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When Can Opinions Be "False" and Result in False Claims Act Liability: Three Circuit Courts Provide Conflicting Guidance—Part I

By Robert S. Salcido*

Recently three circuit courts have considered when opinions can be false under the False Claims Act ("FCA"). Although the circuits disagree regarding whether plaintiff must establish "objective falsity" to assert an FCA violation, they agree that the common law provides guidance regarding when an opinion can be false under the FCA. In this first part of a two-part article, the author discusses the background of the issue and U.S. Supreme Court precedent. In the second part of the article, which will appear in an upcoming issue of Pratt's Government Contracting Law Report, *the author explains the circuit split and offers key takeaways.*

Although the False Claims Act ("FCA"), as its title indicates, requires that claims be "false," the FCA contains no definition of falsity. Rather than define exactly what renders a claim false, courts have applied a specific analytical framework to determine whether claims are false. That is, depending upon context, a claim can be factually false or legally false. If it is legally false, it may be false because of either an express or implied false certification. Courts may also find that claims are false under a fraud in the inducement theory of FCA liability.[1]

THE PROBLEM WITH THE FRAMEWORK

However, this framework does not provide guidance to determine when, if ever, opinions can be false. Congress's failure to provide a statutory definition of falsity creates a statutory gap because representations on claims frequently call for an exercise of discretion or for representations that cannot be adjudged as true or false. For example, in one case the government contended that claims for health care services were false because the physician's documentation to support the claim was insufficient when there was, in fact, no published

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[1] For a detailed discussion regarding how courts have distinguished legally and factually false claims and express and implied false certification cases and the standard applied in fraudulent inducement cases, see False Claims Act & the Health Care Industry: Counseling & Litigation at 2:03 (3d ed. American Health Law Ass'n 2018).

standard to assess what level of documentation was sufficient.[2] In another, the plaintiff asserted that the defendant contractor falsely certified that it maintained vehicles in "good appearance" when there was no indication of what constituted a good appearance.[3] In these cases, and multiple others, courts ultimately addressed this statutory gap by ruling that the FCA required an objective falsehood and dismissed plaintiff's claim because plaintiff did not establish that defendant's representation was objectively false.[4]

THE CIRCUIT SPLIT

Recently courts have had the opportunity to reexamine—and have split—regarding whether the FCA requires an objective falsehood. Specifically, the

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[2] *United States v. Prabhu*, 442 F. Supp. 2d 1008, 1032–33 (D. Nev. 2006) (defendant's "claims are not false . . . because his documentation practices would fall within the range of reasonable medical and scientific judgment regarding how to document the medical necessity of pulmonary rehabilitation services. . . . To establish falsity under the FCA, it is not sufficient to demonstrate that the person's practices could have or should have been better. Instead, plaintiff must demonstrate that an objective gap exists between what the Defendant represented and what the Defendant would have stated had the Defendant told the truth. . . . Accordingly, because, at a minimum, reasonable minds may differ regarding whether the documentation underlying [defendant's] claims satisfied some undefined standard, the Government has not establish[ed] falsity as a matter of law") (citations and footnote omitted).

[3] *U.S. ex rel. Wilson v. Kellogg Brown & Root*, 525 F.3d 370, 377–78 (4th Cir. 2008).

[4] *See, e.g.*, *U.S. ex rel. Thomas v. Siemens AG*, 593 Fed. Appx. 139, 143 (3d Cir. 2014) (holding that a "statement is 'false' when it is objectively untrue" and finding that the relator did not demonstrate an objectively untrue statement when the relator contended that the defendant had failed to disclose accurately on a form the discounts it provides to other customers because the government forms were ambiguous and the government itself accepted different interpretations of how those forms should be completed, including what kinds of discounts needed to be disclosed); *U.S. ex rel. Hill v. Univ. of Med. & Dentistry*, 448 Fed. Appx. 314, 316 (3d Cir. 2011) ("Because [e]xpressions of opinion, scientific judgments or statements as to conclusions which reasonable minds may differ cannot be false, . . . FCA liability will not attach") (internal quotation marks and citation omitted); *U.S. ex rel. Yannacopoulos v. Gen. Dynamics*, 652 F.3d 818, 836 (7th Cir. 2011) ("A statement may be deemed 'false' for purposes of the False Claims Act only if the statement represents 'an objective falsehood' ") (citations omitted); *Kellogg Brown & Root*, 525 F.3d at 377–78 (to prove falsity, plaintiffs must show that the "statement or conduct alleged . . . represent[s] an objective falsehood" and plaintiffs could not satisfy this standard when defendant allegedly breached general maintenance standards in contract—such as keeping vehicles in "safe operating condition and good appearance"—and did not specify a specific maintenance program or require specific acts of maintenance and holding that an "FCA relator cannot base a fraud claim on nothing more than his own interpretation of an imprecise contractual provision" but instead must show an expression of fact "which (1) admit[s] to being adjudged true or false in a way that (2) admit[s] of empirical verification") (citations and internal quotations omitted); *U.S. ex rel. Will v. A Plus Benefits, Inc.*, 139 Fed. Appx. 980, 982 (10th Cir. 2005) ("At a minimum the FCA requires proof of an objective falsehood") (citations omitted).

issue has arisen in the context of whether a physician's clinical opinion can be a false opinion under the FCA. The U.S. Court of Appeals for the Eleventh Circuit, in *United States v. AseraCare, Inc.*,[5] relying upon the U.S. Supreme Court's decision in *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*,[6] found that mere clinical disagreement is insufficient to constitute an actionable falsehood because the FCA, under these circumstances, requires the alleged falsehood to be objectively false.

Shortly thereafter, both the U.S. Court of Appeals for the Third Circuit, in *U.S. ex rel. Druding v. Care Alternatives*,[7] and the U.S. Court of Appeals for the Ninth Circuit, in *U.S. ex rel. Winter v. Gardens Reg'l Hosp. & Med. Ctr., Inc.*,[8] rejected the Eleventh Circuit's conclusion that the FCA required proof of "objective falsity." Both circuits believed that an "objective falsity" standard unnecessarily conflated the FCA's falsity and knowledge elements. All three circuits agreed that the common law provided useful guidance regarding whether a false opinion can be actionable under the FCA.[9]

The circuit courts' focus on whether the FCA requires an objective falsehood is misplaced.[10] In evaluating the standard courts should employ to determine

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[5] 938 F.3d 1278 (11th Cir. 2019).

[6] 575 U.S. 175, 178 (2015).

[7] 952 F.3d 89 (3d Cir. 2020).

[8] 953 F.3d 1108 (9th Cir. 2020).

[9] *See, e.g.*, *Druding*, 952 F.3d at 95 ("Since Congress did not define what makes a claim 'false' or 'fraudulent' under the FCA, the Supreme Court has looked to common law to fill the definitional gap"); *Winter*, 953 F.3d at 1117 (noting Congress incorporated common law definitions related to falsity).

[10] Courts, in rejecting objective falsity, have asserted that the standard is misplaced because it seeks to add an extra-textual requirement above what the FCA itself requires. *See Winter*, 953 F.3d at 1113 ("We hold that a plaintiff need not allege falsity beyond the requirements adopted by Congress in the FCA, which primarily punishes those who submit, conspire to submit, or aid in the submission of false or fraudulent claims. Congress imposed no requirement of proving 'objective falsity,' and we have no authority to rewrite the statute to add such a requirement"). The precedent applying this standard, however, belies the conclusion that the courts were seeking to rewrite or expand the FCA. *See, e.g.,* above at n. 4. Instead, the precedent reflects that the invocation of an objective falsity standard is simply a recognition that sincere statements of opinion cannot be false or fraudulent and the plaintiff must show more to establish FCA falsity. The use of the moniker "objective falsity" is simply a label to capture this concept rather than an attempt to add an additional element to FCA liability. Indeed, in *AseraCare*, the Eleventh Circuit, in describing what objective falsity encompassed, described precisely the common law elements to determining when opinions can be false and anchored its decision, as noted, in the Supreme Court's ruling in *Omnicare*. *See id.*, 938 F.3d at 1297. Rather than expand the FCA with extra-textual requirements, courts have simply used the common law to fill a statutory gap

whether opinions can be false under the FCA, courts should focus on the issue upon which these circuits agreed—i.e., that the common law test serves as an appropriate basis to assess the issue—and not the peripheral issue upon which they disagreed, i.e., whether the FCA requires an "objective" falsehood.[11] As a general matter, the common law set forth the general rule that a sincere statement of pure opinion, by itself, is not an untrue statement of material fact even if it is ultimately wrong.[12]

Instead, generally, an opinion can only be false, in accordance with common law principles, when the person does not actually hold the opinion, utters an opinion that contains an embedded fact which is false, knows of facts that would preclude the opinion or does not know facts that would justify the opinion.[13] If these facts are not established, a sincere opinion cannot be false and there should be no liability under the FCA.

Knowing the standard to apply in determining when clinical opinions—or any opinions—can be actionable under the FCA is very important. Health care entities, in particular, have an affirmative statutory duty to remit known overpayments.[14] To discharge the duty to remit a known overpayment, they must know, in the first instance, whether an overpayment exists.

For example, does an overpayment exist when reasonable experts disagree regarding a clinical opinion or is it sufficient to demonstrate that a clinical opinion is true—or, at least, not false—as long as the clinician reasonably

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regarding when opinions can be false. All courts have agreed that this gap filling practice is appropriate. *See Omnicare*, 575 U.S. at 183–86; *Winter*, 953 F.3d at 1117; *Druding*, 952 F.3d at 95.

[11] Courts, including the Supreme Court, have applied common law rules to construe the FCA's materiality and knowledge elements. *See, e.g.*, *Escobar*, 136 S. Ct. at 1999, 2002 (noting that it is "well a settled principle of interpretation that, absent other indication, Congress intends to incorporate the well-settled meaning of the common-law terms it uses" and that the FCA materiality definition "descends from 'common-law antecedents") (citations omitted); *United States v. Safeway Inc.,* No 11-cv-3406, 2020 U.S. Dist. LEXIS 103094, at *53 (C.D. Ill. June 12, 2020) (noting Supreme Court in *Safeco Ins. Co. v. Burr*, 551 U.S. 47 (2007) adopted common law meaning of recklessness in construing that term in Fair Credit Reporting Act and noted "that a common law term in a statute comes with a common law meaning, absent anything pointing another way" and applying that meaning to reckless disregard under the FCA because the FCA, too, "does not point another way").

[12] 575 U.S. 175, 178 (2015).

[13] *See id.* at 184–86, 191–92.

[14] *See* 42 U.S.C. § 1320a-7k(d) (mandating that health care providers and suppliers to report and remit overpayments within 60 days of when those overpayments are "identified"). Of course, all persons who do business with the government have an affirmative duty to remit known overpayments to the federal government. *See* 31 U.S.C. § 3729(a)(1)(G).

believes the service is appropriate and there are not objectively verifiable facts at odds with the clinician's opinion regarding the appropriate course of care?

Under the common law standard the Supreme Court applied in *Omnicare* and the Eleventh Circuit applied in *AseraCare*, there can be two or more reasonable opinions, with none of them being false or wrong. Under these circumstances, there would be no overpayment owed to the government. Alternatively, if the legal standard is a claim may be false when two reasonable clinicians disagree, a health care provider may have a duty to remit an overpayment whenever an internal audit reveals that two clinicians reasonably disagree.

Set forth below is a discussion of *Omnicare*, upon which the Eleventh Circuit relied in *AseraCare*, which applied the common law rules regarding when an opinion can be false. As noted below, *AseraCare* correctly followed this approach.

Finally, in the second part of this article, the Eleventh, Ninth, and Third Circuit decisions are addressed. The Ninth Circuit's decision, in assessing a dismissal under Fed. R. Civ. P. 12(b)(6), correctly applied the common law factors regarding when an opinion can be false. It reversed the district court's dismissal because it found that relator had plausibly pled facts showing that those certifying claims did not believe their opinions and did not have a factual foundation to support their opinions. The Third Circuit, while invoking the common law, failed to apply it in any meaningful way, and improperly conflated the FCA's falsity and knowledge elements while professing an intent to avoid that result.

SUPREME COURT'S DETERMINATION IN *OMNICARE* REGARDING WHEN AN OPINION CAN BE FALSE

Prior to the Eleventh, Ninth, and Third Circuits' recent consideration of when clinical opinions can be false under the FCA, the Supreme Court addressed the issue of when opinions can be false in *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*.[15] In *Omnicare*, the Court considered whether two statements of opinion in a company's Securities and Exchange Commission ("SEC") filing were untrue statements of material fact or omitted material facts necessary to make the statements not misleading.[16]

Specifically, the company's registration statement represented that the company believed that its "contractual arrangements with other healthcare

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[15] 575 U.S. 175 (2015).

[16] *Id.* at 178.

providers . . . are in compliance with applicable federal and state laws."[17] The registration statement also stated that the company believed that its "contracts with pharmaceutical manufacturers are legally and economically valid arrangements that bring value to the healthcare system and the patients" that it serves.[18] The plaintiff asserted that the company's statements were materially false based upon lawsuits the government later filed against the company alleging that the company's receipt of payments from drug manufacturers violated the antikickback laws.[19] The plaintiff also contended that a company lawyer had warned that a particular contract "carrie[d] a heightened risk" of liability under the antikickback laws.[20]

The Court first addressed the general issue of when an opinion itself may constitute a factual misstatement. The Court ruled that a sincere statement of pure opinion is not an "untrue statement of material fact" even if an investor can ultimately prove the belief was wrong.[21] The Court found that the two statements to which plaintiff objected were pure statements of opinion, stating in essence, "we believe we are obeying the law."[22] Because plaintiff did not contest that the company's opinions were honestly held but only that those opinions were wrong, the Court ruled that plaintiff did not establish that the company made a false statement.[23]

Relying in part on common law principles, the Court provided two examples to contrast when a company's statement of pure opinion in the SEC filing can be false: (1) the speaker does not actually hold the opinion or (2) the opinion contains an embedded fact which is false.[24] The Court noted that the first example would apply if, for example, a person stated "I believe our marketing practices are lawful" if her own state of mind is that the company is violating the law.[25] The Court noted that the second example would apply if, for example, a person stated "I believe our TVs have the highest resolution available

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[17] *Id.* at 179.

[18] *Id.* at 180.

[19] *Id.*

[20] *Id.*

[21] *Id.* at 186. The Court, using dictionaries, noted that a "fact" is "a thing done or existing" or "[a]n actual happening" while an opinion is a "a belief[,] a view" and "rest[s] on grounds insufficient for complete demonstration." *Id.* at 183.

[22] *Id.* at 186.

[23] *Id.*

[24] *Id.* at 184–86.

[25] *Id.* at 184.

because we use a patented technology to which our competitors do not have access" and an embedded fact—we use a patented technology—was false.[26]

The second issue the Court addressed concerned when an opinion may be rendered misleading by the omission of discrete factual representations. In the context of registration statements, the Court ruled that an opinion may omit material facts that renders it misleading if it leaves out material facts regarding the speaker's inquiry into or knowledge about the opinion and those facts conflict with what a reasonable investor would take from the opinion.[27] For example, the court noted that an opinion may omit material facts rendering it misleading if the speaker stated we "believe our conduct is lawful" but made the statement without consulting with a lawyer because a reasonable investor may understand an opinion statement to convey facts about how the speaker formed the opinion.[28] However, the Court noted that an opinion is not misleading if it omits some facts that cut the other way because opinions sometimes rest on a weighing of competing facts.[29]

The Court noted that these principles were consistent with common law. Specifically, under the common law respecting the tort of misrepresentation, an opinion may constitute a misrepresentation regarding undisclosed facts when the expression of an opinion carries with it an implied assertion that the speaker knows no facts which would preclude such an opinion and the speaker does know facts which justify it.[30]

Thus, collectively, the Court identified the following examples of when a person may make a "false" opinion:

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[26] *Id.* at 185–86.

[27] *Id.* at 189.

[28] *Id.* at 188. The Court noted that, at times, reliance from regulators or consistent industry practice might accord with a reasonable investor's expectations. *Id.* at n. 5.

[29] *Id.* at 189–90. As an example, the Court noted that if a junior attorney expressed doubts about a practice's legality but six of his more senior colleagues disagreed, the omission would not make the statement of opinion that the arrangement complied with law misleading, even if the minority position ultimately proved correct, because a reasonable investor does not expect that *every* fact known to the issuer supports its opinion. *Id.* at 190.

[30] *Id.* at 191–92. The Court noted that even under this standard an investor cannot state a claim by alleging that the opinion was wrong but must call into question the issuer's basis for offering the opinion. *Id.* at 194. Specifically, the Court ruled that the "investor must identify particular (and material) facts going to the basis for the issuer's opinion—facts about the inquiry the issuer did or did not conduct or the knowledge it did or did not have—whose omission makes the opinion statement at issue misleading to a reasonable person reading the statement fairly and in context." *Id.* (citation omitted). The Court concluded that this "is no small task for an investor." *Id.*

(1) The speaker does not actually hold the opinion;

(2) The opinion contains an embedded fact that is false;

(3) The speaker knows facts that would preclude such an opinion; or

(4) The speaker does not know facts that would justify the opinion.

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