

# **The Future Of False Claims Act Enforcement In Health Cases: Recent Judicial And Legislative Developments**

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**Judicial Developments**

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# Introduction

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- This presentation will explore the future of the False Claims Act (“FCA”) through the examination of recent judicial and legislative developments and what they might mean in the context of FCA enforcement in the health care industry.

## Introduction (Cont.)

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- Recent key court decisions have signaled an emerging trend among the judiciary to restrict and limit the metes and bounds of FCA enforcement.
- Unhappy with this trend, both the Senate and House have legislation pending that undermines these recent decisions and seek to limit current jurisdictional requirements and broaden certain provisions to expand FCA enforcement.

# Introduction (Cont.)

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- **Part I** of this presentation will address these judicial developments and what they could mean in the context of FCA enforcement in health care cases.
- **Part II** of this presentation will address developments related to pending federal legislation that seeks to expand FCA enforcement and recent developments focused on expanded enforcement of state false claims laws.

# The FCA – History

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- Civil War Origins – Passed in 1863.
- Importantly, a reward was offered in what is called the “*qui tam*” provision, which permits citizens to sue on behalf of the government and be paid a percentage of the recovery. In a *qui tam* action, the private individual filing suit is called a “relator”.

# The FCA - Liability Provisions

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- The FCA establishes liability when any person or entity improperly receives from or avoids payment to the Federal government (tax fraud excepted). The most commonly enforced FCA provisions, include:
  - Knowingly **presents, or causes to be presented** to the Government a false claim for payment, 31 U.S.C. 3729(a)(1);
  - Knowingly **making, using, or causing to be made or used, a false record or statement** to get a false claim paid or approved by the government, 31 U.S.C. 3729(a)(2); and,
  - **Conspiring** to defraud the Government by getting a false claim allowed or paid, 31 U.S.C. 3729(a)(3).

# The FCA - 1986 Amendments

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- Establishment of defendant liability for "**deliberate ignorance**" and "**reckless disregard**" of the truth;
- Restoration of the "**preponderance of the evidence**" standard;
- Imposition of **treble damages and civil fines** (now up to \$11,000) per false claim;
- **Increased awards** for qui tam plaintiffs (between 15-30%);
- Successful plaintiff's **attorneys' fees and costs**; and
- **Employment protection** for whistleblowers including reinstatement with seniority status, special damages, and double back pay.

# The FCA - Practical Points

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- The FCA has a detailed process for making a claim.
  - A complaint (lawsuit) must be filed in U.S. District Court in camera (under seal).
  - After an investigation by the Department of Justice within 60 days (frequently extended), DoJ decides whether it will pursue (*i.e.*, “intervene” in) the case.

# FCA Enforcement

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- In the 20 years since the enactment of the 1986 Amendments to the FCA were passed (FY1987-2007), recoveries under the FCA have exceeded **\$20 Billion**.
- **Over \$13 Billion** of this amount – or roughly **two thirds** – has come from cases involving the **health care industry**

# The Supreme Court Weighs In: *Allison Engine Co., Inc. v. U.S. ex rel. Sanders*

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- The Supreme Court's June 9, 2008 decision in *Allison Engine Company, Inc. v. United States ex rel. Sanders*, decided a number of important questions under the FCA and raised others:
  - When does a subcontractor's false statement to a Government contractor give rise to potential FCA liability?
  - What role does the Government's reliance have?
  - What does "paid by the Government" mean?

# ***Allison Engine – Overview***

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- In a unanimous decision by Justice Alito, the Supreme Court vacated the Sixth Circuit's decision and held that, even though "presentment" was not required for liability under 31 USC. §§3729 (a)(2) and (a)(3), it was not sufficient to merely show that a government prime contractor used "government money" to pay a subcontractor's false claim.

# ***Allison Engine* – “Presentment”**

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- The Court's opinion resolves the conflict among the circuits over the necessity of the "presentment" requirement under Sections 3729 (a)(2) and (a)(3).
- The Court's presentment analysis begins with language in subsection (a)(2) requiring that the defendant must make a false or fraudulent record or statement "to get" a false claim "paid or approved by the Government."

# ***Allison Engine* – “Materiality”**

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- Importantly, the Court's decision includes its implicit finding that FCA liability requires a showing of "materiality," and that the false statement must be a "condition of payment" in order to satisfy that materiality requirement.
- Objective and Subjective Requirements?
  - “Could Cause/Impact”
  - “Intended To Cause/Impact”

## ***Allison Engine* – In Sum**

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- Through its decision in *Allison Engine*, a unanimous Supreme Court has made it clear that FCA liability does not extend to situations where the link between a defendant's false statement and the Government's decision to pay is attenuated beyond what is foreseeable.

## ... So What Impact Will *Allison Engine* Have On FCA Enforcement In Health Care Cases?

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- *If* it had been affirmed by the Supreme Court, the Sixth Circuit's decision could 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 used for part of that payment, **regardless** of whether the defendant knowingly intended to obtain Government funds.

## ... So What Impact Will *Allison Engine* Have On FCA Enforcement In Health Care Cases? (Cont.)

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- In the Medicare and Medicaid context, the potential impact of the *Allison Engine* decision is less clear.
  - At oral argument, Justice Ginsburg expressed concern that the petitioners' interpretation might limit FCA enforcement related to Medicare and Medicaid. The Court's unanimous opinion, however, is silent as to its applicability to Medicare and Medicaid cases.

## ... So What Impact Will *Allison Engine* Have On FCA Enforcement In Health Care Cases? (Cont.)

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- While the *Allison Engine* decision does not address health care cases specifically, its holdings may provide opportunities for defendants in health care cases to argue for dismissal if it can be demonstrated that:
  - the allegedly false document, record 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.

# The Circuits “Pile On”:

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- In addition to *Allison Engine*, three recent Circuit Court decisions should further limit FCA enforcement:
  - ***United States ex rel. Wilson v. Kellogg Brown & Root, Inc.***, No. 07-1516, 2008 WL 2069804 (4th Cir. May 16, 2008) (“**KBR**”)
  - ***United States ex rel. K & R Limited Partnership v. Massachusetts Housing Finance Agency***, No. 07-7014, 2008 WL 2651088 (DC Cir. July 8, 2008) (“**K&R Partnership**”)
  - ***United States ex rel. Conner et al. v. Salina Regional Health Center, Inc.***, 2008 WL 4430668 (10<sup>th</sup> Cir. Oct. 2, 2008) (“**SRHC**”)

# The Fourth Circuit's *KBR* Decision

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- On May 16, 2008, the 4<sup>th</sup> Circuit affirmed the dismissal of a *qui tam* case arising out of an Iraq "task order" contract alleging that the defendant fraudulently induced the Army to issue a task order for transportation services based on an allegedly false misrepresentation that it would comply with the task order's maintenance and safety requirements.

## The Fourth Circuit's *KBR* Decision (Cont.)

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### Objective Falsehood Required

- *First*, the court held that a "false" claim or statement under the FCA requires an "objective falsehood."
- The Fourth Circuit in *KBR*, rejects this notion and requires an objective determination in determining this issue of whether or not a claim or statement is "false."

# The Fourth Circuit's *KBR* Decision (Cont.)

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## Objective Falsehood Required (cont.)

- The Fourth Circuit in *KBR* held that the FCA requires a sensible approach:

[w]hile the "phrase 'false or fraudulent claim' in the False Claims Act should be construed broadly," it just as surely cannot be construed to include a run-of-the-mill breach of contract action that is devoid of any objective falsehood. An FCA relator cannot base a fraud claim on nothing more than his own interpretation of an imprecise contractual provision. To hold otherwise would render meaningless the fundamental distinction between actions for fraud and breach of contract.

## The Fourth Circuit's *KBR* Decision (Cont.)

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### Materiality and Rule 9(b)

- ***Second***, the court held that, even if the statement was "false," it could not have been material, and affirmed dismissal under Rule 9(b) for failure to plead the necessary facts demonstrating materiality.

## ... So What Impact Will *KBR* Have On FCA Enforcement In Health Care Cases?

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- While the Fourth Circuit's *KBR* decision does not address health care cases specifically, its holdings may provide opportunities for defendants to argue for dismissal if it can be demonstrated that:
  - There is **no objective falsehood, but rather a disagreement in contractual provisions;**
  - The **dispute is contract based** and not subject to the FCA; and
  - Where no breach of contract claim is asserted and the allegations lack specificity to support an FCA claim, **Rule 9(b)** compels dismissal.

# The DC Circuit's *K&R Partnership* Decision

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- In a decision issued on July 8, 2008 – one month after the Supreme Court issued its *Allison Engine* decision, the DC Circuit affirmed the dismissal of FCA allegations that were premised on what the court found to be ambiguous Government requirements in mortgage notes that were the basis of Federal claims.

# “Is this love baby, or just confusion?”

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# The DC Circuit's *K&R Partnership* Decision

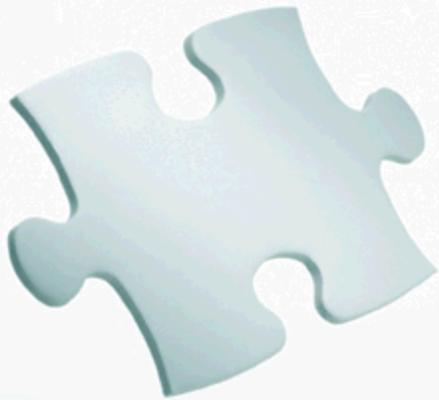
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- Judge Brown, writing for a unanimous panel of the DC Circuit, held that a finding of reckless disregard could not be supported because:
  - the requirements on which the *qui tam* relator based its argument of "falsity" were ambiguous,
  - the defendant's interpretation of those requirements was reasonable, and
  - nothing warned the defendant away from its interpretation.

## **... And, The Significance Of *K& R* Partnership To Health Care Cases?**

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- This decision also should pave the way for more summary dispositions of FCA cases based on ambiguous regulations or contractual requirements.



## ... And, The Significance Of *K& R Partnership To Health Care Cases?* (Cont.)

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- ***Rehabilitation Assoc. of Va. V. Kozlowski***, 42 F.3d 1444, 1450 (4th Cir. 1994).

"There can be no doubt but that the statutes and provisions in question, involving the financing of Medicare and Medicaid, are among the most completely impenetrable texts within human experience. Indeed, one approaches them at the level of specificity herein demanded with dread, for not only are they dense reading of the most tortuous kind, but Congress also revisits the area frequently, generously cutting and pruning in the process and making any solid grasp of the matters addressed merely a passing phase."

# The 10<sup>th</sup> Circuit's *SRHC* Decision: "False Certification" FCA Claims Rejected

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- ***United States v. Data Translation*, 984 F.2d 1256 (1<sup>st</sup> Cir. 1992)**
- Broad-based certification language does not satisfy the materiality standard
- The court considered whether a broad disclosure requirement formed the basis for false claims allegations. (The disclosure form at issue was analogous to the "kitchen sink" certification language found in the Form 2552.) Judge (now Supreme Court Justice) Breyer was not impressed with the Government's reliance on such a broad-based conformance as the basis for its false certification allegation.

## The 10<sup>th</sup> Circuit's *SRHC* Decision: "False Certification" FCA Claims Rejected (Cont.)

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- "Exaggerating to explain our point, we find the Government's interpretation a little like that of, say, a park keeper who tells people that the sign "No Animals in the Park" applies literally and comprehensively, not only to pets, but also to toy animals, insects and even chicken sandwiches. If one met such a park keeper, one would find his interpretation so surprisingly broad that one simply would not know what he really meant or what to do . . . . [N]o reasonable person . . . could have believed that the Government really wanted the complete and total disclosure for which the language seems to ask."

# SRHC And Its Impact On FCA Health Care Cases

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- Alleged that SRHC violated the FCA by seeking payment for Medicare services rendered while in violation of a host of regulations and statutes.
  - SRHC submitted “annual cost reports” with the Government certifying compliance with Medicare laws and regulations.
  - Because SRHC was not in total compliance it renders all claims submitted for reimbursement false under the FCA.

## **SRHC And Its Impact On FCA Health Care Cases (Cont.)**

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- “Although this certification represents compliance with underlying laws and regulations, **it contains only general sweeping language and does not contain language stating that payment is conditioned on perfect compliance with any particular law or regulation.** Nor does any underlying Medicare statute or regulation that payment is so conditioned.”

## **SRHC And Its Impact On FCA Health Care Cases (Cont.)**

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- “Connor fundamentally contends that ***any*** failure by SRHC to comply with ***any*** underlying Medicare statute or regulation during the provision of ***any*** Medicare-reimbursable service renders this certification false, and the resulting payments fraudulent.”

# SRHC And Its Impact On FCA Health Care Cases (Cont.)

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- **Conditions of program participation v. conditions of payment**
- “A false certification is ... actionable under the FCA only if it leads the government to make a payment which it would not otherwise have made.”
- “Conditions of ***participation*** ... are enforced through administrative mechanisms, and the ultimate sanction for violation of such conditions is removal from the government program .... Conditions of ***payment*** are those which, if the government knew they were not being followed, might cause it to actually refuse payment.”

## **SRHC And Its Impact On FCA Health Care Cases (Cont.)**

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- “Based on the fact that the government has established a detailed administrative mechanism for managing Medicare participation, we are compelled to conclude that although the government considers substantial compliance a condition of ongoing Medicare ***participation***, it does not require perfect compliance as an absolute condition to receiving Medicare ***payments*** for services rendered.”

# Handout Materials (On Judicial Developments Portion):

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- False Claims Act, 31 U.S.C. 3729 *et seq.*
- Department of Justice False Claims Act Enforcement Statistics (including general, health care specific, and *qui tam/non-qui tam*)
- Recent Key FCA Decisions (*Allison Engine*, *KBR*, *K&R Partnership*, and *SRHC*)
- Article, “The Supreme Court’s *Allison Engine* Decision’s Potential Impact on FCA Enforcement in Health Care Cases”
- Case Summaries of Recent Health Care FCA Cases Citing *Allison Engine*, *KBR*, and *K&R Partnership*