



COZEN
O'CONNOR®

HEALTH LAW

Alert!

News Concerning Recent Health Law Issues

June 23, 2008

Cozen O'Connor is pleased to welcome **Iden Grant Martyn** to the firm's White Collar and Complex Criminal Defense Practice.



Iden Grant Martyn, a highly successful white collar defense attorney, has joined the firm's Washington, D.C. office. As an Assistant United States Attorney in

the Northern District of Ohio from 1989 through 2000, he handled a wide variety of matters in the areas of civil and criminal fraud, bankruptcy and health care law. He was appointed to the Executive Office for United States Attorneys (EOUSA) where he eventually served as Principal Deputy Director—the second-highest position in that organization. During his years with the government, Martyn was the recipient of numerous awards, including the "Director's Award," the highest award bestowed by the EOUSA.

In his highly respected private practice, Iden concentrates on representing corporations and senior-level corporate officials in both civil and criminal fraud matters. He has extensive experience handling False Claims Act matters for a broad range of clients in the healthcare, defense contract and financial services industries.

Cozen O'Connor proudly welcomes Iden Martyn to the firm.

500 Attorneys • 23 Offices
www.cozen.com

SUPREME COURT WEIGHS IN ON SCOPE OF FALSE CLAIMS ACT

By: *Salvatore G. Rotella, Jr., Esquire*

COZEN O'CONNOR

1900 Market Street • Philadelphia, PA 19103

Phone: 215.665.2000 • Fax: 215.665.2013

srotella@cozen.com

A recent, unanimous decision of the U.S. Supreme Court appears significantly to reduce the potential liability under the False Claims Act for claims health care providers file with private Medicare and Medicaid managed care organizations, as opposed to with the Medicare and Medicaid fee-for-service programs. *Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. ___ (No. 07-214, June 9, 2008).

Specifically, the Court in *Allison Engine* addressed the necessary showings to prove violations of 31 U.S.C. §§ 3729(a)(2) & 3729(a)(3), which impose civil liability, respectively, on any person who knowingly uses a "false record or statement to get a false or fraudulent claim paid or approved by the Government" and any person who "conspires to defraud the Government by getting a false or fraudulent claim allowed or paid." With respect to Section 3729(a)(2), the Court held that it was insufficient for a plaintiff merely to show that government funds were used to pay a false claim. Instead, while it is not necessary for the defendant to have presented the false claim to the government, the plaintiff "must prove that the defendant intended the false record or statement be material to the Government's decision to pay or approve the claim." With respect to Section 3729(a)(3), the Court held that a plaintiff "must show that the conspirators agreed to make use of the false record or statement" likewise to materially affect the Government's payment or approval decision with respect to a false claim.

Allison Engine involved contracts between the U.S. Navy and two shipyards to build a fleet of destroyers. The shipyards subcontracted with the Allison Engine Company to build generator sets to supply electrical power for the ships. Allison Engine then subcontracted with General Tool Company (GTC), which in turn subcontracted with Southern Ohio Fabricators, Inc. All of the funds used to pay the subcontracts ultimately came from the Federal Treasury. Two former employees of GTC brought a whistleblower action under the FCA (*i.e.*, 31 U.S.C. Secs. 3729(a)(1)-(3)), alleging that the subcontractors both (i) submitted fraudulent invoices to the shipyards seeking payment for work that had not been done to contract specifications and (ii) knowingly issued certificates of conformance that falsely claimed that the generator sets had in fact been built to the specifications.

After the case was tried to a jury, a federal district court found that the whistleblowers could not prevail on their FCA causes of action as a matter of law, because they had not introduced the

**Principal Office:
Philadelphia**

(215) 665-2000 or (800) 523-2900

Atlanta

(404) 572-2000 or (800) 890-1393

Charlotte

(704) 376-3400 or (800) 762-3575

Cherry Hill

(856) 910-5000 or (800) 989-0499

Chicago

(312) 382-3100 or (877) 992-6036

Dallas

(214) 462-3000 or (800) 448-1207

Denver

(720) 479-3900 or (877) 467-0305

Houston

(832) 214-3900 or (800) 448-8502

London

011 44 20 7864 2000

Los Angeles

(213) 892-7900 or (800) 563-1027

Miami

(305) 704-5940 or (800) 215-2137

New York Downtown

(212) 509-9400 or (800) 437-7040

New York Midtown

(212) 509-9400 or (800) 437-7040

Newark

(973) 286-1200 or (888) 200-9521

Santa Fe

(505) 820-3346 or (866) 231-0144

San Diego

(619) 234-1700 or (800) 782-3366

San Francisco

(415) 617-6100 or (800) 818-0165

Seattle

(206) 340-1000 or (800) 423-1950

Toronto

(416) 361-3200 or (888) 727-9948

Trenton

(609) 989-8620

Washington, D.C.

(202) 912-4800 or (800) 540-1355

W. Conshohocken

(610) 941-5000 or (800) 379-0695

Wilmington

(302) 295-2000 or (888) 207-2440

invoices submitted by the shipyards to the Navy and thus had not shown that the subcontractors had presented false claims directly to the Government. The United States Court of Appeals for the Sixth Circuit reversed, holding that it was sufficient to prove that a defendant intended a false claim to be paid by a contractor using Government funds.

The Supreme Court disagreed with both lower courts, noting that Section 3729(a)(2) imposed liability specifically for making a false statement “to get” a false claim “paid or approved by the Government.” This statutory language must require that the defendant made the false statement with the intent that the Government itself would pay a false claim, the Court reasoned, or the FCA would sweep far broader than its intended role of combating fraud against the Government. Otherwise, if merely showing that a claim was paid with Government funds was sufficient, then any false claim to an entity that receives substantial federal grants – like most colleges or universities, for example – could lead to liability under the statute. A claim as defined by the FCA includes claims submitted to a Government contractor as well as those submitted directly to the Government, the Court noted, and it is not a pre-requisite under Section 3729(a)(2) for the defendant to have presented a false claim to the Government. Nonetheless, for liability to attach under this provision in the context of a false statement submitted by a subcontractor or other defendant to a private entity acting as a Government contractor, the defendant must have made the submission intending for the statement “to be used by the prime contractor to get the Government to pay its claim.”

It remains to be seen how courts will apply these holdings in the context of Medicare and Medicaid reimbursement. At the very least, however, there is now a serious question as to whether a health care provider can be held liable under the FCA for submitting a false statement to get a false or fraudulent claim paid by, for example, a private entity serving as an at-risk Medicaid MCO. While the MCO ultimately uses Government funds – in the form of capitation payments from the State Medicaid agency – to pay such a claim, it cannot be said that the provider intended for the Government to rely on the false statement as a condition of making the capitation payments to the MCO, as *Allison Engine* would appear to require.

Please contact any Health Law attorney at Cozen O'Connor if you have any questions regarding this Alert.

COZEN O'CONNOR HEALTH LAW PRACTICE GROUP

Mark H. Gallant, Co-Chair	215.665.4136	mgallant@cozen.com
John R. Washlick, Co-Chair	215.665.2134	jwashlick@cozen.com
Gregory Fliszar	215.665.7276	gfliszar@cozen.com
Kimberly Bane Hynes	215.665.2022	khynes@cozen.com
Katherine M. Layman	215.665.2746	klayman@cozen.com
Melanie Martin	215.665.2724	mmartin@cozen.com
E. Gerald Riesenbach	215.665.4159	eriesenbach@cozen.com
Salvatore G. Rotella, Jr.	215.665.3729	srotella@cozen.com
Judy Wang	215.665.4737	jwang@cozen.com

© 2008 Cozen O'Connor. All Rights Reserved. Comments in the Cozen O'Connor Alert are not intended to provide legal advice. The analysis, conclusions, and/or views expressed herein do not necessarily represent the position of the law firm of Cozen O'Connor or any of its employees, or the opinion of any current or former client of Cozen O'Connor. Readers should not act or rely on information in the Alert without seeking specific legal advice from Cozen O'Connor on matters which concern them.