

Sixth Circuit FCA Ruling on Speculative Damages May Have Broader Implications for Health Care Providers



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On Feb. 4, 2016, the Sixth Circuit Court of Appeals issued a decision in *U.S. ex rel. Wall v. Circle C. Construction*, No. 14-6150, 2016 WL 423750 (6th Circ. Feb. 4 2016) holding that damages in false certification cases should be based on actual damages to the government. i.e., the difference between what the government paid for the goods and/or services and what the government should have paid.

In *Wall*, Circle C Construction (“Circle C”) signed an agreement with the Army to construct buildings at a military base. The contract included a number of wage and payroll obligations and a requirement that Circle C ensure that its subcontractors complied with the Davis-Bacon Act. The contract also required Circle C to certify to the government that it complied with these obligations and that the payroll certifications submitted were complete and accurate.

Circle C subcontracted at least 98 percent of the electric work on the project to another company, Phase Tech. On January 25, 2007, an employee of Phase Tech (the Relator) filed a False Claims Act (FCA) qui tam lawsuit on behalf of the United States against Circle C and Phase Tech. The Relator argued Circle C failed to list certain Phase Tech employees on its certified payrolls and the payroll certifications falsely

asserted that Circle C paid the prevailing Davis-Bacon Act wages to employees. The Relator argued this technical non-compliance tainted all of the Federal payments to Circle C for the relevant time period for work performed by Phase Tech.

On cross motions for summary judgment, the District Court granted the Relator's motion, holding that Circle C violated the FCA by submitting false payroll certifications to the government and wrongly certifying that prevailing wages were paid to Phase Tech employees when they were not. The District Court found damages to be \$553,807.71, which represented the total amount the U.S. paid to Circle C for work performed by Phase Tech without regard to actual harm to the U.S. Government. This amount was then trebled pursuant to 31 U.S.C. §3729(a)(7), resulting in a judgment against Circle C in the amount of \$1,661,423.13. Circle C appealed, maintaining the District Court's damages award was speculative in that it did not accurately account for the Federal government's actual damages. More specifically, Circle C argued it was speculative to assume that if the government had investigated and found Circle C had misclassified Phase Tech employees, it would have actually withheld \$553,807.71 from Circle C. Circle C argued a timely investigation by the U.S. Government would have determined whether employees had been paid the prevailing wage, and, if they had not, it would have resulted in payment of that wage to them.

While affirming the District Court's decision with regard to liability, the Sixth Circuit agreed with Circle C and held the District Court's estimation of damages did not "accurately represent the difference between what the government actually paid Circle C and the payments to which Circle C would have been entitled in the absence of fraud." The Sixth Circuit reversed the District Court's damages calculation and remanded the case for a recalculation of damages.

Impact on Health Care Providers

While *Wall* arose in the context of a construction contract, this case is also helpful for health care providers within the context of FCA lawsuits alleging Anti-kickback Statute or Stark law violations and false certification theories of recovery, in particular. This Sixth Circuit decision is in line with other federal court jurisprudence supporting a defendant's argument that, when the U.S. government has not sustained or cannot prove actual damages, its potential recovery under the FCA may be limited to the \$5,500-\$11,000 per claim penalty. Where a health care provider can establish that the difference between what the U.S. government actually paid and the payments to which it would have been entitled in the absence of its alleged fraud is zero, the health care provider can now cite the *Wall* case as additional support for an argument that treble damages should be unavailable as a matter of law.

The Sixth Circuit's decision in *Wall* can be viewed [here](#).

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