

Under Scrutiny:

SHB's Government Enforcement & Compliance Update

JUNE 10, 2008



U.S. SUPREME COURT ISSUES IMPORTANT RULING FOR DEFENDANTS FACING FALSE CLAIMS ACT LIABILITY

The U.S. Supreme Court yesterday issued an important ruling for defendants facing potential liability under the False Claims Act (FCA), which imposes civil liability on any person who knowingly uses a “false record or statement to get a false or fraudulent claim paid or approved by the Government.” The Court in *Allison Engine Co., Inc. v. United States ex rel. Sanders, et al.*, held that to hold a defendant liable for the submission of a false statement or record in support of a false claim under subsection (a)(2) of the FCA, a plaintiff must prove that the defendant submitted the false record or statement for the purpose of inducing the government’s decision to pay or approve the false claim. Authored by Justice Samuel Alito, the Court’s unanimous decision is based on the language in the statute that to be actionable under the FCA, the false record or statement must be made “to get” the government to pay or approve a false or fraudulent claim. The Court also held that for conspiracy liability under the FCA, the plaintiff must establish that the conspirators intended to defraud the government, not merely that the scheme had the effect of causing the government to pay a claim. (See 31 U.S.C. § 3729(a)(2-3).) This decision is important because it significantly restricts the scope of FCA liability for defendants who do not submit claims directly to the government for payment.

The Facts

In 1985, the U.S. Navy entered into contracts with shipbuilders for the construction of a new fleet of destroyers. A portion of the work to be performed under the contract was subcontracted to the petitioners in this case. The Navy’s contract specified that each and every part of the destroyer was to be built in accordance with baseline drawings and military standards. The contract also required that each of the petitioners submit a certificate of conformance certifying that the work was performed in accordance with the Navy’s requirements.

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 1995, two former General Tool Company employees brought suit in the Southern District of Ohio as *qui tam* relators seeking to recover damages under FCA sections 3729(a)(1-3). The relators alleged that the invoices submitted to the shipbuilders by the petitioners fraudulently sought payment for work that had not been done in conformance with the contract specifications.

At trial, the relators failed, however, to introduce evidence that the shipbuilders submitted the invoices to the Navy. As a result, the trial court granted petitioners' motion for judgment as a matter of law, finding that no reasonable jury could find an FCA violation because relators failed to introduce any evidence that a false or fraudulent claim had ever been presented to the Navy. On appeal, the Sixth Circuit reversed the district court in part. The appellate court held that sections 3729(a)(2) and (a)(3) do not require proof of any intent to cause a false claim to be paid by the government. Instead, it held that proof of intent to cause a false claim to be paid by a private entity using government funds was sufficient.

The Supreme Court granted certiorari and reversed the Sixth Circuit's decision.

Decision Summary

The key issue presented was whether under the FCA a false record or statement made "to get" a false claim paid must have been presented to the government for it to pay the claim as distinguished from getting a false claim paid with government funds. This is known as the "presentment" requirement. The Court did not impose a presentment requirement but held that the FCA requires that the defendant must have made the statement for the purpose of getting a false claim paid or approved by the government. The Court stated: "'To get' denotes purpose, and thus a person must have the purpose of getting a false or fraudulent claim 'paid or approved by the Government' in order to be liable under [section] 3729(a)(2). Additionally, getting a false or fraudulent claim 'paid...by the Government' is not the same as getting a false or fraudulent claim paid using 'government funds.' [citation omitted] Under [section] 3729(a)(2) a defendant must intend that the Government itself pay the claim." According to the Court, this element of intent prevents the False Claims Act from expanding "well beyond its intended role of combating 'fraud against the Government.'" [emphasis in original]

The Court Rejects a Presentment Requirement for Subsection (a)(2) Claims

The Court rejected the idea that subsection(a)(2) requires that a false statement or record be presented to the government, implicitly rejecting the D.C. Circuit's decision in *Totten v. Bombardier Corp.*, 380 F.3d 488 (D.D.C. 2004), which was authored by then D.C. Circuit Justice John Roberts, now Chief Justice Roberts. *Totten* held that subsection (a)(2) implicitly required that the false statement or record be presented to the government. The Supreme Court explicitly rejected this reasoning, although interestingly it did not reference the *Totten* decision. The Court stated that "the inclusion of an express presentment requirement in subsection (a)(1), combined with the absence of anything similar in subsection(a)(2), suggests that Congress did not intend to include a presentment requirement in subsection (a)(2)." The *Allison Engine* decision, which emphasizes adherence to the statutory language, is certainly an approach favored by the Court's majority and stands in contrast to the *Totten* decision.

The opinion suggests that the Court believes the *Totten* decision had the right end in mind but adopted the wrong means. By ruling that a false statement or record must be made for the purpose of getting a false claim paid, it achieved substantially the same result, that is, restricting the scope of FCA liability for defendants who are not in privity with the government. The Court provided an example: "If a subcontractor or another defendant makes a false statement to a private entity and does not intend the Government to rely on that false statement as a condition of payment, the statement is not made with the purpose of inducing a payment of a false claim 'by the Government.' In such a situation, the direct link between the false statement and the Government's decision to pay or approve a false claim is too attenuated to establish liability." Without these limitations, the Court feared that recognizing a cause of action under the FCA for fraud directed at private entities would threaten to transform the FCA into an all-purpose antifraud statute.

Conspiracy Liability Under the False Claims Act

The Court also interpreted the language of section 3729(a)(3), which creates liability for conspiring to defraud the government by getting a false claim paid, along the same lines as its interpretation of section 3729(a)(2). The Court held that a relator must show that the conspirators intended to defraud the government, not simply that the alleged conspirators agreed upon a fraud scheme that had the effect of causing a private entity to make payments using money obtained from the government. The Court added that it is not necessary to show that the conspirators intended the false record or statement to be presented *directly* to the government,

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but it must be established that "they agreed that the false record or statement would have a material effect on the Government's decision to pay the false or fraudulent claim." This reading of section 3729(a)(3), according to the Court, comports with its previous decisions holding that a conspiracy to defraud a federally funded private entity does not constitute a conspiracy to defraud the United States.

The *Allison Engine* decision is a good one for defendants, although not as clear cut a victory as it might have been had the Court accepted the premise that subsection (a)(2) contains an implicit presentment requirement. While the decision will certainly reduce the exposure of persons and organizations doing business with government contractors, future relators will no doubt seek to test the range of conduct that can be considered for the purpose of getting a false claim paid by the government.

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