Case at a Glance

The federal False Claims Act provides the United States with a remedy for fraud practiced on the government and permits actions to be brought in the government's name by persons who can share in penalties paid under the act to the government. This case calls for the Supreme Court to decide whether a false claim paid from federal dollars violates the law even if the claim was paid by a private entity without ever having been presented to the government.

Can the False Claims Act Apply to Claims That Were Never Presented to the Federal Government?

by Michael Kurs

PREVIEW of United States Supreme Court Cases, pages 222–226.

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ISSUE

May whistleblowers recover under the federal False Claims Act for claims submitted to private contractors or other entities who pay the claims with federal funds without proof that the claims were presented to the federal government?

FACTS

Under the federal False Claims Act (FCA), ordinary citizen "relators" who become aware of fraud against the federal government may share with the government in substantial penalties recoverable through *qui tam* actions, actions in which a person sues in the name of the United States. Since the 1986 amendments to the FCA, civil cases under the FCA have resulted in the return of more than $20 billion to the United States Treasury. *Allison Engine Company, Inc. v. United States of America ex rel. Sanders* is an occasion for the Court to consider whether a 2004 interpretation of the FCA by then Circuit Court of Appeals Judge John Roberts is the correct reading of the statute or whether the position advanced by, among others, the respondents in this case (Roger L. Sanders and Roger Thacker), the federal government (through the Solicitor General), and Senator Charles E. Grassley (a sponsor of the 1986 amendments) should control.

Sanders and Thacker formerly worked for General Tool Company. General Tool served as a subcontractor to Allison Engine Company, Inc., a division of General Motors Corporation until 1993. Allison participated in work awarded by the Navy to Bath Iron Works and Ingalls Shipbuilding, Inc., involving the construction of more than 50 new guided-missile destroyers for a price of approximately $1 billion per ship. Allison served as the source of generators that provide electric power for the destroyers. Each generator, or "Gen-Set," costs $3 million, and each destroyer requires three Gen-Sets.

Sanders and Thacker brought two *qui tam* actions in 1995 against Allison, General Motors, General Tool, and Southern Ohio Fabricators, Inc. (SOFCO), all of

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DOCKET NO. 07-214

ARGUMENT DATE:
FEBRUARY 26, 2007
FROM: THE SIXTH CIRCUIT

which were subcontractors to the prime-contractor shipbuilders and responsible for various aspects of the Gen-Sets' production. Allison contracted to supply the Gen-Sets. General Tool assembled the Gen-Sets. SOFCO had a contract with General Tool to build the Gen-Set bases and enclosures. More than 150 Gen-Sets eventually were installed in more than 50 completed destroyers. General Motors/Allison provided a written Certificate of Conformance with each delivered Gen-Set, assuring that the unit was manufactured in accord with all of the Navy's baseline configuration and military requirements. SOFCO signed hundreds of Certificates of Conformance, attesting that all of its work complied with the Navy's requirements.

The money paid to these companies for the Gen-Sets came from the United States. The Navy paid Bath. Bath paid Allison. Allison paid General Tool. General Tool paid SOFCO. Of the $3 million paid Allison for each Gen-Set, General Tool received $800,000 and SOFCO $100,000.

In the first *qui tam* action, Sanders and Thacker alleged the defendants submitted claims for payment despite knowing that the Gen-Sets did not conform to contract specifications or Navy regulations. They charged the companies knew these defects constituted a violation of the company's contracts but nevertheless submitted invoices for payment. As a result, they argued, the invoices constituted false or fraudulent claims. In the second action, they alleged the companies withheld cost or pricing data during negotiations with an agent of the government in violation of the Truth in Negotiations Act. The government, which under the FCA can intervene and take over responsibility for conducting the litigation of an FCA case, declined to intervene. It did appear as an amicus curiae (friend of the court), in favor of the relators in the first action.

During the course of a five-week trial, Sanders and Thacker introduced evidence that the companies knowingly violated Navy requirements. The evidence suggested unqualified SOFCO welders worked on all of the first 67 Gen-Sets produced. The evidence also maintained that General Motors/Allison and General Tool installed defective and leaking Gen-Set gearboxes in 52 units and that General Tool failed to conduct a quality final inspection for almost half of the first 67 Gen-Sets.

The U.S. District Court for the Southern District of Ohio, Western Division, ruled against the two relators' false-claims counts after the close of their evidence. The companies convinced the court that the relators were required by the FCA to show that a false or fraudulent claim was submitted to the government. The district court rejected the relators' arguments that the court should focus, not on whether the claim was presented to the United States, but rather on the fact that government money was eventually used to pay the companies that submitted the allegedly false claims. Sanders and Thacker also argued that they had offered proof of the presentment of fraudulent claims to the government by Bath, an argument that rested on an "implied certification" theory of liability.

In its 2005 opinion rejecting the argument that liability should attach to false claims not presented to the government but paid with money that came from the government, the trial court noted that at least nine federal circuit courts of appeal have rejected this position. Among the explanations cited in the opinion by District Court Judge Thomas M. Rose is one that was advanced in a Ninth Circuit opinion: "the allegation of a private false scheme is not enough without showing an actual false claim for payment to the Government … In this case, the only entities that could have submitted actionable claims to the Navy were the prime contractors, Bath Iron Works and Ingalls." Judge Rose also based his decision on a District of Columbia Circuit decision (authored by the now Chief Justice Roberts) in *United States ex rel. Totten v. Bombardier Corp.,* 380 F. 3d 488 (D.C.Cir. 2004), rehearing en banc denied (Dec. 8, 2004). In that case, the majority found that FCA liability attaches when the government provides funds to a grantee upon presentment of a claim to the government or if after a grantee presents a claim, the government provides the funds directly to a claimant. "Liability also attaches if the government, upon presentment of the claim, reimburses the grantee for funds that the grantee has already disbursed to the claimant."

Sanders and Thacker appealed to the U.S. Court of Appeals for the Sixth Circuit. The court of appeals reversed the district court's False Claims Act ruling on the question of whether proof of a claim's presentment to the government was necessary for the two relators to prevail. The Sixth Circuit based its reversal on its interpretation of the plain language of the FCA statute, the legislative history accompanying the most recent change to the statue, and the policy reasons behind the FCA.

The court read the plain language of the FCA as stating that presentment of a claim to the government is required under one, but not all, of the subsections of 31 U.S.C. § 3729. According to the Sixth Circuit, only subsection (a)(1) of the statute

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makes any mention of presenting a claim to the government. Subsection (a)(2) requires only that a defendant make or use a false record or statement in order to induce the government to pay or approve a claim. Subsection (a)(3) requires a conspiracy to defraud the government to pay or allow a false claim. The court reasoned that the FCA's definition of a *claim* further supports its ruling. Under 31 U.S.C. § 3729(c), a *claim* includes "any request or demand … for money or property which is made to a contractor … if the United States provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor … for any portion of the money or property which is requested or demanded."

The Sixth Circuit read the legislative history of the 1986 amendments to the FCA as intended to broaden the reach of the FCA to cover fraudulent claims submitted by subcontractors that result in a loss to the government. The court pointed to a Senate report noting that the amendment was aimed at making the FCA a more effective weapon against fraud perpetrated on the federal government by correcting overly restrictive judicial interpretations of the act. The court pointed to the report's statement that the FCA "is intended to reach all fraudulent attempts to cause the Government to pay out sums of money." It also quoted the statement: "For example, a false claim to the recipient of a grant from the United States or to a State under a program financed in part by the United States, is a false claim to the United States." The court reasoned that its position comports with the policy rationale behind the FCA—"protecting the government fisc—while ensuring that the statute applies only to claims submitted to the government and not to private entities." The circuit court agreed with the district court's decision to reject the relators' Truth in Negotiations Act claims, however.

The defendants in the Sanders and Thacker actions, faced with the prospect of the case returning to the district court for trial on the FCA claims, asked the Supreme Court to review the case. The Supreme Court agreed to consider the issue of whether it is necessary under the second and third subsections of 31 U.S.C. § 3729 to prove that a false claim was submitted to the federal government, or whether it is sufficient to establish that the claim was paid using federal funds.

Case Analysis

The corporate defendants in the Sanders and Thacker's actions, now petitioners in the Supreme Court, seek to convince the Court that "submission of a false claim to a private entity that receives funding from the federal government is not equivalent to the submission of a claim to the government itself." The companies maintain that the Sixth Circuit's decision in the case "dramatically expands the FCA's scope beyond the limits established by Congress." They argue that, according to the Sixth Circuit, the FCA encompasses any false claim paid with government funds and therefore would apply whenever any "allegedly false claim is submitted to any of the tens of thousands of private entities—including state and local governments, educational institutions, and private businesses—that receive some amount of funding from the federal government."

The companies' arguments take the Court through the language, structure, and history of the FCA. Their brief contends that subsections (a)(1) and (a)(2) were originally part of a single lengthy sentence that "unambiguously made submission of a claim to the government" an element of actions under both subsections and then were recodified without substantive change. They suggest other language Congress could have employed had it intended the submission of false claims to federally funded entities to implicate the FCA. They compare the language of the subsections to other statutes and another subsection of the FCA. As do the respondents, the petitioners employ the full spectrum of standard approaches to divining the meaning of statutes that litigants resort to when endeavoring to convince a court that their respective readings represent the single correct reading.

Petitioners argue that the Supreme Court decision in *Tanner v. United States,* 483 U.S. 107 (1987), should guide the Court to decide the case in favor of the companies in this case. *Tanner,* a criminal fraud case, involved defendants who allegedly conspired to defraud a private rural electric distribution cooperative company that received federal financial assistance. The Supreme Court held that the defendants did not engage in a conspiracy to defraud the United States if the government could not prove a conspiracy to cause misrepresentations to be made to the federal Rural Electrification Administration or some other arm of the government. Of course, the petitioners also support their position with a discussion of the Roberts opinion in *United States ex rel. Totten v. Bombardier Corp.* In that case the circuit court held that the FCA did not apply to the submission of false claims for payment to Amtrak, a private entity funded by the federal government.

Petitioners also refer the Court to U.S. Government Accountability Office information which they characterize as showing that the average

recovery in an FCA action is more than $10 million. They warn that an expansion of the FCA pursuant to the Sixth Circuit opinion in this case "creates fertile new ground for disgruntled employees to seek unwarranted multimillion-dollar payouts from private companies." Petitioners also raise the specter of "abusive" litigation spurred by the "fact that the civil penalties and treble-damages awards available in FCA suits impose tremendous settlement pressure upon even those companies that have meritorious defenses." An affirmance by the Court would mean "every construction company hired as a subcontractor on a federal building, every accounting firm hired by a prime contractor to monitor the finances of a federal project, and every engineering firm hired to perform one of the hundreds of subcontracts relating to the construction of a naval vessel will be subject to FCA liability based on claims submitted to a prime contractor or higher-tier subcontractor but never passed along to the government."

In response, the respondent-relators maintain that "It is a paper fiction to suggest, as Petitioners do, that fraud against the federal public fisc cannot occur unless a Government employee personally receives a false claim for federal funds." They argue that, "the Navy's procurement of its Gen-Sets and the involvement of the subcontractor Petitioners were not 'private' matters among 'private' parties involving 'private' contract requirements." Respondents attribute the result against them in the trial court to the court's reliance on the Roberts opinion in *Totten*. Their brief, too, argues that the plain language of the statute supports their position. They say that the definition of the term *claim* unambiguously reaches false claims for federal money not "presented" to a federal government employee, "and since the plain language of Section (a)(2) does not make 'presentment' an element of liability, this Court need look no further to affirm the Sixth Circuit."

Respondents warn that petitioner's position would dramatically restrict the FCA. "Most notably," they maintain, false claims submitted to Medicare and Medicaid would no longer be actionable under the FCA because those claims are not presented to a federal government employee. Respondents argue against a decision that would have the effect of immunizing most subcontractors from FCA liability because their invoices are usually not passed along to the government.

Ultimately, though, because Congress has the power to amend its statutory enactments, Congress, and not the Court, promises to have the final say in determining the reach of the FCA. The amicus brief filed on behalf of Senator Grassley in support of respondents notes that the senator has introduced new legislation to clarify that section 3729(a) does not require presentment of a claim to a government employee. The legislation is intended to remedy judicial interpretations of the 1986 amendments that Senator Grassley's brief maintains are inconsistent with Congress's intent. See False Claims Corrections Act of 2007, S. 2041, 110th Cong. Senator Grassley, for one, has made known his disagreement with the Chief Justice's *Totten* opinion before. His amicus brief also describes Chief Justice Roberts's 2005 confirmation hearing, at which time, according to the senator's brief, "Senator Grassley questioned him closely regarding the unwillingness to accede to the intent of Congress which the *Totten* opinion evidences." We should know whether their disagreement will extend past the decision in this case after the Court's decision is released.

Significance

The United States amicus brief identifies the FCA as having been used more than any other statute in defending the federal treasury against unscrupulous contractors and grantees. The Taxpayers Against Fraud Education Fund brief reports the federal government now spends more than $900 billion a year through grants and contracts. With relators able to obtain between 25 percent and 30 percent of any FCA recovery if the government does not intervene, and between 15 percent and 25 percent if it does, the dollars impacted by the Court's decision in the case promise to be substantial for litigants, private contractors, and grantees of all sorts, as well as for the government. As important as the goal of fraud detection may be, however, no one should be surprised if the Court reverses the decision of the Sixth Circuit in favor of the *Totten* interpretation of the FCA. The Sixth Circuit's interpretation means the FCA can reach any private transaction involving funds traceable back to a government appropriation. Before the Court accepts that interpretation, it may yet want to be sure that Congress intended the long arm of the FCA to actually reach that far.

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Amicus Briefs

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