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FEATURE COMMENT: Will *Allison* Reshape The FCA?

Allison Engine Co., Inc. v. U.S. ex rel. Sanders, 128 S.Ct. 2123 (2008)

In *Allison Engine Co., Inc.*, a unanimous U.S. Supreme Court settled several issues surrounding the civil False Claims Act that had been hotly debated, and provided important guidance on the current version of the FCA. The FCA, 31 USCA § 3729, provides for liability to the Government for the following acts, among others, if a person:

> (a)(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;
> (a)(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;
> (a)(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid ....

The Court unanimously resolved the split in the circuits over whether subparagraphs (a)(2) and (a)(3) require that a false claim be presented to a federal official, the "presentment" requirement, and whether the provisions require intent to cause the Government to pay a false claim. Although it found no presentment requirement in (a)(2) and (a)(3), the Court held that it is insufficient to show merely that federal funds were used to pay the claim. Rather, under (a)(2) it must be shown that the "defendant intended that the false claim or statement be material to the Government's decision to pay or approve the false claim," and under (a)(3) it must be shown that the conspirators intended to use the false record or statement to get a claim paid by the Government. In so ruling, the Court charted a course and interpretation of the FCA that may have significant ramifications for other aspects of the much-litigated Act.

This Feature Comment focuses on possible ramifications of *Allison*. The article "Supreme Court Clarifies Elements of FCA Action," 50 GC ¶ 208, provides an excellent summary of the holdings of this case.

Procedural/Factual History—Allison Engine Co. Inc. supplied generator sets under subcontract to two shipyards, Bath Iron Works and Ingalls Shipbuilding, that held prime contracts with the Navy for destroyers. Allison subcontracted with General Tool Co. (GTC) to assemble the sets, and with Southern Ohio Fabricators Inc. (SOFCO) to manufacture the base and enclosures for the sets. Former GTC employees brought a qui tam action alleging that certificates of conformance signed by Allison, GTC and SOFCO falsely stated that work complied with Navy specifications and that their invoices to the shipyards constituted express, or, in the alternative, implied, certifications that the work complied with specifications. At trial, however, relators did not introduce into evidence the invoices that the shipyards submitted to the Navy.

The U.S. District Court for the Southern District of Ohio held that both subparagraphs (a)(1) and (a)(2) require a showing that a false or fraudulent claim was submitted to the Government. The court refused to "infer" that the prime contractors had submitted invoices and, in the absence of actual invoices in evidence, granted defendants' motion for judgment as a matter of law. The U.S. Court of Appeals for the Sixth Circuit concluded that subparagraphs (a)(2) and (a)(3) do not require proof of intent to cause a false claim to be paid by the Government and reversed the lower court ruling. *U.S. ex rel. Sanders et al. v. Allison Engine Co. et al.*, 471 F.3d 610 (6th Cir. 2006); see Debolt and Reams,

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Feature Comment, "False Claims, Presentment And The Possible Future Of Iraqi Reconstruction Litigation," 49 GC ¶ 165.

In essence, the Sixth Circuit found that it was enough that Government funds were to be used to pay the false claim, and that there is no presentment requirement in (a)(2) or (a)(3), as there is in (a)(1). This conflicted with the U.S. Court of Appeals for the District of Columbia Circuit's decision in *U.S. ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488 (D.C. Cir. 2004), cert. denied, 544 U.S. 1032 (2005). In *Totten*, the presentment requirement in (a)(1) was read into (a)(2).

The *Allison* Decision—The Supreme Court viewed subparagraphs (a)(2) and (a)(3) differently than did the Sixth Circuit. It interpreted (a)(2) as requiring a plaintiff to "prove that the defendant intended that the false record or statement be material to the government's decision to pay or approve the false claim." It held that the Sixth Circuit's interpretation did not accord meaning to the statutory requirement in (a)(2) " 'to get' a false or fraudulent claim 'paid or approved by the government.' " It interpreted "to get" as denoting purpose and requiring an intent that a false or fraudulent claim be "paid or approved by the government." The Supreme Court further rejected the argument that the definition of "claim" in § 3729(c), which includes a claim that is not directly submitted to the Government, should be construed to read out the express language in (a)(2) that the defendant intends that the Government pay or approve the claim. The Court clarified that the requirement in (a)(2) to show an intended purpose—payment or approval by the Government—is separate and distinct from the requirement in § 3729(b) that the contractor "knowingly" submit false information.

The Court cautioned that if relators were not required to show intent that the claim be paid or approved by the Government, liability under the FCA would be almost boundless. The Court also emphasized that contractors should not be liable for consequences beyond their conduct.

The Supreme Court applied a similar statutory interpretation to (a)(3), which concerns conspiracy "to defraud the government by getting a false or fraudulent claim allowed or paid." The Court found that this requires a showing that the "conspirators had the purpose of 'getting' the false record or statement to bring about the government's payment of a false or fraudulent claim," and that the false record or statement is material to the Government's payment. It concluded that the interpretation sought by the Government and approved by the Sixth Circuit had the effect of substituting the phrase " 'paid or approved by the government' for the phrase 'paid by government funds.' "

The Court was careful to explain that the need to show intent to get a claim paid does not mean that plaintiffs had to prove that conspirators intended that the claim be presented directly to the Government, as petitioners argued. In doing so, it overruled the portions of *Totten* that read the presentment requirement of (a)(1) into subparagraphs (a)(2) and (a)(3). Although it did not conclude that (a)(2) and (a)(3) specifically require that a claim be presented to a federal official or employee, the Court refined the analysis in *Totten* to focus on the intent of the submitter to have a false claim presented to the Government for payment.

Possible Ramifications—The practical result of this decision is that plaintiffs will have greater difficulty proving FCA violations against subcontractors. More significantly, the Court's confirmation of a materiality requirement and the requirement to demonstrate an intent that the claim be paid by the Government will prevent expansion of the FCA to situations in which alleged false statements are remote from payment. As the Court clarified these requirements, it underscored the need to bind the FCA to its original role of fighting fraud and to not expand it to attach to any falsity causing federal funds to be received.

Additional Difficulty Showing Intent for False Subcontractor Claims: Although the Supreme Court recognized that a relator must show that the defendant actually submitted the claim to the Government, the requirement to show an intent that the claim be paid or submitted to the Government appears to protect lower-tiered subcontractors who may not know that the end user is the Government. The Court clearly intended to restrict FCA liability for actions directed solely at private parties, even if they have the ultimate effect of causing the Government to overpay. The more remote the subcontractor tier presenting the claim, the more difficult it likely will be to prove the requisite intent. The Government can no longer argue that it need only show an intent to submit a false claim to the private entity that would pay the claim with federal funds.

However, the facts in *Allison* are extreme because the plaintiffs did not introduce into evidence the invoices that the prime contractors presumably

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submitted to the Government. The Court's rejection of petitioners' argument that (a)(2) requires presentment of the false claim or statement directly to the Government means that subcontractors, even lower-tiered ones, may be liable under the FCA if facts prove the requisite intent that the false claim or statement be used to get the Government to pay the claim.

Materiality and Intent Requirements May Restrict FCA Expansion—The Court confirmed that the materiality of the false statement or claim to the Government's decision to pay is an essential element of (a)(2) and (a)(3). It requires a showing of "the direct link between the false statement and the Government's decision to pay or approve a false claim." Additionally, plaintiffs must show that the false record or statement at issue had a "material effect on the government's decision to pay the false or fraudulent claim." Thus, the Court linked materiality to a showing that the false statement, claim or certification caused the Government to pay. However, it did not expand on a particular test for this showing.

The materiality requirement will likely be used to argue that the alleged false statement, document or certification had little or nothing to do with the decision of the Government official. Given the Court's language, it will be more difficult for the Government to rely on performance aspects that are not specifically required for payment by the Government.

The Supreme Court clearly views the FCA as an instrument to combat false claims to the Government, not as a general fraud statute. The materiality requirement, as well as the intent requirement, may impede expansion into areas such as implied false certification cases, in which the submission of a request for payment is argued to imply compliance with preconditions to payment. The Court's ruling in *Allison* affirms case law in many circuits that has been used to restrict FCA application to only those noncompliances that are material to Government disbursement decisions. See *U.S. ex rel. Mikes v. Straus,* 274 F.3d 687 (2d Cir. 2001) (Implied certification "is appropriately applied only when the underlying statute or regulation upon which the plaintiff relies *expressly* states the provider must comply in order to be paid."); *U.S. ex rel. Willard v. Humana Health Plan of Texas Inc.*, 336 F.3d 375, 382–83 (5th Cir. 2003) (Court rejected allegation based on implied false certification for violation of antidiscrimination regulations because plaintiff did not show that the agency conditioned payment on compliance with such regulations, and such regulations were not referenced in the contract); *U.S. ex rel. Landers v. Baptist Mem'l Health Care Corp.*, 525 F. Supp. 2d 972, 978 (W.D.Tenn. 2007) ("Conditions of Participation are not the equivalent of Conditions of Payment.").

Significantly, the Court's decision did not discuss whether, under its ruling, the concept of "implied certification" could be sufficient for FCA liability, although that issue was raised at the district court level. The Court's decision does not expressly overrule the recognition of an implied certification theory, but the requirement to show the nexus between a contractor's action and the intent to cause the Government to pay should make it tougher to prove the necessary elements for implied certification in circuits that have recognized it. Moreover, the Court's concern that unsuspecting entities may be subject to FCA liability for actions "beyond their control" suggests that the allegedly breached standard would have to be clear and directly material to payment.

Potential Congressional Changes to the FCA—*Allison* is a significant decision, but it is also a statutory construction case. If Congress disagrees with the Court's interpretation, it could change the FCA. Sen. Charles Grassley (R-Iowa), who filed an amicus curiae brief in *Allison* in support of the Sixth Circuit's ruling, has introduced the False Claims Act Correction Act of 2007, S. 2041. The House version, H.R. 4854, as currently drafted, defines "government money" or property to include not only money belonging to the Government, but money originally provided by the Government or belonging to an "administrative beneficiary," such as a bankruptcy trustee. This expanded definition would arguably expand FCA liability to encompass submissions to private entities that have received Government funds without requiring the nexus between the false statement and the act of seeking payment from the Government. See *Written Statement of the U.S. Chamber of Commerce and U.S. Chamber Institute for Legal Reform In Opposition to H.R. 4854, The False Claims Correction Act of 2007* (June 19, 2008). At this time, it is too speculative to predict what version, if any, of the bill will be passed by Congress. Given this uncertainty, it is difficult to foresee the lasting effect of *Allison* on the FCA.

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