American Bar Association
www.supremecourtpreview.org

No. 07-214

Supreme Court of the United States

ALLISON ENGINE COMPANY, INC. ET AL.,
Petitioners.

v.

UNITED STATES EX REL. ROGER L. SANDERS AND ROGER L. THACKER,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR AMICUS CURIAE PROFESSOR JOEL D. HESCH IN SUPPORT OF RESPONDENTS

Joel D. Hesch
Liberty University School of Law
1971 University Boulevard
Lynchburg, VA 24502
(434) 592-4251

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. THE DISTRICT COURT REACHED A WRONG CONCLUSION BECAUSE IT BEGAN WITH THE WRONG PREMISE THAT A CLAIM HAD NOT BEEN SUBMITTED TO THE GOVERNMENT. . 4

II. THIS COURT SHOULD ADOPT A THREE-STEP STANDARD FOR DETERMINING WHETHER SPECIFIC CONDUCT VIOLATES THE FCA 11

A. Step One: Were the Payments "Federal Funds"? 13

1. *The moneys paid to Petitioners were federal funds.*. 13

2. *The same analysis applies where the government front-loads money.* . . . 16

3. *The proposed standard would not reach the worst case hypothetical examples raised in amicus curiae briefs in support of Petitioners.* 17

B. Step Two: Did the Person Know it was Falsely Seeking, Obtaining, or Retaining Federal Funds? 21

C. Step Three: Which Section of 3729(a)(1)-(7) was Violated? 23

1. *Section 3729(a)(1) applies.* 26

2. S*ection 3729(a)(2) applies.* 27

CONCLUSION 28

TABLE OF AUTHORITIES

CASES **Page(s)**

Costner v. URS Consultants, Inc.,
153 F.3d 667 (8th Cir. 1998) 21

Hutchins v. Wilentz, Goldman, & Spitzer,
253 F.3d 176 (3d Cir. 2001) 21

In re Columbia Gas Sys., Inc.,
997 F.2d 1039 (3d Cir. 1993) 15

In re Penn Cent. Transp. Co.,
486 F.2d 519 (3d Cir. 1973) 16

Rockwell v. United States,
127 S. Ct. 1397 (2007) 1, 2

United States v. Bornstein,
423 U.S. 303 (1976) 7, 9, 26, 27

United States ex rel. Marcus v. Hess,
317 U.S. 537 (1943) 9, 10, 11

United States ex rel. Schmidt v. Zimmer, Inc.,
386 F.3d 235 (3d Cir. 2004) 10, 26, 27

United States ex rel. Totten v. Bombardier Corp.,
380 F.3d 488 (D.C. Cir. 2004) 2, 6

United States v. Krizek,
111 F.3d 934 (D.C. Cir.1997) 10

United States v. Mackby,
261 F.3d 821, 827 (9th Cir. 2001) 10

United States v. Neifert-White Co.,
390 U.S. 228 (1968) 23

Peterson v. Weinberger,
508 F.2d 45, 52-53 (5th Cir. 1975) 10

United States v. Rachel,
208 Fed. Appx. 236 (4th Cir. 2006) 10

United States v. Southland Mgmt. Corp.,
326 F.3d 669 (5th Cir. 2003) 21

United States v. Taber Extrusions, LP,
341 F.3d 843 (8th Cir. 2003) 10

STATUTES

31 U.S.C. § 3729(a)(1) . . . . *passim*

31 U.S.C. § 3729(a)(2) . . . . *passim*

31 U.S.C. § 3729(a)(3) 5, 24, 25

31 U.S.C. § 3729(a)(4) 24

31 U.S.C. § 3729(a)(5) 24, 25

31 U.S.C. § 3729(a)(6) 25

31 U.S.C. § 3729(a)(7) 23, 25

31 U.S.C. § 3729(b) 12, 21, 22

31 U.S.C. § 3729(c) 11

OTHER AUTHORITIES

Joel D. Hesch, *Restating the "Original Source Exception" to the False Claims Act's "Public Disclosure Bar,"* 1 Liberty U.L. Rev. 111 (2006) . 1

Joel D. Hesch, *Whistleblowing: A Guide to Government Reward Programs* (2008) 1

INTEREST OF AMICUS CURIAE[1]

Joel D. Hesch is a professor at Liberty University School of Law and an expert on the False Claims Act (FCA).[2] He is the author of a recent book[3] and scholarly article,[4] and writes a weekly media column.[5]

For more than fifteen years, between 1990 and

---

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made any monetary contribution intended to fund the preparation or submission of this brief. No person other than the amicus curiae made a monetary contribution to its preparation or submission.

[2] 31 U.S.C. §§ 3729-31.

[3] *Whistleblowing: A Guide to Government Reward Programs* (2007).

[4] Joel D. Hesch, *Restating the "Original Source Exception" to the False Claims Act's "Public Disclosure Bar,"* 1 Liberty U.L. Rev. 111 (2006)(cited 5 times in an amicus brief to this Court in *Rockwell v. United States*, 127 S. Ct. 1397 (2007)).

[5] *Whistleblowing* is a column published by WorldNetDaily.com. Each week, Mr. Hesch highlights a different aspect of fraud against the government and otherwise comments about the use of the FCA to combat fraud. His articles are located at http://wnd.com/news/archives.asp?AUTHOR_ID=285.

2006, Professor Hesch worked as a Trial Attorney in the Civil Fraud Section of the Department of Justice (DOJ), where he conducted nationwide FCA investigations affecting twenty different government agencies. While at DOJ, he worked on cases recovering more than $1 billion, including the trial aspects of *Rockwell v. United States*, 127 S. Ct. 1397 (2007), as well as FCA proceedings against subcontractors.

Professor Hesch offers his scholarship and unique FCA experiences to aid this Court in establishing a standard for the courts to use in evaluating whether the FCA is violated and applying it to the instant case.

SUMMARY OF ARGUMENT

Because the lower courts lack a standard for addressing whether a defendant is liable under the FCA, there is an increasing level of inconsistency in the developing case law under this important federal statute. In particular, the lack of a standard led the district court and Sixth Circuit to needlessly address whether Sections 3729(a)(2) and (3) of the FCA contain a requirement that a claim be presented to the government, based upon the rationale identified in *United States ex rel. Totten v. Bombardier Corp.,* 380 F.3d 488 (D.C. Cir. 2004). This issue does not apply to this case any more than it would to any other FCA case against a government prime or subcontractor. Specifically, the *Totten* issue factually arises only in an entirely different type of case than this one, such as front-loading money under a federal

grant. That is because government contracting cases, including this one, always involve claims being presented to the government for payment.

This brief proposes the following three-step standard, which will lead to uniform results consistent with the purpose of the FCA:

> *(1) Are the funds "federal funds?" If no, the FCA does not apply. If yes, proceed to question two.*
>
> *(2) Did the person knowingly make or use a false statement or claim to seek, obtain, or retain such federal funds? If no, the FCA does not apply. If yes, proceed to question three.*
>
> *(3) Which one or more of the seven provisions contained in Section 3729(a)(1)-(7) apply?*

This case presents a perfect scenario for applying the proposed standard. If it had been used by the district court or the Sixth Circuit, this case would never have reached this appeal and the case would have been resolved years ago.

In this case, the district court bypassed the issues addressed in the first step and totally skipped over the issues addressed in the second step. It also began with a wrong premise when addressing the issues in the third step. Therefore, it was inevitable that the district court would reach a wrong result. Specifically, the district court reached as its ultimate conclusion that the FCA does not apply to a classic

case of subcontractor fraud. Such a result is contrary to holdings by this Court and every Circuit Court of Appeals that has addressed the issue.

The Sixth Circuit also would have benefitted from the proposed standard. Without this standard, it attempted to fix the wrong conclusion without first addressing the incorrect root premises that led the district court to improperly dismiss the case in the middle of trial.

In the process of applying the facts of this case to the proposed three-step standard, this brief demonstrates that the record contained significant evidence to establish that claims had been submitted to the Navy for payment. This brief also establishes that if the three-step standard is followed by the courts, there is no need to inject into Sections 3729(a)(2) and (3) a requirement that a claim be presented to the government.

Accordingly, this Court should affirm the Sixth Circuit's reversal of the district court's dismissal of the case, but remand the case back to the district court to apply the proposed three-step standard.

ARGUMENT

I. THE DISTRICT COURT REACHED A WRONG CONCLUSION BECAUSE IT BEGAN WITH THE WRONG PREMISE THAT A CLAIM HAD NOT BEEN SUBMITTED TO THE GOVERNMENT.

This case centers upon allegations that the Petitioners, as subcontractors, knowingly delivered

defective parts, known as Gen-Sets,[6] to their prime contractor for use in building $1 billion Navy ships. CA App. 317.[7] It is alleged that Petitioners violated three separate liability provisions of the FCA: (1) by causing the prime contractor to submit false claims to the Navy under 31 U.S.C. § 3729(a)(1); (2) by causing the prime contractor to use false records or statements to get false claims paid under Section 3729(a)(2); and (3) by conspiring to defraud the government under Section 3729(a)(3).[8] JA 94a-96a.

The district court noted in its opinion that the plaintiffs contended that the Petitioners, as subcontractors, caused the prime contractor to present claims to the Navy. Pet. App. 40a-41a, 56a-59a. The district court, however, refused to accept that the prime contractor presented claims for payment to the Navy, based solely upon the fact that the invoices of the prime contractor were not introduced into evidence at trial. *Id.* at 56a-59a.

---

[6] Pet. App. 3a-4a. The government was required to pay approximately $3 million for each of the 150 Gen-Sets that would be used in the Navy ships. JA 40a-41a; CA App. 638-54, 914-53.

[7] Citations to the parties' Joint Appendix in this Court are "JA." Citations to the Petition for Certiorari Appendix are "Pet. App." Citations to Petitioners' Merit Brief are "Pet. Br." Citations to the parties; joint appendix in the Sixth Circuit are "CA App."

[8] This brief does not address the merits of the conspiracy count.

Therefore, at the conclusion of plaintiffs' case at trial, the district court dismissed the entire case.

It dismissed the first count under Section 3729(a)(1), because that provision explicitly contains a requirement that a claim be presented to the government. *Id.* Next, it relied upon *Totten* to dismiss the counts under Sections 3729(a)(2) and (3) by holding that these FCA provisions contain an "implicit" requirement that a claim be presented to the government. *Id.* at 47a-56a.

By starting with the wrong premise that no claim had been presented to the Nave, a wrong conclusion was inevitable. As demonstrated below, claims were presented to and paid for by the Navy.

The Respondents, as Relators[9] in this declined *qui tam* case, made a decision not to introduce at trial any of the hundreds of invoices the prime contractor presented to the Navy. That does not mean, however, that claims had not been submitted to the Navy. Nor does it mean that there was no evidence in the record that claims were presented to and paid for by the Navy.

The focus of this FCA case is upon the conduct of the Petitioners, as subcontractors, and their invoices, not those of the prime contractor. The Respondents introduced at trial all of the invoices the subcontracting Petitioners provided to the prime contractor, which they caused to be passed on to the

---

[9] Under the FCA, a private person, known as a "relator," may bring a *qui tam* action "in the name of the Government." 31 U.S.C. § 3730(b).

government.[10]

The Relators' decision to introduce evidence other than the prime contractor's invoices to establish that claims were presented to the Navy is supported by *United States v. Bornstein*, 423 U.S. 303, 309-13 (1976). In that case, this Court ruled that the number of civil penalties imposed in a FCA case against a subcontractor is not based upon the invoices of the prime contractor, but rather the invoices of the subcontractor provided to the prime contractor. *Id.* This Court noted that the focus in a FCA subcontractor fraud case is "upon the specific conduct of the person from whom the Government seeks to collect the statutory forfeitures." *Id.* at 313.

In this case, to support its assertion that claims had been submitted to the Navy, the Respondents introduced the government contract, which outlined the terms and conditions of payment and the procedures for submitting invoices. CA App. 410-15. Like most government contracts, the prime contractor was required to submit regular bills to the government as work was completed.

The district court quoted portions of one key provision of the contract:

The Contractor shall certify on each invoice:

---

[10] Summaries of the invoices are located at CA App. 914-953 (Allison), 966-994 (General Tool invoices to Allison), 837-854 (SOFCO invoices to General Tool). The amounts from these invoices were included in invoices the prime contractor submitted to the government.

> (1) the percentage of physical progress in the performance of work on the vessel as a decimal carried to four places; and
> (2) the allowable cost incurred in the performance of the work on the vessel as of the date the invoice is submitted.

Pet. App. 58a. The same clause also defined "incurred costs" as follows:

> 'Incurred Costs' are those costs identified through the use of the accrual method of accounting, as supported by the records maintained by the Contractor and which are allowable ... and include only: (1) Costs for items or services purchased directly for the contract which are paid as well as incurred, as shown by payment made by cash, check, or other form of actual payment....

CA App. 413. In addition, the government contract permitted the prime contractor to submit invoices every two weeks. *Id.*

Thus, the Navy did not front-load money to the prime contractor. Rather, the prime contractor billed the Navy every two weeks for work that had been performed under the contract–either by it or its subcontractors. In other words, the Navy contract dictated that government payments can *only* be made *after* the prime contractor presents claims which are based upon costs which had been incurred and are conforming to the contract. CA App. 411-13. Therefore, it would be unlawful for the Navy to pay

for work performed by the Petitioners, as subcontractors, prior to them submitting invoices to the prime contractor to be presented to the Navy.

Petitioners have never contended that the Navy front-loaded payments under the government contract; nor could they. During trial, one of the Petitioners' project engineers provided testimony confirming the process whereby Petitioners, as subcontractors, submitted bills to the prime contractor, the prime contractor submitted bills to the Navy, the Navy paid the bills, and the prime contractor passed the funds on to the Petitioners. JA 107a-112a.

The district court also acknowledged that the Respondents offered circumstantial evidence to support its contention that claims were presented to the Navy; namely that "the ships were continuing to be built." Pet. App. 58a. In other words, unless invoices had been submitted and paid, the prime contractor would have stopped performing work. As is true in government contracting, the prime contractor did not wait to tender a fully completed $1 billion ship before seeking any progress payments. Accordingly, the record demonstrates that the prime contractor did present claims to the Navy.

There could not be a more classic example of a valid use of Sections 3729(a)(1) and (2) than in a subcontractor fraud setting, such as the instant case. In fact, the Supreme Court and every Circuit Court of Appeals that has addressed the issue has ruled that the FCA applies to those without a direct contract with the government, including subcontractors, because they cause another to submit claims to the

government. *Bornstein*, 423 U.S. at 309-13; *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 544-45 (1943)(The FCA provisions "indicate a purpose to reach any person who knowingly assisted in causing the government to pay claims which were grounded in fraud, without regard to whether that person had direct contractual relations with the government."); *United States v. Rachel*, 208 Fed. Appx. 236 (4th Cir. 2006)(no direct contract is required to be liable under the FCA); *United States v. Taber Extrusions, LP*, 341 F.3d 843, 845 (8th Cir. 2003)("Without question, the first three subsections of 31 U.S.C. § 3729(a) are broad enough to 'reach any person who knowingly assisted in causing the government to pay claims which were grounded in fraud, without regard to whether that person had direct contractual relations with the government.'")(citing *Hess*, 317 U.S. at 544-45); *United States ex rel. Schmidt v. Zimmer, Inc.*, 386 F.3d 235, 242-44 (3d Cir. 2004)(reversing the district court's dismissal of FCA claims against subcontractor); *United States v. Mackby*, 261 F.3d 821, 827 (9th Cir. 2001)("The FCA reaches 'any person who knowingly assisted in causing the government to pay claims which were grounded in fraud, without regard to whether that person had direct contractual relations with the government.'")(citing *Hess*, 317 U.S. at 544-45); *United States v. Krizek*, 111 F.3d 934, 942 (D.C. Cir.1997)(holding that a doctor was liable for false claims prepared by his wife, where he "delegated to his wife authority to submit claims on his behalf" and utterly failed to review the false submissions); *Peterson v. Weinberger*, 508 F.2d 45, 52-53 (5th Cir.

1975)("These provisions, considered together, indicate a purpose to reach any person who knowingly assisted in causing the government to pay claims which were grounded in fraud, without regard to whether that person had direct contractual relations with the government.")(citing *Hess*, 317 U.S. at 544-45).

As evidenced by the wrong approach used by the lower courts in this, and many other cases, when analyzing whether a defendant violated the FCA, there is a great need for this Court to provide guidance to the lower courts to follow when evaluating FCA cases. The next section proposes a model for this Court to adopt. The following sections apply the model to this case and also address the issue of whether the FCA contains an implicit requirement that a claim be submitted to the government.

II. THIS COURT SHOULD ADOPT A THREE-STEP STANDARD FOR DETERMINING WHETHER SPECIFIC CONDUCT VIOLATES THE FCA.

The manner in which the FCA is drafted lends itself to a three-step analysis for determining whether any specific conduct violates the FCA.

The first hallmark of the FCA is that it protects the flow of federal funds. The FCA broadly defines a "claim" to capture all forms of requests for payments, including demands made to a contractor or grantee, if the government provided any portion of the money. 31 U.S.C. § 3729(c). In other words, the FCA applies

where federal money is used to fund a government contract, program, or grant. On the other hand, the FCA does not apply to situations where purely private funds are involved, such as Enron, where stockholders were defrauded. Thus, a proper approach to analyzing the FCA begins with determining whether the funds at issue are federal funds.

The FCA is not intended to reach every instance of payment of federal funds. Rather, a second hallmark of the FCA is that a person must possess scienter or guilty knowledge that its statements or claims were false. The FCA does not apply to honest disputes, but only where a person had actual knowledge of falsity or if he acted with either "deliberate ignorance," or "reckless disregard" for the truth or falsity of the information. 31 U.S.C. § 3729(b). Therefore, the second step is to determine if the claims were false and the person had knowledge of such falsity.

The third and final step in the liability analysis is for a court to identify which one or more of the seven overlapping substantive provisions apply from Section 3729(a)(1)-(7).[11]

Accordingly, this brief proposes that courts apply the following three-step standard for determining whether a defendant's conduct violated the FCA:

(1) Are the funds "federal funds?" If no, the

---

[11] The requirements of these sections will be discussed when addressing the third step.

> *FCA does not apply. If yes, proceed to question two.*
>
> *(2) Did the person knowingly make or use a false statement or claim to seek, obtain, or retain such federal funds? If no, the FCA does not apply. If yes, proceed to question three.*
>
> *(3) Which one or more of the seven provisions contained in Section 3729(a)(1)-(7) apply?*

Beneath this approach lie real and concrete standards that foster efficiency and lead to more uniform results. The next sections flesh out these standards in the context of this case.

A. Step One: Were the Payments "Federal Funds"?

The first question a court must ask is whether the money is federal funds. If not, the FCA does not apply regardless of whether fraud occurred. Because courts tend to skip over this analysis, it often leads to wrong results.

In the next section, the facts of this case will be applied to step one. It will also discuss how this standard would apply if the government had front-loaded a grant, as well as its application in the context of the worst case hypothetical examples raised in the amicus curiae briefs of the Chamber of Commerce and the Washington Legal Foundation.

1. ***The moneys paid to Petitioners were federal funds.***

Petitioners wrongly equate the fraud committed by themselves, as subcontractors, in delivering non-conforming parts under a government contract as a matter solely between two private parties–itself and the prime contractor. (Pet. Br. at p. 3.) Apart from relying on the erroneous holding by the district court that claims had not been presented to the Navy, the Petitioners do not support their suggestion that the funds were private funds.

As established above, the prime contractor's claims were presented to and paid by the Navy. Therefore, it cannot be contested that Navy payments to the prime contractor constituted federal funds.

The fact that the prime contractor passed along the federal funds to its subcontractors does not alter that the moneys were federal funds at the time the government was asked to pay and did pay the prime contractor's invoices.

Here, it is alleged that the Petitioners violated the FCA by *causing* the prime contractor to submit false claims to the Navy. As a matter of law, a violation of Section 3729(a)(1) occurs at the time a claim by the prime contractor is presented to the Navy. Similarly, a violation of Section 3729(a)(2) occurs at the moment of payment of funds from the Navy to the prime contractor.

Accordingly, violations of both of these two FCA provisions occurred by the time payment was made by the Navy to the prime contractor. Thus, step one is satisfied and the Court should proceed to the

second step of the standard, which asks whether the claims were false and the person knew they were false.

Before addressing step two, however, this brief explores whether the money remained federal funds at the time the Petitioners *received* payments from the prime contractor. Even though it would not be appropriate to do so in this case because the FCA violations occurred, at the latest, at the point of payment by the Navy to the prime contractor, the analysis of this question is useful for examining how step one would be applied in a case where federal funds are front-loaded, such as in a typical federal grant setting.

Here, the money would still constitute federal funds at the time of *receipt* by Petitioners. That is because the government retains title to or a lien upon the funds until the work being billed was conforming to the contract.

The payments made by the Navy were "conditional." The Navy contract stated that payments were conditioned upon the claimed costs being both incurred and allowable.[12] CA App. 410-15.

---

[12] The contract also gave the Navy the right to audit the invoices: "Certifications and Audits. At any time or times prior to final payment under this contract, the Contracting Officer may have any invoices and statements or certifications of costs audited. The Contracting Officer may require the Contractor to submit, or make available for examination by the Contracting Officer or his designated representative, the supporting documentation upon which invoices, statements or

Because the conditional payments required that conforming goods be delivered, there existed a form of an "implied trust" or "equitable lien" upon the federal funds. *Cf. In re Columbia Gas Sys., Inc.*, 997 F.2d 1039, 1056 (3d Cir. 1993)("Federal common law imposes a trust when an entity acts as a conduit, collecting money from one source and forwarding it to its intended recipient."). The lien or trust on the funds only extinguishes once the work was both complete and conforming to the requirements.

If the Gen-Sets do not conform to the contract requirements, the mere invoicing or transmittal of funds would not extinguish the government's title or lien. Accordingly, transmittal of funds to the prime contractor would not extinguish the government's interest in or title to the federal funds if the Gen-Sets are non-conforming. Therefore, even at the time when the money was received by the Petitioners, it would constitute federal funds–assuming the Respondents establish that the Gen-Sets did not conform to the contract.

2. *The same analysis applies where the government front-loads money.*

The same analysis extends to situations where the government front-loads money to an entity under a contract or grant to perform a federally funded project. The government retains an interest in the funds until its purposes are satisfied. This is a form

---

certifications of costs are based." CA App. 414.

of an implied trust even without express language in an agreement. *In re Penn Cent. Transp. Co.*, 486 F.2d 519, 524 (3d Cir. 1973)("When the language of the parties fails to clearly indicate their intention, it may be ascertained by other objective manifestations of intent, such as the facts and circumstances surrounding the transaction and the relationship of the parties."). For instance, if the entity canceled its project immediately after receiving grant funds, it would not be able to simply keep the federal funds.

The goal and role of the FCA is to protect the flow of federal funds. Title to the funds is not extinguished until the purpose for which the funds were provided is met. Only once the funds are spent on a purpose for which the funds were intended and the work satisfactorily conforms to the project is the implied trust satisfied.

Thus, even if the government front-loads funds, the money is still considered federal funds until the money is spent for conforming purposes.

3. *The proposed standard would not reach the worst case hypothetical examples raised in amicus curiae briefs in support of Petitioners.*

Two of the amicus curiae briefs in support of the Petitioners each raise two hypothetical cases where they suggest that the FCA would be stretched beyond its purposes unless this Court reads into Section 3729(a)(2) limiting language that the claim be presented directly to the government. All four hypothetical situations, however, are strawman

arguments. Notwithstanding that none of these situations have ever been the subject of a FCA action, they would not satisfy the proposed three-step standard regardless of whether the Court imposes a requirement that the claim be presented to the government.

The amicus curiae brief of the Chamber of Commerce suggests as its two worst case scenarios that Section 3729(a)(2) of the FCA will be improperly applied in a government firm-fixed price contract setting where a subcontractor overcharges a prime contractor for goods which are conforming to the contract or in a Medicare setting where a supplier overcharges a hospital receiving a fixed amount under the prospective payment system for a particular procedure or test.[13] (Chamber of Commerce Brief at 11-14.)

In firm-fixed price settings, such as the two raised by the Chamber of Commerce, the government has agreed to pay a set price for conforming goods or services. It does not matter to the government how

[13] For example, the government agrees to pay a fixed price of $100 for a contractor to deliver a widget. The contractor obtains the widget from a vendor for $80. The widget is conforming to the contract and the government pays $100. It turns out that the vendor should have charged the contractor $75, but lied about its costs. The Chamber of Commerce suggests that the government might sue the supplier for the $5 it defrauded the contractor. The FCA would not permit such an action regardless of whether the FCA contains a requirement that the claim be presented to the government.

much it costs the prime contractor or hospital to make or acquire the goods or services. Once a conforming good or service is tendered, the government's lien or title to the funds is extinguished. Therefore, the funds paid to the subcontractor or vendor would not constitute federal funds and the FCA would not apply to these hypothetical examples.

The Chamber of Commerce carefully chose its hypothetical examples to consist of examples where the goods and services were (1) conforming to the contract, and (2) the government contract was a fixed-price setting. The Chamber of Commerce does not suggest that it would be improper or unfair for the subcontractor or vendor to be liable under the FCA if the goods were nonconforming or if the contract price was a "cost" basis. Under those circumstances, the subcontractor or vendor would have *caused* a false claim to be submitted to the government by asking the prime contractor or hospital to seek increased payments based on fraudulent data or payments for non-conforming goods. Moreover, in those situations, a claim would have been submitted to the government and therefore fall outside the context of the discussion of whether Section 3729 (a)(2) contains an implicit requirement that the claim be presented.

The Washington Legal Foundation raises its own worst case hypothetical examples by suggesting that under the Sixth Circuit's opinion the FCA might apply anytime a Social Security beneficiary or a federal employee is defrauded with its personal funds because the money originated from the federal

government.[14] (Washington Legal Foundation Brief at p. 6.) This argument suggests that if a federal employee deposits its salary into the bank and then uses these funds to hire someone to remodel his home, the Department of Justice would sue the carpenter for triple damages if he cheated the employee by not performing the work on the employee's private dwelling. Again, this argument misunderstands what constitutes federal funds.

The government's title or lien upon the funds it pays to a beneficiary or federal employee does not flow ceaselessly, but is extinguished upon payment. Thus, at the moment of payment, it ceases to be federal funds. The purpose of the payment to a Social Security beneficiary was to provide funds to a person eligible for the benefit, and the purpose of the payment to a federal employee was to pay for work performed. In these hypothetical examples, both the beneficiary and employee were entitled to the payments. Therefore, the lien or interest on the funds extinguished once the federal funds were paid. Accordingly, the FCA would not apply to these

---

[14] It suggested as its third and final example a situation where a subcontractor cheats a prime contractor, but the prime contractor is not entitled to submit costs for that work to the government. (Brief at 7.) This example is the same as one raised by the Chamber of Commerce, i.e. a fixed price setting where the amount charged by a subcontractor to the prime contractor is not part of the agreement to perform work under a federally funded program or project. For the reasons discussed above, this example would not be governed by the FCA.

hypothetical examples regardless of whether there was a requirement that the claim be presented to the government.

B. Step Two: Did the Person Know it was Falsely Seeking, Obtaining, or Retaining Federal Funds?

The second step, determining whether the person knew the claim was false, actually involves answering two related questions: Was the claim false, and if so, did the person know it was false?

This step is critical, because the FCA applies only if a person had requisite scienter or guilty knowledge that it was falsely seeking, obtaining, or retaining federal funds. 31 U.S.C. § 3729(b). The FCA does not seek to reach every instance of payment of federal funds. Rather, the FCA only applies if the person not only was not entitled to the federal funds, but he knew it.

First, a claim is deemed false, as a matter of law, when a request is made for funds to which the person is not entitled. *See United States v. Southland Mgmt. Corp.*, 326 F.3d 669, 674-75 (5th Cir. 2003)(a false claim means a claim for money or property to which a defendant is not entitled); *Hutchins v. Wilentz, Goldman, & Spitzer*, 253 F.3d 176, 184 (3d Cir. 2001)("we hold the submission of false claims to the United States government for approval which do not or would not cause financial loss to the government are not in the purview of the False Claims Act"); *Costner v. URS Consultants, Inc.*, 153 F.3d 667, 677 (8th Cir. 1998)("Only those actions by the claimant ...

[calculated to] cause the United States to pay out money it is not obligated to pay ... are properly considered 'claims' within the meaning of the FCA.").

This standard does not depend upon the knowledge of the person presenting the claim. Rather, it is a pure legal recognition that a claim is false when it seeks costs for something not allowed.

The second prong in this step addresses whether the person knew the claim was false. The FCA defines guilty knowledge not only as actual knowledge of falsity, but also includes situations where he acted with either "deliberate ignorance" or "reckless disregard" for the truth or falsity of the information. 31 U.S.C. § 3729(b).

If both of these conditions are satisfied, the court would move to step three. If either is missing, the FCA case should be dismissed.

Here, the district court short-circuited the process by dismissing the case before the defendants presented their case. Accordingly, a jury did not have an opportunity to decide whether the Gen-Sets complied with the contract specifications, rendering the claim false, and if the Petitioners had such guilty knowledge at the time it asked the prime contractor to submit its claims to the Navy for payment. Accordingly, this step still needs to be determined by the district court.[15]

---

[15] The district court indicated that even if the claims had been presented, the entire case might still need to be dismissed because it viewed the FCA as requiring that claims be certified. There are two errors with this

C. Step Three: Which Section of 3729(a)(1)-(7) was Violated?

At step one in the proposed standard, it would have been established that the funds were federal funds. At step two, it would have been established that a person's claim was false and that he knew it at the time. The third and final step is to identify which one or more of the seven substantive provisions from Section 3729(a)(1)-(7) apply to the false statements or claims.

When Congress enacted the FCA, it intended to capture every possible manner in which a wrongdoer, through a false statement or false claim, could either attempt to obtain, actually obtain, or continue to retain federal funds. *United States v. Neifert-White Co.*, 390 U.S. 228, 232 (1968)("[T]he Act was intended

---

analysis. First, Section 3729(a)(1) does not require any form of a false statement, much less a certification. This provision imposes liability upon anyone who "causes to be presented" to the government "a false or fraudulent claim for payment or approval." 31 U.S.C. § 3729(a)(1). Second, although (a)(2) is worded differently than (a)(1) by including the language "*use of a false record or statement* to get a false or fraudulent claim paid," it does not mandate that a certification accompany the invoice. *Id.* at § 3729(a)(2). Rather, any false statement would satisfy this provision; it need not be a certification to an invoice. In any event, the contract required the prime contractor to certify in its invoices that the claimed costs were allowable. Pet. App. 58a. This certification satisfies Section 3729(a)(2).

to reach all types of fraud, without qualification, that might result in financial loss to the Government."). That explains why there are seven overlapping, yet distinctive, substantive provisions defining liability under the FCA. *See* 31 U.S.C. §§ 3729(a)(1)-(7). For instance, (a)(1) applies when a person "seeks" federal funds, (a)(2) applies when he "obtains" federal funds, (a)(7) applies if he "retains" federal funds, and (a)(3) applies when he conspires to seek, obtain, or retain federal funds.

In order to accomplish these purposes, it was necessary to build in overlap among the seven provisions. Yet, each of the seven does have distinctive functions or roles.

The first two liability sections of the FCA, Sections 3729(a)(1) and (2), combine to capture most fraudulent schemes. Although they frequently apply to the same misconduct, including two overlapping provisions reduces the risk of unintended loopholes which would likely occur if Congress attempted to draft them to be mutually exclusive.

The primary distinction is that Section 3729(a)(1) includes *attempts* to cheat through its language of submitting a claim "for payment or approval," whereas Section (a)(2) applies only when payment has actually been made, i.e. getting a false claim "paid or approved." 31 U.S.C. §§ 3729(a)(1) and (2).

This *presentment* requirement in Section (a)(1) does not exist in the remaining six provisions of Section 3729(a), because (a)(1) is the only substantive FCA provision which makes a person liable when the claim is not paid and there is no actual damage to the government. The presentment condition acts as a

form of a safety check in situations where civil penalties can be imposed when there is no actual loss to the government.

Next, Section 3729(a)(3) addresses acts of conspiracy, making each co-conspirator liable without having to prove that each individual caused the false claim to be submitted. It has a completely different function from the preceding sections, although a co-conspirator could still also violate Sections (a)(1) or (2).

Sections 3729(a)(4) through (6) are narrowly tailored to address specific, but less frequent, types of fraud. Section (a)(4) reaches situations where a person delivers less property to the government than required. Section (a)(5) addresses the potential that a government employee might receive a kickback to issue a false receipt. Section (a)(6) applies to situations where a person purports to buy excess or unneeded government property when the government official has no authority to sell it.

Finally, Section 3729(a)(7) addresses reverse false claims where a person uses a false statement or record to avoid an obligation to return federal funds or property. For instance, if a contractor receives engine parts for repair and is required to perform an annual accounting of the property in its possession in order to pay for any shortages, it would be a violation of (a)(7) to use a false statement to conceal shortages of parts in the inventory list to avoid the duty to pay for such missing parts.

When viewed together, the intention of these seven provisions is to capture all forms of fraud against the government. There is no injustice

drafting a statute with overlapping provisions because the wrongdoer is only obligated to pay damages once. Rather, it would be an injustice to narrowly read these provisions or inject into any provision beyond Section 3729(a)(1) a requirement that a claim be presented to the government because it would create gaps such that not every instance of fraudulently seeking, obtaining, or retaining federal funds would be covered.

As shown below, at least Sections 3729(a)(1) and (2) apply to this case, provided steps one and two of the proposed standard have been met.

1. *Section 3729(a)(1) applies.*

Section 3729(a)(1) reads:

> (1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government ... a false or fraudulent claim for payment or approval.

31 U.S.C. § 3729(a)(1).

To establish a prima facie claim under this provision, a plaintiff must show "(1) the defendant presented or caused to be presented to an agent of the United States a claim for payment; (2) the claim was false or fraudulent; and (3) the defendant knew the claim was false or fraudulent." *Zimmer*, 386 F.3d at 242 (citation omitted).

In steps one and two, it would have already established above that the money was federal funds, the claims were false, and the Petitioners had

knowledge of the falsity of the claims. The only additional requirement at this third step for liability to attach under (a)(1) is to show that the Petitioners caused the claims to be presented by the prime contractor to the Navy.

Here, the Respondents introduced at trial the false invoices of the Petitioners, the contract describing the invoicing process, and testimony regarding how the subcontractors submitted invoices to the prime contractor. Thus, Petitioners caused the prime to submit false claims to the government. There could not be a more classic example of a case where Section 3729(a)(1) applies. *See Bornstein*, 423 U.S. at 309-13.

2. *Section 3729(a)(2) applies.*

Section (a)(2) reads:

> (2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government.

31 U.S.C. § 3729(a)(2). The distinction between this and Section (a)(1) is that a plaintiff must also show that the defendant "made or used (or caused someone else to make or use) a false record in order to cause the false claim to be actually paid or approved." *Zimmer*, 386 F.3d at 242.

No where does this clause contain a requirement that the wrongdoer "present" a false claim to the government, and this Court should not read into it

such a requirement. Again, Section 3729(a)(2) has a different purpose than (a)(1). Because (a)(2) only covers situations where federal funds were actually lost due to fraud, there was no need for Congress to add the same safety check found in (a)(1) of requiring a presentment of a false claim where civil penalties are imposed without wrongful payment of federal funds.

Again, the seven parts of Section 3729(a) are worded differently to ensure that the FCA covers every conceivable instance where a person tries to or succeeds in obtaining federal funds by means of falsity. Therefore, it would not be appropriate for this Court to inject language into Section 3729(a)(2) or (3), which would improperly narrow the FCA and open the door to loopholes.

The evidence in the record of this case demonstrates that the claims at issue had been presented to the Navy. Accordingly, it is not necessary for this Court to impose a requirement into Section 3729(a)(2) or (3) that claims be presented to the government in order to properly rule upon this case. Again, there could not be a more classic case of the application of Section 3729(a)(1) or (2) than a subcontractor fraud case, such as this one.

CONCLUSION

This Court should affirm the Sixth Circuit's reversal of the district court's dismal of the case, but it should remand the entire case back to the district court to apply the proposed three-step standard for evaluating whether the Petitioners violated the FCA.

Joel D. Hesch
Liberty University School of Law
1971 Univ. Blvd.
Lynchburg, VA 24502
(434) 592-4251

Counsel for Amicus Curiae