

VORYS FALSE CLAIMS ACT TRIAL TEAM PREVAILS IN THE U.S. SUPREME COURT

On June 9, 2008, the U.S. Supreme Court unanimously reversed the Sixth Circuit's decision in [*Allison Engine Co. v. United States ex rel. Sanders* \(No. 07-214, June 9, 2008\)](#). In rejecting the plaintiff-whistleblowers arguments, the Court established tough new standards that plaintiff-whistleblowers must satisfy in order to prove liability under the False Claims Act ("FCA").

In March 2005, a Vorys' False Claims Act team, comprised of Glenn V. Whitaker, Victor A. Walton, Jr. and Michael J. Bronson obtained a directed verdict for the Allison Engine Company ("Allison Engine") and its co-defendants after six weeks of trial in an FCA case. The court agreed with Vorys that the plaintiff-whistleblowers had failed to present evidence that any false claim or statement had ever been submitted to the Navy. The plaintiff-whistleblowers had sought hundreds of millions of dollars from Allison and its co-defendants.

A divided three-judge Sixth Circuit Court of Appeals panel overturned the directed verdict in December 2006. This ruling was controversial, as it conflicted with several other appellate court decisions. The Supreme Court agreed to review the case. Oral arguments were heard last February, and this week, the Court handed down its decision.

The FCA allows purported whistle-blowers to bring actions against people or companies that have committed fraud against the Government. The penalties under the FCA are punitive and severe. Over the years, courts have interpreted the statute broadly, expanding liability far beyond the reach intended by Congress. Under the statute, the whistle-blower (denoted as the "relator") is entitled to recover both statutory penalties (up to \$11,000 for each false claim) and treble damages for the Government, while also keeping a sizable percentage (up to 30%) of the recovery as a bounty for himself. The bounty can be considerable, as many FCA actions involve allegations of fraud concerning contracts worth millions or billions of dollars.

In the *Allison Engine* case, the Navy had hired two shipyards to build a new fleet of guided missile destroyers, and these shipyards had hired Allison Engine to build generators to power the destroyers. Although the Navy and the shipyards were pleased with the performance of the generators, two disgruntled employees at one of Allison Engine's subcontractors claimed that the generators did not meet the quality standards required by the Navy. At trial, the whistleblowers refused to call any witnesses from the Navy or the shipyards to address the performance and quality of the generator sets. They also failed to introduce any evidence that any actual false claims were submitted to the Government. In the absence of any evidence of false claims, the judge dismissed the relators' claims at the close of their case.

At the Supreme Court, the primary issue was the meaning of 31 U.S.C. § 3729(a)(2), which establishes liability for a 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." The relators argued that this provision creates liability whenever Government money trickles down to someone who commits a fraud, regardless of whether he intended to defraud the Government. By contrast, Allison Engine argued that fraud must actually be intended to cause the Government to pay claims that it should not pay, and the Supreme Court

agreed. The Supreme Court held that a relator bringing “a § 3729(a)(2) claim must prove that the defendant intended that the false record or statement be material to the Government’s decision to pay or approve the false claim.” Although the Court held that relators need not necessarily prove that a false statement was actually submitted to the Government, it also made clear that there must be a “direct link between the false statement and the Government’s decision to pay or approve a false claim” The defendant must intend that the Government itself pay the claim, not merely that the prime contractor or some other private company pay the claim using Government funds.

The Supreme Court’s decision places severe limitations on FCA. The Court explained that this limitation ensures that “a defendant is not answerable for anything beyond the natural, ordinary, and reasonable consequences of his conduct.” The Court imposed a similar limitation on the liability that arises under Section (a)(3) of the FCA, which concerns conspiracies to submit false claims. The Court found that a relator could not prevail under (a)(3) unless he has “established that [the defendants] agreed that the false record or statement would have a material effect on the Government’s decision to pay the false or fraudulent claim.” The establishment of a “materiality” requirement represents a significant victory for defendants.