

## Vorys False Claims Act Trial Team Obtains Another Victory in *Allison Engine*

The District Court for the Southern District of Ohio became the second respected court to hold that the FCA amendments cannot be applied retroactively to cases pending as of June 7, 2008.

On October 27, 2009, the Vorys False Claims Act (“FCA”) trial team of Glenn V. Whitaker, Victor A. Walton, Jr., Michael J. Bronson, and Jeffrey A. Miller obtained a ruling that amendments designed to expand FCA liability retroactively are unconstitutional. These FCA amendments, enacted as part of the Fraud Enforcement and Recovery Act (“FERA”), sought to legislatively overrule Vorys’ unanimous victory before the U.S. Supreme Court in Allison Engine Co. v. United States ex rel. Sanders, No. 07-214, 128 S.Ct. 2123 (2008), a decision that narrowed the scope of FCA liability significantly.

In March 2005, Vorys obtained a directed verdict for the Allison Engine Company (“Allison Engine”) and its co-defendants after six weeks of trial in an FCA *qui tam* case. The case concerned allegations that Navy subcontractors had provided substandard generator sets to two private shipyards, who then used the generator sets in building guided missile destroyers for the Navy. Although the Navy and the shipyards were pleased with the performance of the generator sets, two disgruntled employees of one of the subcontractors claimed that the generator sets did not meet the quality standards required by the Navy. After the relators failed to introduce any evidence that any actual false claims, false statements, or false records of any kind were submitted by any of the

subcontractors to the Government, however, the United States District Court for the Southern District of Ohio dismissed the relators’ claims at the close of their case.

The relators appealed, and a divided three-judge panel for the Sixth Circuit Court of Appeals overturned the directed verdict in December 2006. This ruling was controversial, and the Supreme Court agreed to review the case. On June 9, 2008, the Supreme Court handed down its unanimous ruling, vacating the Sixth Circuit’s decision for the relators and establishing tough liability standards, including the requirement of a “direct link” between a record or statement by a subcontractor and the payment of a false claim by the Government. To establish this direct link, the Supreme Court held that a defendant must intend for its statement to induce the Government itself to pay a false claim. As part of its decision in favor of the subcontractors, the Supreme Court ordered the relators to pay the subcontractors’ costs, and sent the case back to the District Court.

In response to the Supreme Court’s decision, the relators’ bar and the Department of Justice lobbied Congress to change the law. The FERA amendments to the FCA, which President Obama signed into law on May 20, 2009, broadened the scope of liability under the FCA, and also took direct aim at the Supreme Court’s

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unanimous Allison Engine decision. With respect to the provision of the FCA at issue in Allison Engine, the amendments purported to apply retroactively to any “claims” pending as of June 7, 2008—two days before the Supreme Court’s decision. The apparent goal of this retroactivity provision was to overrule the Supreme Court and nullify the Allison Engine decision entirely.

Following the passage of FERA, the Vorys FCA trial team, with substantial assistance from additional Vorys FCA team members Mary C. Henkel, Dorothea K. Langsam, and Patrick M. Hagan, argued in the District Court that the FCA amendments could not apply retroactively, both for constitutional reasons and as a matter of statutory construction. The District Court agreed with Vorys, holding that Congress did not clearly state in FERA that the amendments apply

retroactively to FCA cases pending on June 7, 2008. The District Court further held that, even if Congress had clearly intended the amendments to apply retroactively, retroactive application of the FCA—a punitive civil statute that carries the potential for treble damages and significant penalties—would violate the Constitution’s Ex Post Facto Clause.

By its decision in favor of Vorys, the District Court for the Southern District of Ohio became the second respected court to hold that the FCA amendments cannot be applied retroactively to cases pending as of June 7, 2008, and the first to hold that retroactive application of the FCA is unconstitutional. As a result of these well-reasoned decisions, the Supreme Court’s holding in Allison Engine applies to nearly every currently pending FCA case.

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