

A Study on the Implied Certification Theory in the United States for anti-corruption

부패방지를 위한 미국의 암묵적 서약 이론 연구

Park, Se Hun(박세훈)*

국문초록

부패방지를 위한 부정청구법은 “사기행위를 처벌하고 억제시키기 위해 고안된 법률”이지 “겨우 태만으로 인해 제출된 명백한 실수나 착오의 청구에 대한 것이나 정부와 계약자들에게 조사에 대한 제한된 의무가 아닌 부담스러운 의무를 부과하기 위한 수단이 아니다”라고 하는 것에서도 잘 나타나 있듯이, 부정청구법상 배상청구 소송을 개진하기 위해서 원고는 (1) 피고가 정부의 대금지급이나 승인에 대한 청구를 제시하고자 하였고, (2) 그 청구가 허위였으며, (3) 피고는 그 청구가 허위라는 사실을 알고 있었다는 것을 증명해야 한다. 이때 중요성 요건과 인지 요건을 갖추는 것이 특징이다.

중요성 요건에서는 암묵적 서약은 가령 위반사실을 인지했었다면 대금을 지급하지 않았을 것이라는 것과 같이 대금지급 조건에 영향을 미쳐야만 한다. 정부가 상대방에게 대금을 지불했고, 만약 법규나 규정 위반 사실을 인지했었다면 그 대금을 지급하지 않았을 것이었고, 그 대금에 대해 제출된 청구서가 법규나 규정을 준수한다는 암묵적 서약을 포함하고 있으며 그 청구서가 부당할 것이라고 하고 있다.

인지 요건은 중요성 조건에 더하여, “고의로” 했을 경우를 조건으로 해야만 부정청구법상 배상책임을 청구할 수 있다. 인지 요건은 큰 기업들에서 흔히 발생할 수 있는 하급자에 의해 제출된 부정한 청구의 인지로부터 기업 담당자가 그들을 보호하려는 무사안일주의 행위를 잡아내기 위해 1986년 부정청구법 개정 때 추가했다. 부정청구법은 “고의”를 (1) 실제 알고 있을 것, (2) 허위의 사실을 의도적으로 무시했을 것, 혹은 (3) 허위의 사실을 신중하지 않게 무시했을 것으로 정의내리고 있다.

부패방지를 위한 부정청구방지법은 정부에 대한 사기혐의 행위를 억제하고 그에 따른 피해를 구제하기 위하여 어느 범위까지 확대 해석할 수 있는지 여부가 핵심내용이라고 하겠다. 부정청구방지법은 전통적인 적용대상인 허위 진술뿐만 아니라 허위적인 암묵적 진술에도 적용해야 할지 여부가 중요하며, 추가로 적용한다고 하더라도 법원이 실제로 말하지 않은 허위에 대한 책임으로서 3배의 손해배상 책임을 지우는 것이 타당한지 여부 등 정부재정을 악의적으로 손해를 끼친 피고의 무언의 진술에 대해 그의 책임을 물을 것인가 등 묵시적 서약 이론은 다양한 논의를 가진다. 미국의 암묵적 서약이론의 적용여부는 개별 사안에 따라 다르게 적용되고 있기에 향후 국내의 적극적인 부패방지를 위해 악의적인 청구 및 암묵적 서약 이론 등의 적용 여부에 대

* Research Fellow, Korea Legislation Research Institute/Dr. of Laws.

한 논의 등 부패방지 척결을 위한 시야를 확장하는데 그 의의가 있다고 하겠다.

주제어: 부패방지, 부정청구법, 암묵적 서약, 암묵적 서약 이론, 악의적 청구

I. Introduction

The False Claims Act (31 U.S.C. §§ 3729–733 (2000)) is an anti-fraud act. The False Claims act allows any person (hereinafter “relator”) to file suits on behalf of the government, whether or not the government intends to intervene in such suits. The suits filed by a relator pursuant to the False Claims Act are commonly called “Qui Tam” suits.¹⁾ Pursuant to the False Claims Act, a relator who successfully brings a qui tam action may receive an amount equivalent to at least 15 percent but not more than 30 percent of the proceeds of the action or settlement of the claim, in addition to an amount for reasonable expenses, attorneys’ fees and costs incurred, as described in U.S.C. § 3729(a).²⁾ Meanwhile, the False Claims Act provides that the amount of damages must be three times of actual damages and that a civil penalty of not less than \$5,550 and not more than \$11,000 must be imposed for each claim.³⁾

Typical and traditional cases relating to the False Claim Act occur mainly in connection with a contract under which a contractor supplying defense materials or a medical service provider is to provide services or goods in return for payments from the government. In most cases, a legal issue arises when a relator alleges that a contractor is suspected to have submitted a false claim or false certificate with intent to receive a payment from the government. Traditionally, it was easy to ascertain a suspected false statement alleged by a whistle blower in the meaning of the False Claims Act.

The reason is that there is no doubt that underlying statements, such as documents or details, exist. For example, the details of claims for the quantity of delivered goods, the details of certificates for qualification of companies eligible for participating in

1) “*Qui tam*” in Latin means “a person who files a lawsuit not only for himself but also on behalf of the king,” derived from the Latin words “*qui tam pro domino rege quam pro si ipso in hac parte sequitur*.”

2) 31 U.S.C. § 3730(c)(1), (d)(1), (d)(2) (2000).

3) § 3729(a) (2000); Civil Monetary Penalties Inflation Adjustment, 28 C.F.R. § 85.3(a)(9) (2008).

government programs, or details about whether medical service has been actually provided are included in such statements. Such cases often involve intense debates on legal and factual issues on whether any of the statements mentioned above is false or not or whether the case at issue is actionable under the False Claims Act.

Recently, the Implied Certification Theory has emerged as a theory that broadens the scope of the False Claims Act. These days, relators are filing lawsuits relating to the False Claims Act, based on false statements made implicitly by the defendant, rather than merely accusing the defendant of false statements actually made. According to the Implied Certification Theory, the court gives meanings of certain implied terms to the defendant's claims or certificates.⁴⁾ In addition, if such implied certification is found false while other elements of the False Claims Act are met, the defendant is held liable under the False Claims Act. This new theory of liability has developed in cases of the False Claims Act involving defense contractors, especially Medicare, health care providers, and schools, particularly for-profit schools.⁵⁾

II. Overview of Implied Certification Theory

1. Elements of Suits under the False Claims Act

Pursuant to the False Claims Act, no person is allowed to do any of the following conduct: (1) knowingly presenting, or causing to be presented, a false or fraudulent claim to the United States; (2) knowingly making, using, or causing to be made or used, a false record or statement with intent to receive payment for a false or fraudulent claim; (3) conspiring to fraudulently receive payment from the government; (4) certifying the kind or value of property to be used by the government; (5) testifying the receipt of property by a document without knowing that the information on the receipt is true; (6) knowingly buying government property from an unauthorized officer or employee of the government, or (7) knowingly making, using, or causing to

4) Explained in Appearance of Implied Certification Theory.

5) For example, see *Hendow v. Univ. of Phoenix*, 461 F.3d 1166, 1173 - 74 (9th Cir. 2006) (for-profit schools); *Mikes v. Straus*, 274 F.3d 687 (2nd Cir. 2001) (healthcare); *Coppock v. Northrop Grumman Corp.*, No. Civ.A. 3:98-CV-2143-D, 2003 WL 21730668 (Texas, North Dakota, Jul. 22, 2003) (a defense contractor leasing facilities from the Navy).

be made or used, a false record with intent to avoid or reduce an obligation to pay the price for property to the government or to deliver property to the government.⁶⁾

The most common violations of the False Claims Act are to submit false or fraudulent claims even though it is known that they are false or fraudulent.⁷⁾ Consequently, the government's finances, which are of public nature, continue to suffer losses from malicious claims. This type of violation of the False Claims Act is committed: (i) when the defendant makes a claim against the U.S. government or submits or causes to be submitted a claim or application for government approval; (ii) when the claim or application is false, and (iii) when the defendant is aware that the claim or application is false.⁸⁾ The term "claim" refers to an act of requesting or demanding payment or provision from a contractor, beneficiary, or other recipient, where the US government pays money or provides property upon a claim, under a contract or otherwise, or requesting or demanding payment or provision, where the US government reimburses money or provides property upon a claim.⁹⁾

The False Claims Act considers both "de facto false" statements and "legally false" statements as elements of falsity.¹⁰⁾ Statements in the form of "de facto false" statements are more common in cases of the False Claims Act.¹¹⁾ These are cases in which the government (or a relator) alleges that the Defendant stated that he had supplied goods or provided services that had never been supplied or provided by him or claimed the price for such goods or services not provided.¹²⁾ For example, such cases arise where a healthcare provider submits a specified form according to the Medicaid program or a program operated by a government fund for payment for medical services that neither a physician nor a licensed specialist has provided.¹³⁾ On

6) 31 U.S.C. § 3729(a) (2000)

7) It is distinguished from claims under implied certification. *Hopper v. Anton*, 91 F.3d 1261, 1265-6 (9th Cir. 1996).

8) *Mikes*, 274 F.3d at 695; *Gross v. Aids Research Alliance-Chicago*, 415 F.3d 601, 604 (7th Cir. 2005).

9) 31 U.S.C. § 3729(c)

10) *Mikes*, 274 F.3d at 696-7.

11) *Hopper*, 91 F.3d at 1266.

12) *Mikes*, 274 F.3d at 697.

13) *Woodruff v. Hawaii Pac. Health*, No. 05-00521, 2007 WL 1500275, at *1-2 (D. Haw. 2007.5.21) (involving the defendant suspected to have violated the False Claims Act by submitting a *de facto* false form to the government); *United States v. Krizek*, 7 F. Supp. 2d 56, 57 (D.D.C. 1998) (involving a relator alleging that the defendant is suspected to have filed a *de facto* false claim for the provision of psychotherapy under Medicare and Medicaid for more than 24 hours during a single day).

the contrary, a “legally false” statement under the False Claims Act refers to a false statement or testimony that an applicable statute, regulation, or terms of a contract have been complied with.¹⁴⁾ As an example of a false statement under the Act, there is a statement submitted to the U.S. Department of Housing and Urban Development that clearly testified that relevant regulations had been complied with without complying with them.¹⁵⁾

2. Historical Aspects

The main purpose of the False Claims Act is to have money acquired by fraud returned to the government.¹⁶⁾ Qui Tam lawsuits have exercised some functions of the False Claims Act to prevent fraudulent conduct against the federal government since the Civil War during which fraudulent claims against the federal government for undelivered goods overflowed.¹⁷⁾ In *United States v. McNinch*, the Supreme Court noted that “testimony before Congress painted a sordid picture of how the United States had been billed for nonexistent or worthless goods, charged exorbitant prices for goods delivered, and generally robbed in purchasing the necessities of war.”¹⁸⁾

The number of qui tam lawsuits increased and decreased, depending on the countermeasures of Congress and courts providing incentives while maintaining balance with inspections to properly detect fraud from the early stage of the Civil War and to avoid excessive accusations at the same time.¹⁹⁾ For example, in 1986, Congress amended the False Claims Act to find a middle way between appropriate incentives for whistleblowers providing truly valuable information and measures to prevent opportunistic plaintiffs who do not provide valuable information helpful in itself.²⁰⁾

14) *Mikes*, 274 F.3d at 697.

15) *United States v. Hibbs*, 568 F.2d 347 (3rd Cir. 1977); *Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899 (5th Cir. 1997) (involving the defendant who filed a false claim without complying with the provision prohibiting frauds in receiving benefits in the Medicare Act (42 U.S.C. § 1320a-7b(b)), although he testified that he had complied with such provisions).

16) *Augustine v. Century Health Servs. Inc.*, 289 F.3d 409, 413 (6th Cir. 2002) (commenting that the purpose of the False Claims Act is for recovery).

17) *Mikes*, 274 F.3d at 692.

18) 356 U.S. 595, 599 (1958).

19) For general information, see John T. Boese, Civil False Claims and *Qui Tam* Actions § 1.01[A] (Supp. 2008-2).

20) Cited from *Lamers v. Green Bay*, 168 F.3d 1013, 1016 - 17 (7th Cir. 1999) (*Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 649 (D.C. Cir. 1994)

Courts have also historically made efforts to ensure that relators' aggressive qui tam litigation conforms to the provisions and spirit of the False Claims Act Act and to prevent the Act from turning into a weapon for contesting accusations of government-related illegal conduct.²¹⁾

Ⅲ. Appearance of Implied Certification Theory

The Implied Certification Theory appeared as an attempt to significantly expand the scope of false statements under the False Claims Act. In an easy expression of the False Claims Act, this theory is often difficult to justify because the decisive prohibition requirements of the False Claims Act are circumvented by knowingly submitting false claims to the government.²²⁾ Rather, in such cases, claims filed with the government are based on the general theory that they do not express requirements in words or text or contain implied certification. In order to understand and synthesize customary laws reformed in the area of the False Claims Act, relevant cases are divided into the following three categories, which reflect the most common contexts in which the Implied Certification Theory is applicable: (i) the cases where the relator alleges that the defendant violated implied certification on continuous compliance with some of the explicit certification submitted in advance; (ii) the cases where the relator alleges that the defendant made implied certification in a claim that the defendant has complied with statutes and regulations applicable to the governmental program at issue; and (iii) the cases where the relator alleges that the defendant violated implied certification in his claim on compliance with all terms and conditions of the contract made by him as the source of the claim for proceeds. Each of such categories of cases is discussed in the following:

1. Implied certification on continuous compliance with explicit certification submitted in advance:

Among others, courts have adopted the Implied Certification Theory where the party

21) *Hopper v. Anton*, 91 F.3d 1261, 1265 (9th Cir. 1996).

22) *Boese*, *supra* note 19, § 2.02[B].

who explicitly certified that he had complied with certain payment conditions whenever a subsequent claim was filed.²³⁾ Such cases typically arise when a company is required to submit a certificate proving certain facts to receive a federal fund after participating in a federal program. For example, the Implied Certification Theory has been applied in the area of Medicare and pursuant to the Small Business Administration Act. There are three exemplary cases in which the application of the Implied Certification Theory is analyzed in such context: *Ab-Tech Construction, Inc. v. United States*;²⁴⁾ *Augustine v. Century Health Services Inc.*; and²⁵⁾ *Main v. Oakland City University*.²⁶⁾

In *Ab-Tech Construction, Inc. v. United States*,²⁷⁾ a construction company participated in a program implemented by the Small Business Administration for promoting businesses owned by people from minor ethnic groups. In order to participate in the federal program, Ab-Tech was required to submit a form (“cooperation form”) by which it must explicitly certify that it met many conditions for participation, including requirements from the program for continuously maintaining its qualification for participation.²⁸⁾ Ab-Tech filed claims for payments with the Small Business Administration later on.²⁹⁾ Learning that Ab-Tech was not allowed to participate in the program because it was related to a company owned by a person from a non-minor ethnic group, the Small and Business Administration filed a lawsuit under the False Claims Act to recover the payments already made to the company

23) See *In re Pharm. Indus.* (on average wholesale price), 491 F. Supp. 2d 12, 18 (D. Mass. 2007) (adopting the stance that “the government can define violations of the Anti-Rebate Act on claims filed under the Medicare program as subsequent claims under the False Claims Act, as healthcare providers must affirmatively certify that they have complied with the Anti-Kickback Statute.”); *Smith v. Yale Univ.*, 415 F. Supp. 2d 58, 91 (D. Conn. 2006) (“According to the regulations on Medicare and the CMS (former HCFA)-1500 and HCFA-1450 forms, certification is required as a prerequisite for reimbursement from the government. Healthcare providers are required to certify that they have complied with the conditions specified in such forms as the conditions for reimbursement and the conditions for the government to pay”); *Gublo v. NovaCare, Inc.*, 62 F. Supp. 2d 347, 355 (D. Mass. 1999) (including the explicit certification on an annual report); *Stebner v. Stewart & Stevenson Servs., Inc.*, 305 F. Supp. 2d 694, 698-9 (S.D. Tex. 2004) (stating that the failure of the contractor supplying a truck to the government to mention that the truck did not meet the specifications for corrosion in claiming the completed truck and other performance payments does not constitute the filing of a false claim)

24) 31 Fed. Cl. 429 (1994).

25) 289 F.3d 409 (6th Cir. 2002).

26) 425 F.3d 914 (7th Cir. 2005).

27) 31 Fed. Cl. at 431-2.

28) *Id.* at 432.

29) *Id.* at 433.

during the period in which the company failed to meet the condition.³⁰⁾ There was no explicit false statement in the claims submitted by Ab-Tech to the Small Business Administration, but the court held that each claim filed by the company included implied certification that the company would continue to comply with the explicit certification (the promise to continue to comply with the requirements specified by the Small Business Administration concerning minority-owned companies) previously submitted by the company.³¹⁾ In the trial, the court ruled that Ab-Tech's claims for payment were wrong because they failed to comply with the conditions set out in such implied certification.³²⁾

In the recent case of *Maine v. Oakland City University*,³³⁾ the Seventh Circuit Court heard a similar case, although it did not directly mention the words "Implied Certification Theory". In *Maine*, a relator accused a university of its fraudulent claims at several levels under the False Claims Act.³⁴⁾ First, in order to obtain a certificate of eligibility for receiving government subsidies, the university explicitly certified that it would comply with the provisions of 20 U.S.C. § 1094 and 34 C.F.R. § 668.14(b)(22)(i) on incentives as "the condition of eligibility granted to educational institutions that certify to refrain from paying contingent fees to persons recruiting students for enrolling."³⁵⁾ Secondly, the university and enrolled students filed applications for subsidies and loans to which the False Claims Act applies but the university did not certify again that it did not pay contingent fees.³⁶⁾ The Seventh Circuit Court held that the phase-two charge on disbursements depended on the phase-one certification of eligibility, according to Judge Easterbrook's opinion.³⁷⁾ The court held that if a contract or government-backed benefit was originally obtained through false statement or fraudulent conduct, it must be held liable for each claim filed with the government under one contract.³⁸⁾

30) *Id.* at 432-3.

31) *Id.* at 434.

32) *Id.*

33) 426 F.3d 914, 916 (7th Cir. 2005).

34) *Id.*

35) *Id.*

36) *Id.*

37) *Id.* Same at 916-17; see also *Hendow v. Univ. of Phoenix*, 461 F.3d 1166, 1173-74 (9th Cir. 2006) (discussing the case in detail).

38) *Main*, 426 F.3d at 916-7; see also *Hendow*, 461 F.3d at 1173-4 ("The liability (under the False Claims Act) is the same, whether under the Implied Certification Theory or under the False Promise Fraud Theory.")

This case, which first applied the Implied Certification Theory, seems less controversial in that it holds the defendant liable for explicit certification made actually by the defendant to qualify for federal funds. The law only implies that the defendant must repeat this certification each time it submits a claim as a participant in the federal program. In this type of situation, once a party has explicitly certified to comply with certain funding requirements, it is reasonable for the government to consider that the party will continue to comply with those requirements. Applying the Implied Certification Theory in such context does not constitute inappropriate expansion of the scope of application of the False Claims Act. Rather, it is consistent with the purpose of the Act to compensate the government for damages caused by fraud against the government.

2. Submission of bills with implied certification to comply with relevant statutes, regulations and government policies

In the application of the Implied Certification Theory, there are cases where a defendant participating in a federal program is suspected of violating laws, regulations, or government policies applicable to participation in the same program. The government and the relator come up with the Implied Certification Theory if the defendant fails to make a statement on the bill that explicitly certify to comply with the laws, regulations or policies he is accused of violating. Looking into the cases discussed below, we can find that the cases rely on the Implicit Certification Theory to argue that the submission of the bill itself is an implied statement of the defendant's compliance with the laws and regulations applicable to federal programs. This type of implied certification is often asserted in cases related to Medicare, as relators are based on lawsuits related to the False Claims Act on charges of violating any of the vast number of complex rules and regulations related to the False Claims Act.³⁹⁾

39) See *Mikes v. Straus*, 274 F.3d 687, 701 (2nd Cir. 2001) (holding in a case of an alleged violation of 42 U.S.C. §§ 1320c-5(a) and 1395y(a)(1)(A) (Medicare Act) that “according to [42 U.S.C.] § 1395y(a)(1)(A), the defendant impliedly certified that he would comply with the provisions when he submitted the claim because no payment was explicitly permitted to a Medicare service provider violating the same provisions”); *Lee v. Fairview Health Sys.*, No. Civ.02-270 RHK/SRN, 2004 WL 1638252, at *3 (D. Minn. 2004. 7.22) (a case where a Medicare provider was charged for a violation of implied certification to comply with 42 C.F.R. § 416.60(c)(1)(i) that requires physiotherapists to perform medical treatment within the scope of their licenses); *In re Cardiac*

In such circumstances, some relators came up particularly with the Implied Certification Theory aggressively. For example, some of them accused defendants of a violation of a statute or regulation irrelevant to the terms of payment of the government program.⁴⁰⁾ Certain relators tried to expand the scope of application of the Implied Certification Theory not only to relevant statutes or regulations but to non-binding guidelines, manuals and policies.⁴¹⁾

Devices *Qui Tam* litigation, 221 F.R.D. 318, 346 (D. Conn. 2004) (“In filing claims, the defendants submitted a written implied certification to claim only the costs for valid and necessary medical services in compliance with the Medicare Act [42U.S.C.] 1395y(a)(1)(A), and according to the Implied Certification Theory, a bill including a claim for costs not valid nor necessary is a legally false bill within the scope of the claim.”); *Pogue v. Diabetes Treatment Ctrs. of Am., Inc.*, 238 F. Supp. 2d 258, 266 (D.D.C. 2002) (discussing certification in Medicare and holding that the False Claims Act applies to a breach of the duty to comply with laws); *Sharp v. Consol. Med. Transp., Inc.*, No. 96-C-6502, 2001 WL 1035720, at *2 (N.D. Ill. Sept. 4, 2001) (a case of a charged violation of 42 U.S.C. § 1320a-7(b)(2) prohibiting the payment of rebates for referral of Medicare patients).

- 40) See *Willard v. Humana Health Plan of Tex., Inc.*, 336 F.3d 375, 382 (5th Cir. 2003) (holding that compliance with the provisions that the defendant is suspected of violating is not a condition for payment under the provisions that “the government is not authorized to suspend the payment for which an application has been already submitted but can only suspend future submission of bills, suspend future payments, or impose penalties” if the defendant fails to fulfill the conditions for the payment of proceeds.); *Hockett v. Columbia/HCA Healthcare Corp.*, 498 F. Supp. 2d 25, 68 - 1 (D.D.C. 2007) (rendering a summary judgment as the relator fails to identify the regulation or law specifically providing the payment condition that the defendant is entitled to payment when he complies with the law, regulation or requirement that the defendant violated); *Gay v. Lincoln Technical Inst., Inc.*, No. Civ.A. 301CV505K, 2003 WL 22474586, at *4 (N.D. Tex. 2003.9.3.) (the relator’s charge of implied and explicit false certification was dismissed as the relator did not argue that the false statement on the compliance with regulations or statutes as the government’s payment condition was knowingly prepared by the defendant); *Graves v. ITT Educ. Servs., Inc.*, 284 F. Supp. 2d 487, 501 (S.D. Tex. 2003) (holding that the relator is unable to identify the measures to be taken pursuant to the False Claims Act “because there is no regulation that explicitly provides for the condition that the fund shall be paid on the condition of certification of compliance,” although the relevant statute or regulation must explicitly provide that the certification of compliance is the payment condition.); *Swan v. Covenant Care, Inc.*, 279 F. Supp. 2d 1212, 1221 (E.D. Cal. 2002) (granting the defendant’s motion for summary judgment as the plaintiff failed to produce evidence on the plaintiff’s charge that the defendant certified the compliance with the Medicare Act as a condition for the receipt of a federal fund); *Swafford v. Borgess Med. Ctr.*, 98 F. Supp. 2d 822, 831 (W.D. Mich. 2000), accepting certification, 24 Fed. Appx. 491 (6th Cir. 2001), rejecting the evidence on certification, 535 U.S. 1096 (2002) (cited *Luckey v. Baxter Health Corp.*, 183 F.3d 730 (7th Cir. 1999)) (“*Luckey* has been interpreted to stand for the proposition that an implied false certification theory can succeed only where the defendant’s compliance with statutory or regulatory authority is so essential for reimbursement that, if the government had been aware of the defendant’s non-compliance, it would have refused payment.”);

Aggressive application of such Implied Certification Theory can be found in *Hopper v. Anton*.⁴²⁾ In this judgment, the court suppressed relators' attempt to use the Implied Certification Theory in such a way. In the proceedings, the court established two important criteria for relators' determination before applying the Implied Certification Theory. That is, (i) the relevant statute or regulation must provide clear conditions on the payment of proceeds and (ii) the statute or regulation must have a binding power, not merely an unofficial principle, guideline, or manual of the government.

A. *Hopper v. Mikes*

In the *Hopper* case, the relator who was a special education teacher filed a False Claims Act claim against the Los Angeles School District.⁴³⁾ Contending that the School District made false statements in certain forms ("J-50" and "J-380" forms) annually submitted to the California Department of Education, the relator argued the State Department of Education permitted the School District to illegally receive federal funds under the Individuals with Disabilities Education Act (IDEA) for special education programs.⁴⁴⁾ Moreover, the relator contended that the School District did not observe federal and state regulations, including § 56341(b)(2) of the Education Act of California and 34 C.F.R. § 300.344(a) providing the methods of evaluation of special education children, at the time when such forms were submitted.⁴⁵⁾ Although the relator did not mention the Implied Certification Theory, she argued that the J-50 and J-380 forms contained implied false certification to comply with all federal and state regulations on special education programs. The District Court rendered a summary judgment in favor of the School District, determining that the School District did not

41) *Mikes*, 274 F.3d at 701 - 2 (rejecting the argument of implied certification underlying the charged violation of the guidelines for Medicare); *Yannacopoulos v. Gen. Dynamics*, No. 03 C 3012, 2007 WL 495257, at *3- (N.D. Ill. 2007.2.13.) (rejecting the argument of implied certification underlying the charged violation of guidelines of the Defense Security Assistance Agency (DSAA); *Swafford*, 98 F. Supp. 2d at 828 - 9, 833 (granting the defendant's motion for summary judgment for the litigation on the False Claims Act and rejecting the plaintiff's argument that the Medicare Carriers Manual is the appropriate guidelines for determining that a Medicare claim presented by a physician for reporting the results of intravenous ultrasound is false or fraudulent claim in violation of the False Claims Act.).

42) 91 F.3d 1261 (9th Cir. 1996).

43) 91 F.3d at 1263

44) *Id.* at 1265.

45) *Id.* at 1264.

make a false statement that could give rise to the False Claims Act litigation in the J-50 and J-350 forms submitted to the government, although it did not comply with some provisions.⁴⁶⁾ The District Court refused to accept the relator's lengthy theory of the scope of implied statements expressed in the School District's forms, noting that the relator deeply misunderstood the scope of the False Claims Act. As such, it is necessary to clearly understand the scope and nature of the Implied Certification Theory.

It is not possible to automatically file a lawsuit under the False Claims Act on the ground that a person receives a fund, although the person breaches a contract, violates a regulation or law, or is not eligible for payment. The scope of application of the False Claims Act is much narrower than this. Litigation requires a false claim. Therefore, an intentional, false application for payment must exist. This does not mean that remedies for violations can be provided by other forms of regulations, contracts, or conditions stipulated for receipt of payments or federal laws and regulations but only means that no remedy for such conduct can be provided by the False Claims Act or provisions on citizens' litigation in the same Act.⁴⁷⁾

B. Violation of laws and regulations clearly providing conditions of payment

As seen in the Hopper case and the Mikes case, the relator should not rely on the Implied Certification Theory to hold a person liable under the False Claims Act for charged violations of all laws and regulations. No claim for payment can be said to be false simply because the provided service does not comply with any law, regulation, or contract terms nearly irrelevant to the service.⁴⁸⁾ The barrier to litigation on implied certification under the False Claims Act is much higher than that. As accurately emphasized in the Mikes case, the main purpose of the False Claims Act is to recover government funds received by fraud.⁴⁹⁾ Holding a person liable for alleged non-compliance, when such non-compliance does not affect the government's decision

46) *Id.* at 1264-5.

47) *Id.* at 1265.

48) Same in 697.

49) *Id.*

to pay, it is inconsistent with the purpose of the law and thus inappropriately expands the scope of the Act.⁵⁰⁾ Therefore, a relator must identify the violation of the law or regulation clearly providing for payment conditions.⁵¹⁾ Actually in a lawsuit under the False Claims Act, an important element that presupposes a contention that a person made false certification on compliance with requirements under a law or regulation is that the certification of compliance should be one obvious condition for government payment.⁵²⁾

50) *Id.*

51) Same in 700; *Sikkenga v. Regence Bluecross Blueshield of Utah*, No. 2:99-CV-00086, 2007 WL 2713913, at *2. See also *D. Utah*, Sep. 12, 2007 (citing the *Mikes* case and stating that “the plaintiff must specify the law, regulation or the contract condition allegedly violated by the defendant, although the defendant must comply with it as the precondition for payment (emphasis added)”; *Klaczak v. Consol. Med. Transp.*, 458 F. Supp. 2d 622, 663 (N.D. Ill. 2006) (the plaintiffs must argue (or ultimately prove) that the government should have refused to pay the claim, if it knew the rebate arrangement, and that the defendants knew the fact when they committed the fraudulent conduct.); *Klaczak v. Consol. Med. Transp.*, 458 F. Supp. 2d 622, 663 (N.D. Ill. 2006) (the plaintiffs must argue (or ultimately prove) that the government should have refused to pay the claim, if it knew the rebate arrangement, and that the defendants knew the fact when they committed the fraudulent conduct.); *Cooper v. Gentiva Health Servs., Inc.*, No. 01-508, 2003 WL 22495607, at *3 (W.D. Pa. Nov. 4, 2003) (holding that the limitation of the Implied Certification Theory in the *Mikes* case is in “the coherency and accuracy of the logic of the statement of law.”); *Graves v. ITT Educ. Servs., Inc.*, 284 F. Supp. 2d 487, 501 (S.D. Tex. 2003) (citing the *Mikes* case, stating that “the law or regulation at issue must clearly provide that the certification of compliance is the condition for payment,” and holding that the relators failed to “present legal measures under the False Claims Act in that ”there is no clear provision on the condition that the fund will be paid (only when the certification of compliance is complied with (emphasis added); *Watson v. Conn. Gen. Life Ins. Co.*, No. Civ.A. 98-6698, 2003 WL 303142, at *10 (E.D. Pa., 2003.2.11.) (citing the *Mikes* case and stating that the liability under the False Claims Act for false or fraudulent certification of compliance, whether explicitly expressed or implied, exists only when it affects the government’s decision to pay.); *Pogue v. Diabetes Treatment Ctrs. of Am., Inc.*, 238 F. Supp. 2d 258, 264 (D.D.C. 2002) (“the Implied Certification Theory applies where a claim for payment contains implied certification to comply with laws or regulations and the claim is false, if the government would not pay if it knew a violation of laws or regulations at the time of payment.”);

52) *Gross v. AIDS Research Alliance-Chicago*, 415 F.3d 601, 605 (7th Cir. 2005); see also *Bowan v. Educ. Am., Inc.*, 116 Fed. Appx. 531 (5th Cir. 2004) (per curiam) (if it is impossible to determine false certification of compliance with applicable regulations and statutes on participation in the federal government’s student financial aid programs as false certification under the payment condition particularly provided by a certain regulation, such certification cannot be asserted as the ground for the liability under the False Claims Act.); *Schmidt v. Zimmer, Inc.*, 386 F.3d 235, 245 (3rd Cir. 2004) (holding that the relator’s litigation under the False Claims Act, arguing that “the certification of compliance with healthcare laws is a precondition for the payment of Medicate benefits and the written false certification of compliance is inevitable consequence of

In analyzing whether payment can be made only when clearly determined by the laws or regulations in question, the court distinguishes between the payment conditions and the simple participation conditions in the federal program.⁵³⁾ This principle follows the fundamental logic of the False Claims Act that there was no fraud if the government paid the contractor despite the alleged violation of the participation conditions.⁵⁴⁾ The court rejected the argument that any violation of the condition of participation results in responsibility under the False Claims Act, and stated that such a conclusion was to “expand the scope of the False Claims Act to an unacceptable extent.” The court emphasized that it could not find a precedent to the effect that a violation of the condition of participation alone was sufficient to file a charge under the False Claims Act based on false certification on Medicare or Medicaid claims.⁵⁵⁾

C. Existence of Statute or Regulation

The second requirement for proper application of the Implied Certification Theory is for the relator to enunciate a violation of the applicable law or regulation in which the

(the defendant’s) marketing system”, is legitimate.); *Costner v. United States*, 317 F.3d 883, 887 (8th Cir. 2003)(“the plaintiff failed to present evidence even for the information that the defendant is suspected to have failed to disclose is relevant to the decision of the Environmental Protection Agency (EPA) to pay.”); *Gay v. Lincoln Technical Inst., Inc.*, No. Civ. A. 301CV505K, 2003 WL 22474586, at *4 (N.D. Tex., 2003.9.3.) (holding that the court does not accept the relator’s contention of implied and clear false certification, because the relator did not argue that the defendant knowingly made false certification of compliance with regulations or statutes as one of the government’s payment conditions.); *Swan v. Covenant Care, Inc.*, 279 F. Supp. 2d 1212, 1221 (E.D. Cal. 2002) (granting the defendant’s motion for summary judgment as the relator failed to present evidence providing that the defendant made certification to comply with applicable Medicare regulations as a precondition for receipt of federal funds.); *United States v. Estate of Rogers*, No. 1:97CV461, 2001 WL 818160, at *6 (E.D. Tenn., 2001.6.28.) (“no person can be held liable under the False Claims Act simply on the ground that the person did not comply with a statute or regulation. the liability under the False Claims Act for false certification is a precondition for benefits from the compliance with statutes or regulations, and the defendant may be held liable only when he affirmatively certified that he would comply with them.”)

53) Examples: See also *Woodruff v. Haw. Pac. Health*, No. 05-00521 JMS/LEK, 2007 WL 1500275, at *7- (D. Haw, 2007.5.21); *Augustine v. Century Health Servs., Inc.*, 289 F.3d 409, 414-5 (6th Cir. 2002) (holding that a claimant for payment becomes liable when he violates the condition of participation after making explicit certification of compliance, including implied certification of continuous compliance with the condition of participation).

54) See *Augustine*, 289 F.3d at 413.

55) *Id.*

terms of payment are clearly defined.⁵⁶⁾ Contending that the accused violated guidelines, a manual, or any other non-binding publication of the government is not sufficient to give rise to the application of the Implied Certification Theory.⁵⁷⁾ Guidelines too are not published by any regulatory body of an agency nor subject to strict public review. Therefore, they can be easily changed, and so companies can hardly follow up on such changes. To simply hold the defendant liable for violating guidelines that he may unknowingly have violated would unacceptably broaden the scope of law and would not meet the intended requirements of the False Claims Act.

56) Examples: *Mikes v. 274 F.3d 687, 700* (2nd Cir. 2001)(mentioning the requirement of the “underlying statute or regulation requiring business operators to comply in order to receive proceeds.”) (emphasis added); *Herndon v. Sci. Applications Int’l Corp.*, No. 05CV2269–BEN (RBB), 2007 WL 2019653, at *5 (S.D. Cal. July 10, 2007) (rejecting the relator’s argument under the False Claims Act, reasoning that the relator failed to identify the law or regulation that provided for the condition that the defendant would be eligible for payment from the government as the law or regulation that the defendant was charged for violating); *Yannacopoulos v. Gen. Dynamics*, 2007 WL 495257, at *3 (N.D. Ill. 2007.2.13.) (stating that “in order to win with this (implied certification) theory, the plaintiff must prove that the compliance with relevant statutes and regulations is the condition for receipt of payments”) (emphasis added); *Erickson v. Uintah Special Servs. Dist.*, 395 F. Supp. 2d 1088, 1097 (D. Utah 2005) (holding that a local quasi-public corporation did not present a “false claim” in order to receive Mineral Lease Monies, reasoning that the relator did not specify the statute, rule, or regulation requiring the defendant to submit a bill, request, demand, or report in order receive the fund.); *Cooper v. Gentiva Health Servs., Inc.*, No. 01–508, 2003 WL 22495607, at *2 (W.D. Pa. 2003.11.4.) (granting the defendant’s motion for summary judgment because the plaintiff failed to prove the “condition requiring compliance with a statute or regulation in order to receive payments from the government.”); *Bailey v. Ector County Hosp.*, 386 F. Supp. 2d 759, 765 (W.D. Tex. 2004) (granting the defendant’s motion for summary judgment because the relator failed to prove that the defendant “knowingly made false certification of compliance with statutes and regulation.”) (emphasis added); *King v. F.E. Moran, Inc.*, No. 00–C–3877, 2002 WL 2003219, at *11 (N.D. Ill. 2002.8.22.) (stating that the relator must prove that “compliance with relevant statutes and regulations is the condition for receipt of payments.”) (emphasis added); *Luckey v. Baxter Healthcare Corp.*, 2 F. Supp. 2d 1034, 1045 (N.D. Ill. 1998) (mentioning that “the defendant’s compliance with statutes and regulations is an important condition for payments from the government.”) (emphasis added);

57) See *Mikes*, 274 F.3d at 701–2 (rejecting the argument on implied certification based on a charged violation of part of guidelines for Medicare); *Yannacopoulos*, 2007 WL 495257, at *3 (rejecting the argument on implied certification premised on a charged violation of guidelines of the Defense Security Assistance Agency); *Swafford v. Borgess Med. Ctr.*, 98 F. Supp. 2d 822, 827–8 (W.D. Mich. 2000) (granting the defendant’s motion for summary judgment for the litigation on the False Claims Act and rejecting the plaintiff’s argument that the Medicare Carriers Manual published by the Health Care Financing Administration (HCFA) for Medicare carriers is proper guidelines for determining whether Medicare claims presented by physicians for reporting the results of intravenous ultrasound are false or fraudulent claim in violation of the False Claims Act.).

This second requirement can be seen in *Yannacopoulos v. General Dynamics*,⁵⁸⁾ in which the relator attempted to hold a contractor for the Department of Defense liable by applying the Implied Certification Theory to a charged violation of guidelines of the Defense Security Assistance Agency (DSAA) which was obviously not part of the contract (or not the contractor's bill or explicit certification). The court ruled that DSAA's guidelines were neither a statute nor a regulation with binding power because the guidelines were not published under the regulatory authority of the agency nor are subject to legislative notices or the Administrative Procedure Act. The court explained that "(the DSAA's guidelines) have no legal effect, and thus no allegation of a violation of the False Claims Act can be supported only by testimony that General Dynamics may not have followed in detail certain guidelines not stated in the certification."⁵⁹⁾ There is no precedent on the False Claims Act that held a defendant liable according to the Implied Certification Theory based on a manual of the government or guidelines of an agency, which are not legally effective, or any other non-binding government publication. Instead, the court considered such non-binding manual or guidelines only as necessary materials in determining whether the defendant violated an underlying statute or regulation.⁶⁰⁾ In such cases that frequently arise in connection with Medicare, courts review guidelines or government manuals, but it is difficult for them to always review all statutes or regulations that give rise to the application of the Implied Certification Theory. Therefore, it is impossible to apply the Implied Certification Theory, unless there is a binding law or regulation.⁶¹⁾

3. Compliance with terms of contract

There are cases where the defendant is charged for the submission of a false claim

58) No. 03 C 3012, 2007 WL 495257, at *1 (N.D. Ill, 2007.2.13).

59) *Id.*

60) See *In re Cardiac Devices Qui Tam* Litigation, 221 F.R.D. 318, 323 (D. Conn. 2004).

61) Although it is a comic perspective, you can see the difference between guidelines and binding laws in Hollywood's movie "Pirates of the Caribbean I". When Elizabeth (Keira Knightley) said she should return to the beach and be released under the pirates' code, Barbosa (Geoffrey Rush as a pirate) said, "First, it was not part of our negotiations that you should return to the beach, and there is nothing I can do because it has not been agreed upon. Secondly, You should be a pirate to apply the pirates' code to you, but you are not. And thirdly, the pirates' code is not a rule in fact but is close to namely guidelines." *Pirates of the Caribbean: The Curse of the Black Pearl* (Disney Studio, 2003).

for payment in violation of the terms of a contract with the government according to the Implied Certification Theory. In such cases, relators argue that compliance with all terms stipulated in the underlying contract with the government is impliedly certified in the claims they argue as false.⁶²⁾ Courts have emphasized that implied certification cannot be invoked for every violation of a contract in relation to the cases discussed above which arise in connection with laws and regulations.⁶³⁾ Rather, a claim is but implied certification on explicit contract terms for payment.⁶⁴⁾ Therefore, if all other elements are met, the violated contract terms for payment must be clearly identified in order to file a lawsuit on a violation of the contract under the False Claims Act.⁶⁵⁾ The cases in which such requirement was properly applied are *Coppock v. Northrup Grumman Corp.*⁶⁶⁾ and *Marcy v. Rowan Cos.*⁶⁷⁾

In the *Coppock* case, the defendant, Northrop Grumman Corp.(Grumman), leased the Naval Weapons Industrial Reserve Plant from the Navy.⁶⁸⁾ *Coppock* argued that Northrop made a false statement in a report on the release of hazardous materials, which Northrop is required to submit annually to the Environmental Protection Agency (EPA) pursuant to federal environmental laws in order to operate the plant.⁶⁹⁾ *Coppock* also argued that Northrop made implied false certification on the payment of rents for the plant.⁷⁰⁾ Particularly, *Coppock* argued that Northrop knew that it violated environmental laws when it paid rents and “did not perform a considerable portion of the duty of care under the contract.”⁷¹⁾ *Copock* argued that complying with various environmental laws was a condition for payment, reasoning that “the Navy would not have allowed Northrop to continue using the facility if it had known that Northrop

62) *Shaw v. AAA Eng'g & Drafting, Inc.*, 213 F.3d 519, 531 - 3 (10th Cir. 2000) (holding that the defendant violated implied certification by submitting a claim for the full amount of the price under the contract, knowing that it failed to comply with mandatory requirements of the contract at the time of submitting the claim.); *Bryant v. Williams Bldg. Corp.* v. 158 F. Supp. 2d 1001, 1010 (D.S.D. 2001) (holding that a claim for payment is implied certification on continuous compliance with all essential terms);

63) *Hopper v. Anton*, 91 F.3d 1261, 1265 (9th Cir. 1996)

64) *Bryant*, 158 F. Supp. 2d at 1010; see *Shaw*, 213 F.3d at 531 - 3

65) *Coppock v. Northrup Grumman Corp.*, No. Civ.A. 3:98-CV-2143-D, 2003 WL 21730668, at *11 - 2 (N.D. Tex. Jul. 22, 2003).

66) *Id.*

67) No. 03-3395, 2006 WL 2414349, at *1 (E.D. La. 2006.8.17).

68) *Coppock*, 2003 WL 21730668, at *1-.

69) *Id.* at *2.

70) *Id.*

71) *Id.*

violated the terms of the lease.”⁷²⁾ Coppock argued that the contract explicitly required to “comply with environmental laws and regulations and with environmental maintenance requirements” and that moreover such compliance was the precondition for the Navy to continue leasing the plant.⁷³⁾ However, the court ruled that no lawsuit under the False Claims Act may be filed for an alleged breach of a contract.⁷⁴⁾ The court said, “even if a lawsuit can be filed in any other context, it cannot be considered that false claims have been made against the government with regard to all violations of laws or contracts.”⁷⁵⁾ The court finally dismissed this case, because Coppock did not contend that “compliance with these contract terms was the real prerequisite for receipt of rents” and the plaintiff also did not contend that “failure to comply with the contract terms would inevitably result in termination of the lease.”⁷⁶⁾ The court concluded that “even if Coppock sufficiently claimed that Northrop violated the lease in question, he was unlikely to win a lawsuit on the ground of the violation itself under the Unfair Claim Prevention Act.”⁷⁷⁾

Marcy filed a False Claims Act suit against a company operating an offshore oil rig in the Gulf of Mexico. The relator contended that the company impliedly certified compliance with environment-related statutes and regulations whenever the company paid a rent.⁷⁸⁾ The relator argued that the company violated such implied certification by participating in illegal dumping of oil, waste oil, waste, other hazardous wastes and solid waste into the Gulf of Mexico at nighttime.⁷⁹⁾ The District Court dismissed the False Claims Act suit filed by Marcy, reasoning that “Marcy did not argue that ‘compliance with the terms of the lease, which provided for compliance with

72) *Id.*

73) *Id.* at *12.

74) *Id.*

75) *Id.* at *11.

76) *Id.* at *12.

77) See also *Luckey v. Baxter Healthcare Corp.*, 2 F. Supp. 2d 1034, 1045 (N.D. Ill. 1998) (holding that the logic of implied certification is not applicable because of the lack of a “regulation, statute, or contract term” requiring Baxter to comply with the procedure for the blood test in question.)

78) Same in *1. In particular, the relator contended that the defendant made implied certification, whenever it paid a rent, on compliance with: the Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. §§ 1251 - 387; the Act to Prevent Pollution from Ships (APPS), 33 U.S.C. §§ 1901 - 915 (2000 & Supp. V 2005); the Oil Pollution Act of 1990 (OPA), 33 U.S.C.A. § 2701 et seq.; the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. §§ 1331 - 356; and 33 C.F.R. pt. 151.25. Marcy, 2006 WL 2414349, at *1.

79) Marcy, 2006 WL 2414349, at *1.

environmental laws and regulations,’ was the real prerequisite for the defendant to continue to use the leased facility.”⁸⁰⁾ The Court emphasized that “Marcy did not argue that ‘the lease was terminated inevitably if the defendant complied with laws and regulations or the contract.”⁸¹⁾ Rather, the court considered that “according to Marcy’s argument, terminating the lease on the ground of a violation of terms is discretionary.”⁸²⁾ Therefore, Marcy’s failure to prove that the government had conditioned that the defendant could receive payment only if the defendant proved that it had complied with the terms was fatal to Marcy’s False Claims Act suit.

Coppock v. Marcy shows who properly the Implied Certification Theory should apply in the aspect of contract. The purpose of the False Claims Act is not to consider all breaches of a contract as causes of action but to provide remedies for false claims against the government. This does not mean that other breaches of a contract cannot be subject to a lawsuit but means that such breaches are not subject to lawsuits under the False Claims Act.⁸³⁾

IV. Direction of Recent Amendment of the False Claims Act

On May 20, 2009, Congress amended the False Claims Act by enacting the Fraud Enforcement and Recovery Act (FERA).⁸⁴⁾ The amendment expands legal liability under the False Claims Act and makes investigations of conduct and recovery easier. Judicial restrictions are removed so that the use of the False Claims Act can function appropriately against injustice, rather than as an excessive exercise to punish any nonperformance in government contracts. The result is that legal liability of companies and individuals dealing with the government will expand exponentially.⁸⁵⁾ In particular, the amendment is discussed with respect to the argument of implied certification.

80) *Id.* at *11 (the original revised) (cited from Coppock v. Northrop Grumman Corp., No. Civ.A. 3:98-CV-2143-D, 2003 WL 21730668, *Id.* at *12 (N.D. Tex. 2003.7.22)

81) *Id.* (the original revised) (cited from Coppock , 2003 WL 21730668, *12).

82) *Id.* at *12.

83) Hopper v. Anton, 91 F.3d 1261, 1265 (9th Cir. 1996).

84) Pub.L. No. 111-21, 123 Stat. 1617 (2009).

85) See e.g. Joseph De Simone, Marcia G. Madsen, & John J. Tharp, Federal Program Participants: Beware the Amended False Claims Act, N.Y. L.J., Aug. 17, 2009.

1. Principle of materiality

In particular, what is relevant to the argument of implied certification is the addition of the “materiality” requirement promulgated by the 2009 Amendment. In a claim for compensation under the False Claims Act based on the Implied Certification Theory, analysis is focused on whether the defendant intentionally made, used, or intended to make or use a fraudulent statement with intent to present a fraudulent or unjust claim for payment or approval from the government,⁸⁶⁾ the Amendment imposes legal liability to any opposite party who intentionally made, used, or intended to make or use a false statement essential for a fraudulent or unjust claim.⁸⁷⁾ In fact, this is not the creation of a new element to a claim for compensation under the False Claims Act. Rather, it is the codification of the “materiality” requirement judicially created by courts as a widely applicable requirement.⁸⁸⁾ The 1st, 4th, 5th, 6th, 8th, and 9th Circuit Courts consider that the False Claims Act include the “materiality” requirement.

Moreover, the Act solved the problem of courts’ division in the application of the criterion of materiality by adopting the approach of a “natural tendency to influence”. By defining “materiality” under the statute, Congress supported the weaker and very subjective criterion of “potentiality to influence on the decision to pay”, while refusing to interpret the more objective “terms and conditions of payment” and “documentary prerequisites specified for payment”. Accordingly, it will be analyzed whether an allegedly fraudulent or unjust statement, which is essential for the government’s decision to pay, has a natural tendency to influence or to be capable of influencing the acquisition of money or property or payment.⁸⁹⁾

Adopting such a subjective criterion is a critical risk to businesses dealing with the government. Literally almost all breaches of a contract can have the potentiality to influence the government’s decision to pay. This will bring uncertainty to the companies dealing with the government and cause individual litigants to file claims for compensation for minor contractual or regulatory violations under the False Claims Act. In doing so, the line between a breach of contract and a claim of fraud will be further shaken. For example, if defense companies that supply aircraft parts fail to

86) 31 U.S.C. § 3729(a)(2)

87) FERA § 4(a)(1)(B); 31 U.S.C. § 3729(a) (1)(B).

88) See, e.g., *Bourseau*, 531 F.3d at 1170–71.

89) FERA § 4(a)(4); 31 U.S.C. § 3729(b)(4).

comply with environmental regulations that are not related to the supply of aircraft parts, it is a question of whether they will be vulnerable to a treble compensation system and the damage compensation system specified in the Act. The answer to the question will be given by the jury subjectively in many cases.

The actual impact of the formal adoption of the “potentiality to influence” criterion is not yet known. Although §3729(a)(1)(B) pending on June 7, 2008 is to be applied retroactively to all “claims for compensation”, most courts considering the retroactive provisions concluded that the provision are only retroactively applicable to the defendant’s claims for payment, while they will not apply to cases pending under the False Claims Act because the “claims for compensation” under the False Claims Act (FERA 4(f)(1)) are related to claims for payment.⁹⁰⁾ However, one court held that all the retroactive provisions contravene the Constitution.⁹¹⁾

In particular, the 5th and 2nd Circuit Courts rendered contrasting judgments by applying §3729(a)(1)(B) to the cases pending on June 7, 2008, even if the claims for payment were made before that date.⁹²⁾ Nevertheless, according to a number of interpretations, the “materiality” criterion promulgated by the FERA can be asserted retrospectively only for lawsuits for the charge of a fraudulent or unjust claim arising on or after June 7, 2008.

There are no clear signs yet of how courts will apply the “materiality” criterion established by the FERA. This is because it is still premature in cases of the charge of a fraudulent or unjust claim arising from the decision on a claim for payment on or after June 7, 2008. Nevertheless, some insights can be found from court rulings that applied the criterion of “potentiality to influence” prior to the enactment of the FERA.⁹³⁾

90) See, e.g., *Hopper v. Solvay Pharm., Inc.*, 588 F.3d 1318, 1327 n. 3 (11th Cir. 2009); *United States ex rel. Carpenter v. Abbott Labs., Inc.*, 723 F. Supp. 2d 395, 402 (D. Mass. 2010); *United States ex rel. Westrick v. Second Chance Body Armor, Inc.*, 709 F. Supp. 2d 52, 55–56 (D.C. 2010) (op. on recons.); *Mason v. Medline Indus., Inc.*, 731 F. Supp. 2d 730, 734 (N.D. Ill. 2010).

91) *United States ex rel. Sanders v. Allison Engine Co.*, 667 F. Supp. 2d 747, 752–56 (S.D. Ohio 2009) (the retroactive provisions of the FERA contravene the principle of post-examination.)

92) See *Steury*, 625 F.3d at 267 n.1; *United States ex rel. Kirk v. Schindler Elevator Corp.*, 601 F.3d 94, 113 (2d Cir. 2010), rev’d on other grounds, 131 S. Ct. 1885 (2011).

93) See *supra*, Section IV.B.

2. Removal of requirement of “clear intention”

The new provision of §3729(a)(1)(B) was amended by removing the requirement that a contractor should have acted with intent to collect money through a fraudulent or unjust claim. The previous model §3729(a)(1)(B) of §3729(a)(2) stipulated that “legal liability will be imposed on any opposite party who intentionally makes, uses, or intends to make or use a false statement essential to a fraudulent or unjust claim in order to obtain a fraudulent or unjust claim paid or approved by the government, but the FERA Amendment deleted the expression “to obtain”.⁹⁴⁾

The deletion of the expression “to obtain” fundamentally denies the decisions by the Supreme Court that has maintained the stance that the defendant must have an intent to obtain a fraudulent or unjust claim paid or approved by the government in order to hold the defendant liable under §3729(a)(2) and the expression “to obtain” refers to such intent.⁹⁵⁾⁹⁶⁾ The Amendment disregarded the warning from the Supreme Court that the False Claims Act would be “boundless” without the clear requirement of intention.⁹⁷⁾

3. Civil Investigative Demand

Other added amendment is related to the government’s investigative authority. The government’s power for judicial investigations has been strengthened so that more claims under the False Claims Act can be investigated, not just for the contention of implied certification but also all aspects related to investigations under the False Claims Act.

The 1986 Amendment authorized the power to use Civil Investigative Demand (hereinafter “CID”) to obtain documents, queries, or fact-checking transcripts that could be provided prior to the initiation of lawsuits during the government’s investigation process. The government was given the power to share information obtained through CID with relators and federal agencies. In the past, CID needed

94) FERA § 4(a)(1)(B).

95) *Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662 (2008).

96) On remand, the district court held that retroactive application of this amendment violated the Ex Post Facto Clause. *U.S. ex rel. Sanders v. Allison Engine Co.*, 667 F. Supp. 2d 747, 752 (S.D. Ohio 2009).

97) *Id.* at 669.

authorization from the Attorney General. However, the FERA Amendment authorized the Attorney General to delegate the power.⁹⁸⁾

CID has been rarely used so far, but changes resulting from the amendment will be a prerequisite for using the strong investigation tool. Consequently, this provision may impose a new burden on defendants to faithfully respond to federal investigators' investigations and on employees of companies dealing with the government to respond to interviews and recording.

4. "Ratification" clause

Contractors dealing with the government should recognize that the Amendment gave birth to the "Ratification" clause. This makes it possible for the Ministry of Justice to intervene in a *qui tam* lawsuit by adding pleading if a transaction or case that appears or attempts to appear in the original complaint of a whistleblower is not timely for the statute of limitations.⁹⁹⁾

Along with this Amendment, the Ministry of Justice can monitor relators' cases for several years, together with pleadings added subsequently, while postponing intervention in actions.¹⁰⁰⁾ The actions filed in 2001, in which the government intervened in relation to alleged violations in the late 1980s and 1990s, are considered not to be subject to the statute of limitations when they were related back to actions in 1995. The government's revised actions filed in 2010 were related to the relators' actions based on acts done before 2004.¹⁰¹⁾ This clause can potentially place a huge additional burden on the defendant and jeopardize the defendant's ability to defend himself.

98) FERA § 4(c); 31 U.S.C. § 3733(1).

99) 31 U.S.C. § 3731(c). "For statute of limitations purposes, such Government pleading shall relate back to the filing date of the complaint of the person who originally brought the action, to the extent that the claim of the Government arises out of the conduct, transactions, or occurrences set forth, or attempted to be set forth, in the prior complaint of that person."

100) See e.g. *United States ex rel. Miller v. Bill Harbert Intern. Const., Inc.*, 608 F.3d 871, 877-80 (D.C. Cir. 2010).

101) *United States ex rel. Freedman v. Suarez-Hoyos*, 2011 WL 972585, * 11 (M.D. Fla. Mar. 18, 2011)

V. Conclusion

In recent years, courts have limited relators' efforts to expand the scope of the False Claims Act by applying the Implied Certification Theory.¹⁰²⁾ As relators tried to broaden the scope of the False Claims Act through the Implied Certification Theory, the court in Hopper's case ruled that "no lawsuit can be automatically initiated under the False Claims Act only on the ground that a person breached a contract or violated a regulation or law or received a payment not entitled to receive." It would be useful to listen to the warning that "the scope of the False Claims Act is much narrower."¹⁰³⁾

The Implied Certification Theory on legal liability under the False Claims Act poses a considerable risk to companies intending to participate in contracts with the government. Historically, it was very difficult to predict essential contractual requirements in a contract because of continually changing approaches applied by courts. With the adoption of the main text of the FERA Amendment and the subjective "potentiality of influence" criterion, it will be more challenging. In many cases, the jury's award of damages warns that if a contractor still fails to comply with minor contractual requirements, even when supplying goods or providing services as required by the government, it may incur huge damages and fines. In such a case, we believe that companies will be encouraged to negotiate contractual provisions with the government to determine which provisions are essential to the government's decision to bring payments into effect. At the time when contracts with the government increase enormously in the future, the possibility of applying the theory of implied certification between the government and contractors to prevent infringement of national finances accumulated for public interest is always open.

102) *Mikes v. Straus*, 274 F.3d 687, 699 (2nd Cir. 2001) ("we must be careful not to ignore the broader context in interpreting this (implied certification) theory"); Boese, note 19 in the main text, §2-148 through §2-149 ("the implied certification theory has the effect of punishing the defendant for falsity by putting words, even fictional words, into the defendant's mouth").

103) *Hopper*, 91 F.3d at 1265.

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<Abstract>

A Study on the Implied Certification Theory in the United States for anti-corruption

Park, Se Hun

The Anti-Corruption Claims Act is “a law designed to punish and deter fraudulent acts” and “not for claims of obvious mistakes or errors submitted solely due to negligence or with a limited obligation to investigate against government contractors. It is not a means for imposing burdensome obligations”, in order to proceed with a claim for compensation under the Fraudulent Claims Act, the plaintiff (1) the defendant intended to present a claim for payment or approval from the government (2) the claim was false and (3) the defendant must prove that he knew that the claim was false. At this time, it is characterized by having materiality and cognitive requirements.

In the materiality requirement, an implicit pledge must affect the terms of the payment, for example, if the breach had been known, the payment would not have been made. The government paid the other party, and if it had known that the law or regulation had been violated, it would not have made the payment, and the invoice submitted for the payment contains an implied pledge that the law or regulation will be complied with, and the bill is said to be unreasonable.

In addition to the materiality condition, the recognition requirement must be conditional on “intentional” in order to claim compensation under the Unjust Claims Act. The recognition requirement was added in the 1986 amendment to the Fraudulent Claims Act in order to catch the negligent act of corporate officials trying to protect them from the recognition of fraudulent claims submitted by subordinates, a common occurrence in large corporations. The Fraudulent Claims Act defines “intentional” as (1) actual knowledge, (2) intentional ignorance of false facts, or (3) negligent ignorance of false facts.

The key content of the Anti-Corruption Claims Act for the Prevention of Corruption

is to what extent it can be broadly interpreted in order to deter alleged fraudulent acts against the government and to relieve damage resulting from it. It is important whether the Anti-Corruption Act should be applied not only to false statements that are traditionally applied, but also to false implicit statements. The implicit pledge theory has various discussions, such as whether or not the defendant will be held responsible for the unspoken statements of the defendant who maliciously damaged the government finances. The application of the implied certification theory in the United States is applied differently depending on individual cases, so it broadens the scope for eradicating anti-corruption, such as discussing whether malicious claims and the implied certification theory are applied to actively prevent domestic corruption in the future.

Key words: anti-corruption, False Claims Act; implied certification; Implied Certification Theory; malicious claim(s)

