



## THE U.S. SUPREME COURT INTERPRETS THE “PRESENTMENT” REQUIREMENT OF THE FEDERAL FALSE CLAIMS ACT, AND ADDS INTENT AND MATERIALITY REQUIREMENTS

On June 9, 2008, the U.S. Supreme Court issued a unanimous decision in *Allison Engine Co. v. United States*, that limits – but does not eliminate – the circumstances in which a contractor or subcontractor on a federally funded project may be liable under the federal False Claims Act (“FCA”).

The FCA can be violated in two basic ways: (1) knowingly presenting a false claim to a federal Government official for payment or approval; or (2) knowingly making a false record or statement to get a false or fraudulent claim paid or approved by the Government. Federal courts have been split on whether “presentment” of a false claim to the Government for payment is a prerequisite for liability. Some courts have followed a decision by the Sixth Circuit Court of Appeals in *Allison* that the FCA is violated any time federal funds are used to pay a false claim, whether or not the claim is presented to the Government for payment. Other courts have followed the decision by the D.C. Circuit Court of Appeals in *Totten* (an opinion written by now Chief Justice Roberts), ruling that the FCA is violated only if a false claim is actually presented to the Government for payment. In accepting the *Allison* appeal, the U.S. Supreme Court decided to resolve the issue of whether the FCA covers any false claim paid for by Government funds, or only false claims submitted to a Government official for payment or approval.

Although the Court vacated the Sixth Circuit’s decision, the Court sided with the Sixth Circuit in ruling that “presentment” of a contractor’s claim for payment directly to the Government is *not* required for FCA liability for knowingly making a false record or statement to get a false claim paid or approved by the Government. However, the Court added the following *important limitations*:

- Liability will arise only when a contractor submits a false record or statement “*intend[ing]* that the *Government itself* pay the claim.”
- Thus, a false record or statement does not have to be submitted to the Government, but a false claim does have to be submitted to another “contractor, grantee, or other recipient of federal funds and then forwarded to the Government” with the intent that the claim be paid by the Government.

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- FCA liability will not arise if a false statement is made to a private entity without an intent that the Government will rely on the statement as a condition of payment. There must be a “direct link” between the false statement and the Government’s decision to pay or approve a false claim.
- The false record or statement must be “*material* to the Government’s decision to pay or approve the false claim.”
- To be liable for conspiracy to violate the FCA, the conspirators must have intended that a false record or statement would be used to get the Government to pay a claim. Again, liability would not depend on presenting the false record or claim directly to the Government; however, the conspirators must have agreed that the false record or statement would have a material effect on the Government’s decision to pay a false claim. In other words, the conspirators must have intended to defraud the Government.

Interestingly, the Court’s engrafting onto the FCA a requirement that a defendant must have had the *intent* that the *Government itself* pay a false claim has not been the basis of other federal court decisions and apparently was not even argued in the *Allison* case. This, coupled with the Court’s ruling that the false record or statement must have a *material* effect on the Government’s decision to pay the false claim, seems to be an attempt by the Court to close the floodgates to FCA claims that would otherwise be brought if the presentment requirement was eliminated without at least some qualifications.

Instead of providing contractors with a bright line for determining potential FCA liability, the practical effect of the Court’s ruling in *Allison* is to make the legal landscape even murkier. If a contractor submits an invoice for payment on a project that the contractor knows is federally funded, will that be enough to establish an intent to have the Government pay? In light of the intent requirement, are contractors better off not knowing whether a project is federally funded? Does intent have to be actual or can it be “constructive,” depending on the circumstances? These are just a few of the questions that will have to be answered in future cases.

The bottom line is that contractors with federally funded contracts will still have to be careful when contracting with agencies such as state departments of transportation because, depending upon how contractor payment requests are made and the contractor’s intent in making them, and how such requests are processed and paid, FCA liability may still exist.

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Note that pending in Congress is a bill that would *completely eliminate the presentment requirement* under the FCA and make the FCA applicable any time a contract is federally funded. The “False Claims Act Corrections Act of 2007,” S. 2041, has been reported out of the Senate Judiciary Committee, but has not come up for a vote in the Senate. A com-



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panion bill is in a House committee.

In the aftermath of the *Allison* decision by the U.S. Supreme Court, a “whistleblower” organization devoted to bringing FCA claims called the Court’s decision a “minor set back” and commented that “the rules of the game may have changed a little, however, the strategy to bring those guilty of defrauding the government to justice, has become more interesting.” These whistleblowers further commented that, “Maybe this uncertainty [about the implications of the *Allison* decision] will light a fire under Congress to pass the False Claims Correction Act.”

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In a recent regulatory development that is indirectly related to the issues in *Allison*, an amendment to the Federal Acquisition Regulations (“FAR”) was proposed on May 16, 2008, that would require federal prime contractors and subcontractors with contracts exceeding \$5 million and a performance period of more than 120 days to “self-report” suspected violations of the *civil* FCA by either a prime contractor or its subcontractors. A previously proposed amendment to the FAR would have limited the self-reporting requirement to suspected violations of federal *criminal* laws. The newly proposed regulation would obviously expand that obligation into an area in which the rules are unclear and the risks are formidable. Failure to self-report could lead to suspension, debarment and possibly other penalties.