

Please [click here](#) to view our archives

## FALSE CLAIMS ACT: Unanimous Opinion by the Supreme Court in *Allison Engine* Vacates Sixth Circuit's Expansion of FCA Liability

In a unanimous decision by Justice Alito, the Supreme Court today vacated the Sixth Circuit's decision in *Allison Engine Co. v. United States ex rel. Sanders*, 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 Co. v. United States ex rel. Sanders*, No. 07-214, slip op. (US June 9, 2008).<sup>1</sup> Contrary to the Sixth Circuit's interpretation, the Court held that "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." *Id.* at 2. Likewise, the Court held that, for conspiracy liability under Section 3729(a)(3), "it must be shown that the conspirators intended 'to defraud the Government.'" *Id.* at 9.

The Court explained that the mere fact that federal "government money" was involved was not a sufficient basis for liability. Instead, in simple but unequivocal language, the Court emphasized the requirement of a "direct link" between the false statement and the loss to the Federal Treasury:

If 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, the statement is not made with the purpose of inducing payment of a false claim "by the Government." In such a situation, the direct link between the false statement and the Government's decision to pay or approve a false claim is too attenuated to establish liability.

*Id.* at 8-9. Without this link, the Court found, the FCA would be impermissibly expanded to recognize fraud directed at private entities, which "would threaten to transform the FCA into an all-purpose anti-fraud statute." *Id.* at 9.

---

<sup>1</sup> The reader should note that the author of this Alert filed an amicus brief for the Washington Legal Foundation supporting the petitioner/defendant in this case.

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). While courts were in agreement that presentment was required for liability under subsection (a)(1), the circuits were split on the necessity of presentment under the two other liability provisions primarily relied upon in FCA cases. On one side of the conflict was the Sixth Circuit majority's holding in *Allison Engine* that presentment to the government was not required under subsections (a)(2) and (a)(3) as long as "government money" was used in whole or in part to pay the false or fraudulent claim. See [FraudMail Alert Nos. 07-10-29](#) and [08-02-26](#). On the other side of the issue, a majority of the DC Circuit held in *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488 (DC Cir. 2004) ("*Totten II*") that the presentment requirement was implicit in Section 3729(a)(2). The Supreme Court's decision today resolves this conflict by rejecting the Sixth Circuit's analysis, but also rejecting the reasoning of the DC Circuit in *Totten II*.

The Court's rejection of the presentment analysis in both cases began 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." The Court held that this language requires intent by a subcontractor that the Government, rather than another entity, eventually pay the claim, and not merely that "government funds" are used by private entities to pay it. Slip op. at 8 & n. 2. The Court noted that this requirement limits a defendant's liability to "the natural, ordinary and reasonable consequences of his conduct," but does not require proof that the false record or statement was actually submitted to the Government. *Id.* at 8-9.

Perhaps the most important aspect of the Court's decision is 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. In addition to materiality, the opinion contains important findings on intent and a variety of other key elements of liability under Sections 3729 (a)(1), (a)(2), and (a)(3), all of which will be examined in a subsequent FraudMail Alert.

Under today's decision, the full 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 foreseeable limits. This decision by a unanimous Court returns FCA liability from the realm of the potentially absurd to focus on what is reasonably foreseeable. It also insures that the False Claims Act remains a remedy for fraud that has a direct causal link to a loss to the Federal Treasury.

The Supreme Court's decision in *Allison Engine* is available [here](#).

## Authors and Contributors

---

For more information regarding this client alert, please contact your usual Fried Frank attorney or any of the attorneys listed below:

### Washington, DC

John T. Boese  
+1.202.639.7220

---

## Fried, Frank, Harris, Shriver & Jacobson LLP

### New York

One New York Plaza  
New York, NY 10004-1980  
Tel: +1.212.859.8000  
Fax: +1.212.859.4000

### Washington, DC

1001 Pennsylvania Avenue, NW  
Washington, DC 20004-2505  
Tel: +1.202.639.7000  
Fax: +1.202.639.7003

### Frankfurt

Taunusanlage 18  
60325 Frankfurt am Main  
Tel: +49.69.870.030.00  
Fax: +49.69.870.030.555

### Hong Kong

in association with  
Huen Wong & Co.  
9th Floor, Gloucester Tower  
The Landmark  
15 Queen's Road Central  
Hong Kong  
Tel: +852.3760.3600  
Fax: +852.3760.3611

### Shanghai

No. 888 Wanhangu Road  
7th Floor, Unit D  
Shanghai 200042  
(until Summer 2008, when we will be  
located in Park Place, Nanjing Road  
West)  
Tel: +86.21.2321.0188  
Fax: +86.21.6326.6899

## Fried, Frank, Harris, Shriver & Jacobson (London) LLP

### London

99 City Road  
London EC1Y 1AX  
Tel: +44.20.7972.9600  
Fax: +44.20.7972.9602

## Fried, Frank, Harris, Shriver & Jacobson (Europe)

### Paris

65-67, avenue des Champs Elysées  
75008 Paris  
Tel: +33.140.62.22.00  
Fax: +33.140.62.22.29

### *A Delaware Limited Liability Partnership*

FraudMail Alert® is published by the Qui Tam Practice Group of, and is a registered trademark and servicemark of Fried, Frank, Harris, Shriver & Jacobson LLP.

FraudMail Alert® is provided free of charge to subscribers. If you would like to subscribe to this E-mail service, please send an E-mail message to [FraudMail@ffhsj.com](mailto:FraudMail@ffhsj.com) and include your name, title, organization or company, mail address, telephone and fax numbers, and E-mail address.

To view copies of previous FraudMail Alerts, please visit our [FraudMail Alert® archives](#) on the Fried Frank website.

To view copies of previous Qui tam To Our Client Memoranda, please visit our [archives](#) on the Fried Frank website.