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REPORT

False Claims Act

The Preeminence of Presentment: Important Developments Under the False Claims Act

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An important decision interpreting the federal civil False Claims Act ("FCA") was recently handed down by the U.S. District Court for the Eastern District of Virginia in *United States ex rel. DRC Inc. v. Custer Battles LLC*.[1] That decision set aside a $9 million jury verdict in a FCA case involving the Coalition Provisional Authority ("CPA"), which governed Iraq immediately after the 2003 invasion. The FCA allows the U.S. government, or private individuals who sue on its behalf known as *qui tam* relators, to recover civil penalties and treble damages for "false or fraudulent claims" submitted to the United States.[2] In *Custer Battles*, the relators alleged that the defendants had defrauded the United States by submitting false invoices and records to justify a $3 million advance payment that Custer Battles received pursuant to a contract with the CPA.[3] The jury returned a $3 million verdict in favor of the relators, which was statutorily trebled to $9 million, and the defendants moved for judgment as a matter of law. The court ultimately threw out the jury verdict and granted the defendants judgment because the "relators did not prove that the claims were presented to the United States."[4]

The recent *Custer Battles* decision is only the latest in a series of cases construing the so-called "presentment" requirement of the FCA. These cases have tended to adopt a narrow reading of the FCA advanced by Chief Justice John Roberts in a now-landmark case decided before his elevation to the Supreme Court. This emerging "presentment" requirement has the potential to curtail the reach of the FCA in any case where federal money is disbursed, not by the federal government, but by intermediaries such as state governments, prime contractors, or international agencies. The "presentment" issue is therefore worthy of attention for federal government contractors and subcontractors, state gov-

[1] *United States ex rel. DRC, Inc. v. Custer Battles, LLC*, 444 F. Supp. 2d 678, 679 (E.D. Va. 2006).

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[2] 31 U.S.C. § 3729-3730.
[3] 444 F. Supp. 2d at 679.
[4] *Id.*

ernment contractors, and any other entities that receive federal funds disbursed by someone other than the federal government.

The Views of the Chief Justice

The issue of whether the FCA requires proof of the ''presentment'' of a false claim to the United States was treated comprehensively by the U.S. Court of Appeals for the District of Columbia Circuit in its 2004 decision involving the case of *United States ex rel. Totten v. Bombardier Corp.*, which is now commonly referred to as ''*Totten II*.''[5] The majority opinion in the case has taken on added significance in recent months because it was authored by then-Circuit Judge John Roberts, now Chief Justice of the United States. In *Totten II*, the relator, a former Amtrak employee named Edward Totten, alleged that the defendants had violated the FCA by delivering defective rail cars to Amtrak, which Amtrak then paid for with funds that, in part, came from the U.S. government.[6] Significantly, however, Totten did not allege that the defendants or Amtrak ever presented false claims or records to an officer or employee of the United States.[7]

Judge Roberts' thorough opinion affirmed the district court's dismissal of Totten's complaint on the grounds that presentment to the U.S. government was required under the plain language of the FCA.[8] Section 3729(a)(1) of the FCA provides that

> Any person who . . . knowingly *presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States* a false or fraudulent claim for payment or approval . . . is liable.[9]

Totten and the Justice Department, acting as *amicus curiae*, urged the D.C. Circuit to rule that the defendants could be liable under § 3729(a)(1), notwithstanding the above-italicized language, because requiring presentment to the United States in cases involving grantees of federal funds like Amtrak would be ''inconsistent with the plain language of Section 3729(c).''[10] Section 3729(c) contains the FCA's definition of ''claim,'' and provides that

> For purposes of this section, ''claim'' includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.[11]

Judge Roberts disagreed and concluded that ''[n]othing about the language of subsection (c) requires ignoring that of subsection (a)(1).''[12] Rather, the two sections should be read together and result in FCA liability only if false claims submitted to a grantee are in turn presented to a federal employee.[13]

Totten and the government also argued that, even if § 3729(a)(1) did not apply, there could still be FCA liability in Totten's case under § 3729(a)(2), which provides that

> Any person who . . . knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government. . . is liable.[14]

Judge Roberts again disagreed and ruled that by adding the phrase ''paid or approved by the Government'' to § 3729(a)(2), ''Congress was referring back to the presentment requirement of Section 3729(a)(1).''[15] Thus, presentment to the United States was a required element of liability under either § 3729(a)(1) or (a)(2), and since no such presentment had occurred, Totten's case had to be dismissed.[16]

In a spirited and thorough dissent, Judge Merrick Garland took the contrary position that because § 3729(a)(1) contained express language requiring presentment to an officer or employee of the United States, while § 3729(a)(2) did not, Congress must have therefore intended that no presentment to the government was required to violate § 3729(a)(2).[17]

The Lay of the Land

In the wake of *Totten II*'s now-landmark decision on presentment, the lower courts have tended to follow the approach advocated by the new Chief Justice. To date, only one court has explicitly rejected Chief Justice Roberts's view in favor of Judge Garland's,[18] while a few others have declined to weigh in on the debate.[19] Courts have ruled in this fashion even though the Justice Department has consistently taken the position that *Totten II* was wrongly decided.[20] But following the majority view in *Totten II* has not always resulted in victory for defendants. Rather, the courts have now begun to focus clearly on whether the plaintiff has adequately pleaded or proved presentment under the specific factual circumstances of each case.

The Justice Department has consistently taken the position that *Totten II* was wrongly decided.

It is apparent from the first ten cases decided after *Totten II* that the presentment requirement is emerging as an important, and in some cases dispositive, element of FCA liability; indeed, a failure to meet the present-

[5] 380 F.3d 488 (D.C. Cir. 2004).
[6] *Id.* at 490.
[7] *Id.*
[8] *Id.* at 492-502.
[9] 31 U.S.C. § 3729(a)(1) (emphasis added).
[10] 380 F.3d at 492.
[11] 31 U.S.C. § 3729(c).
[12] 380 F.3d at 493.
[13] *Id.*
[14] 31 U.S.C. § 3729(a)(2).
[15] 380 F.3d at 499.
[16] *Id.* at 502.
[17] *Id.* at 502-16 (Garland, J., dissenting).
[18] *United States ex rel. Maxfield v. Wasatch Constructors*, No. 2:99-CV-00040, 2005 U.S. Dist. LEXIS 10162, at *22 (D. Utah May 27, 2005) (agreeing with Judge Garland's ''well-reasoned'' dissent in *Totten II* that the plain language of Section 3729(a)(2) lacks a presentment requirement).
[19] *See, e.g. United States v. AM Squire*, No. 05-C-3781, 2005 U.S. Dist. LEXIS 35749, at *12 (N.D. Ill. Dec. 12, 2005); *United States ex rel. Tyson v. Amerigroup Illinois, Inc.*, No. 02-C-6074, 2005 U.S. Dist. LEXIS 24032, at *3 (N.D. Ill. Oct. 17, 2005).
[20] *See, e.g., United States v. Sequel Contractors, Inc.*, 402 F. Supp. 2d 1142, 1149 (C.D. Ca. 2005).

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ment requirement resulted in judgment for the defendants in half of the cases decided in the past two years. While the cases differ somewhat in their legal approach to the presentment requirement, and are to a large extent driven by their particular facts, it is possible even at this early stage of presentment jurisprudence to discern three key issues that are likely to affect the outcome of future presentment cases.

Matters of Proof

One lesson that can be drawn from recent presentment cases is that proof matters. In some cases, careful attention to the presentment requirement can make a huge difference in the outcome of the case. Indeed, in some of the cases where defendants prevailed on presentment grounds, it appears that the plaintiffs could have continued the litigation if they had approached the case with a greater focus on presentment issues.

For example, in *United States ex rel. Sanders v. Allison Engine Co.*, the relators brought an FCA suit against subcontractors of Bath Iron Works and Ingalls Shipbuilding. After the relators completed their case in chief at trial, the subcontractor defendants moved for judgment as a matter of law arguing under *Totten II* that the relators were required ''to show that a false or fraudulent claim was submitted by Bath or Ingalls to the Government'' but had failed to do so.[21] The relators countered that ''they did not have to show that there was a false claim submitted to the Government,'' but only ''that Government money was eventually used to pay the subcontractors who submitted allegedly false claims.''[22] The court disagreed, and following the majority opinion in *Totten II*, granted the defendants' motions for judgment as a matter of law on the grounds that ''the only entities that could have submitted actionable claims to the Navy were the prime contractors, Bath Iron Works and Ingalls,'' and the relators ''presented no evidence that either Bath Iron Works or Ingalls submitted false or fraudulent claims to the Government.''[23]

The relator was allowed to proceed under similar factual circumstances in *United States v. Sequel Contractors*, however. There the relator claimed that the defendants had violated the FCA by submitting inflated invoices to Orange County, Calif., which in turn sought reimbursement from the federal government.[24] The defendants moved to dismiss, relying on *Totten II* to argue that ''no FCA liability arises where a party presents a false claim to a recipient of federal funds, such as Orange County.''[25] The court denied the motion on the grounds that *Totten II* ''did not require that the defendants themselves directly present the false claim to the federal government,'' but did require ''that *someone* must directly present a false claim to the federal government in order for liability under the FCA to arise.''[26] ''Thus, FCA liability arises where a defendant presents false claims to a state, which then presents the false claims to the federal government.''[27] The court therefore denied the motion to dismiss because the complaint alleged that ''Defendants caused a third party, Orange County, to present a false claim to the federal government.''[28]

The defendants appear to have prevailed in *Sanders*, at least in part, simply because the relators did not attempt to prove that the prime contractors submitted false claims to the Navy. By contrast, the relator was allowed to proceed in *Sequel Contractors* precisely because he alleged that the false claims submitted by the defendants were, in turn, submitted by the defendants' contracting partner to the United States.

A failure to meet the presentment requirement resulted in judgment for the defendants in half the cases decided in the past two years.

A trio of post-*Totten II* health care fraud cases also illustrates how important pleading and proof can be in presentment cases. In *United States ex rel. Atkins v. McInteer*, the relator alleged that the defendants had violated the FCA by submitting false Medicaid claims to the state of Alabama.[29] Shortly after *Totten II* was decided, the district court dismissed the relator's claims, reasoning that, according to the complaint, ''the only directly defrauded entity was a grantee,'' the Alabama Medicaid Agency, and thus there was ''no allegation or suggestion of the direct presentation of any false claim by any defendant to a federal officer or employee.''[30]

But a different result was reached in the factually similar case of *United States ex rel. Tyson v. Amerigroup Illinois*. In that Medicaid fraud case, the defendants argued that the relator's claims should be dismissed under *Totten II* because ''the allegedly false or fraudulent claims at issue were submitted by Defendants directly to the Illinois Department of Public Aid (the ''IDPA''), and not to the federal government.''[31] The district court observed that ''both the majority and dissent in [*Totten II*] acknowledge that presentment can occur directly or indirectly, as indicated by the statute itself through its use of the phrase 'causes to be presented' in Subsection (a)(1), and 'causes to be made or used' in Subsection (a)(2).'' The court also pointed out that, ''[u]nder Medicaid, the state pays health care providers for services rendered to Medicaid recipients, and is reimbursed for a significant portion of those funds by the federal government.'' Accordingly, the court ruled that the defendants' motion should be denied because the complaint adequately alleged that ''the federal government ultimately approved the purportedly false Medicaid claims processed and submitted to it by the IDPA'' and that, ''[b]ased on those claims, the federal government then reimbursed the State of Illinois.''[32]

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[21] *United States ex rel. Sanders v. Allison Engine Co.*, No. 1:95-CV-970, 2005 U.S. Dist. LEXIS 5612, at *4 (S.D. Ohio Mar. 11, 2005). The authors' firm represented one of the defendants in *Sanders*.

[22] *Id.* at *4-5.

[23] *Id.* at *32.

[24] *United States v. Sequel Contractors, Inc.*, 402 F. Supp. 2d 1142, 1146 (C.D. Ca. 2005).

[25] *Id.* at 1149.

[26] *Id.* at 1150.

[27] *Id.*

[28] *Id.*

[29] *United States ex rel. Atkins v. McInteer*, 345 F. Supp. 2d 1302, 1304 (N.D. Ala. 2004).

[30] *Id.*

[31] 2005 U.S. Dist. LEXIS 24032 at *3.

[32] *Id.* at *5, 6, 9.

The same rationale prevailed in *United States v. AM Squire* where the defendant, citing *Totten II*, moved to dismiss a Medicare fraud case and argued that because all of Squire's Medicare claims were submitted to Medicare fiscal intermediary Palmetto rather than to the government, ''the government has made no allegations that Squire either presented a claim or caused a claim to be presented to an officer or employee of the government.''[33] The district court denied the motion because the complaint alleged that after Squire ''submitted false claims to Palmetto, Palmetto paid those claims out of its commercial bank account and then requested and received reimbursement from the Federal Reserve Bank,'' and thus it was sufficient for the government to allege that Squire ''caused a false claim to be presented to an employee or officer of the federal government.''[34]

These cases suggest that the relator in *Atkins* might well have survived the motion to dismiss his Medicaid fraud claims if he had only made the effort to plead the mechanism by which the federal funds were paid to the defendants through the Medicaid program. Indeed, the relators in *Tyson* and the government in *Squire* were allowed to proceed precisely because their complaints adequately alleged that the presentment requirement was satisfied when the state and fiscal intermediary sought payment from the federal government.

Following Procedure

Another lesson that can be drawn from the recent presentment cases is that procedure is important. The cases also seem to indicate that, regardless of how hard the plaintiff tries, there are some cases that will never satisfy *Totten II*'s presentment requirement because of the procedure under which the federal funds are disbursed.

For example, the court granted summary judgment for the defendants in *United States v. City of Houston* because the relator had failed to demonstrate presentment. There, the relator alleged that the defendants made false claims to the City of Houston that were paid out of funds provided in a federal grant from the Department of Housing and Urban Development (''HUD'').[35] The defendants moved for summary judgment, arguing that the relator could not show that they had presented any claims to the U.S. government as required by *Totten II*.[36] The court granted the motion, reasoning that ''[l]ike Amtrak, the City is not a department, agency, or instrumentality of the Government, and Relator has failed to produce any evidence that the City . . . or anyone else presented a claim to any entity that is a department, agency, or instrumentality of the Government'' since the city's ''use of previously approved and allocated HUD funds does not constitute the presentment of a claim to the Government for purposes of the False Claims Act.''[37]

The defendants had similar success in *United States ex rel. Rafizadeh v. Continental Common*. That case concerned ''allegedly false and fraudulent provisions in a lease between the defendants and the State of Louisiana Departments of Social Services (''DSS'') and Health and Hospitals'' (''DHH''), both of which were ''alleged to be 'heavily subsidized' by the federal government.''[38] The relator contended that *Totten II*'s presentment requirement was satisfied since ''the false and inflated invoices were incorporated 'into the budget presented to the United States for funding' '' and ''the United States funded a portion of the DHH and DSS budgets.''[39] The court rejected the relator's argument and granted the defendants' motion to dismiss, reasoning that the ''relator's 'incorporation into the budget' argument, while innovative, is too tenuous to constitute presentment of the inflated invoices to the United States'' since ''[t]he allegedly inflated invoices were presented to the State of Louisiana, not the federal government.''[40]

The contrary result was reached in *United States ex rel. Maxfield v. Wasatch Constructors*, but only because the court refused to follow *Totten II*. There, the relators claimed that the defendants violated the FCA while performing road work for the Utah Department of Transportation (''UDOT''). The district court acknowledged that if '' 'direct presentment' to the United States is required to trigger liability under § 3729(a)(2), then all of Maxfield's claims should be dismissed because the allegedly false claims here were presented to a grantee of federal funds — UDOT — rather than directly to the U.S. Government.''[41] However, the court denied the motion to dismiss, citing ''Judge Garland's well-reasoned dissent'' in *Totten II* that ''Section 3729(a)(2) should not be read as containing a requirement of direct presentment to a [federal] government official.''[42] Notably, *Maxfield* is the only decision, to date, that expressly rejects the position advanced by Judge Roberts in *Totten II*.

Like *Totten II* itself, *City of Houston* and *Continental Common* appear to be the type of case in which plaintiffs could never prevail on the presentment issue because, as a factual matter, federal monies are paid over to a state or other non-federal entity that then disburses the funds without ever submitting claims or records to the federal government. In such cases there will never be FCA liability under *Totten II*, because there is no presentment of a false claim or record to a U.S. government agent. *Maxfield* appears to be this type of factual situation as well, but was not dismissed because the court declined to follow the majority opinion in *Totten II*.

Which Hat Are You Wearing?

The final lesson that can be drawn from the recent presentment cases is that capacity matters. Indeed, which ''hat'' a federal employee is wearing at the time of presentment was the dispositive issue in the recent and highly publicized case of *United States ex rel. DRC, Inc. v. Custer Battles*. There, the relators alleged that the defendants had violated the FCA by submitting false claims to the CPA in Iraq.[43] But following a $9 million jury verdict for the relators, the court granted the defen-

[33] 2005 U.S. Dist. LEXIS 35749, at *10.
[34] *Id.* at *12-13.
[35] *United States v. City of Houston*, No. H-03-03713, 2006 U.S. Dist. LEXIS 57741, at *2, 4 (S.D. Tex. Aug. 16, 2006).
[36] *Id.* at *5.
[37] *Id.* at *19.
[38] *United States ex rel. Rafizadeh v. Continental Common, Inc.*, No. 04-1778, 2006 U.S. Dist. LEXIS 18164, at *1-2 (E.D. La. Apr. 10, 2006).
[39] *Id.* at *4.
[40] *Id.* at *5-6.
[41] *Maxfield*, 2005 U.S. Dist. LEXIS 10162, at *19.
[42] *Id.* at *22, 29.
[43] *United States ex rel. DRC, Inc. v. Custer Battles, LLC*, 444 F. Supp. 2d 678, 679 (E.D. Va. 2006).

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dants' motions for judgment as a matter of law, finding that the ''relators did not prove that the claims were presented to the United States.''[44] Although there was abundant evidence at trial ''that invoices and records were presented to CPA employees, including members of the United States Armed Forces detailed to the CPA,'' the court found that the relators had failed to demonstrate presentment ''because the CPA was not a U.S. government entity, and therefore U.S. employees of the CPA were not working in their official capacity as employees or officers of the United States government.''[45] Accordingly, the defendants were entitled to judgment notwithstanding the jury's verdict.[46]

Maxfield is the only decision, to date, that expressly rejects the position advanced by Judge Roberts in _Totten II_.

On the other hand, in *United States ex rel. Vargas v. Lackmann Food Services*, the court denied the defendants' motion to dismiss on presentment grounds.[47] In that case, the defendants had a federal food service contract at a NASA installation which required them to deposit 50 percent of the net revenue from their food sales in a separate account held by the government. Under the terms of the contract, the defendants could recover a percentage of the funds in the separate account based upon periodic performance evaluations.[48] The relator, a former Lackmann employee, claimed that the defendants had violated the FCA by repeatedly serving expired food to the federal employees who ate at the NASA facility.[49] The defendants moved to dismiss, arguing that the relator had failed to allege presentment of a false claim to the government since the allegedly false claims were made to individual federal employees as they purchased the allegedly outdated food.[50] However, the court denied the motion to dismiss since the complaint alleged ''that Defendants submitted false claims to Government employees,'' and ''[e]ven more importantly, a reasonable inference can be made that the Government would have likely given Defendants a smaller percentage of funds from the separate account if the Government knew that its employees were served substandard food.''[51]

The *Custer Battles* decision emphasized that FCA liability could only attach if a false claim was presented to a federal employee acting as a federal agent. Accordingly, proof of presentment to federal employees assigned to the CPA was not sufficient for FCA liability because those persons were acting as agents of the CPA, not the U.S. government. *Custer Battles* appears to be in conflict with *Vargas* in this regard. While the rationale of the *Vargas* decision is not entirely clear, the court seems to hold that the presentment requirement was satisfied simply because the false claims were presented to federal employees. To the extent that is the holding of *Vargas*, it begs the question, analyzed at length in *Custer Battles*, of whether those federal employees were acting as federal agents in purchasing the food at issue, or simply acting in their personal capacity as they bought their lunch. Perhaps future rulings in *Vargas* or similar cases will elucidate this issue further.

Custer Battles is clearly just the most recent and most dramatic case on presentment. More cases on the issue are sure to follow. Given the growing importance of presentment in FCA jurisprudence, the developments will certainly be worth watching.

[44] *Id.*
[45] *Id.* at 686, 689.
[46] *Id.* at 685.
[47] *United States ex rel. Vargas v. Lackmann Food Services, Inc.*, No. 6:05-cv-712, 2006 U.S. Dist. LEXIS 32385, at *10-11 (M.D. Fla. May 23, 2006).
[48] *See id.* at *2-3.
[49] *Id.* at *2-4.
[50] *See id.* at *6.
[51] *Id.* at *10-11