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No. 10-188

IN THE

Supreme Court of the United States

SCHINDLER ELEVATOR CORPORATION,
Petitioner,

v.

DANIEL KIRK,
Respondent.

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

BRIEF OF UNITED TECHNOLOGIES CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES................................	ii
INTEREST OF *AMICUS CURIAE*.....................	1
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	4
ARGUMENT...	6
I. THE SECOND CIRCUIT'S DECISION MISINTERPRETS THE EFFECTIVE DATE IN THE FRAUD ENFORCEMENT AND RECOVERY ACT OF 2009...	6
CONCLUSION	9

TABLE OF AUTHORITIES

CASES Page

Allison Engine Co. v. United States, ex rel. Sanders, 128 S. Ct. 2123 (2008).............. 6

Hopper v. Solvay Pharms., Inc., 588 F.3d 1318 (11th Cir. 2009)............................... 3

Mason v. Medline Indus., Inc., __ F. Supp. 2d __, C.A. No. 07C5615, 2010 WL 653542 (N.D. Ill. Feb. 18, 2010) 4

Russello v. United States, 464 U.S. 16, 104 S. Ct. 296, 78 L. Ed. 2d 17 (1983)............ 8

United States ex rel. Baker v. Cmty. Health Sys., Inc., __ F. Supp. 2d __, Civ. No. 05-279, 2010 WL 1740624 (D.N.M. Mar. 19, 2010)... 4

United States ex rel. Burroughs v. Cent. Ark. Dev. Council, No. 4:08CV2757, 2010 WL 1542532 (E.D. Ark. Apr. 19, 2010)... 3-4

United States ex rel. Carpenter v. Abbott Labs., Inc., __ F. Supp. 2d __, C.A. No. 07-10918, 2010 WL 2802686 (D. Mass. July 16, 2010)... 3, 4

United States ex rel. Drake v. NSI, Inc., __ F. Supp. 2d __, No. 3:94-cv-963, 2010 WL 3417854 (D. Conn. Aug. 26, 2010)..... 2

United States ex rel. Gonzalez v. Fresenius Med. Care N. Am., No. EP-07-CV-247, 2010 WL 1645971 (W.D. Tex. Mar. 31, 2010)... 4

Page

United States ex rel. Kirk v. Schindler Elevator Corporation, 601 F.3d 94 (2d Cir. 2010)....................2, 3, 4, 7

United States ex rel. Parato v. Unadilla Health Care Ctr., Inc., C.A. No. 5:07-cv-76, 2010 WL 146877 (M.D. Ga. Jan. 11, 2010)....................4

United States ex rel. Pilecki-Simko v. Chubb Inst., C.A. No. 06-3562, 2010 WL 1076228 (D.N.J. Mar. 22, 2010)....................4

United States ex rel. Putnam v. E. Idaho Reg'l Med. Ctr., 696 F. Supp. 2d 1190 (D. Idaho 2010)....................4

United States ex rel. Sanders v. Allison Engine Co., 667 F. Supp. 2d 747 (S.D. Ohio 2009)....................4

United States v. Sci. Applications Int'l Corp., 653 F. Supp. 2d 87 (D.D.C. 2009)....................4, 9

United States ex rel. Steury v. Cardinal Health, Inc., No. 09-20718, 2010 WL 4276073 (5th Cir. Nov. 1, 2010)....................4

STATUTES

Fraud Enforcement And Recovery Act of 2009, 123 Stat. 1617 (2009)....................*passim*

False Claims Act, 31 U.S.C. § 3729 *et seq.* (2009)....................*passim*
31 U.S.C. § 3729(a)(2)....................*passim*
31 U.S.C. § 3729(b)(2)....................3, 4, 5, 7

Page

OTHER AUTHORITIES

S. Rep. No. 111-10 (2009) 6
S. Rep. No. 110-10 (2009) [sic] 9

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INTEREST OF *AMICUS CURIAE* [1]

United Technologies Corporation ("UTC") submits this *amicus* brief to alert the Court to what it views as an error embedded in the decision below, which

[1] This *amicus* brief is filed with the consent of the petitioner and the respondent, in accordance with Rule 37.3(a). Pursuant to Rule 37.6, no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

might not otherwise be identified by the parties to this appeal. UTC urges the Court not to inadvertently endorse that aspect of the decision.

Specifically, in *United States ex rel. Kirk v. Schindler Elevator Corporation*, 601 F.3d 94 (2d Cir. 2010), the Second Circuit assumed – apparently without any significant briefing or argument on the point – that the Fraud Enforcement And Recovery Act of 2009 ("FERA"), 123 Stat. 1617, 1621 (2009), which amended 31 U.S.C. § 3729(a)(2) (2009) of the False Claims Act ("FCA"), applies retrospectively to any *case* pending on the applicable effective date—June 7, 2008. Virtually every other court to consider this issue, however, has concluded that FERA applies retrospectively, not to *cases* pending on that date, as *Kirk* held, but, consistent with FERA's language, to *claims for payment*, being pursued subject to the False *Claims* Act, pending on that date.

As a publicly traded company that collaborates with the federal government on a variety of public projects, UTC has an interest in judicial decisions interpreting the False Claims Act. Moreover, UTC is party to a case within the Second Circuit, where the issue – whether FERA's retroactivity clause describes "cases" or "claims" – has already arisen. *See, e.g.*, *United States ex rel. Drake v. NSI, Inc.*, -- F. Supp. 2d --, No. 3:94-cv-963, 2010 WL 3417854 (D. Conn. Aug. 26, 2010) (following *Kirk* and holding that FERA applies retrospectively to a case pending on June 7, 2008).

Thus, while the issue that UTC identifies here is not part of the question presented for appeal, and is apparently not a focus of any of the parties in this case, UTC alerts the Court to its existence because of

the possibility that if the Court were unaware of the issue, it might unintentionally endorse the Second Circuit's view.

STATEMENT OF THE CASE

In *Kirk*, the Second Circuit resolved several legal issues, including the public disclosure bar issue that is the subject of the writ of certiorari. But as a preliminary matter, it addressed in passing whether FERA's amendments to § 3729(a)(2) – which took effect as if enacted on June 7, 2008, and which apply to all "claims" pending on or after that date – could be applied retrospectively. 601 F.3d at 113. The court assumed that the word "claims" in the effective date provision applied to all *cases* pending on that date. *Id*. While Kirk's *case* was pending, the allegedly fraudulent claims for payment were not. Thus, this assumption was critical to whether the FERA amendments applied.

The Second Circuit concluded that the term "claims" meant "cases" with little analysis, *see id*. at 113, despite that it was interpreting an amendment to the False *Claims* Act, 31 U.S.C. § 3729 *et seq*. (2009), in which the concept of "claim" is obviously very different from the claims that are pursued as part of a lawsuit. The court did not, for instance, examine whether the effective date was susceptible to different interpretations, nor did it note that the FCA expressly defines "claim" in a contrary manner, 31 U.S.C. § 3729(b)(2), as virtually every other court to consider the issue has recognized.[2] Because

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[2] *See, e.g.*, *Hopper v. Solvay Pharms., Inc.*, 588 F.3d 1318, 1327 n.3 (11th Cir. 2009); *United States ex rel. Carpenter v. Abbott Labs., Inc.*, -- F. Supp. 2d --, C.A. No. 07-10918, 2010 WL 2802686, at *5 (D. Mass. July 16, 2010); *United States ex rel.*

"claim" is a defined term under the FCA that means a claim for payment, 31 U.S.C. § 3729(b)(2), case law is "almost uniformly"[3] in agreement that FERA's retrospective reach is limited to claims for payment that were pending on or after June 7, 2008. One court of appeals, however, has cited *Kirk* and without much discussion adopted its holding in a footnote, which suggests that a deep circuit split may be developing.[4]

SUMMARY OF ARGUMENT

Congress expressly limited the retrospective application of FERA such that the amendments to 31 U.S.C. § 3729(a)(2) would take effect "as if enacted

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Burroughs v. Cent. Ark. Dev. Council, No. 4:08CV2757, 2010 WL 1542532, at *2-3 (E.D. Ark. Apr. 19, 2010); *United States ex rel. Gonzalez v. Fresenius Med. Care N. Am.*, No. EP-07-CV-247, 2010 WL 1645971, at *9 (W.D. Tex. Mar. 31, 2010); *United States ex rel. Pilecki-Simko v. Chubb Inst.*, C.A. No. 06-3562, 2010 WL 1076228, at *4 n.10 (D.N.J. Mar. 22, 2010); *United States ex rel. Baker v. Cmty. Health Sys., Inc.*, -- F. Supp. 2d --, Civ. No. 05-279, 2010 WL 1740624, at *16-17 (D.N.M. Mar. 19, 2010); *United States ex rel. Putnam v. E. Idaho Reg'l Med. Ctr.*, 696 F. Supp. 2d 1190, 1196 (D. Idaho 2010); *Mason v. Medline Indus., Inc.*, -- F. Supp. 2d --, C.A. No. 07C5615, 2010 WL 653542, at *3 (N.D. Ill. Feb. 18, 2010); *United States ex rel. Parato v. Unadilla Health Care Ctr., Inc.*, C.A. No. 5:07-cv-76, 2010 WL 146877, at *4 n.4 (M.D. Ga. Jan. 11, 2010); *United States ex rel. Sanders v. Allison Engine Co.*, 667 F. Supp. 2d 747, 751-752 (S.D. Ohio 2009); *United States v. Sci. Applications Int'l Corp.*, 653 F. Supp. 2d 87, 106-107 (D.D.C. 2009).

[3] *See Carpenter*, 2010 WL 2802686, at *5 (noting "case law has almost uniformly interpreted 'claims' to mean claims for reimbursement").

[4] *See United States ex rel. Steury v. Cardinal Health, Inc.*, No. 09-20718, 2010 WL 4276073, at *7 n.1 (5th Cir. Nov. 1, 2010).

on June 7, 2008" and would apply to any "claims" pending on or after that date. *See* FERA § 4(f)(1). The Second Circuit, however, took the word "claims" to mean "cases" (or, at least, claims that were being pursued in court as part of a case), and thereby concluded that FERA applied to any False Claims Act case pending on or after June 7, 2008. The Second Circuit's decision is inconsistent with FERA's plain language – and the decisions of the overwhelming majority of courts having addressed the issue – for a number of reasons.

First, the FCA expressly defines a "claim" to mean "any request or demand . . . for money or property . . . ," 31 U.S.C. § 3729(b)(2), not a case. Second, Congress used the word "claims" in § 4(f)(1) and "cases" in § 4(f)(2). The use of "claims" in one subsection and "cases" in the next demonstrates that the drafters knew how to distinguish the two terms and that Congress acted intentionally to limit § 4(f)(1) to pending claims for payment. Third, interpreting "claims" to mean claims for payment, not cases, is consistent with the structure of FERA's effective-date provision, which provides a general rule of prospectivity addressed to when the *conduct* at issue occurred. Fourth, even if the word "claims" was ambiguous, FERA's legislative history dispels any confusion that Congress meant to write cases: In the Senate Report, the drafters referred to "claims" to mean claims for payment and "cases" to mean civil actions.

ARGUMENT

I. THE SECOND CIRCUIT'S DECISION MISINTERPRETS THE EFFECTIVE DATE IN THE FRAUD ENFORCEMENT AND RECOVERY ACT OF 2009.

Before FERA, § 3729(a)(2) prohibited a person from knowingly making or using 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). This Court, in *Allison Engine Co. v. United States ex rel. Sanders*, concluded that § 3729(a)(2) required proof that "defendant made a false record or statement for the purpose of getting 'a false or fraudulent claim paid or approved by the Government.'" 553 U.S. 662, 671, 128 S. Ct. 2123, 170 L. Ed. 2d 1030 (2008). Merely proving "that a false statement resulted in the use of Government funds to pay a false or fraudulent claim," was not enough. *Id* at 668. Congress enacted FERA to legislatively overrule *Allison Engine*.[5]

When Congress enacted FERA, it provided that FERA would only apply to *conduct* that occurred after the date of enactment, *except* that the amendments to § 3729(a)(2) would take effect "as if enacted on June 7, 2008" – two days before *Allison Engine* was decided – and would apply to any "claims" pending on or after that date. *See* FERA § 4(f)(1). Specifically, FERA provides:

> **Effective Date and Application**. – The amendments made by this section shall take effect on

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[5] *See* S. Rep. No. 111-10, at 10 (2009) (noting FERA "amends the FCA to clarify and correct erroneous interpretations of the law that were decided in *Allison Engine Co. v. United States ex rel. Sanders*, 128 S. Ct. 2123 (2008) . . .").

> the date of enactment of this Act and shall apply to conduct on or after the date of enactment, except that –
>
> (1) [The amendments to § 3729(a)(2)] . . . shall take effect as if enacted on June 7, 2008, and apply to all *claims* under the False Claims Act (31 U.S.C. 3729 *et seq*.) that are pending on or after that date; and
>
> (2) section 3731(b) of title 31, as amended by subsection (b); section 3733, of title 31, as amended by subsection (c); and section 3732 of title 31, as amended by subsection (e); shall apply to *cases* pending on the date of enactment.

See § 4(f), 123 Stat. at 1625 (emphasis added). A plain reading of this effective date provision is that the amendments to § 3729(a)(2) apply only to *conduct* (*i.e.*, using or making a false statement material to a false claim) on or after June 7, 2008, including those claims pending on that date. Most courts have so held.

In *Kirk*, however, the Second Circuit applied FERA to allegedly false claims that were not pending on or after June 7, 2008, because it interpreted FERA's effective date as meaning "cases" (or perhaps claims in False Claims Act cases) not the underlying false "claims" being pressed for payment. 601 F.3d at 113. The plain language of FERA, however, calls for a different conclusion, for several reasons.

First, the FCA itself defines "claim" to mean "any request or demand . . . for money or property. . . . ," 31 U.S.C. § 3729(b)(2), not a case.

Second, Congress used "claims" in § 4(f)(1) and then, immediately after, used the word "cases" in the

next subsection. *Compare* FERA § 4(f)(1) (applies to pending "claims") *with* FERA § 4(f)(2) (applies to pending "cases"). The use of "claims" in one subsection and "cases" in the next demonstrates that the drafters knew how to distinguish the two terms and that Congress was referring in § 4(f)(1) to pending claims for payment. *See Russello v. United States*, 464 U.S. 16, 23, 104 S. Ct. 296, 78 L. Ed. 2d 17 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (internal quotation marks omitted).

Third, interpreting "claims" to mean the underlying false claims for payment, not cases that include False Claims Act claims, is consistent with the structure of FERA's effective-date provision. That provision provides a general rule of prospectivity addressed to when the *conduct* at issue occurred. As a general rule, FERA's amendments only apply to "conduct" occurring after the date of FERA's enactment. *See* FERA § 4(f). The conduct at issue in an FCA case is the submission of, and pursuit of payment on, false claims. With § 4(f)(1), Congress simply adjusted the controlling date for § 3729(a)(2) so that the amendments would take effect "as if enacted on June 7, 2008" and apply to conduct on or after that date. FERA § 4(f)(1). Because Congress was concerned with conduct, these amendments helpfully clarified that the relevant *conduct* included continuing to pursue claims for payment on or after June 7, 2008 (and did not require, for example, that the claims first be submitted after that date).

Fourth, review of FERA's legislative history clarifies that Congress meant claims for payment. In the Senate Report for the amendments to § 3729(a)(2), the drafters referred to "claims" to mean claims for payment and "cases" to mean civil actions. *Sci. Applications Int'l Corp.*, 653 F. Supp. 2d at 107 ("The Senate Report's explanation of FERA's amendments to the FCA similarly utilizes 'claims' to refer to a defendant's request for payment and 'cases' when discussing civil actions for FCA violations.") (citing S. Rep. No. 110-10 (2009)).[6]

CONCLUSION

Because, at a minimum, a substantial issue exists whether the Second Circuit correctly assumed that FERA's effective date applied to "cases" rather than "claims" for payment pending on the referenced date, this Court should be alert to the issue in connection with its consideration of this appeal.

Respectfully submitted,

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[6] The district court inadvertently cited Senate Report 110-10; the correct report for FERA is Senate Report 111-10.