Supreme Court's Allison Engine Decision's Potential Impact On False Claims Act Enforcement In Healthcare Cases
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Introduction

On June 9, 2008, the Supreme Court issued its unanimous opinion in *Allison Engine Co. v. United States ex rel. Sanders, et al.* ("Allison Engine"), which clarifies the metes and bounds of the limited reach of the False Claims Act ("FCA"). The Court's opinion, authored by Justice Alito, vacated the Sixth Circuit's decision and its core holdings regarding what must be proven to establish liability under key provisions of the FCA. It constitutes one of the most significant FCA decisions handed down by the Court in recent years and has potentially far-reaching favorable implications for those in the healthcare industry facing potential FCA liability.

At its core, the FCA imposes civil liability on any person who: (1) "knowingly presents, or causes to be presented" a false or fraudulent claim to the Government;² (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,";³ and/or (3) "conspires to defraud the Government by getting a false or fraudulent claim allowed or paid,".⁴ The key issue presented to the Supreme Court in *Allison Engine* was whether under §3729(a)(2) 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. As discussed below, while the Court found no implicit presentment requirement in the plain language of §3729(a)(2), it did hold that, formal and actual presentment notwithstanding, the FCA requires proof that the defendant used an allegedly false record or statement for the precise purpose of getting a false claim paid or approved by the Government.⁵

Case Background

In 1985, the U.S. Navy entered into contracts with shipbuilders for the construction of a new fleet of guided missile destroyers.⁶ A portion of the work was subcontracted to the petitioners in this case.⁷ The Navy's contract specified that each and every part of the destroyers was to be built in accordance with certain specifications.⁸ 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.⁹

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, however, the relators failed 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's decision, holding that respondents' §§3729(a)(2) and (a)(3) claims did not require proof of intent to cause a false claim to be paid by the Government, but rather that proof of intent to cause a false claim to be paid by a private entity using Government funds was sufficient.

**Summary of Allison Engine Decision**

In rejecting the Sixth Circuit's interpretation of the FCA, the Supreme Court held that, to establish FCA liability under 31 U.S.C. §§3729 (a)(2) and (a)(3), a mere showing that a prime contractor of the Government used "government money" to pay a subcontractor's allegedly false claim is insufficient. The Court made clear that, to impose liability on a defendant for knowingly using a "false record or statement to get a false or fraudulent claim paid or approved by the Government," the Government "must 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." And, in tandem, the Court held that, to impose liability on a defendant for conspiring "to defraud the Government by getting a false or fraudulent claim allowed or paid," "it must be shown that the conspirators intended 'to defraud the Government.'"

The Court concluded that the Sixth Circuit's interpretation improperly deviated from the FCA's language and intent. Although the Court did not find an implicit presentment requirement under § 3729(a)(2), it did hold that the FCA requires that the defendant must have used an allegedly false record or statement for the precise purpose of getting a false claim paid or approved by the Government. Indeed, 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 §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.' Under §3729(a)(2) a defendant must intend that the Government itself pay the claim." According to the Court, this element of intent prevents the FCA from expanding "well beyond its intended role of combating 'fraud against the Government.'" It emphasized that, "[r]ecognizing 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," and stressed that its interpretation of §3729(a)(2) "gives effect to Congress' efforts to protect the Government from loss due to fraud but also ensures that 'a defendant is not answerable for anything beyond the natural, ordinary and reasonable consequences of his conduct.'"

**Implications For FCA Enforcement In Healthcare Cases**

The great majority of the billions of dollars that the Government has recovered under the FCA
since 2000 have come from cases involving the healthcare industry. If it had been affirmed by the Supreme Court, the Sixth Circuit's decision in *Allison Engine* could, under an expansive interpretation, impose FCA liability on a defendant in a disputed transaction merely if it receives payment from another private party, which receives some source of federal funding that it uses as part of that payment, regardless of whether the defendant knowingly intended to obtain such funds. For example, under the Sixth Circuit's interpretation of the FCA, "garden variety" payment disputes in the healthcare context involving inaccurate bills or invoices from a private vendor to another private entity that normally fall under state contract law, could give rise to FCA liability if the private party billed or invoiced receives any federal funds, including block grants. *Allison Engine* rejects this notion and requires specific intent by defendants to induce payment by the Government. The Court specifically distinguished the situation in which "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" from the situation in which "a subcontractor submits a false statement to the prime contractor intending for the statement to be used by the prime contractor to get the Government to pay its claim."\(^{25}\) According to the Court, as to the former situation, there is no intent to induce payment "by the Government" and therefore no FCA liability under §3729(a)(2).\(^{26}\)

In the Medicare and Medicaid context, the potential impact of the *Allison Engine* decision is less clear. At oral argument in the case, Justice Ginsburg expressed concern that the petitioners' interpretation might limit claims under Medicare and Medicaid otherwise understood to be covered by the FCA. The Court's unanimous opinion, however, is silent as to its applicability to Medicare and Medicaid cases. The conventional view has been that claims submitted to a state Medicaid program as well as records and documents (including certifications of compliance) used to get allegedly false claims paid, are subject to FCA liability because state Medicaid programs are partially funded by the Government. Notwithstanding the concern expressed by Justice Ginsburg at oral argument, the Court's decision may clearly affect this paradigm since it makes clear that it is "necessary for the defendant to intend that a claim be 'paid … by the Government' and not by another entity" and that "a plaintiff asserting a §3729(a)(2) claim must 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."\(^{27}\) Thus, while the *Allison Engine* decision does not address healthcare cases specifically, its holdings may provide opportunities for defendants in healthcare cases brought under the FCA to argue for dismissal if it can be demonstrated that the allegedly false document, record, and/or report at issue was not made with the purpose of inducing payment *by the Government*; the alleged falsity was not material *to the Government*; and/or the fiscal intermediaries or other non-governmental actors who make the payment approval decisions on the claims at issue do not constitute "the Government" for FCA purposes.

**Conclusion**

In sum, the Supreme Court's *Allison Engine* decision squarely rejects the long-held view of the Government that FCA claims may be based on statements made to private entities, including those made in the Medicare and Medicaid context, merely because Government funds are involved and without regard to the intent of the defendant. It also portends a sea change in the materiality analysis applicable to false certification FCA cases by shifting the focus from whether
the statement at issue could be material to the Government's decision to pay a claim to whether
the defendant had the subjective intent that the statement be material to such a decision. Of
course, its over-arching theme is that the FCA is not a limitless, all-purpose, anti-fraud statute and
FCA liability does not lie where there is insufficient proof of intent to get the Government to pay
a false claim.

Finally, it should be noted that, while *Allison Engine* serves to clarify and in large part narrow the
scope of FCA liability for those in the healthcare and other industries, its practical impact may be
somewhat ephemeral. In reaching its conclusions, the Court relied heavily on the plain language
of the statute, which leaves open the possibility that Congress may upset the *status quo* through
amendment. The Senate has introduced the so-called "False Claims Act Correction Act" and the
House has introduced similar legislation that could counter the holdings of *Allison Engine*. These
bills are currently under consideration by the Senate and House, respectively. In any event, false
claims liability is not limited to the FCA. Many states have their own false claims laws on their
books and many other states in the process of enacting new false claims laws. Despite the fact that
*Allison Engine* makes clear that the federal FCA does not reach certain conduct, it does not affect
potential liability for the same or similar conduct under state false claims laws. Thus, it is
imperative for those subject to the FCA and state false claims laws to carefully monitor both
federal and state legislative activities on the FCA/state false claims law front and pay close
attention to future court cases that interpret and apply the *Allison Engine* decision in order to
mitigate risk in this evolving enforcement landscape.

3 §3729(a)(2).
4 §3729(a)(3).
5 *Allison Engine* at 5-7.
6 *Id.* at 2.
7 *Id.*
8 *Id.* at 2-3.
9 *Id.* at 3.
10 *Id.*
11 *Id.* at 3-4.
12 *Id.* at 4; No. 1-:95-cv-970, 2005 WL 713569 (S.D. Ohio, Mar. 11, 2005).
14 *Allison Engine* at 1.
16 *Allison Engine* at 2.
18 *Id.* at 9.
19 *Allison Engine* at 5-7.
20 *Id.* at 5.
21 *Id.*
22 *Id.* at 8-9.
23 *Id.* at 9.
25 Id. at 8.
26 Id.
27 Id. at 7 and 1-2, respectively.

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