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FALSE CLAIMS ACT: D.C. Circuit Court of Appeals Affirms Dismissal of FCA Action, in Decision with Potentially Dramatic Implications for FCA Suits Involving Federal Grantees

A sharply divided panel of the Court of Appeals for the District of Columbia Circuit recently held that no liability can be imposed under 31 U.S.C. §3729(a)(1) of the False Claims Act for claims submitted to a federal grantee, unless the claims were actually presented for payment to an officer or employee of the United States Government. See United States ex rel. Totten v. Bombardier Corp., *No. 03-7128, 2004 U.S. App. Lexis 18231, at *2 (D.C. Cir. Aug. 27, 2004) (*Totten II*). The* Totten II *majority also firmly rejected the dissent's suggestion that FCA liability could arise under Section 3729(a)(2) even when a claim to a grantee is not actually presented to the U.S. Government.*

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In a decision which may appear to be arcane and academic, but is in fact critically important to FCA jurisprudence, the majority recognized and addressed the simple principle that the FCA is not, and was not intended to be, a universal remedy for every alleged false statement tangentially related to the federal government. Just how important the decision will be is not yet clear. Judge Garland contended in a dissenting opinion that the majority decision has potentially far-reaching implications: "The consequence of [this] ruling is a dramatic cutback in the federal government's ability to" litigate false claims actions against grantees. *Id.* at *80 (Garland, J., dissenting). "Where a grantee receives federal money in advance and then pays its contractors directly . . . the FCA will no longer provide an avenue to recover for false claims." *Id.* Whether that is true or not, the *Totten* decision -- and the legal and policy issues that the two opinions reflect -- is certain to be the subject of substantial future litigation.

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Background

The *Totten II* decision arose from relator's second appeal in a declined *qui tam* action; relator alleges that defendants submitted false claims to Amtrak for defective toilet systems. The claims were submitted directly to Amtrak, and apparently were not re-submitted to the government. (The court rejected relator's argument that Amtrak was a government entity, noting that Amtrak's organic statute has stated from Amtrak's inception that it "is not a department, agency, or instrumentality of the United States Government."). *Id.* at *6 (quoting 49 U.S.C. § 24301(a)(3)). However, Amtrak allegedly paid defendants with "federal funds that were specifically provided for the contract at issue." *Totten II*, 2004 U.S. App. LEXIS 18231, at *81 (Garland, J., dissenting).

In a lower court decision that was subsequently reversed, the district court originally held that Amtrak is not "subject to" Title 31 of the United States Code under the 1997 Reform Act. *United States ex rel. Totten v. Bombardier Corp.*, 139 F. Supp. 2d 50 (D.D.C. 2001). Reinstating the case, the Court of Appeals held that the Reform Act exempted Amtrak from the burdens, but not the protections, of Title 31. *United States ex rel. Totten v. Bombardier Corp.*, 286 F.3d 542 (D.C. Cir. 2002) (*Totten I*). However, Judge Randolph also noted in a concurring opinion that the court was expressing no opinion as to another threshold issue: "'whether [a False Claims Act] plaintiff may prevail against a defendant who submits a false "claim" to a federal grantee (such as Amtrak), without presenting evidence that the claim was ever actually submitted to the U.S. Government.'" *Id.* at *4 (quoting *Totten I*, 286 F.3d at 553).

On remand, the district court again dismissed relator's complaint, concluding that Section 3729(a)(1) of the False Claims Act imposes liability on "any person who . . . knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval." Although "claim" is defined in Section 3729(c) to include demands made to a grantee, the court held that the language of Section 3729(a)(1) is unambiguous, and requires that claim to be presented to an officer or employee of the United States Government. *United States ex rel. Totten v. Bombardier Corp.*, No. Civ.A. 98-0657RWR, 2003 WL 22769033, at *2 (D.D.C. Sept. 3, 2003). Relator argued that this ruling would be at odds with congressional intent, but the district court held that the statutory requirement of a claim to the federal government is clear, and that "[l]egislative history is irrelevant to the interpretation of an unambiguous statute." *Id.*

Relator again appealed; the Government filed briefs and argued as *amicus curie* in support of relator.

The Panel Majority's Decision in the Second Appeal

In *Totten II*, the panel majority decision, authored by Judge John Roberts, Jr. and joined by Judge Judith Rogers, applied the same reasoning offered by the district court. The majority held in a lengthy, scholarly opinion that the plain, unambiguous language of Section 3729(a)(1) contains a "presentment requirement." That is, claims must be "presented to an officer or employee of the government before liability can attach." *Id.* at *2. The court noted that there was no dispute that under its enabling statute, Amtrak "is not a department, agency, or instrumentality of the United States Government", and Section 3729(a)(1) requires a claim to be "presented to an officer or employee of the United States Government." *Id.* at *6, quoting 49 U.S.C. § 24301(a)(3).

The Government and relator argued that Section 3729(c)'s definition of "claim" is inconsistent with the Section (a)(1) presentment requirement. *Id.* at *11. Section 3729(c) defines "claim" to include a request or demand for payment made to a grantee "if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse . . . [the] grantee . . . for any portion of the money or property which is requested or demanded." According to the Government and relator, FCA liability may apply to false claims to grantees because such claims are "effectively" claims to the federal government, even in the absence of a direct claim to the government. The majority rejected this argument, quoting the concurring opinion in *Totten I*: "no matter how 'claim' is defined, subsection (a)(1) requires the alleged false claimant to present it (or cause it to be presented) to a federal officer or employee." *Id.* at *12 (quoting *Totten I*, 286 F.3d at 554 (Randolph, J., concurring)).

The majority further reasoned that Congress could have amended (a)(1) in 1986 to impose liability for claims presented only to a grantee or recipient of government funds, but it did not do so. As such, it was not the job of the court to write into the statute language that Congress neglected to provide: "The suggestion that Congress may have 'dropped a stitch' is not enough to permit us to ignore the statutory text. The Supreme Court reminded us in the Term just ended that "'[i]t is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think . . . is the preferred result.'" *Id.* at *19 (citations omitted).

The majority cited a number of policy reasons supporting its analysis, including:

- the need to limit the potential for multiple recoveries for the same alleged harm (which could occur, the court reasoned, if the grantee also pursued remedies against the defendant);
- the benefits of simplifying the statute's scienter requirement (a standard that would be complicated if no presentment requirement existed, because disclosure to the grantee of deficiencies in the claim could negate intent, even if no disclosure to the government occurred); and,
- preventing "almost boundless" collateral litigation from claims presented to grantees with insubstantial federal funds or federal contact. *Id.* at *20-22.

The Dissent

At oral argument, Judge Garland suggested that Section 3729(a)(2) provides an alternative basis for liability -- one that reconciles both the legislative history and the FCA's definition of "claim". The parties submitted supplemental briefs on this issue. In his dissent, Judge Garland argued that Section (a)(2) does not include a presentment requirement, and thus permits the imposition of FCA liability when a claim is submitted to a grantee, rather than to the federal government. According to Judge Garland, Congress intended the FCA to reach false claims or statements made to a party other than the government "if the payment on the claims would ultimately result in a loss to the United States." *Id.* at *70 (quoting S. Rep. No. 99-345, at 10).

The majority rejected this argument, holding that it would render the explicit presentment requirement in Section 3729(a)(1) largely meaningless. Instead, the panel majority held that Section (a)(2) complements (a)(1), and was "designed to prevent those who make false records or statements to get claims paid or approved from escaping liability solely on the ground that they did not themselves present a claim for payment

or approval." *Id.* at *36 (quoting *United States ex. rel. Harris v. Bernad*, 275 F. Supp. 2d 1, 6 (D.D.C. 2003) (citing Boese, Civil False Claims and Qui Tam Actions § 2.01[B], at 2-21 (2d ed. Supp. 2004-1)).

Conclusion

Totten II recognizes substantial limits on the circumstances under which FCA liability may be imposed in cases involving federal grantees. Because federal grantees disburse significant amounts of money under block grants and other federal programs without directly passing contractors' claims on to the federal government, the ramifications of this decision are potentially enormous. Given the high stakes and the strongly worded dissent by Judge Garland, a petition for rehearing en banc in *Totten II* is a virtual certainty. Nevertheless, the issues addressed in this case have not been resolved in other circuits, and the rationale applied by the majority offers a sound basis for challenging similar FCA actions in other jurisdictions.

Final Note

One interesting personal aspect of the two opinions is that the majority refers to the author's False Claims Act treatise as "scholarly commentary" supporting its analysis and conclusions. *Totten II*, 2004 U.S. App. Lexis 18231, at *35. The dissent, on the other hand, disagrees with both the book and the majority's reliance on it, and refers to it as a "practitioners' guide". *Id.* at *55 (quoting the introduction to the book and noting that the legal analysis in the book is without case support). Since these learned judges raised the issue publicly, I thought some comment was in order. When the book, *Civil False Claims and Qui Tam Actions*, was first published in 1993, I hoped it would provide a useful tool for practitioners on all sides of the cases. Over the eleven years since first publication, the book has evolved into a treatise that many circuit and district courts rely upon and quote. *See* FraudMail Alert® No. 03-11-07. Indeed, the Ninth Circuit's decision in *United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1266 (9th Cir. 1996) quoted from the book as its authority before any case law on point existed. I hope courts will continue to recognize the book for what I think it is -- both a "practitioners' guide" and "scholarly commentary."

If you would like to receive a copy of the decisions discussed above, or if you have questions regarding this area, please contact us at fraudmail@ffhsj.com or (202) 639-7220.

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