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PRATT'S
**GOVERNMENT
CONTRACTING
LAW**
REPORT



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Steven A. Meyerowitz

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REGULATIONS ON PAID SICK LEAVE
FOR FEDERAL CONTRACTORS**

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Sixth Circuit Strikes a Blow to the Government's False Claims Act Damages Theory

*By Jesse A. Witten and Andrew P. Reeve**

The U.S. Court of Appeals for the Sixth Circuit recently ruled against the government's False Claims Act theory that, in false certification cases, damages should be measured as the entire amount that the government paid for a good or service. The authors of this article explain the decision and its implications.

The U.S. Court of Appeal for the Sixth Circuit's recent decision in *United States ex rel. Wall v. Circle C. Construction*¹ strikes a blow against the government's False Claims Act ("FCA") theory that, in false certification cases, damages should be measured as the entire amount that the government paid for a good or service. Rejecting the government's position, the Sixth Circuit held that a proper assessment of damages requires comparing the difference between the value of the good or service for which the government contracted and the *actual* value of the good or service provided. The court derided the government's theory as a "fairyland" argument.

UNITED STATES EX REL. WALL V. CIRCLE C. CONSTRUCTION

In *Wall*, the defendant, Circle C Construction, contracted to build multiple warehouses for the Army. Under its contract, Circle C agreed to pay all employees above-market wages pursuant to the Davis-Bacon Act and to provide weekly certifications that it was doing so. After completion of the warehouses, the government learned that one of Circle C's subcontractors paid several electricians hourly wages below those required by the contract (the subcontractor paid \$16.00 per hour instead of \$19.00). The aggregate wage underpayment was \$9,916. Circle C's liability was not at issue in the district court, only the amount of damages subject to trebling under the FCA.² The government

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¹ No. 14-6150 (6th Cir. Feb. 4, 2016).

² The government also sought to recover statutory penalties of \$5,500 to \$11,000 per false claim, but the district court declined to impose a civil penalty due to the trebling of damages. *United States ex rel. Wall v. Circle C. Constr., LLC*, 700 F. Supp. 2d 926, 940 (M.D. Tenn.

asserted that the entire \$259,298.18 of electrical work performed in constructing the warehouses was valueless because Circle C had provided false certifications of compliance with the contract's wage provisions. The district court agreed and entered judgment for \$762,894.54, three times the entire amount that the government paid for electrical work less \$15,000 recovered from the subcontractor.

Even though it reviews damages determinations under an abuse of discretion standard, the Sixth Circuit reversed, emphatically denouncing the government's "creative" damages calculation.³ It rejected the notion that inaccurate certifications made the electrical work valueless and pointed to the fact that the government continued to use the buildings as evidence of value.⁴

The court contrasted the taint in *Wall* with false certifications that might render a good or service valueless and offered two examples of false certifications that would render a good valueless—(1) a false certification of a moral matter, such as a certification that child labor had not been used, and (2) a false certification with an obvious practical impact, such as certifying that goods were functional when they were not.⁵ By comparison, the taint of the false certification in *Wall* could be easily rectified through payment of the electricians.⁶ Accordingly, the government was only entitled to "actual damages," not the "fairyland" damages the government sought.⁷ The Sixth Circuit explained that "actual damages are the difference in value between what the government bargained for and what the government received."⁸ The Sixth Circuit concluded that the government's actual damages were \$9,916, which was the aggregate amount of wage underpayment by the electrical subcontractor, explaining its reasons:

The government also argues that it should pay nothing for [the subcontractor's] work because the government would have suspended its payments had it known that [the subcontractor] was underpaying its workers In determining actual damages, however, the relevant question is not whether in some hypothetical scenario the government

2010). The government did not appeal the district court's denial of penalties. *United States ex rel. Wall v. Circle C. Constr., LLC*, 43 F. Supp. 3d 853, 855 (M.D. Tenn. 2014).

³ *Wall*, No. 14-6150.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

would have withheld payment, but rather, more prosaically, whether the government in fact got less value than it bargained for. And here the government has received almost all of the value (all but \$9,916, to be exact) that it bargained for with respect to the electrical work at its Kentucky warehouses.⁹

The Sixth Circuit found that the damages awarded by the district court were an abuse of discretion, and remanded with instructions to enter judgment in favor of the United States in the amount of only \$14,748 (computed as three times \$9,916, less \$15,000 paid previously by the subcontractor as settlement of the government's FCA claims).¹⁰

CONCLUSION

Although the context of *Wall* was a construction contract, the Sixth Circuit's decision may have great significance in the health care context for FCA cases premised on alleged unlawful referrals in violation of the Stark Law and Anti-Kickback Statute. Many health care providers argue that, where the health care services furnished following unlawful referrals were medically necessary, the government has not suffered actual damages and that FCA liability should consist only of the \$5,500–\$11,000 per-claim penalties. *Wall* provides significant authority to support that position.

⁹ *Id.*

¹⁰ *Id.*