

Allison Engine, The False Claims Act, and Healthcare Fraud

By Scott R. Ebner

Table of Contents

I. Introduction	3
II. The False Claims Act and <i>Allison Engine</i>	6
a. The History of the False Claims Act	6
b. <i>Allison Engine</i> and the Intent Test	11
III. <i>Allison Engine</i> will not Weaken the FCA	13
a. Requiring Evidence of Intent will not Weaken Fraud Prosecution	14
b. Contractors will not be able to avoid Liability through a Medicaid loophole	18
c. Federal Block Grants	25
IV. The False Claims Correction Act of 2008	26
a. The Structure of the FCCA	26
b. The FCCA would have Adverse Consequences for the Healthcare Industry	28
V. Conclusion	30

Allison Engine, the False Claims Act, and the Healthcare Industry

Part I: Introduction

On May 24, 2005, Bonnie Sterling,¹ a programmer in the Medical Quality Department of the Health Insurance Plan of Greater New York (HIP), conducted a “computer analysis to determine the percentage of children diagnosed with Pharyngitis² who were tested for strep throat.”³ The results showed a percentage between 2.35% and 2.95%.⁴ According to Sterling, her supervisor later “altered the data to reflect percentages ranging from 56.7% to 78.04%...by inflating the number of children tested from 374 to 8,419.”⁵ This alteration had consequential financial implications for HIP. HIP, a non-profit healthcare provider, was a major recipient of government contracts, providing “health benefits and health management services” to the city of New York and employees of the federal government.⁶ By virtue of these government contracts, HIP was required to comply with federal regulations which required proper accreditation through the maintenance of accurate statistical data.⁷ Sterling alleged that her supervisor altered the data in order to obtain a more favorable rating from the National Committee for Quality Assurance (NCQA), HIP’s accrediting agency, and thereby secure contracts with the government in the future.⁸

On January 26, 2006, Sterling brought an action against HIP under 31 U.S.C. §§ 3729(a)(2) and (3) of the False Claims Act, a federal anti-fraud statute that allows private citizens to bring an action against entities that defraud the federal government.⁹ Section 3729(a)(2) imposes liability on “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,”¹⁰ while § 3729(a)(3) imposes liability on anyone who “conspires to defraud the government by getting a false or fraudulent claim allowed or paid.”¹¹ The complaint alleged that

the awarding of government contracts to HIP was based upon fraudulent data which induced NCQA to award HIP an inaccurate rating. Since HIP may not have ever received the contract had it been given a lower rating, the federal government was the victim of fraud. On September 30, 2008, the District Court for the Southern District of New York, applying a new test devised by the United States Supreme Court only a few months earlier,¹² granted HIP's motion to dismiss for failure to state a claim.¹³

According to this new test, it was not sufficient under the False Claims Act to prove that an entity committed fraud and was ultimately paid with funds from the United States Treasury.¹⁴ Although such an instance is technically fraud, the court was reluctant to impose the False Claims Act on such a situation. Rather, a plaintiff was now required to prove that defendant operated with a specific intent to defraud the federal government and that the false submission or request was material to the government's decision to pay the claim.¹⁵ Applying this test, the District Court held that, according to Sterling's complaint, HIP's intent was not to defraud the federal government, but rather to defraud its accrediting agency, NCQA, for the purpose of receiving a more favorable rating and thus securing contracts with the government in the future.¹⁶ Therefore, the court reasoned, the false claim was not material to the government's decision to pay the claim. According to the District Judge, Sterling's argument that falsifying data in order to receive a higher rating from NCQA constituted sufficient evidence of an intent to defraud the government, "stretched the narrow boundaries" the Supreme Court created for liability under the False Claims Act.¹⁷ Because of the District Court's application of the intent test, a jury never had the opportunity to determine HIP's true intentions in regard to the falsified data.¹⁸

For some, this decision foreshadows a bleak future for the False Claims Act. The Supreme Court decision upon which it was based, *Allison Engine Co., Inc. v. United States ex rel. Roger L Sanders and Roger L. Thacker*,¹⁹ has been criticized for imposing a higher burden of proof on the plaintiff and for arguably creating loopholes that may be exploited by government contractors wishing to escape liability under the FCA. The public interest group “Taxpayers Against Fraud”²⁰ has called the Supreme Court’s interpretation of the Act “perplexing,” arguing the Court’s test “appears nowhere in the statutory language.”²¹ David Colapinto, writing on the “Whistleblowers Protection Blog,” a blog maintained by the National Whistleblowers Legal Defense and Education Fund, described the decision as “a green light for subcontractors to steal.”²² The decision has also attracted considerable attention from politicians. Currently there is a movement in the Senate to amend the Act in order to circumvent the *Allison Engine* holding.²³ Senator Charles Grassley has stated that the proposed amendments are “intended to correct U.S. Supreme Court and lower court decisions that have misinterpreted and weakened” the Act.²⁴

Both the criticism of *Allison Engine* and the arguments for rewriting the False Claims Act are unconvincing. Even the Department of Justice, the governmental department charged with investigating and litigating claims brought under the False Claims Act has argued against amending the statute, noting that “the FCA in its present form has worked well and there is no pressing need for amendments.”²⁵ This note explores the possible consequences *Allison Engine* may have on the prosecution of healthcare fraud under §§3729(a)(2) and (3) of the False Claims Act and argues that none of these theoretical consequences justify the radical changes proposed by Senator Grassley’s legislation. Also, this note argues that the proposed amendments to the False Claims Act will have unintended and adverse consequences for the healthcare industry and

will most likely result in higher prices for such programs like Medicaid and Medicare while doing little to actually deter fraud.

The reason this note concentrates on healthcare fraud is twofold: First, Medicaid and Medicare fraud are by a significant margin the most frequent sources of FCA judgments and settlements.²⁶ As healthcare spending increases in the future, predictably healthcare fraud will do likewise. Both the *Allison Engine* decision and proposed legislative amendments, therefore, will have its greatest impact upon the healthcare industry. Second, there are characteristics unique to the healthcare system that warrant special attention. Medicaid, for instance, is a state-run program that receives partial funding from the federal government, therefore creating a unique situation that may be beyond the scope of the FCA under a strict reading of the *Allison Engine* intent test.

Part II of this note discusses the False Claims Act, its history, and its current importance in combating fraud against the federal government. Part II also discusses the *Allison Engine* opinion and holding. Part III discusses the three potentially problematic areas where the FCA may be limited in its ability to successfully prosecute healthcare fraud under the new *Allison Engine* intent test. An explanation of why each area will not be a significant hindrance to FCA enforcement then follows. Part IV discusses the proposed amendments to the FCA and details the troubling consequences that would follow. Part V concludes with a summary of why the *Allison Engine* decision will not significantly affect the FCA and why the proposed amendments to the FCA would be responsible for increasing healthcare costs while failing to protect against fraud.

Part II: The False Claims Act and *Allison Engine*

A. The History of the False Claims Act

The False Claims Act (FCA)²⁷ is generally considered the federal “government’s most effective tool against fraud.”²⁸ Enacted in 1863, the statute came about during some of the darkest days of the republic.²⁹ Despite enjoying a number of financial and military advantages over the Confederacy, Union forces achieved little success during the first years of the war.³⁰ 1863 was especially bad for the North, as President Lincoln faced conscription riots in New York,³¹ suffered a costly defeat at Chancellorsville,³² and lamented over the unsatisfactory generals who led his Army.³³ Confederate forces were fighting the Union Army to a standstill in virtually every campaign and were threatening to outflank Union forces and invade Washington D.C.³⁴ Amidst the setbacks on the battlefield, congressional hearings held in 1862 and 1863 found that the Union was the subject of mass fraud at the hands of war profiteers.³⁵ Testimony cited “examples of the same horses being sold twice to the Army, sand being substituted for gunpowder, and crates full of sawdust being shipped to the front lines in place of muskets.”³⁶ To compound matters, there did not yet exist a governmental investigative agency with which to affectively deal with the fraud.³⁷ For Lincoln, the solution was to harness the power of the civil court system.³⁸

The original version of the FCA contained similar provisions to the current Act, primarily a “*qui tam*” provision and harsh monetary penalties.³⁹ “*Qui tam*” is Latin shorthand for *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, meaning “who pursues this action on our Lord the King’s behalf as well as his own.”⁴⁰ The idea, rooted in English common law and popular among legislations in colonial America,⁴¹ allowed for a “whistleblower” or “relator” with inside knowledge of the fraud to bring an action on behalf of the government.⁴² This private citizen became, “in effect, a bounty hunter or private attorney general.”⁴³ As an incentive for coming forward with information, the relator is awarded a share of the fraud recovery.⁴⁴ In

the original version, the FCA allowed a relator to receive fifty percent of the recovered sum.⁴⁵ The damages imposed by the Act were especially severe, requiring the payment of “double damages caused by the fraud as well as a \$2,000 civil penalty for every false claim submitted to the United States.”⁴⁶ The economic incentive for relators combined with strict penalties allowed the Act to achieve a good deal of success in curbing fraud during the war.⁴⁷

Although the FCA succeeded in fighting fraud and adding to the federal treasury during the Civil War, the Act was substantially weakened during World War II as a result of civilian abuse.⁴⁸ The culprit was once again defense contractor fraud, but in “contrast to the Civil War, the Attorney General of the United States was [the one] vigorously prosecuting” the cases.⁴⁹ This led to a “few enterprising citizens with knowledge of the False Claims Act” to file suit against the same contractors upon reading about their indictments in the newspaper.⁵⁰ The FCA has always allowed individuals to recover damages even though they have no connection to the actual fraud, but these instances involved plaintiffs who brought no new information to the government.⁵¹ These “parasitic suits” caused Congress to amend the FCA in 1943 in order to ensure that private citizens could not bring an action when the federal government was already aware of the fraud. The amendment required “any citizen who desired to bring a False Claims Act suit to present all the evidence to the United States government at the time the lawsuit was filed” in order to prevent the citizen from bringing a separate action.⁵² Only if the Government determined not to pursue the claim could the relator continue with the suit.⁵³ The amendment also substantially lessened the amount of recovery for the relator.⁵⁴ If the government took over the case, the relator was entitled to a maximum of ten percent.⁵⁵ If the “relator proceeded with the action after the declination by the government, he could recover no more than twenty-five percent of the damages.”⁵⁶ The effect of the 1943 amendment was to essentially destroy the

relator incentives which made the FCA effective during the Civil War and cause the FCA to fall into “relative disuse.”⁵⁷

For its first 100 years of existence, the FCA was primarily used to prosecute military fraud.⁵⁸ Following the expansion of the Federal Government during FDR’s “New Deal” and Lyndon Johnson’s “Great Society,” however, a greater amount of the country’s GDP began being invested in domestic programs.⁵⁹ The enactment of Medicare and Medicaid through the Social Security Act in 1965, for example, set in motion billion dollar programs that would become the two of the biggest targets of domestic fraud in the history of the country.⁶⁰ In response to the rising problem of healthcare fraud, Congress once again amended the FCA. Signed into law in 1986, the amendment strengthened the economic incentive for private citizens to alert the government of fraud.⁶¹ Currently, the FCA provides for an award of between fifteen to twenty-five percent of the recovered sum if the government participates in the *qui tam* suit.⁶² If the government declines intervention, then a relator may recover between twenty-five and thirty percent of the total damages.⁶³ Such a sum can be substantial when involving Medicare or Medicaid, which often involve million dollar government contracts.

Unlike common law fraud, the damages imposed by the FCA are considered “essentially punitive in nature.”⁶⁴ The act provides for “a civil penalty of not less than \$5,000 and not more than \$10,000 [for each false claim], plus 3 times the amount of damages which the Government sustains.”⁶⁵ If a defendant is found to have defrauded the government of \$100,000, for example, the law will impose damages of \$300,000 plus the \$10,000 penalty for each fraudulent claim. With Medicare and Medicaid fraud, this figure can easily climb into the millions.⁶⁶ In addition, defendants also may be subject to criminal fraud, which contains penalties that may include expulsion from participation in Medicaid and Medicare.⁶⁷ For many businesses, this could

amount to an economic death as many businesses are completely dependent upon these programs.⁶⁸ The purpose of these substantial penalties is to encourage businesses to ensure that they do not engage in any fraudulent conduct. If the Act merely imposed damages in the amount of the government-sustained fraud, the effect would be to render the sum in question merely an interest-free loan.⁶⁹ The treble damages ensure a strong incentive for businesses to actively police themselves in order to avoid such penalties.

According to statistics compiled by the Department of Justice (DOJ), the FCA has recovered over \$21.6 billion through judgments and settlements as of September 30, 2008.⁷⁰ The majority of that sum, over \$14 billion, is attributable to healthcare claims, predominately through the prosecution of Medicare and Medicaid fraud.⁷¹ Healthcare fraud recoveries have increased over the years as healthcare costs have increased.⁷² In 1987, the first year statistics were available following the enactment of the most recent amendments, money recovered under the Act as a result of healthcare fraud totaled only \$11.3 million.⁷³ In 2007, the FCA was responsible for recovering over \$1.5 billion in healthcare fraud.⁷⁴ In contrast, the second most frequent target of the FCA, defense contracting, was responsible for just \$48 million of the recovered sum in 2007.⁷⁵ These statistics demonstrate the pervasiveness of healthcare fraud as compared to other areas of government spending.

Healthcare fraud is and will likely continue to be widespread. In 2007, the United States spent \$2.26 trillion on healthcare.⁷⁶ According to government projections, the United States will spend \$4.3 trillion in 2017 if national health expenditures continue to increase two times the rate of inflation.⁷⁷ Because of the large amounts of money involved with these programs, incentives will exist for some dishonest individuals to steal. Common areas of healthcare fraud include misused physician identifier numbers for the cost of billing Medicare or Medicaid, performance

of unnecessary procedures, and submission of false cost reports in order to obtain higher Medicaid reimbursements than permitted.⁷⁸ As some practices draw the attention of government lawmakers, enterprising individuals will invent new means to commit fraud. Fraud against the government may never be completely stopped, but it may be controlled and statistics show that the FCA remains the government's most indispensable source of protection for the federal treasury. The question remains, however, how far should the FCA be permitted to go in combating fraud?

B. *Allison Engine* and the Intent Test

The *Allison Engine* story begins four years before the case was on the Supreme Court Docket, when the D.C. Circuit Court handed down *United States ex rel. Totten v. Bombardier Corp.*⁷⁹ In *Totten*, Relator Edward Totten brought a *qui tam* suit against Bombardier Corporation and Envirovac Inc., for “delivering allegedly defective rail cars to the National Railroad Passenger Corporation (Amtrak) and submitting invoices to Amtrak for payment from an account that included federal funds.”⁸⁰ The Court interpreted § 3729(a)(1), (2), and (3) of the FCA as requiring direct presentment to either an officer or employee of the government before liability could attach.⁸¹ Totten, however, only alleged that the funds Amtrak used to pay Bombardier and Envirovac came in part from the government, not that “those companies presented their claims to an officer or employee of the government.”⁸² Because the defendants did not present their claims directly to the federal government, the Court granted the motion to dismiss.⁸³

A different interpretation of the FCA came from the 6th Circuit in *U.S. ex rel. Sanders v. Allison Engine, Co., Inc.*⁸⁴ In this case, the 6th Circuit rejected the D.C. Circuit's presentment test and held that FCA liability attached to any defendant who received money from the federal

treasury, regardless of whether they received it directly from the government or through an intermediary.⁸⁵ Under the 6th Circuit's analysis, Edward Totten's suit would not have been dismissed, but Bombardier and Envirovac could be held liable even though they were paid with funds through Amtrak and not the federal government.⁸⁶ When discussing the D.C. Circuit's interpretation, the 6th Circuit noted that not only did legislative history support a more broad interpretation of the statute, but that "the Supreme Court [had] consistently reaffirmed that the FCA is a remedial statute and should be construed broadly."⁸⁷ Ironically, the Supreme Court would reject this interpretation only two years later.⁸⁸

The Supreme Court granted certiorari for *Allison Engine Co., Inc. v. United States ex rel. Roger L Sanders and Roger L. Thacker*⁸⁹ in 2008 in order to settle the split among the circuit courts in interpreting 31 U.S.C. §§3729(a)(2) and (3) of the FCA.⁹⁰ The Supreme Court sided against *Totten* on the issue of presentment, but also substantially narrowed the scope advocated by the 6th Circuit. This middle ground resulted in the creation of the "intent test."

The *Allison Engine* litigation began in 1985 when the U.S. Navy commissioned the building of a new fleet of destroyers.⁹¹ The contractor shipbuilders in turn subcontracted with Allison Engine Company, Inc. to build the fleet's generators.⁹² Allison Engine then subcontracted with General Tool Company (GTC) and Southern Ohio Fabricators, Inc. (SOFCO) to manufacture the generators' bases and enclosures.⁹³ In 1995, two former employees of GTC brought suit alleging that "invoices submitted to the shipyards by Allison Engine, GTC, and SOFCO fraudulently sought payment for work that had not been done in accordance with contract specifications."⁹⁴ Specific instances of contract irregularities included defective gearboxes installed by Allison Engine that leaked oil, failure of GTC to conduct quality inspections of their work, and failure of SOFCO welders to meet military standards.⁹⁵ The

defendant's won at trial under the *Totten* presentment approach because the government failed to produce evidence "that a false or fraudulent claim had ever been submitted to the Navy."⁹⁶ As discussed above, the 6th Circuit reversed, holding that evidence of direct presentment was unnecessary under §§3729(a)(2) and (3) of the FCA.⁹⁷

The Supreme Court adopted neither argument,⁹⁸ instead establishing an "intent" test derived from the statutory language. The Court read the statutes at issue, 31 U.S.C. §§3729(a)(2) and (3) which imposes liability on "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,"⁹⁹ or "conspires to defraud the government by getting a false or fraudulent claim allowed or paid,"¹⁰⁰ respectively, as implying a mens rea "intent" component.¹⁰¹ Writing for the majority, Justice Alito wrote that "'to get' denotes purpose, and thus the person must have the purpose of getting a false or fraudulent claim 'paid or approved by the government.'"¹⁰² The Court also held that a claim need not be submitted directly to the federal government or government entity in order for liability to attach under §3729(a)(2) or (3), a rejection of *Totten*, but did require proof that the government "rely on the false statement as a condition of payment."¹⁰³

Part III: *Allison Engine* will not Weaken the FCA

Detractors of the *Allison Engine* decision argue that the Supreme Court has substantially weakened the FCA and its ability to prevent fraud against the healthcare industry.¹⁰⁴ Three criticisms have been raised as to the applicability of the test used in *Allison Engine*. First, it has been suggested that to require proof of intent in order to establish liability is unreasonable. Second, Medicaid, despite receiving federal funds, is run and governed by the states and not the federal government. Because the federal government must rely on the false claim as a condition

of payment under the *Allison Engine* standard, claims submitted to Medicaid arguably are not within the scope of the FCA. Finally, federal grants are often distributed in a lump sum and therefore the government does not rely on the false claim as a condition of payment. All of these arguments are unconvincing. District Court cases decided since *Allison Engine*, statements given by the Justices at oral argument, and common sense all provide assurance that the combating of healthcare fraud will not be significantly hindered by the *Allison Engine* decision.

A. Requiring Evidence of Intent will not Hinder Fraud Prosecution

The first potentially problematic consequence of the *Allison Engine* decision is that, given the nature of the healthcare industry, “intent” may be difficult to prove.¹⁰⁵ It was this concern that partially motivated the 6th Circuit Court to reject the direct presentment test of the *Totten* court, instead holding that the FCA is applicable when an entity is ultimately reimbursed with federal funds.¹⁰⁶ In many instances of governmental fraud, the intent test would be of little consequence. For instance, if a contractor submitted a false claim to the federal government, liability would be proven by virtue of the offender working directly on behalf of the government. The healthcare industry, however, is built upon a complex interaction of government contractors and subcontractors, including hospitals, insurance providers, and numerous other entities.¹⁰⁷ Under this system, it is foreseeable that a defendant could successfully argue that he is, in the words of Justice Scalia, “just honestly cheating” another contractor or subcontractor rather than the federal government.¹⁰⁸ Although such an argument would not completely absolve the defendant, it would allow for the avoidance of the FCA’s treble damages and thus defeat the purpose of the Act. There is also the possibility that corporate officers could potentially take steps to insulate themselves from knowledge of any false claims in order to avoid liability.¹⁰⁹

Under these scenarios, a firm could commit fraud and be reimbursed with funds from the U.S. treasury without incurring liability under the FCA.

For the *Allison Engine* critics, the HIP case discussed in the introduction will undoubtedly serve as an example of these theoretical critiques realized. The District Court's application of a strict intent test held that the purpose of the fraud was to attain accreditation, not to secure government contracts, even though one could argue that the purpose of defrauding the accreditation agency was to secure said contracts.¹¹⁰ But to believe that this case signals a weakening of the FCA is to gloss over the details of the case. The opinion gives the impression that the plaintiff's case was unsound for reasons beyond mere intention. For instance, the plaintiff brought suit under §3729(a)(3), the conspiracy section of the FCA, but failed to allege more than one person was involved in the fraud.¹¹¹ Also, plaintiff incorrectly argued the merits of the "presentment" requirement of §3729(a)(1).¹¹² It is presumable that because of these pleading mistakes, as well as the overall weakness of her evidence, that the District Judge was seeking a way to dismiss the case.

It is unlikely that a defendant could successfully avoid liability under the FCA by arguing they only intended to defraud another contractor rather than the Federal Government. Government contracts contain "statutory, regulatory, or contractual obligations" which would likely "provide sufficient evidence on subcontractor intent, capable of demonstrating that a subcontractor defendant knew that its deliveries were necessary to trigger the government's payment obligation to the prime contractor."¹¹³ By virtue of such contractual requirements, corporate officers could not avoid liability either by insulating themselves from knowledge of fraud or by arguing they only intended to defraud another non-government entity.

Both the *Allison Engine* opinion and oral argument support the proposition that the purpose of requiring proof of specific intent under §§3729(a)(2) and (3) is to ensure that “a defendant is not answerable for anything beyond the natural, ordinary and reasonable consequences of his conduct.”¹¹⁴ During oral argument, Chief Justice John Roberts gave a hypothetical that is illustrative of the concerns the Court had with the argument that the scope of the FCA should encompass any action in which federal money is involved. Under the Chief Justices hypothetical, the government gives money to the state to build a school. The school then gives money to a painter, who in turn gives money to a paint company, who in turn gives money to the chemical company. Assuming the chemical company fraudulently adds a dollar onto the cost of the chemicals, “the government ends up paying a dollar more because of fraud five, six, seven times down the line.”¹¹⁵ Under the hypothetical it is possible that the chemical company had no intention of defrauding the federal government, nor did they have reason to think they were in any way working on their behalf. It is these situations that the Court had in mind when developing the intent test. The Justices would rather such fraud be handled with a common law fraud lawsuit rather than be exposed to the treble damages of the FCA.

A few Courts have considered the question of intent in healthcare claims since *Allison Engine* has been decided. In *U.S. v. ex rel. Gudur v. Deloitte & Touche*,¹¹⁶ defendant was allegedly inflating reimbursement rates for services rendered to Medicaid-eligible students. The Court held that “evidence of a regulatory violation coupled with [defendant’s] profit motive” is not sufficient to create an issue of fact for the intent of the party.¹¹⁷ The Court added that the statute is “not the appropriate vehicle for policing regulatory compliance” and to do otherwise would “eviscerate the knowledge and intent elements” the Supreme Court just detailed in *Allison Engine*.¹¹⁸ Although this decision seems to interpret the intent element strictly, the Court noted

that the plaintiff did not have the expert report upon which the information his case was built, so plaintiff failed to present any evidence of intent for the Court to consider.¹¹⁹ Unlike the interpretation in the *HIP* case, plaintiff simply failed to provide the Court with facts from which to determine whether liability attaches.

Another case which is *U.S. ex rel. Bane v. Breathe Easy Pulmonary Services, Inc.*,¹²⁰ in which a defendant was accused of attempting to get unauthorized test paid by Medicare.¹²¹ Defendant motioned for summary judgment arguing that liability “cannot be established because there is no direct link between [their] order forms...and reimbursement by Medicare.”¹²² The Court rejected the argument, stating that the claim to Medicare was the claim for the purposes of the FCA, not the order form, and thus denied summary judgment under § 3729(a)(2).¹²³ The Court granted summary judgment as to the conspiracy allegation, stating that plaintiff failed to provide sufficient evidence to indicate that “a meeting of the minds” between the alleged conspirators.¹²⁴ Once again, this case provides another example of a relator simply failing to provide sufficient evidence in regard to his § 3729(a)(3) claim.

A final example is *U.S. ex rel. Roberts v. Aging Care Home Health, Inc.*¹²⁵ where the U.S. Government brought an action against defendant, CFO of Aging Care, for defrauding Medicare through his business.¹²⁶ According to documentary evidence provided to the Court, defendant certified fraudulent cost reports that were sent to Medicare.¹²⁷ The Court held that “the Government has...provided sufficient proof that Mr. Davis had actual knowledge or recklessly disregarded the truth that Aging Care violated Stark and signed cost certifications ‘to get’ Medicare to pay Aging Care.”¹²⁸ Unlike the previous cases analyzed, this Court had evidence with which to find an “intent” to defraud.

Although there has only been a small number of cases decided on this issue since *Allison Engine*, some conclusion can be drawn about how the Courts will interpret intent under §§ 3729(a)(2) and (3). In all of the cases in which claims were dismissed, the Court indicated a lack of evidence as the reason. In *Gudur*, for instance, the plaintiff failed to produce the report which contained the evidence of fraud.¹²⁹ There is no evidence from these cases which indicate that intent will be too great a requirement for relators or the government to meet under the FCA.

B. Contractors will not be able to avoid liability through a Medicaid loophole

Designed to assist low income families, Medicaid was enacted in 1965 under Title XIX of the Social Security Act and signed into legislation by President Lyndon Johnson.¹³⁰ Today, over 60 million Americans are enrolled in Medicaid,¹³¹ and that number is likely to grow in the coming years due to the longer life expectancy of Americans¹³² as well as the recent economic downturn.¹³³ According to a study by the Georgetown University Health Policy Institute, approximately “half of [Medicaid’s] enrollees are children, but the lion’s share of the costs are for adults with significant health and long-term care needs.”¹³⁴ In 2006, the Medicaid costs in the United States totaled over \$303 billion.¹³⁵ In 2008, Medicaid spending climbed to \$339 billion and is projected to reach \$674 billion in 2017, a rise of 7.9% annually.¹³⁶ In 2007, Medicaid expenditures made up 1.4 percent of the United States’ \$13.8 trillion GDP,¹³⁷ making it one of the country’s largest domestic programs next to Social Security and Medicare.¹³⁸ Due to its size, Medicaid has often been the subject of fraud.¹³⁹ The 1986 amendments strengthening the FCA were made largely in response to the growing domestic fraud exercised against programs like Medicaid which now makes up a large percentage of the funds recovered under the Act.¹⁴⁰ But contrary to what a number of tort lawyers and politicians argue, *Allison Engine* presents no danger to Medicaid fraud prosecution under the FCA.

Medicaid is jointly funded by the federal government and the states, with the federal government accounting for approximately 56.2 percent of all Medicaid spending.¹⁴¹ Although a federal program, Medicaid is run and controlled exclusively by the states which implement their own rules for eligibility and services.¹⁴² Claims are first submitted to the states, who in turn pay the healthcare provider with funds advanced from the federal government. The states then submit the claim to the federal government for reimbursement.¹⁴³ Under this system, claims are submitted and approved by the individual state Medicaid agencies, not the federal government.¹⁴⁴ Therefore, although almost 60 percent of all funding comes from the federal treasury, it is the states that rely on the claims as a condition of payment for the purposes of the intent test established by the Supreme Court.

Justice Alito noted in the *Allison Engine* opinion where the contractor does not “intend the government to rely on that false statement as a condition of payment,” that statement cannot be “made with the purpose of inducing payment of a false claim ‘by the government.’”¹⁴⁵ Therefore, under a literal interpretation of the *Allison Engine* holding, fraud committed upon federal funds through the Medicaid program may not fall within the scope of the FCA as the federal government neither sees the false claims nor makes the decision of whether to pay them.¹⁴⁶ Since Medicaid is already a constant target of fraud as evidenced by the pervasiveness of FCA litigation concerning the healthcare industry,¹⁴⁷ the absence of False Claims legislation will be a serious blow to the protection of the federal treasury.

The theory that §§3729(a)(2) and (3) of the FCA are not applicable to Medicaid cases under the *Allison Engine* analysis has already been attempted and rejected in the Southern District Court of New York. In *U.S. ex rel. Romano v. New York-Presbyterian Hosp*, a former employee brought an action against New York Presbyterian Hospital (NYPH) alleging that the

hospital fraudulently billed Medicaid for services not furnished by the billing provider.¹⁴⁸ Like in most states, New York’s Medicaid program receives advance payments from the federal government, and the total is adjusted each quarter upon the state submitting an aggregate report to CMS stating the actual costs.¹⁴⁹ Shortly after *Allison Engine* was decided, NYPH filed a motion for summary judgment arguing that the state Medicaid reimbursement system is beyond the scope of §3729(a)(2) of the FCA:

NYPH urges that this process of advances and aggregation of payments means that the United States does not pay specific claims, or accept the particular false statements supporting them; and thus the claims' submission to, and aggregation and payment by the state agency before reimbursement with federal funds does not meet the statute's requirement of presentment to a federal officer or employee “for payment or approval”. The “payment or approval”, NYPH says, was made by the state agency, not the federal government.¹⁵⁰

After a short discussion and analysis of the *Allison Engine* opinion, the Court denied NYPH’s motion for summary judgment, refusing to find as a matter of law that the action was beyond the reach of §3729(a)(2) of the FCA.¹⁵¹ The Court instead quoted a footnote from the *Allison Engine* opinion which suggested that liability could attach to “a request or demand that was originally ‘made to’ a contractor, grantee, or other recipient of federal funds and then forwarded to the Government.”¹⁵² The implication of this language is that a subcontractor could not escape liability by virtue of being insulated from direct contact with the Federal Government. The

Court interpreted this language to encompass the Medicaid reimbursement system which functions in such a fashion.

Due to the paucity of cases since *Allison Engine* has been decided, no other defendants have yet to put forth this argument, so it is unclear whether the *Romano* Court's analysis will be followed in other jurisdictions.¹⁵³ However, several other District and Circuit Courts have dealt with Medicaid claims since *Allison Engine* was decided and, although not dealing with this argument directly, none have indicated that Medicaid is beyond the reach of §§ 3729(a)(2) and (3) of the FCA.

In one such case, *Abner v. Jewish Hosp. Healthcare Services, Inc.*,¹⁵⁴ the District Court for the Southern District of Indiana denied summary judgment for defendant's accused of fraudulent billing practices for Medicaid services.¹⁵⁵ The action was brought by former employees of Jewish Hospital healthcare Services who alleged that defendant submitted fraudulent invoices for tests physicians did not order or perform.¹⁵⁶ In total, the relators alleged six types of billing fraud.¹⁵⁷ The claims were challenged under the Rule 9(b) of the Federal Rules of Civil Procedure, which requires plaintiff's to plead fraud claims with sufficient particularity.¹⁵⁸ The Court held that three of the allegations "stated with sufficient particularity claims of fraudulent invoices for tests [and services] that physicians did not order [or render]" and thus could survive summary judgment.¹⁵⁹ No mention was made of the "Medicaid loophole."

Three other cases further indicate that Medicaid is not beyond the bounds of §§ 3729(a)(2) and (3) of the FCA. In *U.S. ex rel. Gudur v. Deloitte & Touche*, a case mentioned earlier, a relator brought a §3729(a)(3) action alleging that defendant's "conspired to defraud the government by inflating reimbursement rates for services rendered to Medicaid-eligible students

under the Students Health and Related Services program.”¹⁶⁰ The Court granted summary judgment on the grounds that plaintiff failed to properly plead “knowledge” and “intent” in accordance with the statute.¹⁶¹ Here, summary judgment was granted due to pleading errors, not the Medicaid reimbursement mechanism. In *U.S. ex rel. Vuyyuruv. Jadhav*,¹⁶² the 4th Circuit Court of Appeals determined whether relator’s claim for fraudulent Medicaid billing under §§ 3729(a)(2) and (3) could survive a motion to dismiss on the grounds that the action violated the FCA’s jurisdictional bar as set in § 3730(e)(4) of the FCA.¹⁶³ The Court once again dismissed the claim on jurisdictional grounds stating that there was “a glaring lack of evidence to establish relator Vuyyuru's original source status with respect to his allegations pertaining to his §§3729(a)(2) and (3) actions.”¹⁶⁴ In *U.S. ex rel. Thomas v. Bailey*,¹⁶⁵ the Eastern District Court of Arkansas determined whether allegedly fraudulent bills were presented to the federal government with the purpose of getting a false claim paid by Medicaid.¹⁶⁶ The Court dismissed the §§ 3729(a)(2) and (3) actions because plaintiff failed to allege that that the claim “was presented, or intended to be presented, to anyone for the purpose of getting a claim paid”¹⁶⁷ or that there was a conspiracy to defraud the government.¹⁶⁸

As these cases indicate, the federal judiciary shows no signs of allowing contractors to avoid FCA liability in Medicaid cases under either §§ 3729(a)(2) or (3). No Court that considered a Medicaid claim even addressed the theory that Medicaid may be outside the scope of §§ 3729(a)(2) and (3). The Court points out that the defects in these cases turn on evidentiary problems and pleading defects, not a substantive problem with the law. Nor is there any evidence in the *Allison Engine* opinion to assume that there would be. As mentioned before, the *Romano* Court found evidence in the opinion to reach the opposite conclusion.¹⁶⁹

Although not mentioned specifically in the *Allison Engine* opinion, Medicaid’s federal-state reimbursement system was addressed during oral argument. Justice Ginsburg raised the possibility that Medicaid claims would potentially fall outside the scope of the FCA under the presentment requirement of *Totten*, as such claims are “presented not to the government, but to an intermediary.”¹⁷⁰ Attorneys for both the petitioner and respondent indicated that Medicaid would not be excluded under the *Totten* analysis. Arguing for the petitioners, former Solicitor General Theodore Olson argued that such claims would be covered by virtue of Medicaid’s reimbursement mechanism, as “the provider’s claim is passed on by the insurer to the Medicaid agency or entity.”¹⁷¹ Arguing on behalf of the United States, Mr. Malcolm L. Stewart stated that Medicaid and Medicare would be handled differently under the FCA from normal false claims, stating that “persons other than federal officials decide whether the claims should be paid, but ultimately there’s reimbursement by the federal government.”¹⁷² Although these questions were addressed in the context of the presentment requirement for *Totten*, the situations are analogous to an *Allison Engine* analysis. Both *Totten* and *Allison Engine* attempted to restrain the FCA by requiring plaintiff to demonstrate that the alleged fraud was somehow committed with the intention that the federal government pay the claim. *Totten* accomplished this goal by requiring direct presentment to a governmental agency. *Allison Engine* did so by requiring evidence of intent. But neither test presumed that Medicaid would be beyond the reach of the Act.¹⁷³

It would also be unreasonable to assume that the Supreme Court meant for Medicaid claims to fall outside the scope of §§ 3729(a)(2) or (3) when the possibility was raised during oral argument and yet omitted in the opinion. Considering the substantial amount of litigation involving Medicaid-related FCA actions, a more reasonable interpretation would be that the requirement that the Government “rely on the false statement as a condition of payment”

includes claims submitted to state Medicaid agencies. This was the interpretation of both Mr. Olson and Stewart in arguing *Allison Engine*, and this has also been the interpretation of law firms analyzing the *Allison Engine* decision.¹⁷⁴

Mr. Stewart's comments especially indicate the unique place Medicaid has among government programs which are targets for fraud. His statement that "Medicare and Medicaid fraud is an example that we would deal with differently textually"¹⁷⁵ interestingly did not elicit any comments by members of the Court. A reasonable conclusion would be that the Supreme Court did not intend for Medicaid to be excluded from §§ 3729(a)(2) or (3) of the FCA because they believed that it presented a unique situation which does not lend itself to a strict interpretation of the *Allison Engine* test. Although claims are not presented to the government directly so that the government relies on the claims as a condition of payment, if it could be shown that defendant operated with requisite intent to defraud the federal government, then liability would still likely attach. Such an interpretation is consistent with the District Courts' handling of recent Medicaid claims brought under the FCA.¹⁷⁶

Although these recent court decisions seem to indicate that Medicaid-related FCA actions brought under §§ 3729(a)(2) or (3) are not affected by the Supreme Court's decision in *Allison Engine*, the government may be taking steps to ensure that it never does. The Deficit Reduction Act of 2005¹⁷⁷ was passed in order to encourage states to enact their own versions of the FCA. Under the Act, the federal government agrees to provide additional Medicaid funding to a state in return for the enactment of state legislation similar to the FCA.¹⁷⁸ The rationale appears to be that the government will provide more Medicaid funding if the states employ the means to effectively protect those funds from fraud. Currently, "sixteen states and the District of Columbia have enacted general state false claims laws with qui tam provisions."¹⁷⁹ In addition,

“six states have *qui tam* law covering certain types of healthcare fraud.”¹⁸⁰ According to John T. Boese, one of the nation’s leading attorneys in dealing with the FCA and author of the leading Treatise on the subject, the state false claims acts “have been critical in fraud investigations in the health care field.”¹⁸¹ Further enactment of these statutes would have a beneficial effect on the fight against healthcare fraud and would ensure that defendants cannot avoid FCA liability through the so-called “Medicaid loophole.”¹⁸² The statutes would also alleviate the burden on the Department of Justice (DOJ), the department charged with investigating FCA allegations. Every time an FCA action is filed, the DOJ is required to investigate the validity of the claim and determine whether the government will be a party to the suit.¹⁸³ Allowing the states the ability to investigate their own claims will help alleviate the burden of the DOJ and allow for more thorough investigations.

C. Federal Block Grants

A third way that the *Allison Engine* decision may hamper the prosecution of fraud under the FCA is in regard to Federal Block Grants.¹⁸⁴ Like in instances involving Medicaid, federal block grants do not involve claims submitted to the federal government.¹⁸⁵ Rather, the federal government distributes the money either to the state or private entities and then the “recipients of block grants are typically free to disburse the money as they see fit, with no need to seek reimbursement or approval from the federal government for particular expenditures.”¹⁸⁶ Therefore, under this system, it may be difficult to prove that the federal government relied on the claims as condition of payment when they never see the claim.¹⁸⁷

Whether block grants are beyond the scope of the intent test will be for the District Court’s to decide, but it is unlikely. Grant recipients could still be found to “intend” to defraud the federal government if the government places “conditions on disbursements from a block

grant” and the claimant “makes false statements to the grant recipient to evade those conditions.”¹⁸⁸ Also, like in the case of Medicaid, there is absolutely no evidence that the Supreme Court intended Block Grants to be affected by the “intent test.

Part IV: The False Claims Correction Act of 2008

A. The Structure of the FCCA

Over the last few years there has been a concerted effort in congress to once again amend the FCA.¹⁸⁹ Just as they did in 1986, Congressmen have advocated strengthening the Act in order to effectively guard against fraud that is becoming more frequent and sophisticated.¹⁹⁰ But where the 1986 amendments merely sought to restore the FCA to its pre-World War II form, this newest effort purports to correct what its advocates claim is judicial meddling. The amendments chief proponent, Senator Charles E. Grassley, also the architect of the 1986 amendments, declared that the

False Claims Act faces a situation where it may not be as effective as intended. Recent decisions by Federal courts have limited the False Claims Act in a way that was not envisioned when I authored the 1986 amendments. These court decisions threaten to undermine both the spirit and intent of the 1986 amendments.¹⁹¹

Senator Leahy has made similar comments, stating that “the False Claims Act has yet to fulfill its true potential for combating fraud”¹⁹² and added:

Opponents of the False Claims Act, those who defend the major defense contractors and big drug companies, have worked hard to undermine the original intent of these amendments. A series of recent court decisions have placed new, technical requirements on

false claims cases threaten to weaken the law. Not only would they weaken the law, they would undo the success of these past few years.¹⁹³

When Senators Grassley and Leahy made these statements, *Allison Engine* had not yet been decided. Rather, they were referring to decisions like *Totten* and *Rockwell International Corporation, et al, v. U.S.*¹⁹⁴ These decisions led to the introduction of the False Claims Act Correction Act of 2007. After the *Allison Engine* decision, the False Claims Act Correction Act of 2008 (FCCA) was introduced. It has since received a favorable report from the Senate Judicial Committee as well as bipartisan support.¹⁹⁵ Although cleared from proposed legislation upon the start of the new congressional session, the FCCA or some derivative version will likely be introduced in the future. Such an amendment should be resisted. The scope the amendment proposes to provide to the FCA is too great and will have adverse consequences on the healthcare industry which is the subject of the majority of FCA litigation.

Although not currently pending legislation, the FCCA of 2008¹⁹⁶ may be presumed to be the most accurate reflection of any such legislation introduced in the future, and therefore it is used here as a model in order to examine the impact such legislative changes would have upon the healthcare industry.¹⁹⁷ The two most commonly litigated sections of the FCA, § 3729(a)(2) and (3), are both radically altered by the proposed amendment. Section 3729(a)(2) currently imposes liability on 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.”¹⁹⁸ Under the amended version of § 3729(a)(2), the bill strikes the language “by the government,” so the amended statute would impose liability on 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.”¹⁹⁹ The absence of “by the government,” which was used by the Supreme Court to formulate the “intent” test, would allow a relator or the government to pursue actions against individuals and entities which receive government money regardless of whether defendant actually intended to defraud the federal government. Such an amendment would greatly reduce the standard of proof currently required of a plaintiff, as there would be no requirement that plaintiff offer evidence that the defendant intended to defraud the federal government.

The conspiracy component of the FCA, § 3729(a)(3), currently imposes liability on any person who conspires to defraud the Government by getting a false or fraudulent claim allowed or paid.”²⁰⁰ Like the proposed changes to § 3729(a)(2), § 3729(a)(3) omits any reference to “the Government,” instead imposing liability on anyone who “conspires to commit a violation of” the amended § 3729(a)(2), in other words anyone who conspires to “knowingly make[], use[], or cause[] to be made or used, a false record or statement to get a false or fraudulent claim paid or approved.”²⁰¹ The effect that the new language will have upon the healthcare industry which makes up the majority of FCA cases is not difficult to contemplate. By removing any requirement that the plaintiff demonstrate a connection between the defendant and the government beyond the receiving of federal funds, Congress will have moved every entity that receives a dollar from the federal government, knowingly or unknowingly, into the scope of the FCA. This includes schools, hospitals, and non-profits.

B. The FCCA Would Have Adverse Consequences for the Healthcare Industry

One could argue that a stronger, less restrained FCA would benefit society by creating enormous economic incentives for businesses to avoid fraudulent behavior, thus substantially lessening the federal government’s exposure to fraud. The imposition of greater penalties, the

relaxed requirements for bringing a *qui tam* action, and the elimination of any showing of proximate cause²⁰² will undoubtedly lead to a greater number of relator victories in court, making defendants more eager to settle and thereby avoid treble damages. The greater number of verdicts and settlements will, in the short-run, add to the federal treasury. In the long-run, there will be a large incentive for government contractors to ensure that their businesses are run according to the standards and regulations imposed by law and that their employees are not participating in any fraudulent behavior, which will ensure the Government loses less money through fraud. This will then allow the Federal Government to be less hampered by fraudulent dealings as private contractors will more effectively internally police themselves. Such an argument will undoubtedly be made in the coming months when the FCCA or some derivative version is reintroduced in the Senate.

This argument is not without its appeal. The statistics maintained by the Department of Justice indicate that fraud is a pervasive problem with Medicare and Medicaid,²⁰³ and many advocate the taking of steps to eliminate it.²⁰⁴ This argument is particularly attractive during a financial downturn when more individuals are forced to turn to Medicare and Medicaid. Fraud raises the cost of doing business, and all taxpayers bear the burden of these enormous programs. Although such an argument may bear some truth, and as appealing as it may be to the general public or elected leaders, it should be resisted because of the adverse consequences it would have on government-funded healthcare. For example, the penalties exacted under the FCCA do not create an incentive for private companies to minimize fraud so much as they create a coercive tool for opportunistic relators.²⁰⁵ Under the current version of the FCA, a contractor may be sued for the amount of the contract with the government. This amount is then trebled.²⁰⁶ For example, if a company is found to have defrauded the government of \$100,000, that company

may be liable for \$300,000. Under the FCCA, the entire amount of the contract is trebled. So if the \$100,000 mistake mentioned above is part of a \$50 million contract, then the company may be liable for \$150 million. Under these circumstances, businesses may choose to settle with the government rather than face these penalties in court.

One may point out that a contractor should face severe penalties when they attempt to defraud the government. But as mentioned before, many of the cases involving the FCA involve a contractor who is unaware he is dealing with the federal government. In other cases, there may be a complete absence of intent altogether, with defendant's unwittingly making a mistake under the complicated procedures of Medicare or Medicaid. Ordinarily, such defendants would face common law fraud claims and would be liable for the amount the fraud sustained by the other contractor. By eliminating the requirement that plaintiff establish a nexus between defendant's action and the government, many more businesses will be exposed to the harsh penalties of the FCCA. This will have the effect of coercing those accused of wrongdoing to settle in order to avoid the FCCA's penalties. It would be preferable to pay a large settlement amount rather than three times the amount upon completion of litigation. Relator's may bring weak cases and seek a settlement and contractors may be coerced into paying the settlement just to avoid the enormous penalties the FCCA would impose.

The argument in favor of the FCCA explained above also fails to account for the economic consequences the amended language of the statute will have upon government contractors. It is conceivable that the broader application of the FCCA would increase the costs of doing business with the government.²⁰⁷ When the government interjects itself into the affairs of private parties, those parties may demand higher funding as the result of doing business with the government.²⁰⁸ These higher prices would act as a sort of insurance against potential FCA

penalties. These hidden insurance costs would likely be enormous, as Medicare and Medicaid contractors may have deals with the government and each other worth millions. Many of these contractors may simply leave the field altogether. Also, this would destroy small businesses and nonprofits who deal in health services, as well as prevent future ones from entering the market.²⁰⁹ These businesses may not be taxed for policy reasons, but they are just as vulnerable to tort lawsuits. Ultimately each layer of the healthcare industry will become more expensive leading to the cost for health services becoming more expensive. While a few relators and their lawyers may become wealthy upon successfully prosecuting FCA claims, healthcare costs will get much more expensive for the rest of us.

These economic concerns have been brought to the attention of the Senate Judiciary Committee. While delivering a speech before the committee in regard to the FCCA of 2007, John T. Boese raised two concerns with allowing the Federal Government into the affairs of private parties.²¹⁰ One, the legislation imposes on rights traditionally reserved for the states. Boese commented that this would have an especially adverse consequence on commercial products, as an “allegedly defective product would, if purchased by a federal employee, be subject to the treble damages and penalty provision of the act,” leading to a potential “skyrocket” in prices.²¹¹

The second issue Mr. Boese raised involved concerns of federalism, stating that the amendment would “face vigorous constitutional challenges.”²¹² Boese pointed out that “the Supreme Court has held in a series of decisions that FCA damages and penalties that exceed a reasonable multiple of the actual loss to the Government are unconstitutional under both the Due Process and Excessive Fines Clauses.”²¹³ With the FCCA imposing greater rewards to relators, such an amendment may not stand Constitutional scrutiny.

When Senator Leahy refers to his opponents “those who defend major defense contractors and big drug companies,”²¹⁴ the insinuation is that such convictions are misplaced because these businesses are the problem with fraud. Attorney John Boese has argued that small businesses and non-profits would be greatly impacted by this potential legislation. Where Senator Leahy speaks against those who “defend the major defense contractors and big drug companies,”²¹⁵ Mr. Boese has pointed out that these smaller, more vulnerable entities actually make up a greater number of FCA cases.²¹⁶ And where the large firm may have the resources to effectively defend themselves, Mr. Boese argues that these entities cannot normally “afford to defend themselves against the treble damages and oppressive penalties assessed under the FCA, [so] they must divert valuable resources to do so because failing to do so would expose them to the very real risks of bankruptcy.”²¹⁷ For Public Policy reasons, it would be catastrophic if non-profits would be subject to these huge penalties.

Attorney’s Glenn V. Whitaker and Joseph W. Harper have also speculated that such a wide scope as that advocated by the FCCA would have adverse implication for firm-fixed-price contracts.²¹⁸ Although Whitaker and Harper’s argument is in the context of the absence of a “presentment” requirement as established by *Totten*, their arguments are applicable to the FCCA due to the absence of the “intent” requirement. In both cases, the FCA attaches to any entity that has received federal funds regardless of whether there existed some procedural connection between the fraud and the funds. Firm-fixed-price contracts are those in which the government “agrees to pay the prime contractor as set amount regardless of the actual costs incurred during performance of the contract.”²¹⁹ Whitaker and Harper argue that without some showing that the defendants defrauded the government, “a claim submitted to a subcontractor by a lower tier subcontractor on a project that receives any federal funds could implicate the FCA even though

the Government never saw the claim, approved the claim, or paid the claim, and suffered no loss as a result of it.”²²⁰ This would lead to “windfalls to opportunistic relators,” the kind of problem the World War II amendments were supposed to redress.²²¹

As noted before, the courts have made it a policy to lightly restrain the FCA when possible—requiring a direct presentation to a government institution as in *Totten* or by requiring some showing of specific intent to defraud the federal government as in *Allison Engine* are just two recent examples. Writing for a unanimous court in *Allison Engine*, Justice Alito quoted Chief Justice Roberts’ opinion in *Totten* in arguing that absent proof of intent, § 3729(a)(2) would be “almost boundless: for example, liability could attach for any false claim made to any college or university, so long as the institution has received some federal grants—as most of them do.”²²² The *Allison Engine* oral argument also reveals a great deal of concern about allowing too broad an application of the FCA. Justice Breyer, for instance, expressed concern that “government money today is in everything.”²²³ Arguing for the petitioners at oral argument, Mr. Theodore Olson stated that “given the tens of thousands of government contracts, government funds, government financing of localities, universities, and so forth, there is no limiting point.”²²⁴ Justice Scalia also remarked, “the statute does not have to cover every ill in the world.”²²⁵ Eliminating proof of intent would also cause settlements to become coercive. If contractors are threatened with the huge penalties of § 3729(a) and the government is not required to prove intent, defendants under investigation may agree to settle just to avoid bankrupting damages.²²⁶ The FCA would then cease fighting fraud against the government, as the statute is intended to do, but would instead become a means to shake-down vulnerable government contractors. Such groups include hospitals and businesses which provide medical services. If such businesses are coerced, healthcare costs would greatly rise.

Part V: Conclusion

Although the FCCA has been cleared from the congressional books at the start of the most recent congressional session, the possibility that it may be re-introduced in one form or another and become law has greatly improved since the FCCA of 2007 was first introduced two years ago. Since that time, the Democratic Party has taken control of the White House as well as both houses of Congress. The Wall Street Journal Editorial Board suggests that the tort bar may hold sufficient influence over Democratic members of Congress to pass the bill.²²⁷ They point out, for example, that the bill's co-sponsor's along with Senator Grassley are Senator's Pat Leahy and Arlen Specter, both of whom are, in the views of the Editors, friendly with the national tort bar and who have assisted Senator Grassley in moving the bill through the Judiciary Committee.²²⁸ With Democrats in the majority of both houses of Congress, an amendment bill may receive a sympathetic audience as tort lawyers are strong financial contributors to the Democratic Party.²²⁹

But the success of the FCCA may garner popular support for reasons beyond politics. The current economic downturn may play a role in causing the FCCA to receive popular bipartisan support throughout Congress as well as the country. During difficult financial periods, more people may be turning to governmental programs like Medicaid and Medicare and want the costs of such programs to remain under control. As indicated in this note, the costs of Medicaid and Medicare are going to continue increasing.²³⁰ It is conceivable that due to this sharp rise that federal money given to state Medicaid programs will be capped in the future in order to control costs. Also, there has been a good amount of discussion about wasteful spending with the recent economic stimulus bill.²³¹ Under these circumstances, it may be politically beneficial to support an anti-fraud statute.

Despite the dire future projected by relator-representing organizations or politicians who want to appear tough on fraud, the *Allison Engine* holding will not have a catastrophic effect on the healthcare industry. Rather, it may guard against the possibility that a firm may be prosecuted under the Act without being responsible for committing fraud against the government. But the threatening consequences of the False Claims Act Corrections Act of 2008 are very real.²³² Healthcare costs are already extremely expensive, in part due to fraud.²³³ But the proposed amendments to the FCA will not assist the government any more than the current version, but will rather force government contractors to demand higher prices for the delivery of goods and services. And the increased awards to relators will only increase frivolous litigation. According to the Department of Justice, the Government already finds that 80 percent of FCA cases are without merit.²³⁴ The number of meritless cases will greatly increase if the damages are placed at the level of the FCCA. Cases like *Totten* and *Allison Engine* stand as examples of the judiciary making it public policy to restrict the reach of the FCA in order to protect “defendants from overboard accusations of fraud.”²³⁵ We can only hope they will continue to do so in the future, but they may have no choice if the statutory language is altered, or if defendants never set foot within a courtroom because of corrosive settlement techniques.

¹ Sterling’s primary responsibilities “included analyzing medical claims to determine how often doctors in the HIP network followed protocols relating to accreditation.” U.S. *ex rel.* Bonnie Sterling v. Health Ins. Plan of Greater N. Y., Inc., No. 06 Civ. 1141(PAC), 2008 WL 4449448, at *1 (S.D.N.Y. Sept. 30, 2008).

² Pharyngitis is better known as a sore throat.

³ *Health Ins. Plan*, 2008 WL 4449448, at *2.

⁴ *Id.* at *2.

⁵ *Id.*

⁶ *Id.* at 1.

⁷ *Id.* at *1.

⁸ *Id.*

⁹ *Id.* at *1.

¹⁰ 31 U.S.C. §3729(a)(2) (2000).

¹¹ 31 U.S.C. §3729(a)(3) (2000).

¹² *Allison Engine Co., Inc., et al. v. U.S. ex rel. Roger L. Sanders and Roger L. Thacker*, 128 S.Ct. 2123 (2008).

¹³ *Health Ins. Plan*, 2008 WL 4449448 at *5.

¹⁴ *Allison Engine*, 128 S. Ct. at 2126.

¹⁵ *Allison Engine*, 128 S. Ct. at 2128.

¹⁶ *Health Ins. Plan*, 2008 WL 4449448 at *5.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Allison Engine*, 128 S. Ct. 2123 (2008).

²⁰ Taxpayers Against Fraud, <http://www.taf.org> (last visited Feb. 8, 2008).

²¹ False Claims Update and Alert, <http://www.taf.org/whistle203.htm> (June 10, 2008).

²² Posting of David Colapinto to Whistleblowers Protection Blog,

<http://www.whistleblowersblog.org/2008/06/articles/whistleblowers-tax-fraud/crooked-contractors-will-profit-from-supreme-courts-ruling/> (June 9, 2008).

²³ S. 2041, 110th Cong. (proposed on July 28th, 2008).

²⁴ Marcia Coyle, *Bipartisan House and Senate Bills Would Strengthen Act that Protects Citizens Who Report Fraud*,

²⁵ *The False Claims Act Corrections Act (S.2041): Strengthening the Government's Most Effective Tool Against Fraud for the 21st Century*, 110th Cong. 57-58 (2008) (letter by Brian A. Benczkowski, Deputy Assistant Attorney General letter to Patrick J. Leahy). It should be noted that many of the Department of Justice's complaints regarding the False Claims Act Correction Act of 2008 do not involve either §§3729(a)(2) and (3), those parts of the Act affected by *Allison Engine*. This is not to say that the DOJ was not concerned with these sections, but rather they were more concerned with the amendments attempt to "strengthen" the Act by making it easier for relators to bring claims under the FCA. For example, Benczykowski notes Section 3 of the amendment "which would allow federal employees to act as relators" would "cause an unnecessary drain on the federal treasury, will invite interference with federal investigations, and thus will not further the goal" of protecting the treasury from fraud against the government. Benczykowski also points to Section 4, which "severely narrows the circumstances where the bar would apply in a way that would reward relators with no firsthand knowledge and who do not possess information beyond what is in the public domain." Although these issues are further reasons that the False Claims Act Corrections Act of 2008 should not be enacted into law, they are beyond the scope of this note.

²⁶ See Statistics compiled by the Department of Justice, available at <http://www.taf.org/FCA-stats-DoJ-2008.pdf>.

²⁷ 31 U.S.C. §§3729-3733 (2000).

²⁸ *Hearing supra*, note 24 (statement by Senator Leahy, Chairman, Committee on the Judiciary). See also Editorial, *False Claims Gold Rush*, WALL ST. J., May 2, 2008 available at <http://online.wsj.com/article/SB120968865969361371.html> (Supporting the effectiveness of the FCA from the political right); John T. Boese, Hearing, *supra*, note 24, "The Chamber recognizes the importance of an appropriate use of the False Claims Act." (Arguing in opposition of the False Claims Correction Act of 2007 on behalf of Chamber of Commerce and the U.S. Chamber Institute for Legal Reform).

²⁹ See generally James B. Helmer, Jr. & Robert Clark Neff, Jr., *War Stories: A History of the Qui Tam Provisions of the False Claims Act*, 18 OHIO N.U. L. REV. 35, 36 (1991).

³⁰ *Id* at 35.

³¹ JAMES M. MCPHERSON, *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA*, 610-611 (Oxford University Press, 1988) (these riots were riots against the draft in the North. This was a crisis for Lincoln because the Army had to be summoned in order to put the riots down.)

³² *Id.* at 639-645.

³³ *Id.* at 525, 533, 562 Describing Lincoln's issues with his generals, especially George McClellan who Lincoln consistently placed and replaced as head of the Union Army. McPherson argues that it was McClellan's hesitancy that irritated Lincoln in that he failed to use the superior forces at his command to take over the Confederate Army. Military historians seem to agree that had McClellan pursued the Confederate forces after victory at Gettysburg, the war would have ended earlier. It was not until Lincoln placed Ulysses S. Grant as commander of the army that the North fully utilized their power and Lincoln ceased playing chess with his generals.

³⁴ Helmer and Neff, *supra* note 26, at 35 (Confederate forces invaded the North several times during the course of the war, but never so close as to take the Union Capital. It was General Lee's positioning of his forces in between McClellan's and Washington D.C. that forced Union forces to attach at Gettysburg).

³⁵ Gary G. Booker, *The False Claims Act: Congress Giveth and the Courts Takeaway*, 25 *HAMLIN L. REV.* 373, 375-376 (2002).

³⁶ *Id.* at 376.

³⁷ Helmer & Neff, *supra*, note 26 at 35.

³⁸ *Id.* Helmer and Neff seem to credit Lincoln with the idea of utilizing the *qui tam* provision of the civil bar in order to prosecute war profiteers, but they present no evidence that Lincoln was responsible for formulating the idea. The law is nicknamed after him, however, sometimes known as "Lincoln's Law." It is unclear whether the nickname came about because the FCA was credited to Lincoln or whether it was because Lincoln is so connected with the Civil War.

³⁹ *Id.* at 36.

⁴⁰ Robin Page West, *ADVISING THE QUI TAM WHISTLEBLOWER: FROM IDENTIFYING A CASE TO FILING UNDER THE FALSE CLAIMS ACT 5-6* (2001).

⁴¹ Helmer & Neff, *supra*, note 26 at 36. "The First Continental Congress of the United States...passed several statutes that contained *qui tam* provisions. Such provisions also played an important role in English law." *Id.*

⁴² 31 U.S.C. §3730(b)(1) (2000).

⁴³ Helmer and Neff, *supra*, note 26 at 36.

⁴⁴ *Id.* This note argues that a proper balance between must be struck between too little and too great an incentive for the relator's share of recoveries under the FCA. During World War II, incentives were lowered so as to render the statute less popular. Potential legislation to amend the FCA makes the incentives too great and will encourage meritless suits.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ It is arguable that the civil abuse could have been curtailed without substantially weakening the FCA to the point that the amendments did. For instance, congress could have simply required relators to bring forth information to the Department of Justice before bringing the action themselves. This would have prevented the problem with parasitic suits while keeping in place the monetary incentives that allow the act to be effective.

⁴⁹ Helmer & Neff, *supra*, note 26 at 38 (The Attorney General handling fraud prosecution during World War II was more practical then it was during the Civil War. The latter involved a war that saw the Union government devote little time to domestic matters, which necessitated the independent *qui tam* suits brought by private citizens without government involvement).

⁵⁰ *Id.*

⁵¹ These "parasitic suits" were the result of citizens reading about ongoing suits in the paper and bringing an action of their own.

⁵² Helmer & Neff, *supra*, note 26 at 38.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ John T. Boese, *Fundamentals of the Civil False Claims Act and Qui Tam Enforcement*, in THE 75TH ANNUAL NATIONAL INSTITUTE ON CIVIL FALSE CLAIMS ACT AND QUI TAM ENFORCEMENT, A-1 (2008).

⁵⁸ *See* Hearing, *supra*, note 25 at 26 (statement by Senator Leahy). But military spending has never completely left the minds of those using the FCA. And the Act will likely to continue to be used again to prosecute military fraud with the military operations in Iraq and Afghanistan. "We are in the midst of war, and are facing reports of billions

lost to fraud and waste in Iraq and Afghanistan. And so we are considering new improvements to the False Claims Act.” *Id.*

⁵⁹ See Amity Shlaes, *Obama Will Take Us Backwards by Channeling Keynes*, Bloomberg.com, Nov. 19, 2008, available at http://www.bloomberg.com/apps/news?pid=20601039&refer=columnist_shlaes&sid=a1CNR7igi8KU/.

⁶⁰ See Medical News Today, *U.S. Healthcare Spending Will Continue to Rise, Reaching 20% of GDP by 2015, Report Says*, Feb 26 2006, available at <http://www.medicalnewstoday.com/articles/38255.php>.

⁶¹ Boese, *Supra* note 57 at A-1.

⁶² *Id.* at A-18

⁶³ *Id.*

⁶⁴ Vermont Agency of Natural Resources v. U.S. *ex rel.* Stevens, 529 U.S. 765, 784 (2000) (“the current version of the FCA imposes damages that are essentially punitive in nature”).

⁶⁵ 31 U.S.C. §3729(a) (2000). “Although most Courts view the \$5,000 to \$10,000 penalty provision to be mandatory once liability is established, a few Courts have exercised discretion in reducing penalties below the amounts called for in the statute.” (Boese, *supra*, note 57 at A-16).

⁶⁶ See *supra* note 25.

⁶⁷ See generally, Matt Altshuler, *Health Care Fraud*, 45 AM. CRIM. L. REV. 607 (2008) (Concentrating on the criminal aspects of the FCA).

⁶⁸ *Id.*

⁶⁹ See generally *Health Care Initiatives under the False Claims Act that Impact Hospitals: Hearing Before the Subcommittee on Immigration and Claims of the Committee on the Judiciary, House of Representatives*, 105th Cong.(2000).

⁷⁰ See Statistics, *supra*, note 26.

⁷¹ *Id.*

⁷² See National Health Expenditure Projections, 2007-2017, available at <http://www.cms.hhs.gov/NationalHealthExpendData/Downloads/proj2007.pdf>.

⁷³ See Statistics, *supra*, note 26.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ See Projections, *supra*, note 72.

⁷⁷ National Coalition on Healthcare, *Health Insurance Costs*, available at <http://www.nchc.org/facts/cost.shtml>

⁷⁸ West, *supra*, note 40 at 5-6.

⁷⁹ United States *ex rel.* Totten v. Bombardier Corp., 380 F.3d 488 (D.C. Cir. 2004).

⁸⁰ *Id.* at 490.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at 502.

⁸⁴ U.S. *ex rel.* Sanders v. Allison Engine Co., Inc. 471 F.3d 610 (6th Cir. 2006).

⁸⁵ *Id.*

⁸⁶ One could argue that the 6th Circuit's interpretation of the statute was correct. The legislative history of the Act does provide that it was to be interpreted liberally and recent comments by Senator Charles Grassley and other Congressional figures gives credence to the opinion that the Supreme Court interpreted the FCA provision incorrectly in *Allison Engine*. This note takes no opinion as to that debate, but does argue that the 6th Circuit's opinion, as well as that of Senator Grassley's will be more harmful to the healthcare industry.

⁸⁷ *Allison Engine*, 471 F.3d at 618 (quoting United States v. Neifert-White Co., 390 U.S. 228 (1968)).

⁸⁸ It is fair to say that this rejection was unexpected. Although the Court did see two new additions in Justice Alito and Chief Justice Roberts, who authored the *Totten* decision, the decision was unanimous one and broke the precedential interpretation of the statute.

⁸⁹ *Allison Engine*, 128 S.Ct. 2123 (2008).

⁹⁰ See Peter B. Hutt II, & Steven C. Wu, *Allison Engine: The Supreme Court Addresses Liability under the False Claims Act*, 44 FALL PROCUREMENT LAW. 13 (2008).

⁹¹ *Allison Engine*, 128 S.Ct. 2123, 2126.

⁹² *Id.* at 2126-2127.

⁹³ *Id.* at 2127.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id* at 2128.

⁹⁸ Although the Supreme Court rejected the presentment approach of *Totten* for §§3729(a)(2) and (3) of the FCA, it did not reject the rationale behind *Totten*. *Totten* ensured that the wide scope advocated for by the 6th Circuit did not become a reality by placing a procedural mechanism in the FCA procedure to ensure that liability did not attach to every entity that received Federal funds. The Supreme Court instituted its own mechanism in *Allison Engine* in the form of the intent test. Direct presentment is just one form of presentment. The flexibility that *Allison Engine* provides is that it does not allow the avoidance of liability through insulating layers of contractors and subcontractors.

⁹⁹ 31 U.S.C. §3729(a)(2) (2000).

¹⁰⁰ 31 U.S.C. §3729(a)(3) (2000).

¹⁰¹ *Allison Engine*, 128 S.Ct. at 2128.

¹⁰² *Id.*

¹⁰³ *Id.* at 2130.

¹⁰⁴ Hearing, *supra*, note 25 at 1 (statement by Senator Leahy).

¹⁰⁵ See Jennifer Stamen, *The False Claims Act, the Allison Engine decision, and Possible Effects on Healthcare Fraud Enforcement*, CRS Report for Congress, available at http://assets.opencrs.com/rpts/RS22982_20081106.pdf.

¹⁰⁶ *Allison Engine*, 471 F.3d 610.

¹⁰⁷ See generally Robert Salcido, *The Government's Increasing Use of the False Claims Act Against the Health Care Industry*, 24 J. OF LEGAL MED 457 (2003).

¹⁰⁸ Transcript of Oral Argument at 35, *Allison Engine*, 128 S.Ct. 2123 (No. 07-214).

¹⁰⁹ It would be possible that a company's executive officers would purposely insulate themselves from knowledge of such false claims in order to avoid liability. See 51 ALA. L. REV. 57, 61 (1999) (quoting S. Rep. No. 99-345, at 7 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5272).

¹¹⁰ *Health Ins. Plan*, 2008 WL 4449448 at *4

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ Memorandum by Roger S. Goldman & Abid R. Qureshi, Latham Watkins Client Alert, August 4, 2008 available at http://www.lw.com/upload/pubContent/_pdf/pub2280_1.pdf.

-
- ¹¹⁴ *Allison Engine*, at 2130 (quoting *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 470 (2006)).
- ¹¹⁵ Oral Argument *supra*, note 107 at 33.
- ¹¹⁶ *U.S. v. ex rel. Gudur v. Deloitte & Touche*, No. 07-20414, 2008 WL 3244000 (C.A. 5 Tex. Aug. 7, 2008).
- ¹¹⁷ *Id.* at *2.
- ¹¹⁸ *Id.*
- ¹¹⁹ *Id.* at *1.
- ¹²⁰ *U.S. ex rel. Bane v. Breathe Easy Pulmonary Services, Inc.*, No. 8:06-cv-40-T-33MAP, 2009 WL 188564 (M.D. Fla. Jan. 23, 2009).
- ¹²¹ *Id.* at *7.
- ¹²² *Id.*
- ¹²³ *Id.*
- ¹²⁴ *Id.* at *8.
- ¹²⁵ *U.S. ex rel. Roberts v. Aging Care Home Health, Inc.*, No. 02-2199, 2008 WL 2945946 (W.D. La. July 25, 2008).
- ¹²⁶ *Id.* at *10.
- ¹²⁷ *Id.* at *9.
- ¹²⁸ *Id.* at *10.
- ¹²⁹ *Gudur*, 2008 WL 3244000 at *2.
- ¹³⁰ Center for Medicare and Medicaid Services, Program Overview available at <http://www.cms.hhs.gov/MMIS/>.
- ¹³¹ Georgetown University Health and Policy Institute Center for Children and Families, *Medicaid and State Budgets: Looking at the Facts* available at <http://ccf.georgetown.edu/index/cms-file-system-action?file=ccf-publications/about-medicare/nasbo-final-5-1-08.pdf>.
- ¹³² Medical News Today, *Americans Living Longer, not Healthier*, Oct. 21 (2003), available at <http://www.medicalnewstoday.com/articles/4524.php>.
- ¹³³ Georgetown University Health and Policy Institute, *supra*, note 103.
- ¹³⁴ *Id.*
- ¹³⁵ State Healthcare Facts.Org, available at <http://www.statehealthfacts.org/mfs.jsp?rgn=2&rgn=1&x=9&y=5>.
- ¹³⁶ Kaiser Daily Health Policy Report, *Medicare/ Medicaid Costs Projected to Grow 7.9% Annually*, According to CMS report, Oct. 20 (2008) available at http://www.kaisernetwork.org/daily_reports/rep_index.cfm?DR_ID=55079.

¹³⁷ *Major Entitlements Will Expand to 18.6 Percent of GDP*, available at

http://www.heritage.org/research/budget/images/b2114_chart1.gif

¹³⁸ *Id.*

¹³⁹ *See generally* Hearing, *supra*, note 25.

¹⁴⁰ *See* Statistics, *supra* note 26.

¹⁴¹ Georgetown University Health and Policy Institute, *supra* note 103.

¹⁴² Centers for Medicare and Medicaid Overview, available at <http://www.cms.hhs.gov/MedicaidGenInfo/>.

¹⁴³ An excellent discussion of the Medicaid reimbursement system is available in *U.S. ex rel. Romano v. New York-Presbyterian Hosp.*, 571 F.Supp.2d 473 (S.D.N.Y. 2008).

¹⁴⁴ *Id.*

¹⁴⁵ *Allison Engine*, 128 S.Ct. at 2130.

¹⁴⁶ Memorandum by Jennifer Weaver & Nate Gilmer, *United States: Supreme Court Restricts Scope of False Claims Act*, June 17, 2008, available at <http://www.mondaq.com/article.asp?articleid=62056&login=true&nogo=>.

¹⁴⁷ *See* Statistics *supra*, note 26.

¹⁴⁸ *Romano v. New York*, 571 F. Supp.2d 473 (S.D.N.Y. 2008).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 475.

¹⁵¹ *Id.* at 476.

¹⁵² *Id.*

¹⁵³ It is possible that the FCA's applicability to §§3729(a)(2) and (3) may lead to a Circuit split similar to the "presentment" issue prior to *Allison Engine*. The difference here would be that the presentment split was over interpretation of the FCA statutory language, where this possible new split would be over the language of Justice Alito's opinion. How District Court interpret the issue over the next few years will give an indication of whether there is consensus or the entire issue will be moot upon the enactment of congressional legislation.

¹⁵⁴ *Abner v. Jewish Hosp. Healthcare Services, Inc.*, No. 4:05-cv-0106-DFH-WGH, 2008 WL 3853361 (S.D. Ind. Aug. 13, 2008).

¹⁵⁵ *Id.* at *1.

¹⁵⁶ *Id.* at *6.

¹⁵⁷ *Id.* at *2.

¹⁵⁸ *Id.* at *2.

¹⁵⁹ *Id.* at *6.

¹⁶⁰ *Gudur v. Deloitte & Touche*, 2008 WL 3244000.

¹⁶¹ *Id.* at *1.

¹⁶² U.S. ex rel. Vuyyuruv. Jadhav, 555 F.3d 337(4th Cir. 2009).

¹⁶³ *Id.* at *2.

¹⁶⁴ *Id.* at *12.

¹⁶⁵ U.S. ex rel. Thomas v. Bailey, No. 4:06CV00465 JLH, 2008 WL 4853630 (E.D. Ark. Nov. 6, 2008).

¹⁶⁶ *Id.* at *15.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *See supra*, note 148.

¹⁷⁰ Oral Argument, *supra*, note 108 at 21-22.

¹⁷¹ *Id.* at 22.

¹⁷² Oral Argument, *supra*, note 108 at 31-32.

¹⁷³ The purpose of the “intent” test in *Allison Engine* was to protect innocent subcontractors who had no intention of defrauding the government. If intent could be proved in Medicaid, there would presumably still be liability.

¹⁷⁴ Memorandum for Foley & Lardner LLP, June 10, 2008, *available at*

http://www.foley.com/publications/pub_detail.aspx?pubid=5090. Analyzing the potential consequences of the *Allison Engine* decision for Medicare and Medicaid. The authors doubt that Medicaid would not be covered based on what the Justices said at oral argument stating, “Justice Ginsburg, along with Justices Roberts, Scalia, Breyer, and Souter, also expressed varying degrees of concern about the potential scope of adopting the respondents' and Sixth Circuit's interpretation of the statute. During argument, Justice Scalia noted that “[t]his statute doesn't have to cover every ill in the world.”” Oral Argument, *supra*, note 108 at 31.

¹⁷⁵ Oral Argument, *supra* note 108 at 31.

¹⁷⁶ *See Abner*, 2008 WL 3853361; *Gudar*, 2008 WL 3244000; *Vuyyuruv*, 2009 WL 331967; *Thomas*, 2008 WL 4853630.

¹⁷⁷ See Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 6031 (2006) (to be codified in amendments to the Social Security Act, 42 U.S.C. § 1909(a)).

¹⁷⁸ Boese, *supra*, note 57 at A-21

¹⁷⁹ *Id.* at A-20.

¹⁸⁰ *Id.* at A-21.

¹⁸¹ *Id.*

¹⁸² The availability of this option should alleviate concerns to amend the FCA in order to circumvent the *Allison Engine* “intent” test.

¹⁸³ See Boese, *supra*, note 57 at A-4.

¹⁸⁴ See Hutt and Wu, *supra*, note 90.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ See generally Hearing, *supra*, note 25.

¹⁹⁰ *Id.*

¹⁹¹ 153 Cong. Rec. S11506-01

¹⁹² Hearing, *supra*, note 25 at 1 (statement by Senator Leahy, Chairman).

¹⁹³ *Id.* at 2.

¹⁹⁴ *Rockwell International Corp., et. Al, v. U.S.*, 549 U.S. 457 (2007) (holding that the relator's knowledge with respect to the pondcrete fell short of the “direct and independent knowledge of the information on which the allegations are based” required for him to qualify as an “original source”).

¹⁹⁵ Budget Report: 2041[110th]: False Claims Act Correction Act of 2008 *available at* <http://www.govtrack.us/congress/billreport.xpd?bill=s110-2041&type=cbo>

¹⁹⁶ *Supra*, note 23.

¹⁹⁷ Amendments and legislation have changed throughout the years as new cases interpret and change the FCA. This note examines the consequences of legislation identical to the FCCA of 2008.

¹⁹⁸ 31 U.S.C. § 3729(a)(2).

¹⁹⁹ The False Claims Act Correction Act of 2008 *available at* <http://www.aamc.org/advocacy/coe08320.pdf>. The legislation is no longer available on Westlaw or Lexis Nexis. Some websites have a copy of the False Claims Act Correction Act of 2007 labeled as if it were the most recent piece of legislation.

²⁰⁰ 31 U.S.C. § 3729(a)(3).

²⁰¹ The False Claims Act Correction Act, *supra*, note 199.

²⁰² I use the term proximate cause here to illustrate the direct connection between the fraud and the Government's decision to pay the fraud. There can be fraud committed in a number of ways in which an entity that commits fraud and is reimbursed with Federal funds, but with no direct connection between the fraud and the Government's decision to pay the claim.

²⁰³ *See* Statistics, *supra*, note 26.

²⁰⁴ *See generally* Hearing *supra*, note 25 at 1-2.

²⁰⁵ *See* Medicare: Application of the False Claims Act to Hospital Billing Practices (July 1998) at 10 *available at* <http://www.gao.gov/archive/1998/he98195.pdf>. (Hospitals that underwent audits in the late 1990s to assess the frequency of billing fraud “contend that the False Claims Act’s enormous penalties make its use [in the area of assessing billing fraud] inherently coercive,” adding that “the only reason that hospitals settle with the Justice Department...is that they would face huge liability if they lost in court”).

²⁰⁶ 31 U.S.C. §3729(a) (2000).

²⁰⁷ Glenn v. Whitaker and Joseph W. Harper, *supra*, note 57 at C-38.

²⁰⁸ *Id.* at C-39.

²⁰⁹ Editorial, *False Claims Gold Rush*, Wall St. J., May 2, 2008 *available at* <http://online.wsj.com/article/SB120968865969361371.html>.

²¹⁰ Hearing, *supra*, note 25 at 87 (statement by John T. Boese).

²¹¹ *Id.*

²¹² *Id.* at 88.

²¹³ *Id.* at 88 (referencing *United States v. Halper*, 490 U.S. 435 (1989); *Hudson v. United States*, 522 U.S. 93 (1997) (stating that “[t]he Due Process clause and Equal Protection Clauses already protect individuals from sanctions which are downright irrational [and] [t]he Eight Amendment protects against excessive fines.”). *Id.*

²¹⁴ Hearing, *supra*, note 25 at 2 (statement by Senator Leahy).

²¹⁵ *Id.*

²¹⁶ *Id.* at 81 (Statement by Mr. Boese). “A second, common misconception, perpetrated by the Plaintiffs’ bar that profits from these cases, is that whistleblowers need the amendments so they can pursue big corporate frauds. While some qui tam cases are filed against large companies, the majority of defendants in qui tam cases are small businesses, local governments, and non-profit institutions.” A number of examples are provided by Mr. Boese, including Santa Clara County Office of Education, Old Baldy Council of Boy Scouts of America, Providence Missionary Baptist Church of Atlanta, Pekin Memorial Hospital, Mercy Hospital of Pittsburgh, St. Jude’s Children’s Research Hospital, and the Housing Authority of Seattle. *Id.*

²¹⁷ *Id.*

²¹⁸ Whitaker and Harper, *Is Submission of a False Claim to the Government A Prerequisite to Liability under 31 U.S.C. §§3729(a)(2)-(3) of the False Claims Act?* *Supra*, note 57 at C-39.

²¹⁹ *Id.*

²²⁰ *Id.* It is still possible under these circumstances that the government could suffer a loss. During the *Allison Engine* oral argument, Justice Breyer raised the question whether grants could be considered losses if the government got “less than the grant was supposed to pay for.” Under the firm-fixed-price contract, the government could also get less than it paid for through poor quality of services. This would seem to be a loss to the government under Justice Breyer’s analysis. Oral Argument, *supra*, note 108 at 30-31.

²²¹ *Id.*

²²² *Allison Engine*, 128 S.Ct. at 2128 (quoting *Totten*, 380 F.3d at 496).

²²³ Oral Argument, *supra*, note 108 at 36.

²²⁴ *Id.* at 20.

²²⁵ Memorandum, *supra*, note 174.

²²⁶ Gabriel L. Imperato, *Negotiation Strategies in False Claims Act Cases*, *supra*, note 57 at I-1.

²²⁷ Editorial, *supra*, note 209.

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *See* report, *supra*, note 136.

²³¹ Ed O'Keefe, *Stimulus Waste and Fraud Inevitable*, Washington Post, Mar. 12, 2009 available at <http://voices.washingtonpost.com/federal-eye/2009/03/devaney.html>.

²³² Although the False Claims Act Correction Act of 2008 has been criticized by scholars and the Department of Justice, a similar Act proposed in 2007 gained widespread support and was approved by the Senate Judicial Committee. Whether the 2008 version receives similar support remains to be seen, but it has gained the bipartisan support from Senators Leahy, Durbin, Spector, and Grassley. *See* Hearings, *supra*, note 25 at 1.

²³³ *See generally* Hearing *supra*, note 25.

²³⁴ Editorial, *supra*, note 209.

²³⁵ *Health Ins. Plan*, 2008 WL 4449448 at *5.