

Hello Allison, Goodbye Goldberg

Barbara Van Gelder
Tiffany D. Johnson
Morgan Lewis & Bockius LLP
Washington, D.C.

I. INTRODUCTION

The False Claims Act (“FCA”) was passed during the Civil War to recoup profits from unscrupulous contractors who cheated the Union Army.¹ Early cases were straight forward bid-rigging² or defective product prosecutions.³ The statute was rarely used until the 1986 Amendments to the FCA increased the government’s potential recovery from double to treble damages.⁴ The added economic incentive has made the FCA the government’s statute of choice (some say it is over-used) in the fight against waste, fraud and abuse of taxpayer dollars.

There is no doubt that pursuing FCA suits after the 1986 Amendment has become a profitable endeavor. Since 1986, more than \$21 billion has been recovered in settlements and judgments under the act.⁵ It is not surprising, then, that the government and relators have sought new and novel ways to expand the reach of the FCA. This article reviews the Supreme Court’s decision in *Allison Engine v. U.S. ex rel. Sanders*⁶ and examines how *Allison Engine* will limit the government’s use of affidavits, colloquially known as the “Goldberg declaration,”⁷ to sustain its burden of proof in false certification cases.

II. BACKGROUND OF FCA CERTIFICATION THEORIES

The FCA creates liability for false claims, or false statements in support of false claims, presented to the United States Government for payment.⁸ Courts have held that the FCA requires proof

of an “objective falsehood”⁹ or “a lie.”¹⁰ Mere “allegations of poor or inefficient management of contractual duties” are not actionable under the [FCA].¹¹ FCA actions predicated on 3729(a)(1) require proof that a defendant submitted a false claim, while cases based on 3729(a)(2) must show that both the statement and the claim are false.¹²

Unlike the garden variety FCA cases involving inflated invoices or billing for services never rendered, false certification cases impose liability based upon the failure to comply with regulatory or statutory regimes. Most healthcare cases brought under section (a)(2) allege that the defendants submitted “false certifications” to support their false reimbursement claims for Medicare or Medicaid. There are two types of false certification liability theories—implicit false certification and explicit false certification.¹³ In an FCA action based upon an explicit false certification theory, the government or relator alleges that, in submitting the claim, the defendant made a false representation of compliance with a federal statute or regulation or a prescribed contractual term.¹⁴ Typically, the government argues that the defendant is required to sign the certification in order to submit a claim for payment and that this false certification is the “false statement that the defendant presented to get a claim paid or approved by the government” as required by section 3729(a)(2) of the Act. The implicit false certification liability theory works similarly except that the defendant never actually signs a certification. Rather, in using this theory, the government alleges that the defendant, by submitting a certain claim for payment, makes an implied certification that he has

complied with particular laws because the government would not pay for the claim if those laws had been violated.¹⁵

These theories are considered expansions of the FCA because they allege that the defendant's claim is "legally false." It is well established that the FCA requires proof of an "objective falsehood."¹⁶ For a certified statement to be "false" under the Act, it must be "an intentional, palpable lie."¹⁷ Scholars have suggested that FCA actions require proof that a defendant has submitted a "factually false" claim for payment.¹⁸ Although scholars continue to question whether or not the FCA supports the theory of false certification liability, various courts have ruled that the FCA covers these theories.¹⁹ To prevent the expansion of the FCA to reach every kind of fraud, however, courts have construed the FCA statute to restrict liability to cases where the false certification was material to the government's decision to pay the claim.²⁰

III. PRE-ALLISON ENGINE "MATERIALITY TEST" UNDER THE FCA

Prior to the Supreme Court's decision in the *Allison Engine* case, the Circuits took different approaches to defining materiality. The Fourth Circuit's test was "whether the false statement has a natural tendency to influence agency action or is capable of influencing agency action."²¹ The Second Circuit restricted the liability to cases where the government's payment of the claim was conditioned on certification of the statute that the defendant allegedly violated. For example, in *Mikes v. Straus*, an implicit false certification case, the government and the relator alleged that the defendants, a group of physicians, had violated 42 U.S.C. § 1320c-5(a), which establishes the Medicare Conditions of Participation ("COPs").²² The government argued that compliance with the COPs was an implicit requirement for reimbursement under Medicare. Thus a violation of those requirements rendered the defendants' claims false.²³ The *Mikes* Court determined that the implied certification theory was only appropriate

when the underlying statute or regulation expressly states that compliance with the regulation or statute is a condition of payment.²⁴ The court reasoned that "a claim for reimbursement made to the government is not legally false simply because the particular service furnished failed to comply with the mandates of a statute, regulation, or contract that is only *tangential* to the service for which reimbursement is sought."²⁵ The Seventh Circuit agreed with the Second Circuit's formulation.²⁶

The Fifth Circuit reached a similar conclusion in a non-healthcare, explicit false certification case but chose to use the term "materiality" to describe the necessary element of proof for a false certification. In *U.S. v. Southland Management Corporation, Inc.*, the U.S. brought an action under section 3729(a)(2) of the FCA alleging that a group of apartment complex owners knowingly presented false claims for housing assistance payments based on false statements.²⁷ The alleged false statements were in the form of housing assistance program ("HAP") vouchers certifying that the apartments were decent, safe, and sanitary.²⁸ Citing several other circuit court decisions, the Fifth Circuit found that although the FCA statute contains no express reference to materiality, there is a fourth "materiality" element required to maintain a false certification liability case under the FCA.²⁹ The court interpreted this to mean that the false certification of compliance creates liability if the certification is a condition of the government's payment, thus making the certification a "material misrepresentation"³⁰ and rendering the claim "false as a matter of law."³¹ The court ultimately decided that the government had conditioned the housing assistance payments on the defendants' certifications that the apartments were sanitary and safe.³² Therefore, the defendants' falsely certified compliance with that standard made them liable under the FCA for submitting a false claim.³³

The rationale for this materiality requirement is rooted in the purpose of the FCA. Courts have reasoned that the FCA is designed to seek restitution against defendants who have fraudulently induced the government to pay claims.³⁴ Thus it would be outside the purpose of the FCA to find liability

when the defendant's statements did not affect the government's decision to pay the claim.³⁵ Regardless of what test a Circuit used to determine the materiality of a false certification, prior to *Allison Engine*, all of the Courts viewed the issue from the Government's perspective, i.e., whether or not the false certification affected the government's decision to pay the false claim.

IV. THE GOLDBERG DECLARATION: HAD WE KNOWN, WE NEVER WOULD HAVE PAID

Once it was clear that materiality was a necessary element of FCA liability, the obvious question arose: how does the government prove the statement was material to payment? The answer was the Goldberg declaration. In *U.S. ex. rel. Thompson v. Columbia/HCA Healthcare Corp.*, the defendants were accused of making false certifications of compliance when they signed a Health Care Financing Administration ("HCFA") Form 2552.³⁶ The form certified that they were in compliance with healthcare laws and regulations.³⁷ The government alleged that the defendants had violated the anti-kickback statute and therefore, falsely certified that they had complied with all healthcare laws.³⁸ The district court dismissed the case, holding that violations of the anti-kickback statute did not necessarily give rise to actionable false claims under the FCA.³⁹

On appeal, however, the Fifth Circuit ruled that false certifications of compliance with the anti-kickback statute could give rise to a false claims action under the FCA.⁴⁰ The Fifth Circuit ordered the district court to conduct a form of the materiality analysis to determine if the defendants were liable for their false certifications.⁴¹

The district court was to determine whether the government's payments for the Medicare claims were "conditioned on the truthfulness of the healthcare organizations' certifications."⁴² On remand, the government submitted a declaration from David A. Goldberg, the Acting Chief of the HCFA, which stated, in addition to other things, that "HCFA conditions the payment and provider eligibility on the veracity" of Form 2552 and

that "HCFA views any false statement contained in [Form 2552] as constituting an abuse of the Medicare program."⁴³ Goldberg never explained what was false in the defendants' form or how the specific falsity affected the government's decision to pay the claim.⁴⁴ Despite this generic statement, the district court relied on the Goldberg declaration almost exclusively in concluding that the government's payments were conditioned on the veracity of the certifications in Form 2552.⁴⁵ As a result, the court found that the plaintiffs could pursue a claim for violation of the FCA.⁴⁶

While the affidavit was entered in an effort to overcome the defendants' motion to dismiss, the government's use of the affidavit is problematical. The FCA was not intended to achieve perfection with contractual obligations.⁴⁷ If the courts allowed the government to opine that compliance with every statute or regulation is material to the payment of a claim, the materiality requirement would become eviscerated. In effect, the government would always be able to establish materiality because the government always contends that any falsity is material. To sustain its burden of proof for a false certifications claim under section 3729(a)(2) of the FCA, the government would only need to submit a "had we only known" affidavit stating that the payment of the defendant's claim was conditioned on compliance with a statute, regulation or guideline.

V. POST-ALLISON ENGINE MATERIALITY: A FOCUS ON THE DEFENDANT'S INTENT

The Supreme Court's decision in *Allison Engine* constitutes a sea change in how all FCA cases will be prosecuted. By focusing on the defendant's intent at the time of the statement, rather than the government's intent at the time of payment, the Supreme Court tempered the potential danger presented by use of a Goldberg-type declaration.

Allison Engine concerned explicit certifications of compliance. Allison Engine Company, Inc. ("AE") had been hired by the U.S. Navy to build generator sets for new missile destroyers.⁴⁸ AE subcontracted much of the work to General Tool

Company (“GTC”) and other companies.⁴⁹ As a part of AE’s contract with the Navy, the company had to sign certificates of conformance (“COCs”) certifying that the generators were manufactured in accordance with the Navy’s requirements.⁵⁰ The complaint alleged that GTC submitted invoices to AE’s subcontractors that fraudulently sought pay for work that had not been done in conformance with the COCs.⁵¹ It also claimed that AE issued COCs to the Navy even though AE knew that those specifications had not been met.⁵² In a jury trial, the government introduced evidence to show that the COCs contained false statements that the work was completed in compliance with the Navy specifications.⁵³ The defendants won a motion for judgment as a matter of law because the invoices that AE presented to the Navy were not submitted into evidence.⁵⁴

On appeal, the court reversed the district court holding that FCA claims under Sections 3792(a)(2) did “not require proof of intent to cause a false claim to be paid by the Government.”⁵⁵ The Supreme Court granted certiorari to address this issue.

The Supreme Court reviewed the plain language of section 3729(a)(2), which states that any person who “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” is liable under the FCA.⁵⁶ While the circuit court decision relied on the “approved by the Government” portion of section (a)(2), the Supreme Court focused on the “to get” language and reasoned that “‘to get’ denotes purpose or intent.”⁵⁷ To be liable under the FCA, the court found that the government has to do more than merely allege the defendant made a materially false statement of compliance.⁵⁸ The court held that the government must also show that at the time the defendant made the false statement, the defendant intended the government rely on it to get paid.⁵⁹ The Supreme Court’s attention to the defendant’s purpose was crucial to its determination of whether the FCA applied, because “a cause of action under the FCA for fraud directed at private entities would threaten to transform the FCA into an all-purpose antifraud statute.”⁶⁰

Consequently, after *Allison Engine*, it will not be sufficient to merely prove that government’s payment was conditioned on the veracity of defendant’s certification. The government must also prove that the defendant intended to make the false certification to get paid. Therefore, Goldberg-type declarations can no longer be used as the government’s silver bullet to overcome a motion to dismiss. The government can no longer rely on generic claims of ubiquitous compliance to establish materiality. *Allison Engine* re-enforces the notion that materiality means more than some tangential connection to a funding decision.⁶¹ Post-*Allison* cases should level the playing field by allowing a defense declaration, explaining that at the time the certification was made the defendant believed in the truth of the statement or was not aware of the ultimate payor.

VI. PRACTICAL IMPLICATIONS OF *ALLISON ENGINE*

Allison Engine will not prevent future false certification actions under the FCA. At most, it may deter lower courts from accepting Goldberg-type declarations as the sole basis to determine the materiality of the certifications and allow the defendant an opportunity to present its own affidavit to explain its intent. If allowed, a defense declaration should include a discussion of the company’s compliance program and a recital of the steps the company undertook to verify the statements made in its certifications.

As part of their overall compliance program, companies should ensure that their compliance officers and other relevant employees are aware of all certifications that are required to be submitted with claims for payment to the government. There should be an understanding that these certifications are more than just additional papers to be signed when submitting an invoice for payment. They have the potential to ignite an FCA suit, even if the claim submitted is factually true. A lack of compliance to another law or body of laws could still expose the company to liability under the FCA.

Additionally, companies should know the laws they are dealing with when they certify compli-

ance. Where it is unclear, they should seek legal guidance on which laws are material to the government's decision to pay a claim. Often the answer will be obvious. For example, the government's decision to pay a Medicare claim is most likely conditioned on the company's compliance with anti-kickback statutes. Other times the answer will be less obvious—such as whether Medicare COPs are material to the government's decision to pay Medicare claims. As they are submitting claims for payment, companies should establish a record of attempting to comply with all laws that could be material to the government's decision to pay. In the event of an inadvertent false certification claim, that record will be useful in proving that the company did not intend the certification to be material to the government's decision to pay the claim.

ENDNOTES

1 See *U.S. v. Neifert-White Co.*, 390 U.S. 228, 232 (1968) (“The original False Claims Act was passed in 1863 as a result of investigations of the fraudulent use of government funds during the Civil War.”).

2 See e.g., *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943).

3 See e.g., *United States v. Rule Industries et al.*, 878 F.2d 535 (1st Cir. 1989).

4 31 U.S.C. § 3729(a) (2008).

5 Press Release, Department of Justice, “More Than \$1 Billion Recovered by Justice Department in Fraud and False Claims in Fiscal Year 2008” (Nov. 10, 2008).

6 *Allison Engine v. U.S. ex rel. Sanders*, 128 S.Ct. 2123 (2008).

7 *U.S. ex rel. Thompson v. Columbia/HCA Healthcare Corp., Inc.*, 20 F. Supp. 2d 1017, 1041-1042 (S.D. Tex. 1998).

8 31 U.S.C. §§ 3729(a)(1)-(2) (2008).

9 See *U.S. ex rel. Lamers v. City of Green Bay*, 168 F.3d 1013, 1018 (7th Cir. 1999); *U.S. ex rel. DRC, Inc. v. Custer Battles, LLC*, 472 F. Supp. 2d 787, 797 (E.D. Va. 2007).

10 *U.S. ex rel. Hopper v. Anton*, 91 F.3d 1261, 1266 (9th Cir. 1996).

11 *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 789 (4th Cir. 1999).

12 31 U.S.C. §§ 3729(a)(1),(2).

13 See John T. Brennan, Jr. & Michael W. Paddock, *Limitations on the Use of the False Claims Act to Enforce Quality of Care Standards*, J. HEALTH & LIFE SCI. L., Oct. 2008, at 37, for an excellent discussion of false certification theories of liability.

14 Brennan & Paddock, *supra* note 12.

15 Brennan & Paddock, *supra* note 12.

16 *Lamers*, 168 F.3d at 1018; *Custer Battles*, 472 F. Supp. 2d at 797.

17 *Hopper*, 91 F.3d at 1267.

18 See, e.g., Brennan & Paddock, *supra* note 12 at 40; Robert Fabrikant & Glenn E. Solomon, *Application of the Federal False Claims Act to Regulatory Compliance Issues in the Health Care Industry*, 51 ALA. L. REV. 105, 111-12 (1999).

19 See, e.g., *U.S. v. McNinch*, 356 U.S. 595 (1958); *Mikes v. Straus*, 274 F.3d 687, 696-697 (2nd Cir. 2001); *U.S. ex rel. Pogue v. Diabetes Treatment Ctrs. of Am.*, 238 F. Supp. 2d 258 (D.D.C. 2002).

20 *Harrison*, 176 F.3d at 785, *U.S. v. Southland Mgmt. Corp.*, 288 F.3d 665 (5th Cir. 2001).

- 21 Harrison, 176 F.3d at 785, *U.S. ex rel. Berge v. Bd. of Trs. of the Univ. of Ala.*, 104 F.3d 1453, 1459 (4th Cir. 1997) (citing *U.S. v. Norris*, 749 F.2d 1116, 1122 (4th Cir. 1984)).
- 22 *Mikes*, 274 F.3d at 701.
- 23 *Id.* at 700.
- 24 *Id.*
- 25 *Id.* at 697.
- 26 See *U.S. ex rel. Gross v. AIDS Research Alliance-Chi*, 415 F.3d 601, 604 (7th Cir. 2005).
- 27 *Southland*, 288 F.3d at 669.
- 28 *Id.*
- 29 *Southland*, 288 F.3d at 675-766 (citing *Thompson*, 125 F.3d at 902; *Luckey v. Baxter Health Care Corp.*, 183 F.3d 730, 732 (7th Cir. 1999); *Berge*, 104 F.3d at 1459).
- 30 *Southland*, 288 F.3d at 679.
- 31 *Id.*
- 32 *Id.* at 684.
- 33 *Id.*
- 34 See, e.g., *Mikes*, 274 F.3d at 697 (“...the Act is restitutionary.”).
- 35 *Id.*
- 36 *U.S. ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 20 F. Supp. 2d 1017, 1019 (S.D. Tex. 1998).
- 37 *Id.*
- 38 *Id.* at 1020.
- 39 *Id.*
- 40 *Id.*
- 41 *Id.*
- 42 *Thompson*, 20 F. Supp. 2d at 1020.
- 43 *Id.* at 1041-1042.
- 44 *Id.*
- 45 *Id.* at 1046-1047.
- 46 *Id.*
- 47 See *Hopper*, 91 F.3d at 1267 (“Innocent mistakes, mere negligent misrepresentations and differences in interpretations are not false certifications under the Act.”); see also *Wang v. FMC Corp.*, 975 F.2d 1412, 1421 (9th Cir. 1992) (“Proof of one’s mistakes or inabilities is not evidence that one is a cheat.”).
- 48 *Allison Engine*, 128 S.Ct. at 2126-2127.
- 49 *Id.*
- 50 *Id.*
- 51 *Id.*
- 52 *Id.*
- 53 *Allison Engine*, 128 S.Ct. at 2127.
- 54 *Id.* at 2127-2128.
- 55 *Id.* at 2128.
- 56 *Id.* at 2128 (emphasis added).

57 *Allison Engine*, 128 S.Ct. at 2128.

58 *Id.*

59 *Id.* at 2130.

60 *Id.* During oral argument, Justice Scalia noted that “This statute doesn’t have to cover

every ill in the world.” Transcript of Oral Argument at 37, *Allison Engine*, 128 S.Ct. 2123 (No. 07-214).

61 See *United States ex rel. Costner v. United States*, 317 F.3d 883, 887 (8th Cir. 2003); see also *Mikes*, 274 F.3d at 697.

