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COURT LIMITS FALSE CLAIMS LIABILITY IN CASES INVOLVING FEDERAL GRANTEEES

by

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A sharply divided panel of the Court of Appeals for the District of Columbia Circuit recently held that liability cannot be imposed under 31 U.S.C. § 3729(a)(1) of the False Claims Act for claims submitted to a federal grantee unless the claims were actually presented for payment to an officer or employee of the United States Government. See *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488 (D.C. Cir. 2004) (now commonly referred to as “*Totten II*”). The *Totten II* majority also firmly rejected the suggestion that FCA liability could arise alternatively under another provision of the FCA, Section 3729(a)(2), even when a claim to a grantee is not actually presented to the U.S. Government.

In a decision which may appear to be arcane and academic, but is in fact critically important to FCA jurisprudence, the *Totten II* majority recognized and addressed the simple principle that the FCA is not, and was not intended to be, a universal remedy for every alleged false statement tangentially related to the federal government. Just how important the decision will be is not yet clear, but Judge Garland contended in a dissenting opinion that the majority decision has potentially far-reaching implications: “The consequence of [this] ruling is a dramatic cutback in the federal government’s ability to” litigate false claims actions against grantees. *Totten II*, 380 F.3d at 515 (Garland, J., dissenting). “Where a grantee receives federal money in advance and then pays its contractors directly . . . the FCA will no longer provide an avenue to recover for false claims.” *Id.* Whether that is true or not, the legal and policy issues that the majority opinion and dissent analyze are certain to be the subject of substantial future litigation.

Background. The *Totten II* decision arose from the second appeal by the relator in a declined *qui tam* action. The relator alleged that defendants submitted false claims to Amtrak for defective toilet systems. The claims were submitted directly to Amtrak, and apparently were not re-submitted to the government. The relator argued that Amtrak was a government entity, but the court

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rejected this contention, noting that Amtrak’s organic statute has stated from the company’s inception that it “is not a department, agency, or instrumentality of the United States Government.” *Id.* at 491 (quoting 49 U.S.C. § 24301(a)(3)). However, Amtrak allegedly paid defendants with “federal funds that were specifically provided for the contract at issue.” *Totten II*, 380 F.3d at 515 (Garland, J., dissenting).

In a lower court decision that was subsequently reversed, the district court originally held that Amtrak is not “subject to” Title 31 of the United States Code under the 1997 Reform Act. *United States ex rel. Totten v. Bombardier Corp.*, 139 F. Supp. 2d 50 (D.D.C. 2001). On its first trip to the D.C. Circuit, the case was reinstated because the court concluded that the Reform Act exempted Amtrak from the burdens, but not the protections, of Title 31. *United States ex rel. Totten v. Bombardier Corp.*, 286 F.3d 542 (D.C. Cir. 2002) (*Totten I*). However, Judge Randolph (who was not a member of the *Totten II* panel) also noted in a concurring opinion that the court was expressing no opinion as to another threshold issue: “whether [a False Claims Act] plaintiff may prevail against a defendant who submits a false ‘claim’ to a federal grantee (such as Amtrak), without presenting evidence that the claim was ever actually submitted to the U.S. Government.” *Totten I*, 286 F.3d at 553.

On remand, the district court again dismissed the relator’s complaint, concluding that Section 3729(a)(1) of the False Claims Act imposes liability on “any person who . . . 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.” Although “claim” is defined in Section 3729(c) to include demands made to a grantee, the court held that the language of Section 3729(a)(1) is unambiguous, and requires that claim to be presented to an officer or employee of the United States Government. *United States ex rel. Totten v. Bombardier Corp.*, No. Civ.A. 98-0657RWR, 2003 WL 22769033, at *2 (D.D.C. Sept. 3, 2003). The relator argued that this ruling would be at odds with congressional intent. The district court, however, held that the statutory requirement of a claim to the federal government is clear, and that “[l]egislative history is irrelevant to the interpretation of an unambiguous statute.” *Id.* The relator again appealed; the Government filed briefs and argued as *amicus curie* in support of the relator.

The Panel Majority’s Decision in the Second Appeal. In *Totten II*, the panel majority decision, authored by Judge John Roberts, Jr. and joined by Judge Judith Rogers, applied the same reasoning offered by the district court. The majority held in a lengthy, scholarly opinion that the plain, unambiguous language of Section 3729(a)(1) contains a “presentment requirement.” That is, claims must be “presented to an officer or employee of the government before liability can attach.” *Id.* at 490. The court noted that there was no dispute that under its enabling statute, Amtrak “is not a department, agency, or instrumentality of the United States Government”, and Section 3729(a)(1) requires a claim to be “presented to an officer or employee of the United States Government.” *Id.* at 491 (quoting 49 U.S.C. § 24301(a)(3)).

The Government and the relator argued that Section 3729(c)'s definition of "claim" is inconsistent with the Section (a)(1) presentment requirement. Section 3729(c) defines "claim" to include a request or demand for payment made to a grantee "if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse . . . [the] grantee . . . for any portion of the money or property which is requested or demanded." According to the Government and the relator, FCA liability may apply to false claims to grantees because such claims are "effectively" claims to the federal government, even in the absence of a direct claim to the government. *Id.* at 492. The majority rejected this argument, quoting the concurring opinion in *Totten I*: "no matter how 'claim' is defined, subsection (a)(1) requires the alleged false claimant to present it (or cause it to be presented) to a federal officer or employee." *Id.* at 493 (quoting *Totten I*, 286 F.3d at 554 (Randolph, J., concurring)).

The majority further reasoned that Congress could have amended (a)(1) in 1986 to impose liability for claims presented only to a grantee or recipient of government funds, but it did not do so. As such, it was not the job of the court to write into the statute language that Congress neglected to provide: "The suggestion that Congress may have 'dropped a stitch' is not enough to permit us to ignore the statutory text. The Supreme Court reminded us in its most recent Term that "[i]t is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think . . . is the preferred result." *Id.* at 496 (citations omitted).

The majority cited a number of policy reasons supporting its analysis, including:

- the need to limit the potential for multiple recoveries for the same alleged harm (which could occur, the court reasoned, if the grantee also pursued remedies against the defendant);
- the benefits of simplifying the statute's scienter requirement (a standard that would be complicated if no presentment requirement existed, because disclosure to the grantee of deficiencies in the claim could negate intent, even if no disclosure to the government occurred); and,
- preventing "almost boundless" collateral litigation from claims presented to grantees with insubstantial federal funds or federal contact. *Id.* at 496-97.

The Dissent. At oral argument, Judge Garland suggested that Section 3729(a)(2) provides an alternative basis for liability — one that reconciles both the legislative history and the FCA's definition of "claim." The parties submitted supplemental briefs on this issue. In his dissent, Judge Garland argued that Section (a)(2) does not contain the explicit presentment requirement that is found in Section 3729(a)(1), and thus permits the imposition of FCA liability when a claim is submitted to a grantee, rather than to the federal government. According to Judge Garland, Congress intended the FCA to reach false claims or statements made to a party other than the

government “if the payment on the claims would ultimately result in a loss to the United States.” *Id.* at 506 (quoting S. Rep. No. 99-345, at 10).

The majority rejected this argument, holding that it would render the explicit presentment requirement in Section 3729(a)(1) largely meaningless. Instead, the panel majority held that Section (a)(2) complements (a)(1), and was “designed to prevent those who make false records or statements to get claims paid or approved from escaping liability solely on the ground that they did not themselves present a claim for payment or approval.” *Id.* at 501 (quoting *United States ex. rel. Harris v. Bernad*, 275 F. Supp. 2d 1, 6 (D.D.C. 2003) (citing Boese, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS § 2.01[B], at 2-21 (Aspen Publishers, 2d ed. Supp. 2004-1))).

Conclusion. *Totten II* recognizes substantial limits on the circumstances under which FCA liability may be imposed in cases involving federal grantees. Because federal grantees disburse significant amounts of money under block grants and other federal programs without directly passing contractors’ claims on to the federal government, the ramifications of this decision are potentially enormous. Given the high stakes and the strongly worded dissent by Judge Garland, a petition for rehearing en banc in *Totten II* was a virtual certainty, and as expected, the relator filed a motion for rehearing en banc with the support of the Justice Department.

On December 8, 2004, the Court of Appeals for the D.C. Circuit denied relator’s request for rehearing en banc without comment or another opinion. Three of the eight judges deciding the petition — Judges Henderson, Tatel, and Garland — indicated that they would have granted the petition for rehearing en banc. Because the petition was denied, *Totten II* remains controlling law unless it is accepted for review and reconsidered by the United States Supreme Court. Moreover, the issues addressed in this case have not been resolved in other circuits,¹ and the rationale applied by the majority offers a sound basis for challenging similar FCA actions in other jurisdictions.

¹One federal district court has already cited *Totten II* approvingly in dismissing a *qui tam* action. See *United States ex rel. Atkins v. McInteer*, No. 03-AR-1540, 2004 WL 2651341, at *1 (N.D. Ala. Oct 27, 2004).