

Allison Engine's Positive Effects Upon False Claims Act Litigation in the Healthcare Industry

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On June 9, 2008, the Supreme Court of the United States rendered its unanimous decision in *Allison Engine Co. v. United States ex rel. Sanders*, No. 07-214, 2008 U.S. LEXIS 4704, (S. Ct. June 9, 2008), strictly construing the language of the False Claims Act ("FCA") by holding that mere proof that a false or fraudulent claim was paid using government funds is not sufficient to establish liability under the FCA. Instead, the government or a relator must show that a defendant intended for the government to pay the claim, or that the government actually paid the specific claim at issue itself. Because health care claims are often paid by intermediaries who are not officers or employees of the United States, the *Allison Engine* case has significant potential ramifications for health care providers.

Case Summary

Allison Engine involved the contention that certain subcontractors fraudulently had sought payment for work that did not meet the specifications on a Navy contract. At trial, the relators, individuals acting on behalf of the United States in an FCA case that the government itself had declined to enter, introduced evidence that the subcontractors had presented invoices for payment to the shipbuilders; however, the whistleblowers *did not* introduce the invoices submitted by the shipyards to the Navy. Reversing the district court, the United States Court of Appeals for the Sixth Circuit held that the FCA does not require proof of an intent to cause a false claim to be paid "by the government." Instead, the Sixth Circuit held that proof of intent to cause a false claim to be paid by a private entity "using" government funds was sufficient to establish a violation of the FCA. The Supreme Court flatly rejected this rationale.

Key Holdings in *Allison Engine*

- The Supreme Court emphasized that the statutory term “paid or approved by the Government” means something more than merely getting a false or fraudulent claim paid with funds that might have originated with the federal government.
- The Supreme Court cited with approval the D.C. Circuit holding of then Judge, now Chief Justice, Roberts in *United States. ex rel. Totten v. Bombardier Corp.*, 280 F.3d 488 (D.C. Cir. 2004), that a viable FCA claim under 31 U.S.C. § 3729(a)(1) requires actual “presentment” of the claim at issue to an officer or employee of the United States.
- The Court rejected the Sixth Circuit’s holding in *Allison Engine* that a claim under sections 3729 (a)(2) or (a)(3) could be satisfied if the claim presented could be paid indirectly with federal monies. Instead, the Supreme Court held that, in such cases, the Federal government “literally” must pay the bill. The Court further held that, under section 3729(c), a request or demand may be a “claim” even if not submitted directly to the federal government, to be actionable under section (a)(2) it still must be paid by the federal government.
- The FCA’s requirements can be satisfied if the presenter intends that its certification be used to get the federal government to pay its claim. However, if a “defendant makes a false statement to a private entity and does not intend the Government to rely on that false statement as a condition of payment, the statement is not made with the purpose of inducing payment of a false claim ‘by the Government.’” Therefore, liability would not be established because “the direct link between the false statement and the Government’s decision to pay or approve a false claim is too attenuated to establish liability.”

Implications for the Health Care Industry

The Supreme Court’s strict and literal holding in *Allison Engine* could, if not negated by legislative action (see discussion that follows) have profound and beneficial ramifications for participants in the health care industry, the sector of the economy from which the majority of *qui tam* and government filings under the FCA originate and which provides the lion’s share of FCA settlements and judgments.

- *Many health care claims which are paid with federal monies are not paid by the federal government.* Several pending cases in various district courts will determine in the first instance whether Medicaid claims come within the ambit of the FCA as interpreted by the Supreme Court in *Allison Engine*. Medicaid is a state-based program under which the federal government provides partial funding, but it doesn’t directly pay Medicaid claims. Other claims are paid by federal contractors serving as intermediaries or carriers, with the federal government having only an indirect role.

Pending Legislation Could Change the Current Landscape

Interested clients should note that legislation is being advanced in both the House and Senate that would extend the reach of the FCA to any claim in which federal funds were involved in an actual or potential payment, irrespective of whether the recipient of the claim was a federal officer or employee, or whether the federal government actually

pays such claims directly or whether the defendant intended specifically to defraud the federal government (as opposed to intending to submit a false claim). Styled, the False Claims Act Corrections Act of 2007, in its various iterations, a version of the bill has been favorably reported by the Senate Judiciary Committee.

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