

Under Scrutiny:

SHB's Government Enforcement & Compliance Update

FEBRUARY 8, 2008



The False Claims Act: More Changes Ahead

More than two decades have passed since the 1986 amendments to the False Claims Act ("FCA" or the "Act") reanimated it as a major weapon in the government's arsenal to target and prosecute alleged corporate fraud. Throughout this time, however, litigants, courts and Congress have been engaged in a vigorous debate over its language and meaning. The proliferation of whistleblower suits, political pressure to combat alleged contractor fraud (especially reports of fraud in connection with the war on terror), and ever expanding theories of FCA liability have raised the intensity of the debate and suggest that changes to its interpretation and scope may be coming.

The U.S. Supreme Court Weighs In

Last year in *Rockwell International Corp. v. U.S.*, 127 S. Ct. 1397 (2007), the U.S. Supreme Court restricted the definition of who may qualify as an "original source" to overcome the Act's "public disclosure bar." Later in the year, the Court accepted another FCA case for review, *Allison Engine Co. v. U.S. ex rel. Sanders and Thacker*, which may have a much greater impact on FCA jurisprudence than *Rockwell*. *Allison Engine*, which is scheduled for argument before the U.S. Supreme Court on February 26, 2008, presents the question whether a plaintiff alleging that a defendant made a false record or statement to get a false claim paid or approved by the government under 31 U.S.C. § 3729(a)(2), must also establish that the defendant then *presented* the claim (or caused the claim to be presented) to the government. In the underlying decision, the Sixth Circuit held that section (a)(2) does not incorporate a presentment requirement but its holding is contrary to the earlier D.C. Circuit Court's opinion in *U.S. ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488 (D.C. Cir. 2004) authored by then D.C. Circuit Judge John Roberts, who subsequently became Chief Justice of the Supreme Court.

Interestingly, but not surprisingly, Senator Charles Grassley, chief sponsor of the 1986 amendments and a powerful patron of the Act, has filed an *amicus* brief

GOVERNMENT ENFORCEMENT & COMPLIANCE

Our clients face unprecedented enforcement scrutiny and novel legal theories. Today, government enforcement actions can include civil as well as criminal investigations and litigation. They can involve a host of independent actors including federal and state prosecutors, regulators, whistleblowers and their counsel, and class-action attorneys. These cases must be defended under the watchful eye of investors and the public.

Our Government Enforcement & Compliance Practice consists of former prosecutors -- including a former U.S. Attorney, former Justice Department officials and even former corporate executives -- who counsel and defend companies, their executives and employees in the full range of criminal, civil and regulatory government enforcement actions at the state and federal level. We counsel clients on how to avoid enforcement scrutiny. When investigations do arise, however, we work with our clients to resolve it as efficiently, cost-effectively and quietly as possible.

in the *Allison Engine* case to argue in favor of eliminating the presentment requirement. Constitutional law scholars are fascinated by the rare personification of a constitutional debate between Congress and the Court in the form of Senator Grassley essentially explaining through his *amicus* brief to Chief Justice Roberts that his prior *Totten* opinion was incorrect. Constitutional drama notwithstanding, the U.S. Supreme Court may not give great weight to the senator's views, however. In *Totten*, Justice Roberts observed, "there would be no need for a rule -- or repeated admonition from the Supreme Court -- that there should be no resort to legislative history when language is plain and does not lead to an absurd result, if the rule did not apply precisely when plain language and legislative history may seem to point in opposite directions."

Whether the presentment requirement applies to false records or statements is an important issue because, without it, a company could face treble damages, penalties and attorney's fees for false records or statements that result in the payment of federal funds, even though the defendant did not know that the government was a potential payer. If the presentment requirement is eliminated, a company's FCA risks will increase exponentially, significantly complicating its corresponding risk management challenges.

Congressional Scrutiny

Chief Justice Roberts's criticism of Senator Grassley's legislative draftsmanship notwithstanding, Senator Grassley may ultimately have the last word. He has proposed a new round of amendments to the Act to "correct" judicial interpretations of the FCA with which he disagrees. Among his proposed amendments are the following:

- Removing the requirement that false claims be directly presented to the government official and instead tying liability directly to receiving government money and property (to address *Totten*);
- Requiring the attorney general to file timely motions to dismiss claims that violate the public disclosure bar at the beginning of a case, to eliminate the holding in *Rockwell* that deems the public disclosure defense a matter of subject matter jurisdiction that can be asserted at any time while a case is being litigated;
- Clarifying that non-taxpayer funds under the U.S. government's control are subject to the FCA;

Under Scrutiny:

SHB's Government Enforcement & Compliance Update

FEBRUARY 8, 2008 - PAGE 3

- Clarifying the conditions under which a U.S. government employee may file an FCA case; and
- Making technical corrections to the statute of limitations and the DOJ-authorized civil investigative demands, which are intended to streamline the procedures for filing and prosecuting FCA cases by both *qui tam* whistleblowers and the DOJ.

In sum, the landscape of FCA jurisprudence is shifting, and significant changes loom ahead. Companies concerned about the risk of FCA litigation must, at a minimum, monitor these developments so that they can anticipate and implement necessary adjustments to their risk management and compliance policies and practices. Companies may also wish to ensure that their concerns and interests about the desirability and nature of further amendments to the Act are voiced in the current legislative debate. A reasoned, balanced debate is in the interest of all those the FCA affects.

SHB's Enforcement and Compliance Practice represents companies in False Claims Act litigation. SHB's Public Policy Practice assists clients in influencing the principals of liability law, civil justice reform and counseling to prevent liability exposure.

*If you have further questions concerning the matters addressed in this Update, please contact **David Douglass**.*

The choice of a lawyer is an important decision and should not be based solely upon advertisements.

For additional information on SHB's Government Enforcement & Compliance Practice, please contact

David Douglass
Washington, D.C.
(202) 783-8400
ddouglass@shb.com

Paul C. Harris, Sr.
Washington, D.C.
(202) 783-8400
pcharris@shb.com

Jim Hurd
Houston
(713) 546-5658
jhurd@shb.com

Mike Koon
Kansas City
(816) 559-2285
mkoon@shb.com

Carol Poindexter
Kansas City
(816) 559-2391
cpoindexter@shb.com

www.shb.com



OFFICE LOCATIONS

Geneva, Switzerland
011-41-22-787-2000
HOUSTON, TEXAS
(713) 227-8008
Irvine, California
(949) 475-1500

KANSAS CITY, MISSOURI
(816) 474-6550
London, United Kingdom
011-44-207-332-4500
Miami, Florida
(305) 358-5171

San Francisco, California
(415) 544-1900
Tampa, Florida
(813) 202-7100
WASHINGTON, D.C.
(202) 783-8400