

## Supreme Court Grants Petition for Certiorari on False Claims Act "Presentment" Issue

On Monday, the Supreme Court agreed to hear argument on a False Claims Act (FCA) issue with significant ramifications for the defense industry. Circuit courts are split as to whether a plaintiff alleging violation of 31 U.S.C. §§3729(a)(2) or (a)(3) is required to prove that a false claim was "presented" to the Government, or whether it is sufficient simply to prove that the claim ultimately was paid with federal funds. The core of the issue is deceptively simple:

Subsection 3729(a)(1) expressly prohibits "presentation" of a false claim for payment to the Government, while subsections (a)(2) and (a)(3), which address false statements made in support of false claims, and conspiracies to get false claims paid, do not use the word "presents." The *qui tam* relators' bar long has argued that Congress intended the FCA to reach all false statements and false claims, whether or not such statements or claims ever were submitted to the Government. A Supreme Court resolution of this issue in relators' favor exponentially would expand the scope of FCA suits against contractors at every level. The Supreme Court is expected to hold oral argument in early 2008, and a decision is anticipated Summer 2008.

In *United States ex rel. Sanders, et. al v. Allison Engine Co., Inc., et al.*, the *qui tam* relators alleged that Allison and two of its lower-tier subcontractors, who were among hundreds of subcontractors working for Bath Iron Works and Ingalls Shipbuilding on the U.S. Navy's Arleigh Burke destroyer program, knowingly had submitted false claims for payment that ultimately were paid with Government funds. Relators offered no evidence that any of the alleged false claims had been presented to the Government by defendants or by the shipyards. Following submission of relators' case to the jury, the United States District Court for the Southern District of Ohio (Rose, J.) granted the motion for judgment as a matter of law brought by McKenna Long & Aldridge and other counsel for the defendants. Judge Rose relied upon the interpretation of 31 U.S.C. §3729(a) adopted by the D.C. Circuit in *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488 (D.C. Cir. 2004) (Roberts, J.), which held that in order for a claim under subsection 3729(a)(2) to be actionable, it not only must be "paid or approved by the Government," it must be "presented" to the Government. In that regard, the "presentment" requirement contained in subsection (a)(1) applied as well to claims under subsections (a)(2) and (a)(3).

On appeal, the Court of Appeals for the Sixth Circuit reversed, finding that the "*Totten* court erred in reading a presentment requirement into all subsections" of the FCA, and rejecting the *Totten* court's conclusion that the absence of a presentment requirement in Subsection 3729(a)(2) "would make the presentment requirement in subsection (a)(1) 'largely meaningless.'" *United States ex rel. Sanders, et al. v. Allison Engine Co., Inc., et al.*, 471 F.3d 610 (6th Cir. 2006). The Sixth Circuit reasoned that because "[o]nly subsection 3729(a)(1) makes any mention of presenting a claim to the government," the "plain language" of the statute compelled the conclusion that no evidence of presentment was required. The court noted that "so long as it can be shown that the claim was paid with government funds, "there is "nothing in [the] language to suggest that the claim must have been shown to have been presented to the government." Judge Batchelder, dissenting, pointed out that payment of a claim by the Government "pre-supposes that the claim has been presented to the government as a request for that payment." Judge Batchelder also echoed *Totten's* warning that interpreting Section 3729(a)(2) to require only a nexus between a false claim and Government funds would result in a "boundless" statute.

The Sixth Circuit majority's opinion results in a broad expansion of FCA liability to claims presented to entities which receive even a small portion of federal funding but do not submit that claim to the

---

### CONTACTS

If you would like more information, please contact any of the McKenna Long & Aldridge attorneys or public policy advisors with whom you regularly work. You may also contact:

**James J. Gallagher**

213.243.6165

**Susan A. Mitchell**

213.243.6189

**Michael T. Kavanaugh**

213.243.6233

---

Government. For example, a claim made to a grant recipient would be actionable even though the grantee has already received its federal grant money but has not passed the claim on to the federal treasury.

The Third, Eighth and Eleventh Circuits agree with the D.C. Circuit that presentment of a false claim to the Government is a predicate to liability under the FCA. See *United States ex rel. Joshi v. St. Luke's Hospital, Inc.*, 441 F.3d 552 (8th Cir.), cert. denied 127 S.Ct. 189 (2006); *Corsello v. Lincare, Inc.*, 428 F.3d 1008 (11th Cir. 2005), cert. denied 127 S.Ct. 42 (2006); *United States ex rel. Quinn v. Omnicare Inc.*, 382 F.3d 432 (3d Cir. 2004). The Seventh Circuit has aligned itself with the Sixth Circuit, finding that a false claim submitted to any private entity that receives federal funds can create FCA liability. See *United States ex rel. Crews v. NCS Healthcare of Ill., Inc.*, 460 F.3d 853 (7th Cir. 2006). The presentment issue also has been the subject of the bipartisan False Claims Act Correction Act of 2007, S. 2041, sponsored by Senators Grassley and Durbin. That bill, currently before the Senate Judiciary Committee, is expressly intended to "correct" Justice Roberts' decision in the *Totten* case, and would greatly expand the scope of actionable conduct in a manner consistent with the Sixth Circuit majority's view in *Sanders*.

### **About Us**

McKenna Long & Aldridge LLP is an international law firm composed of lawyers and public-policy advisors with offices in Albany, Atlanta, Brussels, Denver, Los Angeles, New York, Philadelphia, Sacramento, San Diego, San Francisco, and Washington, D.C. The firm provides business solutions in the areas of corporate law, government contracts, intellectual property and technology, complex litigation, public policy and regulatory affairs, international law, real estate, environmental, energy, and finance.

### **Subscription Info**

If you would like others to receive future mailings of the Government Contracts Advisory, please email their contact information to us at [information@mckennalong.com](mailto:information@mckennalong.com)

If you would like to be removed from the Government Contracts Advisory mailing list, please email [information@mckennalong.com](mailto:information@mckennalong.com)

---

\*This announcement is for informational purposes only and does not constitute specific legal advice or opinions. Such advice and opinions are provided by the firm only upon engagement with respect to specific factual situations. This communication is considered Attorney Advertising.