonetheless is acceptable "in the best interests of the United States." 48 C.F.R. § 2009.570-7, 2009.570-9(a).

This avenue of mitigation is a compelling reason why implied certifications of OCI compliance do not meet the criteria for an FCA action, absent an express precondition to payment. OCIs provide recourse to mitigation through "firewalling," subcontracting particular types of work, and other measures. Because of that recourse, a court cannot rely on *post hoc* Government testimony that it categorically would not have authorized payments had it been aware of potential OCIs. The Government regularly authorizes payments in the face of

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[7] For example, in 2005, the Defense Information Systems Agency awarded a contract to the contractor, ITT. That award was protested three times by the non-selected contractor, Alion. After the first protest, the agency agreed to take remedial measures and re-evaluate the proposals and the potential OCIs. The second protest went to the GAO, which sustained the protest based on a finding that ITT's performance of various contract activities could significantly affect other related interests of the contractor, its competitors and its customers. *Alion Sci. & Tech. Corp.*, 2006 CPD ¶ 2 at 5, B-297022.3 (Comp. Gen. Jan. 9, 2006). Finally, the GAO denied the third protest based on a determination that the agency had adequately evaluated and mitigated the OCI. *Alion Sci. & Tech. Corp.*, 2006 CPD ¶ 146 at 10, B-297022.4, B297022.5 (Comp. Gen. Sept. 26, 2006). Throughout these three protests and differing determinations, the facts remained the same; the activities and interests of ITT, its competitors and its customers remained the same; yet the GAO came to different decisions based on the agency's changing evaluation of the facts.

OCIs, provided that its interests are protected by adequate mitigation procedures. For example, the NRC has awarded contracts even where there were potential OCIs similar to those at issue here. In the GAO's decision in *Parameter, Inc.*, 91-1 CPD ¶229 at 4, B-241652 (Comp. Gen. Feb. 28, 1991), the NRC awarded a contract, with the same OCI restrictions that were in SAIC's contracts, to a contractor that had relationships with utilities regulated by the NRC, solicited business from NRC-regulated utilities, and whose employee testified at a rate hearing on behalf of the NRC-regulated utilities.

The NRC's OCI regulations, at 48 C.F.R. § 2009.570, specifically provide for mitigation:

> If potential organizational conflicts of interest are identified after award with respect to a particular contractor and the contracting officer determines that conflicts do exist and that it would not be in the best interest of the Government to terminate the contract ... the contracting officer shall take every reasonable action to avoid, eliminate, or, after obtaining a waiver in accordance with 2009.570-9, neutralize the effects of the identified conflict.

48 C.F.R. § 2009.570-7. In addition, 48 C.F.R. § 2009.570-9 gives the NRC's Executive Director for Operations power to waive an OCI "if he determines that it is in the best interest of the United States to do so." No NRC official offered testimony that the NRC would not, specifically or categorically, issue a waiver of SAIC's potential conflicts alleged in this case. No testimony was provided that

mitigation procedures would have been unavailable.[8] In this case, each of the OCI "violations" arose from the Contracting Officer's determination that SAIC's relationships created a *potential* for bias or impaired objectivity. There was no finding that SAIC's work product actually was biased and, in fact, NRC used that work product without qualification. In fact, when a potential OCI was identified during negotiations of the 1999 contract, SAIC disclosed that OCI to the NRC, and worked with the agency to develop a mutually acceptable mitigation plan. July 14, 2008 p.m. Tr. 70-72.

Where an OCI cannot be mitigated, the Government has many potential remedies, including termination of the contract; but under neither the NRC's OCI regulation nor the FAR does the Government have the right to withhold payment to a contractor on that account. This is consistent with the nature of OCI restrictions; the contracting officer has wide discretion to determine whether a potential OCI in

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[8] The "example" provided in the NRC's OCI regulation demonstrates the subjective judgment that a contracting officer may exercise in determining the existence of an OCI: "*Example.* ABC Corp. is assisting NRC in a major on-site analysis of a utility's redesign of the common areas between its twin reactors. The contract is for two years with an estimated value of $5 million. Near the completion of the NRC work, ABC Corp. requests authority to solicit for a $100K contract with the same utility to transport spent fuel to a disposal site. ABC Corp. is performing no other work for the utility. *Guidance.* The Contracting Officer would allow the contractor to proceed with the solicitation because it is not in the same technical area as the NRC work; and the potential for technical bias by the contractor because of financial ties to the utility is slight due to the relative value of the two contracts." 48 C.F.R. 2009.570-3(c)(8)(i)-(ii).

fact would impair the Government's best interests; if so, and if the OCI cannot be adequately mitigated, withholding payments would not protect the Government.[9]

In contrast, federal regulations on other subjects do provide the contracting officer with the authority to withhold payment if the certification is "false." *See, e.g.*, FAR 52.222-6 and 52.222-7 (under the Davis-Bacon Act, contracting officer may withhold or suspend payments where contractor fails to pay employees minimum wage); FAR 52.222-41(k) (same provision under the Service Contract Act of 1965); FAR 52.230-6 (Administration of Cost Accounting Standards allows for withholding up to 10% of payments due when contractors fail to provide the Government with requested cost accounting information).

In contrast, neither the contracts nor regulations at issue provided the Contracting Officer with an option to withhold payment if potential or actual OCIs were discovered. OCIs could be remedied through mitigation, termination for default, breach of contract claims (for which the jury awarded $78), or through debarment from contracting on future NRC contracts. The Contracting Officer is

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[9] If an undisclosed OCI so clearly could not have been mitigated and led to fraud in the inducement -- not alleged in this case -- or made the contractor's performance valueless, the OCI could hypothetically provide a basis for FCA liability, *if* the contractor's certification of compliance objectively was a pre-condition to payment, or if the absence of any potential OCI was the "core" of the contract. In light of the jury's award of $78 for breach of contract, and the NRC's unqualified use of SAIC's work product, it is apparent that none of these circumstances were present in this case.

not provided a right to withhold payment. *See* Contract, Ex. 8, §H.5, ¶g; and regulation, 48 C.F.R. § 2009.570-10 ("Remedies"). *See also* FAR 9.504(e), to the same effect.

In short, the District Court's decision to instruct the jury that it might find FCA liability based on an implied false certification of SAIC's compliance with OCI requirements, with no objective evidence that compliance was an express precondition of payment, was an unwarranted and unwise extension of the implied certification theory, inconsistent with the precedent of this Court.

Conclusion

For the foregoing reasons, the judgment of the District Court should be reversed, and the case remanded with instructions to enter judgment for SAIC or, in the alternative, to order a new trial.

Dated: April 2, 2010

Respectfully submitted,

By: /s/ James J. Gallagher

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Certificate of Compliance
With Type-Volume Limitation

The undersigned, one of the attorneys for *Amicus Curiae,* hereby certifies pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure that the foregoing brief complies with the type-volume limitation of the Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d), because the brief contains 3,697 words, excluding the parts of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii).

Dated: April 2, 2010

/s/ James J. Gallagher
James J. Gallagher

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of April, 2010, I electronically filed the foregoing Brief for Amicus Curiae with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the Court's CM/ECF system.

Service was accomplished on the following persons on this 2nd day of April, 2010, by electronically filing the foregoing Brief for Amicus Curiae with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the Court's CM/ECF system, and via e-mail (for Jessie K. Liu):

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