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Client Alert

Supreme Court to Address "Presentment" Requirement Under False Claims Act

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In *Allison Engine Co., Inc. v. United States ex rel. Sanders*, No. 07-214, the United States Supreme Court will consider whether the False Claims Act imposes liability on false claims made to parties other than the government so long as the claim is paid with government funds. The case is expected to resolve a conflict among the lower courts with far-reaching implications for companies that work as subcontractors on government projects or otherwise indirectly receive government funds.

The *Allison Engine* case arises from contracts for the construction of 50 United States Navy Arleigh Burke-class guided missile destroyers for approximately $1 billion each. The Navy's prime contractors were two shipyards, each of which retained various subcontractors for the project. The defendants in the case are three subcontractors that built generator sets to supply electrical power to the destroyers. The plaintiff-relators are former employees who worked on the generator set assembly teams for one of the subcontractors.

The relators filed suit under the False Claims Act, alleging that defendants knowingly violated their contracts by using unqualified workers, by not conducting final inspections required by military regulations, and by providing defective generator sets. The False Claims Act imposes liability on any person who presents a false claim to the government (31 U.S.C. § 3729(a)(1)), makes a false statement to get a false claim paid by the government (§ 3729(a)(2)), or conspires to defraud the government by obtaining payment for a false claim (§ 3729(a)(3)). The relators alleged that defendants were liable under each provision of the Act.

At trial, the relators presented evidence that all of the money used to pay the relevant prime contracts and subcontracts came from the government. They did not, however, present any evidence that defendants submitted a false claim for payment directly to the government. At the close of the relators' case, the district court granted judgment as a matter of law, finding that defendants could not be liable under the False Claims

Act absent evidence that they "presented" to the government a false claim for payment. The Sixth Circuit reversed, ruling that False Claims Act liability may be imposed for a false claim that is not presented to the government so long as government money is used to pay the claim. *United States ex rel. Sanders v. Allison Engine Co., Inc.*, 471 F.3d 610, 622-23 (6th Cir. 2007).

Defendants filed a petition for a writ of *certiorari* to the United States Supreme Court, arguing that the Sixth Circuit's ruling is at odds with a 2004 decision from the D.C. Circuit, authored by then-Judge and now-Chief Justice John Roberts, *United States ex rel. Totten v. Bombardier Corp*., 380 F.3d 488 (D.C. Cir. 2004), *cert. denied*, 544 U.S. 1032 (2005). In *Totten*, the D.C. Circuit noted that a plaintiff pursuing a cause of action under Section 3729(a)(2) must prove that a false claim for payment was actually submitted to the government—*i.e.*, "presentment" is an element of any False Claims Act cause of action. The *Totten* ruling flowed from the argument—presented by Pillsbury attorneys Mark Hellerer and Eric Fishman—that the plain language of the statute requires that a claim be presented directly to the government for False Claims Act liability to attach.

In seeking *certiorari*, the *Allison Engine* defendants noted the current split among U.S. Circuit Courts of Appeal on this issue, and asked the Supreme Court to provide guidance and avert "regulatory confusion for the thousands of businesses" that perform subcontracts on federally-funded programs. The defendants argued that should the Sixth Circuit's ruling stand, the scope of the False Claims Act would overextend to apply to "*any* claim for payment submitted to *any* entity that receives federal funding and that uses at least a portion of that funding to pay the claim." Such an interpretation would be at odds with congressional intent, as explained in the *Totten* decision.

The plaintiff-relators opposed the defendants' petition on various grounds. Among other things, the relators argued that "contract privity is irrelevant, since the FCA reaches all those who fraudulently obtain Government funds 'without regard to whether that person had direct contractual relations with the government.'" (quoting *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 544-45 (1943)).

The Chamber of Commerce of the United States submitted an *amicus curiae* brief in support of the defendants' petition. The Chamber's principal concern is that the Sixth Circuit's ruling dramatically expands the scope of False Claims Act liability, "beyond those who actually deal with Government or make claims against it to all transactions that can conceivably be traced to federal Government funds." The Chamber argues that common law and state law remedies should govern fraudulent claims among private parties. Otherwise, companies would be forced to mitigate against the risk of False Claims Act exposure by increasing the costs for products and services. In addition, litigation would become more expensive and difficult to settle in light of the draconian penalties imposed under the False Claims Act (treble damages plus a fine of $5,500-11,000 per false "claim").

The Chamber's arguments are consistent with the position that Pillsbury advanced in *Totten*. As the *Totten* court noted, extending False Claims Act liability to parties who are one or more steps removed from the government would seem to result in quadruple liability: by the subcontractor to the contractor for breach of contract and/or fraud, in addition to the treble damages and statutory fines to the government and the relator under the False Claims Act. The *Allison Engine* case gives the Supreme Court an opportunity to confirm and extend the *Totten* ruling and to limit the False Claims Act to those cases that involve actual fraud on the government, as opposed to disputes over dealings between private parties.

The vitality of the *Totten* rule is confirmed by a recent bill submitted by Senator Chuck Grassley of Iowa, dubbed the "False Claims Act Correction Act," which seeks to "address the *Totten* decision by removing the

requirement that false claims be directly presented to the government official, instead tying the liability directly to government money and property." *Statements on Introduced Bills and Joint Resolutions*, 153 Cong. Rec. S. 11506 (2007) (statement of Sen. Grassley, Member, S. Judiciary Comm.). No matter the outcome before the Supreme Court, the *Totten* rule could be short-lived if Congress passes the proposed legislation.

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