



Whistle

by
Mark Labaton

STOP

A split among federal courts means that Chief Justice Roberts may have an opportunity to revisit his 2004 decision limiting whistle blower suits

The federal False Claims Act (FCA), which was originally adopted in 1863, is an extraordinarily effective statute in combating fraud committed against the government.¹ While the federal government can bring FCA actions on its own, whistle blowers and their counsel also can file FCA suits on behalf of the United States as government watchdogs. In FCA actions, the plaintiff is called the “relator.” If successful, relators receive 15 to 30 percent of any recovery.

In 1986, Congress amended the FCA to make it easier to litigate cases and expanded it to “reach all fraudulent attempts to cause the Government to pay out sums of money or to deliver property or services.”² Since then, the Department of Justice has recovered approximately \$16.5 billion in FCA actions, more than half of which were brought by

whistle blowers. Of this amount, whistle blowers and their counsel have received approximately \$2.5 billion; the remaining \$14 billion has been returned to the U.S. Treasury.³ Thus, in addition to deterring fraud, the FCA has provided a substantial monetary benefit to taxpayers.

In spite of this success, the FCA has been subject to numerous attacks. It faces its latest challenge because of an appellate decision written by then U.S. Court of Appeal Judge (now Supreme Court Chief Justice) John G. Roberts Jr. That decision, *United States ex rel. Totten v. Bombardier Corporation*,⁴ limits the government’s ability to combat fraud committed by certain federal grant recipients and subcontractors.

In *Totten*, whistle blower Edward Totten brought an FCA action against Bombardier Corporation and Envirovac, Inc., alleging

that these companies were liable under the FCA for delivering defective rail cars to Amtrak and submitting invoices for payment to Amtrak from an account funded primarily with taxpayer dollars. At the time of the events at issue, Amtrak operated as a private entity.⁵

The District of Columbia Circuit held that the defendants could not be held liable for the false claims they submitted to Amtrak—even though those claims had been paid largely with federal funds—because

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Amtrak was a private entity and not a part of the federal government. In doing so, the court rejected Totten's argument that a "claim submitted to Amtrak is *effectively* a claim presented to the Government."⁶ Moreover, the court did not accept Totten's contention that the action should not be dismissed because the FCA defines claims to "include a request or demand for payment made to a grantee if the United States Government will reimburse...[the] grantee...for any portion or property which is requested or demanded." Totten argued that this definition would

analysis offered in the dissent. "It's certainly possible that the majority in that case didn't get it right," Judge Roberts said, "and the dissent, and that was a very strong dissent, did get it right....I'm happy to concede that it was among the more difficult cases I've had over the past two years."¹⁰

"*Totten* cases" are moving through the district courts—and the majority of these have either declined to follow the reasoning in *Totten* or have not interpreted the *Totten* opinion expansively. Indeed, numerous courts outside the District of Columbia have already

records and statements made in support of the actual false claims.

In *Totten*, the court held that the "plain" language of Section 3729(a)(1) supported its interpretation of Subsection (a)(1) and that the legislative history of Section 3729(a)(2)¹⁶ supported its interpretation of that subsection. But the majority's reading of (a)(1) and (a)(2) is problematic. Indeed, its reading of Section 3729(a)(1) is flawed for at least two reasons.

First, the *Totten* court fails to give effect to 31 U.S.C. Section 3729(c), which defines "claims" to include "any request or demand,

While the full scope of *Totten* is still to be determined, there are strong reasons to believe that other courts will depart from its holding or will not interpret it expansively.

encompass the defendants' demands.⁷

The *Totten* decision—if it is read expansively and its reasoning is adopted widely—has a potentially substantial reach because the federal government is increasingly reliant on grantees and subcontractors. Recognizing this possibility, the DOJ submitted an amicus brief in *Totten* noting that dismissal of the case could leave significant amounts of federal funds vulnerable to fraud and beyond the reach of the FCA.

While the full scope of *Totten* is still to be determined, there are strong reasons to believe that other courts will depart from its holding or will not interpret it expansively. One possible approach lies in veering away from the *Totten* majority's interpretation of the statutory language of the FCA and the act's legislative history, as Judge Merrick B. Garland did in his dissenting opinion in *Totten*.⁸ Significantly, Judge Paul Cassell of the U.S. district court in Utah specifically adopted Judge Garland's analysis of the FCA and its legislative history.⁹

The *Totten* decision found Judge Roberts taking a position that differed from the one held by his now former colleague Judge Garland. Nevertheless, when questioned about the decision at his Supreme Court confirmation hearing in 2005, nominee Roberts described *Totten* as a "difficult" decision and respectfully acknowledged the alternative

focused on the *Totten* opinion's nonexpansive language.¹¹ Based upon the language and legislative history of the FCA and on subsequent case law, there is good reason to read *Totten* less expansively than some proponents and critics of the decision have done and to allay the DOJ's fears. Moreover, two decisions in accord with *Totten* have been appealed to appellate courts—one in the Sixth Circuit and the other in the Eleventh Circuit.¹² Depending upon the outcomes of these cases, Chief Justice Roberts may have an opportunity to revisit his opinion.

Totten Holding and Dissent

Under the FCA, Section 3729—and specifically Subsections (a)(1) and (a)(2)—primarily govern liability.¹³ The subsections focus on different types of conduct and contain significantly different language.

Section 3729(a)(1)¹⁴ imposes liability on any entity that "knowingly¹⁵ presents, or causes to be presented," to an agency of the United States "a false or fraudulent claim for payment or approval." Section 3729(a)(2), in contrast, imposes liability on any entity that knowingly "makes, uses, or causes to be made or used," a false record or statement to get a false or fraudulent claim allowed or paid by the government. Thus, Section 3729(a)(1) applies to the actual false claims, while Section 3729(a)(2) applies to false

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." *Totten* thus ignores the rule of statutory construction that requires courts to presume Congress intended its amendments to have effect.¹⁷

Second, the decision is not consistent with the legislative history of the FCA—specifically the intent of Congress, in its 1986 amendments, to add a broad definition of the term "claim" to encompass false claims submitted to third-party recipients of federal funds that "ultimately result in a loss to the United States."¹⁸

More troubling, however, is the majority's interpretation of Section 3729(a)(2), which is the focus of Judge Garland's dissent. The dissent begins by noting the DOJ's concerns:

The False Claims Act, "adopted in 1863 and signed into law by President Abraham Lincoln in order to combat rampant fraud in Civil War defense contracts," S. Rep. No. 99-345, at 8 (1986), is the "Government's primary litigative tool for combating fraud."

MCLE Test No. 150

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1. Either the federal government or a private party can start an action under the federal False Claims Act.

True.
False.
2. The 1986 amendments to the FCA made it harder to bring whistle-blower lawsuits.

True.
False.
3. Since 1986, the Department of Justice has recovered less than \$3 billion from actions filed under the FCA.

True.
False.
4. The FCA has proved to be an ineffective tool in combating fraud committed against the government.

True.
False.
5. Congress passed the FCA:

A. After World War II.
B. During the War of 1812.
C. After World War I.
D. During the Civil War.
6. The FCA imposes liability for false claims and for false statements made in support of false claims.

True.
False.
7. It is too early to assess the full impact of the *United States ex rel. Totten v. Bombardier Corporation* decision.

True.
False.
8. In the *Totten* case, the District of Columbia Circuit Court of Appeals held that the defendants could be held liable for false claims submitted to Amtrak.

True.
False.
9. All courts that have interpreted *Totten* have found that its reach is expansive.

True.
False.
10. U.S. Supreme Court Chief Justice John Roberts was questioned about the *Totten* decision at his Senate confirmation hearing.

True.
False.
11. Effective presentment occurs when a claim for reimbursement is submitted to a federal grantee.

True.
False.
12. Chief Justice Roberts has described the *Totten* case as:

A. A “difficult” one.
B. A “no brainer.”
C. A “waste of time.”
D. None of the above.
13. To date, the *Totten* majority opinion has been strictly adopted by all federal courts.

True.
False.
14. The Department of Justice submitted an amicus brief in *Totten*.

True.
False.
15. Judge Merrick B. Garland based his dissent in *Totten* partly on the plain language of the FCA.

True.
False.
16. In *United States ex rel. Maxfield v. Wasatch Construction*, Judge Paul Cassell wholeheartedly adopted *Totten*.

True.
False.
17. Cases similar to *Totten* are currently under review before courts of appeals in the Sixth and Eleventh Circuits.

True.
False.
18. Several cases similar to *Totten* and filed subsequent to it were brought against healthcare providers.

True.
False.
19. In *United States ex rel. Sialic Contractors Corporation v. Sequel Contractors, Inc.*, Judge Gary Klausner held that *Totten* did not preclude an action under the FCA against the subcontractors who paved John Wayne Airport.

True.
False.
20. *United States ex rel. DRC, Inc. v. Custer Battles, LLC* involved alleged false claims submitted to the Coalition Provisional Authority, the agency established to rebuild Iraq.

True.
False.

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16. True False
17. True False
18. True False
19. True False
20. True False

Today, the court adopts an interpretation that, the government warns, leaves “vast sums of federal monies” without False Claims Act protection.¹⁹

Next, he states that Section 3729(a)(2) was properly before the court—despite the contrary view of the majority and the fact that the subsection was largely ignored in the briefing—because *Totten*’s complaint “was not limited to subsection (a)(1), but rather asserted liability under 31 U.S.C. §3729 in its entirety.”

Judge Garland proceeds to methodically discuss the statutory language of Section 3729(a)(2) and the legislative scheme and history of the 1986 FCA amendments. He gives three reasons why Subsection (a)(2) does not require presentment: 1) The “plain language” of the statute imposes no such requirement, 2) imposing such a requirement is not consistent with the definition of “claim” in Section 3729(c), and 3) the majority’s interpretation “is not just inconsistent, but irreconcilable, with the legislative history of the 1986 Amendments to the False Claims Act.”²⁰

Judge Garland noted that the express language in Section 3729(a)(1), which contains the words “presents” and “causes to be presented,” coupled with the absence of such language in Section 3729(a)(2) gives added weight to his view that Subsection (a)(2) imposes no requirement for presentment to an agency of the United States.²¹ This discrepancy, he states, triggers an important canon of statutory construction: When “Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion and exclusion.”²²

Post-*Totten* Interpretations of the FCA

Courts interpreting the *Totten* decision have chosen to depart from it by using one of three approaches:

- 1) Adopting Judge Garland’s position that Section 3729(a)(2) imposes liability against subcontractors who have made false statements or records to get a false or fraudulent claim paid or approved but who have not necessarily presented claims.
- 2) Holding that subcontractors and grant recipients are liable under Section 3729(a)(1) when they “effectively” present claims.
- 3) Giving credence to the nonexpansive language of *Totten*, specifically the majority’s recognition that the act of presentment can be indirect.

In *United States ex rel. Maxfield v. Wasatch Construction*,²³ the court adopted Judge Garland’s dissent. The plaintiff alleged that Wasatch Construction made false statements in connection with its contract to

reconstruct Interstate 15—the largest highway project in the country at the time. Wasatch made these allegedly false statements to the Utah Department of Transportation. The department acted as the intermediary for the Federal Highway Administration, which financed the project.

In denying a motion to dismiss, Judge Cassell rejected *Totten*, choosing instead to follow “Judge Garland’s well-reasoned dissent”:

As Judge Garland explained, the starting point for any issue of statutory construction is “the existing statutory text.” The plain language of §3729(a)(2) lacks any “presentment” requirement. Instead, it allows a suit against anyone 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.” To be sure, the provision also provides that the claim must be paid or approved “by the Government.” But this simply means that the government must be the ultimate source of the funds, either directly or indirectly. Any doubt on this point is erased by the fact that the term “claim” paid by the government is defined elsewhere in the statute as including contractors and others who receive government funds....

To Judge Cassell, Judge Garland also seems to have the better argument on how policy considerations might play a role in determining issues of statutory construction. To construe the FCA as covering only false claims presented directly to the government rather than to federal grantees would leave billions of federal dollars outside the act. As an illustration, Wasatch received tens of millions of dollars for its work on the Interstate 15 project, with a substantial portion of these dollars coming from the federal government. From the perspective of combating fraud in the program, it is important to recognize the fact that, by pure happenstance, a federal grantee (the Department of Transportation) was directly writing the checks.²⁴

In *United States ex rel. Yesudian v. Howard University*,²⁵ a pre-*Totten* opinion, the District of Columbia Circuit found that “effective” presentment was enough. According to the court:

It is also possible to read the language [in Section 3729(a)(1)] to cover claims presented to grantees, but “effectively” presented to the United States because the payment comes out of funds the federal government gave the grantee. Such a reading would be in harmony with the legislative history [of the FCA]. As the Senate Judiciary

Committee put it, without adding a “presentation” caveat, a false claim to the recipient of a grant from the United States or to a State under a program financed in part by the United States is a false claim to the United States.²⁶

The *Totten* court not only rejected this reasoning but also viewed this part of the *Howard University* decision as dicta.²⁷ Still, despite the District of Columbia Circuit’s rejection of the view that “effective presentation” to an agency of the United States is sufficient, a Texas district court, in *United States ex rel. Farmer v. City of Houston*,²⁸ recently held that effective presentment was enough.

The case involved false claims submitted by the defendants to the Houston Area Urban League (HAUL), a nonprofit entity financed with grants from the federal government. The court held:

Even though an RFP [request for payment] is submitted by HAUL to the City, the City uses federal funds to pay an RFP, therefore a request under the Program to be paid by the City is a request to be paid by federal funds, and payment by the City is payment by the federal government. Moreover, an RFP demonstrates that the City paid HAUL’s fraudulent claims. Relator alleges that the City paid the claims with federal funds, knowing the claims were false; therefore, she has properly alleged that Defendants made, and conspired to make, false claims in violation of the FCA.²⁹

Thus the court held that the presentment requirement was satisfied because HAUL effectively acted as an arm of the federal government.

The *Totten* court recognized that the act of presentment can be indirect, a view supported by the “causes to be presented” language in Subsection (a)(1) and the phrase “causes to be made or used” in Subsection (a)(2).³⁰ In recent months, several courts have held that indirectly presenting false claims was sufficient to pursue an FCA action against subcontractors.³¹ These decisions focus on the causation requirements of presentment and are consistent with *Totten* and an earlier precedent that “gives the United States a cause of action against a subcontractor who causes a prime contractor to submit a false claim to the Government.”³²

Two of these recent cases—*United States v. Squire and Accucare, Inc.*³³ and *United States ex rel. Tyson v. Amerigroup Illinois*³⁴—were brought against healthcare providers that allegedly defrauded Medicare, in one case, and Medicaid, in the other. Significantly, under Medicare and Medicaid, states pay

healthcare providers for the services the providers render to program recipients, and the federal government then reimburses the states for almost all the funds they advance to the healthcare providers. Based on this fiscal and regulatory structure, the courts in these two cases held that the healthcare providers "caused claims to be presented" to the federal government through intermediary state agencies.³⁵

Similarly, in *United States ex rel. Sialic Contractors Corporation v. Sequel Contractors, Inc.*,³⁶ Judge Gary Klausner of the Central District of California held that the reasoning in *Totten* did not preclude an FCA action against a subcontractor paid to pave John Wayne Airport in Orange County. Citing *Totten*, Sequel Contractors unsuccessfully moved to dismiss on the grounds that it presented claims to Orange County, not to the federal government. Rejecting Sequel's argument, Judge Klausner held that the defendants interpreted *Totten* too broadly because *Totten* does not require direct presentation by the defendants. Judge Klausner explained:

The *Totten* Court held that liability under the FCA requires presentation of a false claim to the federal government. However, *Totten* did not require that the defendants themselves directly present the false claim to the federal government. Instead, the *Totten* court held that someone must directly present a false claim to the federal government in order for liability under the FCA to arise....

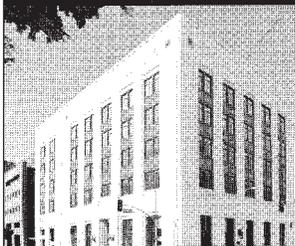
The *Totten* court found no FCA liability for the false claims presented to Amtrak because the claims were never presented to the federal government by any party, not because the defendants themselves failed to directly present the claims to the federal government. Thus *Totten* holds that the FCA is not implicated if no claim is ever presented to the federal government. The FCA is implicated where the defendants directly present a false claim to the federal government, or cause a third party to present the false claim.³⁷

The court held that the complaint was sufficient because it alleged that the defendants submitted false cost reports—the false claims—to Orange County, which were then forwarded for reimbursement to the Federal Aviation Administration, a federal agency. The defendants' failure to present its claims directly to the FAA was not a determining factor in the outcome of the case.

Last year, in *United States ex rel. DRC, Inc. v. Custer Battles, LLC*,³⁸ a Virginia district court also held, at least implicitly,

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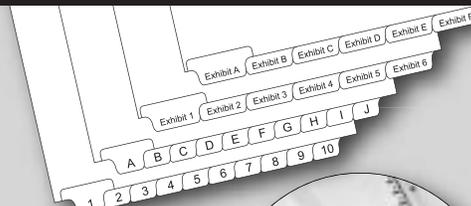
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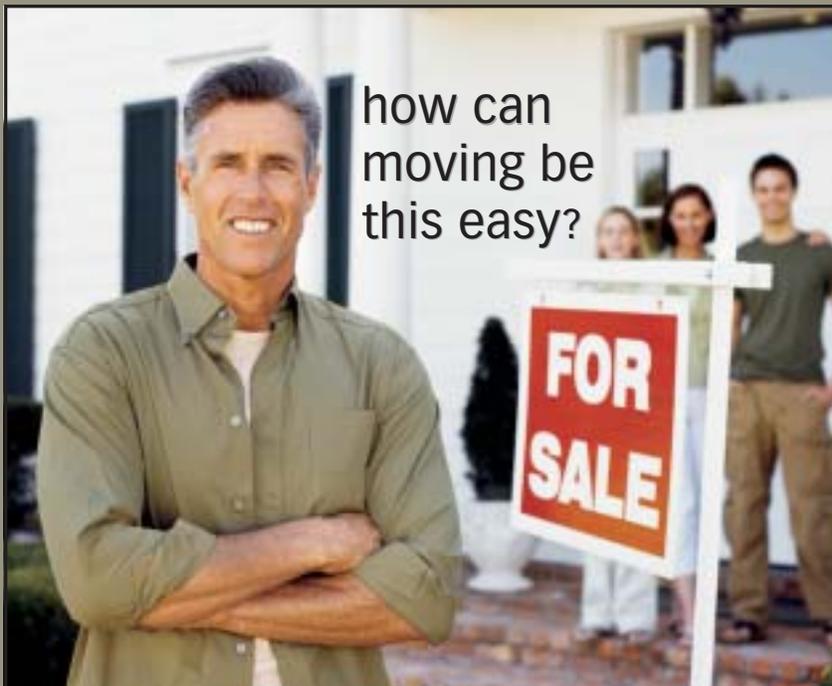
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that indirectly presenting a false claim to an agency of the United States sufficed to pursue an FCA action. The case involved alleged false claims submitted to the Coalition Provisional Authority, the agency established to govern and rebuild Iraq. This international agency was overseen by the United States and administered with funds from a variety of sources, including the United States, the United Nations, and other international organizations. Moreover, some of its funds came from money confiscated from the former government of Iraq.

The district court sidestepped the issue of whether a fraud on the CPA constituted a fraud on the United States. Instead, the court held that the relator satisfied the presentment requirement because the defendants caused the CPA to submit false claims to the U.S. Army.³⁹

Totten warrants serious consideration because of its author, the influential circuit in which it is controlling law, and the potential implications of the decision. Nevertheless, it is too early to assess the full impact of *Totten*. Indeed, those who are overstating its significance may have spoken too soon. No doubt, the issues raised in *Totten* will continue to appear in some grantee and subcontractor cases. As they do, other courts will decide whether or not to reject *Totten* as well as whether to focus on the nonexpansive language in that case. In the end, Chief Justice Roberts might well have another opportunity to address the issues that came before the District of Columbia Circuit in *Totten*, though these issues might come before the U.S. Supreme Court in a slightly different form and context. ■

¹ Congress enacted the FCA to reduce widespread military contracting fraud, which was pervasive during the Civil War. Congress recodified the FCA in 1982 under Title 31 of the U.S. Code. 31 U.S.C. §§3729-31 (1982). Following its initial enactment, the FCA was amended several times. Congress's most significant overhaul of the FCA came in 1986 in response to massive military contracting fraud during the Cold War. In recent years, the largest FCA cases have involved military contracting fraud, healthcare fraud, and pharmaceutical fraud, though there also have been many other large cases involving other areas of government fraud and abuse.

² S. REP. NO. 99-345, 99th Cong., 2d Sess., at 9, reprinted in 1986 U.S.C.C.A.N. 5266, 5274. Among other things, the 1986 amendment of the FCA increased the recoverable penalties and provided greater opportunities and incentives—including more significant protections against employer retaliation—for whistle blowers to initiate and litigate FCA cases, particularly when the United States declines to actively participate. *Id.* at 5266 *et seq.*; see also 31 U.S.C. §3730.

³ These numbers come from information compiled by the DOJ, which annually releases statistics on these types of settlements and judgments. See <http://www.taf.org/fcastatistics2006.pdf>.

⁴ United States ex. rel. *Totten v. Bombardier Corp.*, 380

F. 3d 488 (D.C. Cir. 2004).

⁵ *Id.* at 491-92. The court rejected the plaintiff's assertion that Amtrak was a mixed ownership entity during part of the relevant time period. Moreover, the court noted that this assertion was not legally relevant anyway because Amtrak was never an agency of the United States. *Id.*

⁶ *Id.* at 490-503.

⁷ *Id.* at 492; *see also* 31 U.S.C. §3729(c).

⁸ Totten, 380 F. 3d at 502-16.

⁹ *See* United States ex rel. Maxfield v. Wasatch Constr., 2005 U.S. Dist. LEXIS 10162 (D. Utah May 27, 2005).

¹⁰ Chief Justice Roberts's remarks came on September 14, 2005, during his confirmation hearings before the Senate Judiciary Committee and in response to a question from Senator Charles Grassley. *See* <http://www.asksam.com/ebooks/releases.asp?file=JGRHearing.ask&cdn=Day%203%20-%20Grassley%20-%20Legislative%20History>.

¹¹ *See* United States v. Squire & Accucare, Inc., 2005 WL 3470297 (N.D. Ill. Dec. 12, 2005); United States ex rel. Tyson v. Amerigroup Ill., 2005 WL 266707 (N.D. Ill. Oct. 17, 2005); United States ex rel. Sialic Contractors Corp. v. Sequel Contractors, Inc., 402 F. Supp. 2d 1142 (C.D. Cal. 2005).

¹² United States ex rel. Sanders v. Allison Engine Co., 2005 WL 713569 (S.D. Ohio Mar. 11, 2005), *appeal filed*; United States ex rel. Atkins v. McInteer, 345 F. Supp. 2d 1302 (N.D. Ala. 2004), *appeal filed*.

¹³ Other sections of the FCA that impose liability include 31 U.S.C. §3729(a)(3) (for conspiring to receive payment for a false claim) and 31 U.S.C. §3729(a)(7) (for, among other things, "reverse false claims," which include the failure to return money wrongfully paid by the government to a contractor).

¹⁴ 31 U.S.C. § 3729(a)(1) imposes liability on "[a]ny person who knowingly presents, or causes to be pre-

sented, 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." The statute uses the word "person" in §3729(a)(1) and (2), but it is undisputed that this term encompasses entities as well.

¹⁵ In 31 U.S.C. §3729(b), "knowingly" is defined to include either actual knowledge, deliberate ignorance, or acting in reckless disregard of the truth or falsity of the information.

¹⁶ United States ex. rel. Totten v. Bombardier Corp., 380 F. 3d 488, 501 (D.C. Cir. 2004). The majority, however, bases part of its opinion on a reading of the legislative history of the FCA that ignores its 1986 amendments and instead focuses on its earlier legislative history. *Id.* at 501.

¹⁷ Stone v. INS, 514 U.S. 386, 397 (1995). Moreover, the courts also must look to the design of the statute as a whole and its object and policy. K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988).

¹⁸ 31 U.S.C. §3729(c). In amending the FCA in 1986, the Senate Judiciary Committee stressed that it did not matter whether the claim was made to a government employee or to a grantee. *See also* S. REP. 99-345, 99th Cong., 2d Sess., at 10, *reprinted* in 1986 U.S.C.C.A.N. 5266, 5275.

¹⁹ Totten, 380 F. 3d at 502.

²⁰ *Id.* at 503-05.

²¹ *Id.* (quoting Barnhart v. Sigmon Coal Co., 534 U.S. 438, 452 (2002)).

²² *Id.*

²³ United States ex rel. Maxfield v. Wasatch Constr., 2005 U.S. Dist. LEXIS 10162 (D. Utah May 27, 2005).

²⁴ *Id.* at *19-*27.

²⁵ United States ex rel. Yesudian v. Howard Univ., 153 F. 3d 731 (D.C. Cir. 1998).

²⁶ *Id.* at 738. Judge Garland wrote this opinion for the

court.

²⁷ Totten, 380 F. 3d at 493-94:

In *Yesudian*, the court considered the present question, but expressly concluded that it "need not resolve the question today"....That was because the issue in *Yesudian* was not liability under the False Claims Act for false claims, but whether an employer retaliated against an employee for filing a *qui tam* action under the Act. Such retaliation,...the *Yesudian* court concluded, could be shown without establishing that the *qui tam* plaintiff would have prevailed in the suit.

²⁸ United States ex rel. Farmer v. City of Houston, 2005 WL 1155111 (S.D. Tex. May 5, 2005).

²⁹ *Id.* at *3.

³⁰ Totten, 380 F. 3d at 499-500, 507 n.8.

³¹ *See* United States v. Squire & Accucare, Inc., 2005 WL 3470297 (N.D. Ill. Dec. 12, 2005); United States ex. rel. Tyson v. Amerigroup Ill., 2005 WL 266707 (N.D. Ill. Oct. 17, 2005); United States ex rel. Sialic Contractors Corp. v. Sequel Contractors, Inc., 402 F. Supp. 2d 1142 (C.D. Cal. 2005).

³² United States v. Bornstein, 423 U.S. 303, 309 (1976) (in which a subcontractor-defendant allegedly submitted false records to a federal contractor, causing the contractor, in turn, to present false claims for payment directly to the United States).

³³ Squire, 2005 WL 3470297.

³⁴ Amerigroup Illinois, 2005 WL 266707.

³⁵ Squire, 2005 WL 3470297, at *5; Amerigroup Illinois, 2005 WL 266707, at *1-*3.

³⁶ Sequel, 402 F. Supp. 2d 1142.

³⁷ *Id.* at 1150.

³⁸ United States ex rel. DRC, Inc. v. Custer Battles, LLC, 376 F. Supp. 2d 617 (E.D. Va. 2005).

³⁹ *Id.* at 635-41.

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