

Liability Under the False Claims Act Arises Even Where a Claim is not Presented to the Government

Introduction: The Sixth Circuit recently rejected a D.C. Circuit interpretation of the False Claims Act ("FCA"), which had stated that, to be liable for a FCA violation under 31 U.S.C. section 3729(a)(2), a contractor must have presented a false claim to the United States government. See *United States ex rel. Sanders, et al. v. Allison Engine Co., et al.*, No. 05-3502 (6th Cir. Dec. 19, 2006) (rejecting interpretation of 31 U.S.C. § 3729(a)(2) found in *United States ex. Rel. Totten v. Bombardier Corporation and Envirovac, Inc.*, 380 F.3d 488 (D.C. Cir. 2004)). Instead, the Sixth Circuit held that the plain language and legislative intent of the FCA did *not* require that the false claim be presented to the government where a person "knowingly makes ... a false record or statement to get a false or fraudulent claim paid or approved by the Government." This Update discusses this decision, its implications, particularly for contractors doing business in Iraq, and offers several practitioner's points.

Background: The FCA, 31 U.S.C. § 3729(a) provides, in relevant part:

Any person who:

- (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; [or]
- (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;

....

... is liable to the United States Government for a civil penalty of not less than \$5,000 and not more than \$10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person¹

- Passed initially in 1863, revised in 1982, and amended in 1986, the FCA is designed to curb fraud perpetrated against the government by, among others, contractors engaged in the performance of government contracts. Importantly, the statute is enforceable not only by the United States government, but also by private citizens who learn of fraud against the government ("relators"). As part of the 1982 revisions, the above-quoted text was separated from a single paragraph into the numbered sections that exist today. Of interest here, the text of section 3729(a)(1) specifically requires that a false claim be presented to the United States government for payment, while the text of section 3729(a)(2) contains no such explicit requirement.
- In *Totten*, the United States Court of Appeals for the D.C. Circuit had, in dicta, interpreted section 3729(a)(2) to require that a person would not only have to use a false record or statement to get a false claim paid by the government, but would also have to present such a record or statement to the government. While section 3729(a)(2) does not mention a presentment requirement, the *Totten* court found that the history of the FCA, along with several canons of statutory construction, required that the words "*by the Government*," included at the end of section 3729(a)(2), be interpreted as Congress' way of "referring back to the presentment requirement of Section 3729(a)(1)."

¹ The civil penalty now stands at \$5,500 to \$11,000 due to the Federal Penalties Inflation Adjustment Act of 1990.



The *Allison Engine* Decision: In *Allison Engine*, plaintiff-relators provided evidence that several false claims were knowingly submitted by lower-tier subcontractors and were ultimately paid with government funds. Relators did not, however, provide evidence that these claims were presented to the government. Following the *Totten* decision, the United States District Court for the Southern District of Ohio found that there could be no liability absent proof of presentment, and granted the defendant's motion for judgment as a matter of law.

- On appeal, the Sixth Circuit rejected the conclusion reached by the *Totten* court, holding instead that the plain language of section 3729(a)(2) does not specifically require that a false claim be presented to the government. The *Allison Engine* court pointed out that 31 U.S.C. section 3729(c) defines a "claim" as "any request ... for money or property ... if the United States provides any portion of the money or property which is requested or demanded [or any money which is used to reimburse a contractor]...." The court concluded that this language, read in conjunction with section 3729(a)(2), demonstrates that "so long as it can be shown that the claim was paid with government funds," there is "nothing in [the] language to suggest that the claim must have been shown to have been presented to the government."
- The *Allison Engine* court buttressed its interpretation of the statutory text with citations to legislative history indicating that the FCA "is intended to reach all fraudulent attempts to cause the Government to pay out sums of money," and that "a false claim is actionable ... [even though] the claims ... were made to a party other than the Government, if [such payment would result] in a loss to the United States." Differentiating the meaning of 3729(a)(1) from 3729(a)(2), the court stated that 3729(a)(1) dealt with presenting a false claim to the government, regardless of whether the claim was actually paid, while 3729(a)(2) addressed the situation where a contractor is actually paid with the government's money, in reliance on the contractor's fraudulent record or statement. This, the *Allison Engine* court believed, effectuated the Supreme Court's interpretation that the FCA is a remedial statute and should be construed broadly to protect the public fisc from fraudulent claims in whatever form they may be made.
- Since the District Court for the Southern District of Ohio had granted the defendant's motion for judgment as a matter of law on the grounds that the relators had not introduced evidence on presentment, the Sixth Circuit reversed the District Court and remanded the case so that the jury could decide whether the defendants had violated the FCA.

Practical Implications: The practical implications of the *Allison Engine* decision are far-ranging.

- The decision's broadest interpretation allows for FCA liability whenever a false claim is submitted to any entity, so long as that entity is paying such false claim with even a small percentage of government funding. This would include submitting fraudulent statements or records to prime contractors, subcontractors, organizations operating under federal grants, or even foreign entities that are wholly or partially financed by the United States government. This last set of recipients is of paramount importance in the wake of recent events.
- One of the most high profile contemporary issues concerns the abuse, both real and perceived, of the contracting processes in the course of Iraq reconstruction. Several instances of alleged contractor abuse have garnered national media coverage, and the new Democrat-controlled Congress has vowed to make examination of Iraqi reconstruction contracts one of its top priorities. In an environment where non-governmental agencies are contracting with private companies in the chaos present in modern Iraq, one should expect increased FCA litigation, and that the divergence of opinion between the *Totten* court and the *Allison Engine* court will spur litigation that might otherwise be discouraged if actual presentment to the government was uniformly held to be a requirement under 3729(a)(2).

Practitioners' Tips: As *Allison Engine* removed the presentment requirement from section 3729(a)(2), at least in the Sixth Circuit and perhaps in other circuits which have not considered the issue, the decision will embolden plaintiffs lawyers' efforts to pursue recoveries under the FCA's *qui tam* provision. Further, the *Allison Engine* court's expansive language regarding the scope of the FCA's anti-fraud provisions may inspire future decisions construing that statute more broadly. To avoid the litigation costs associated with *qui tam* suits, we recommend the following practitioners' tips where federal government funds are involved:

- Ensure that contract and program personnel fully understand the terms of any agreement before representing to the government, a prime contractor, or other organization that your company has met all applicable requirements governing the expenditure of government funds.
- Document any disputes with the government or other customer concerning the meaning of any contract terms or performance requirements in order to be able to demonstrate later your rationale as to why your company believed it had satisfactorily performed the contract under its interpretation of the contract.
- Fully document your performance of your agreement as it relates to billings. Remember the phrase: "if you cannot justify, you cannot bill that guy."
- Remember that under the *Allison Engine* decision, any false communication that may arguably relate to an invoice or payment requirement can be considered a false record or statement. Consider channeling all of your communications between your company and the contracting entity through as few people as possible to ensure that only personnel educated about the FCA are making substantive representations regarding the performance of the contract.
- Educate your employees to ensure that they know the penalties associated with a FCA violation. For each infraction, a contractor is liable for a civil penalty of \$5,500 to \$11,000, plus three times the damages suffered by the government as a consequence of the false claim. Additionally, in some cases, criminal penalties may apply.

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