



For Immediate Release

April 4, 2008

Are Regulators Converting False Claims Act Into an All-Purpose Health Law?

As the government has become more involved in the provision of health care in America, the federal False Claims Act (FCA) has taken on a very prominent role in regulating health-related business conduct. While the law had predominantly been used to ferret out fraud in health care industries' government contracting, as a new Washington Legal Foundation (WLF) WORKING PAPER reveals, prosecutors are increasingly using the FCA to impose federal health care quality standards.

The False Claims Act: A Proper Tool for Enforcing Health Care Quality Standards?, was authored *pro bono* for WLF by **Brian Stimson**, an attorney with the law firm Alston & Bird LLP.

After a brief description of the FCA's origins as a civil fraud statute aimed mostly at military procurement and its expansion through congressional amendment in 1986, Mr. Stimson examines liability theories which government enforcers are utilizing under the Act. He pays particular attention to the "implied false certification doctrine," under which "implied misrepresentations of statutory, regulatory, and contractual compliance are as actionable as express falsehoods." Mr. Stimson states that on its face, this is a significant stretch of the FCA's purposes, and, far worse for targeted businesses, "the courts maintain starkly different views on what certifications may be imputed to claimants based on the mere act of submitting a claim."

The majority of courts, Mr. Stimson writes, follow a narrower view of the implied false certification doctrine, which imposes liability only if a contractor failed to follow health quality standards that were express conditions for contractual payment. Therefore, under this approach "exposure under the implied false certification doctrine for providing substandard health care usually only arises if a provider has billed for medically unnecessary, duplicative, or experimental services."

A number of federal jurisdictions, however, have embraced a far broader approach to this liability theory, under which contractors "impliedly certif[y] compliance with all express preconditions for payment, plus all health care quality requirements for participating in the program." Mr. Stimson provides a comprehensive overview of the relevant court decisions, and relates the policy criticisms that can be made against this broad view.

The WORKING PAPER concludes with a section assessing how federal prosecutors have aggressively pushed the "condition of participation" view in its FCA and health care quality enforcement actions. Of particular focus for prosecutors have been long-term care facilities such as nursing homes, and Mr. Stimson predicts that such use of the FCA will continue this year and the remainder of the decade.

Copies of this educational paper, WLF WORKING PAPER, Number 156 (April 2008), can be obtained by forwarding a request to: Publications Department, Washington Legal Foundation, 2009 Massachusetts Avenue, NW, Washington, D.C. 20036, or calling (202) 588-0302.

Washington Legal Foundation is a national, non-profit, public interest law and policy center. By utilizing a unique approach to forward its mission – publishing timely legal studies, engaging in innovative litigation, and communicating directly to the public – WLF has become the nation’s most effective advocate of free enterprise.