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## U.S. Supreme Court Clarifies Subcontractor Liability under False Claims Act

A recent United States Supreme Court decision clarified the requirements for prosecuting subcontractors under the False Claims Act (FCA).<sup>1</sup> The FCA imposes liability on anyone who knowingly makes or uses a "false statement" (or anyone who conspires to do so) in order to get false claims paid or approved by the government. To further discourage false claims, the FCA allows private citizens to sue government contractors in the name of the United States and to collect a percentage of any judgment awarded. The FCA may come into play in the health care context whenever hospitals or other health care providers receive funds—directly or indirectly—from the federal government. In recent years, the federal circuits have struggled to define the exact nature of the relationship required between the alleged "false statement" and the government's ultimate decision to pay or approve a given claim. When such statements are made directly to the government by the claimant, the relationship is relatively obvious, but when federal dollars pass through multiple intermediaries (subcontractors for example), it becomes more difficult to separate a false government claim from mere private fraud. In *Allison Engine Company v. United States*<sup>2</sup>, decided June 9, 2008, the Supreme Court issued a definitive statement on the matter. The Supreme Court held that there is no liability under the FCA unless it is shown that the defendant made a false statement *for the purpose of getting a false claim paid by the government*. This holding may appear nuanced, but it has significant implications.

The case involved multiple tiers of prime and subcontractors contributing to build a fleet of destroyers for the U.S. Navy. The Navy contracted directly with two shipyards, in turn, the shipyards contracted with various parties to supply and assemble parts of the destroyers. Allison Engine Company, one of the defendants, contracted to provide the generator power sets for the destroyers. Allison Engine in turn

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subcontracted with two additional defendants, General Tool Company (GTC) and Southern Ohio Fabricators, Inc. (SOFCO). All prime and subcontracts involved in the project required that every part of the destroyers be built in accordance with the Navy's standards. Further, each of the completed generator sets was to be accompanied by a certificate of conformance, certifying that the unit met Navy requirements. The case was brought by two former GTC employees who alleged the invoices and certificates submitted by GTC, SOFCO and Allison Engine fraudulently sought payment for work that did not meet the Navy's contract specifications.

At trial, the plaintiffs presented convincing evidence that false statements were made by the subcontractors and that government funds ultimately paid the submitted invoices. Plaintiffs, however, failed to produce evidence that the false statements were intended to, or did, reach the federal government. The plaintiffs either did not obtain or did not introduce copies of the invoices submitted by the shipyards directly to the Navy, nor did they show by any other means that the alleged false statements were intended to fraudulently influence the Navy's decision to pay. Justice Alito, writing for a unanimous Court, explained that while it is not necessary that the false statement be made directly by the defendant to the government, the FCA does require an element of "intent." A subcontractor violates the FCA if the subcontractor submits a false statement to the prime contractor *intending* for the statement to be used by the prime contractor to get the government to pay its claim. Without this link, Justice Alito warned, the FCA might be made to serve as an "all-purpose anti-fraud statute."<sup>3</sup>

Health care providers frequently contract out services for which the health care providers will seek reimbursement from the government. Subsequent federal court decisions have applied *Allison Engine's* reasoning in the health care context whenever government funds are filtered through an intermediary. A common example is the Medicare reimbursement program. The federal Medicare program reimburses hospitals for the reasonable costs of services that the hospitals provide to Medicare beneficiaries. Medicare contracts with private insurance companies, known as fiscal intermediaries, to facilitate the reimbursement process. False statements made by a subcontractor to the contracting hospital may fall under the FCA, but only if it can be shown both that the subcontractor had knowledge that the information was false and that the purpose in making the false record or statement was to get a claim paid or approved by the fiscal intermediary (government).

It is possible that third parties providing services on behalf of the hospitals to patients might attempt to shield themselves from liability under the reasoning in *Allison Engine* because they are not submitting statements for the purpose of getting a claim paid by the government but are merely seeking payment under their direct contract with the health care provider. At the contract drafting stage, health care providers might consider developing self-serving required acknowledgements and representations by subcontractors acknowledging that the health care provider will ultimately look to the government for reimbursement of costs expended under the subcontracts and might possibly condition payment under the subcontract upon approval by the government in appropriate instances. Such language might circumvent any attempts by subcontractors to use *Allison Engine* defensively to the detriment of health care providers where FCA liability is alleged.

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<sup>1</sup>31 U.S.C. § 3729 et. seq.

<sup>2</sup>*Allison Engine Co. v. U.S.*, 128 S. Ct. 2123 (2008).

<sup>3</sup>*Id.* at 2130.

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