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CIVIL FALSE CLAIMS ACT: The Supreme Court Hears Argument on "Presentment" Requirement in the False Claims Act: Justices' Questioning Probed Statutory Construction Issues as well as Unusual Evidentiary Posture of the Case

Today the Supreme Court heard oral argument in *Allison Engine Co., Inc. v. United States ex rel. Sanders,* No. 07-214. The question on which the Court granted *certiorari* was whether "presentment" of a false claim to the Government, or some other form of submission to or approval by the Government, is required under Sections 3729(a)(2) and (a)(3) of the False Claims Act, 31 U.S.C. §§ 3729(a)(2) and (a)(3). The word "presentment," which is explicit in Section 3729(a)(1), is not found in (a)(2) and (a)(3), and a circuit split has developed on the issue of whether or not it is required under these sections. The split is most sharp between the D.C. Circuit holding in *Totten II* that the requirement is implicit in (a)(2), and the Sixth Circuit holding in *Allison* that no "presentment" or "submission" to the Government is required to establish liability under subsections (a)(2) and (a)(3). *See FraudMail Alert No. 07-10-29.*

In this case, false claims were allegedly submitted by the defendant subcontractor (Allison Engine) to prime contractors working on a Navy contract. The "presentment" requirement in such a case would appear to be easy to satisfy, except that in *Allison* the defendants argued, and the District Court agreed, that there was no evidence introduced at trial by the relators to show that any false statements or claims were ever submitted or presented to the Navy by the prime contractor. As a result, the case was dismissed at the close of the plaintiffs' case under Rule 50 after almost five (5) weeks of trial. The Sixth Circuit, however, reversed the District Court, holding that liability nevertheless extended to the subcontractor's claims to the prime contractor under subsections (a)(2) and (a)(3) as long as the prime contractor paid for the claims with "government funds." No "presentment" or "submission" to the U.S. was

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required under the Sixth Circuit's holding, which put it in direct conflict with the D.C. Circuit.

Today Allison's counsel (Theodore Olson) was peppered with questions about the scope and language of the FCA. Many justices were quizzical about the factual record. Much of the questioning by the Court of the U.S. Solicitor General's Office, which appeared *amicus* in favor of the relators, seemed to focus on how broadly the DOJ's view of the law affected "tangential" transactions. Justice Breyer constantly referred to the fact that government money is pervasive in the American economy, so that a strict reading of the relators' argument would apply the FCA to "virtually everything." The Government's attempts to draw limits on the scope of the law was subject to harsh questioning by a number of Justices, particularly after Government counsel appeared to concede that a false claim that defrauds only the contractor on a fixed price contract, and causes no loss to the Government, would not fall within the scope of the FCA.

Nearly every Justice weighed in with questions that probed the limits of liability under the Sixth Circuit's interpretation, as well as the evidence of presentment at trial.

The Court's opinion is expected in the spring.

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