ALLISON ENGINE: A "LESS FRIENDLY" ENVIRONMENT FOR QUI TAM PLAINTIFFS - BUT HOW MUCH SO?

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When the Supreme Court handed down its opinion in *Allison Engine Co. v. United States ex rel. Sanders*, 128 S. Ct. 2123 (2008), last year, it addressed a split in the circuits over the meaning of the "presentment" requirement of § 3729(a)(2) of the False Claims Act and examined "the relationship" between the making of a "false record or statement," and the payment of the ultimate "false or fraudulent claim…by the government." *Id.* at 2126. Did claims have to be presented directly *to* the government and must payment be made directly *by* the government? Did there have to be a nexus between the falsity and the reimbursement? Or, under the Act could a *qui tam* plaintiff meet his burden simply by establishing that government money was eventually used to pay any "false or fraudulent" claim?

The Court's consideration of the issue was immediately seen as having significant reach. Within a month of publication, the Sixth Circuit observed in *U.S. v. Ford Motor*, 532 F.3d 496, 509 (6th Cir. 2008) "[I]n light of the Supreme Court's recent decision in *Allison Engine*...the law in this Circuit is now less friendly to *qui tam* plaintiffs than it was prior to that decision." It is too early to tell how much less friendly the legal environment will become for relators, or whether the case will give rise to a legislative response, but the courts have begun the process of interpreting the holding and an examination of the case and the early returns is certainly worthwhile.

The Facts of *Allison Engine*

The defendants in *Allison Engine*, a declined *qui tam*, were alleged to have submitted false claims for generator sets that were not manufactured in accordance with the Navy's baseline drawings or with military standards — both of which were incorporated into the defendant's subcontracts. The relator alleged that the invoices for the generator sets were fraudulent because 1) they were defective; 2) they did not meet military standards though the Certificates of Conformance falsely claimed they did; and 3) the defendants knew that the generator sets were defective and failed to meet military standards.

At the conclusion of the trial, but before a verdict was rendered, the defendants moved to dismiss, asserting the plaintiff had failed to prove that the claims had been presented to the government, and that such a failure was fatal as a matter of law. The trial court agreed and dismissed the action, but a divided panel of the Sixth Circuit reversed, holding that the intent to cause a false claim to ultimately be paid with government funds was sufficient. This holding was in conflict with *United States ex rel. Totten v.*

Bombardier Corp., 380 F.3d 488 (C.A. DC 2004), written by Chief Justice Roberts when he was still sitting as a Circuit Judge, and the Supreme Court granted certiorari to resolve the conflict.

The Supreme Court's Analysis

Not surprisingly, the Court sided with *Totten*. The unanimous opinion held that it was "insufficient" for a plaintiff to "show merely" that a false statement's use either resulted "in obtaining or getting payment or approval of the claim," or that "government money was used to pay the false or fraudulent claim," *Allison Engine* at 2126. The court rejected the view that it is enough to show that government funds will ultimately be involved, stating "[P]aid by the government" is not the same as getting a claim paid by someone simply using government funds; a defendant must intend that "the Government itself pay the claim." *Id.* at 2128. To eliminate this element would, the Court said, expand the FCA well beyond its intended role of combating "fraud against the Government." *Id*.

The Court went on to hold that while the claim itself has to be paid by the government, it doesn't have to be made to the government as long as it is submitted for the purpose of getting "a false or fraudulent claim paid or approved by the Government." *Id.* This distinction is important where subcontractors' claims are passed on directly to the government by the prime, or in health care cases where claims are made through intermediaries and carriers, but the Court held that where a subcontractor makes a false statement to a private entity without the intent to have the Government rely upon it, such a claim would not be made with the purpose of inducing payment of a false claim "by the Government."

Importantly, the Court also addressed the relationship between statement or record and the claim itself, creating what would appear to be a two-part test. Not only must the false record or statement be made with the intent "to get" a false or fraudulent claim "paid or approved by the Government," but a plaintiff must also allege and 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." *Allison Engine* at 2125. "Materiality" is an issue in almost every health care FCA case, as the line between the alleged falsity and the payment is often very hazy and unclear. However, it is noted that the Court stopped short of also holding that the false record or statement actually be material to the payment determination itself by the government.

Finally, the Court further held that it was insufficient in a conspiracy claim to show that the conspirators had a general scheme to defraud the government, and that it must be shown that "conspirators agreed to make use of the false record or statement" to have a "material effect" on the government's decision to pay. *Id.* at 2126.

Reaction by the Lower Courts

The initial reaction by the lower courts has focused on the materiality and intent in several different contexts. One district court reversed itself and dismissed a crop insurance fraud case because the "direct link between the false statements and the government decision to pay is too attenuated to establish liability" (*United States v. Hawley*, citing page 6 of *Allison*). The Fifth Circuit recently used it in an unpublished opinion to affirm summary

judgment for a lack of intent to prove materiality saying "The FCA is...not an appropriate vehicle for policing regulatory compliance." *U.S. ex rel. Gudur v. Deloitte & Touche*. And several other courts have applied *Allison Engine* to support dismissals under Motions to Dismiss under both 12(b) as well as 9(b).

Another potential extension of the reasoning in *Allison Engine* is that it can be used as the basis for finding that Medicaid claims are not "claims to the government" and, therefore, are inapplicable under the FCA. This has been raised in a number of cases as well as in a November 6, 2008, report released by the Congressional Reporting Service (CRS), but to date no court has taken such an action and at least two courts have declined to do so. While this is an issue which must be considered ripe under a literal reading of the case, if it is successful, the CRS report suggests that such a ruling would likely be vulnerable to a legislative fix.

Conclusion

We are beginning to see the response to *Allison Engine*, but its impact in health care false claims cases won't be known for some time. At the least, the courts appear willing to enforce the more vigorous materiality requirement in motion practice, and that alone will create a less friendly atmosphere for *qui tam* plaintiffs, but the jury is out on just how far that will go — or whether larger changes may take place.

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