Circuit Split with False Claims Act Case

By A. Jeff Ifrah and Thomas A. Rust

A recent decision by the United States Court of Appeals for the District of Columbia throws the future of multimillion dollar recoveries involving claims filed against recipients of federal funds into doubt. The decision in United States ex. rel. Totten v. Bombardier, 380 F.3d 488 (D.C. Cir. 2004) could reverse what has been a decade long trend of growth in False Claims Act, 31 U.S.C. 3729 (“FCA”), recovery. Indeed, since 2000, over 1,300 FCA complaints have been filed culminating in recoveries totaling over five billion dollars.

In Totten, the D.C. Circuit held that the FCA did not apply to two contractors that allegedly delivered defective rail cars to Amtrak and later submitted invoices to Amtrak for payment from an account made up of primarily federal funds. In fact, from 1998-2002, federal appropriations to Amtrak totaled $5.2 billion.

Central to the court’s analysis in Totten was that liability under the FCA only arises when a person “knowingly presents, or causes to be presented to United States Government . . . a false or fraudulent claim for payment or approval.” 31 U.S.C. 3729(a)(1). The court logically concluded that, because Amtrak was not the “United States Government,” a false claim presented to Amtrak was not “presented” to the United States Government.

But, while the Court’s reasoning appears logical, its decision throws into flux a system that since 1986 has operated on the assumption that as long as the funds that paid the claim at issue derived from the federal government, liability under FCA could issue. In 1986 Congress amended the FCA in order to supercede a line of court rulings that limited the reach of the FCA, including the Seventh Circuit’s holding in United States v. Azzarelli, 647 F.2d 757 (7th Cir. 1981) (holding that a false claim made to a state government for funds supplied under the Federal-Aid Highway Act was not subject to the FCA).

In fact, until Totten, virtually all courts have read the 1986 amendments to the FCA broadly to include false claims for any money given to federal grantees. See e.g. Costa v. Baker & Taylor, 1998 U.S.Dist.LEXIS 23509, *23 (N.D.Cal. 1998) (“Given that the plain meaning of the statute allows the United States to recoup monies it granted to states which were then subject to fraudulent overcharging, the court will not exempt the Library Act from the federal False Claims Act. Defendants’ policy arguments regarding the potentially limitless reach of the False Claims Act under this reading of 3729(c) should be addressed by Congress, not the court.”); Wilkins v. Ohio, 885 F.Supp. 1055, 1063 (S.D.Ohio 1995) (finding that the new definition of “claim” was “broad enough to include any funds provided directly or indirectly by the United States, regardless of whether the grant was in a fixed amount or open-ended.”); United States v. Nazon, 1993 U.S.Dist.LEXIS 15642, *5 (N.D.Ill. 1993) (“Any claim made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient’ comes with the ambit of the False Claims Act.”) (quoting 31 U.S.C. 3729(c)); United States v. American Elevator Co., 1989 U.S.Dist.LEXIS 1391, *8-9 (E.D.Pa. 1989) (“From this broad definition of ‘claim’ it is clear that Congress intended to enable the government to sue individuals or entities for submitting false claims not only directly to the United States government but to ‘grantees,’ such as PHA, or ‘contractors’ hired by the government, as well.”).

The D.C. Circuit was simply not convinced that the 1986 amendments achieved the result that other courts declare was intended—notably to remove the so-called presentment to the United States Government requirement. Totten recognized that, under the FCA, a “claim” includes claims for federal grant money, but the court decided that liability under the FCA will not attach unless...
the fraudulent claim is eventually presented to the United States Government.

The decision in *Totten* also includes a spirited 14 page dissent by Judge Merrick B. Garland. The dissent reasoned that the majority’s holding requiring presentment was inconsistent with the plain text of the FCA and “not just inconsistent, but irreconcilable, with the legislative history of the 1986 Amendments[,]” *Id.* at 503. The dissent consisted of three main arguments. First, 31 U.S.C. 3729(a)(2) does not contain an express presentment requirement; rather, it permits liability to issue when a person “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) (emphasis added). Second, the FCA does not require the government to “provide” the funds after presentment of a claim to the Government. Third, an examination of the legislative history leads to the inescapable conclusion that Congress did not intend to retain the presentment requirement. *Totten*, 380 F.3d at 512.

On September 27, 2004, Totten filed a petition for rehearing *en banc*. Given the potential impact of this decision, if it is ultimately affirmed, the Supreme Court may be compelled to weigh in.

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