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CIVIL FALSE CLAIMS ACT: The False Claims Act is Amended for the First Time in More Than Twenty Years as the President Signs the Fraud Enforcement and Recovery Act of 2009

Last night, the Fraud Enforcement and Recovery Act of 2009 (“FERA”) was signed into law by the President, marking only the second time in the history of the civil False Claims Act (“FCA”) that all-embracing amendments have been made to this 1863 law. After its first large-scale revision in 1986, the FCA became the government's most successful weapon in its fight against suspected fraud on the United States, but it also became a weapon that competitors, disappointed bidders, disgruntled employees, and antagonistic agencies could use to punish and destroy those who opposed them. Congress’s stated purpose in passing the FERA was to expand the FCA's liability provisions to reach frauds by financial institutions and other recipients of TARP and economic stimulus funds, but those funds were already covered by the FCA. The real purpose of these amendments is to overturn many decisions—like the unanimous Supreme Court decision last year in *Allison Engine Co. v. United States ex rel. Sanders*—which set logical and reasonable limits on the scope of the FCA, a punitive statute that has the power to destroy any individual, institution, municipal entity, or company subject to its provisions.

The new amendments will adversely affect everyone—all government contractors and subcontractors, all healthcare providers, every public and private grantee and sub-grantee, and every other person, company, and entity that pays money to the government or receives Federal funds—by making it far easier to conduct FCA investigations and to win FCA recoveries. Quite simply, many logical defenses have been eliminated, and those who deal in any way with the Federal government are entering a whole new world in which FCA liability is much broader and easier to prove.

Prior FraudMail Alerts have commented on the FCA amendments in the FERA throughout the legislative process. See FraudMail Alert Nos. [09-05-19](#); [09-05-15](#); [09-05-13](#); [09-05-06](#); [09-04-30](#). Here is a comprehensive look at these FCA amendments. A red-line version of the changes that have now become final is available [here](#). Attached is the [final version of the FCA](#) that is effective as of May 20, 2009.

Major FCA Amendments Expanding Liability

Under the FERA, the key liability sections of the FCA remain the provisions addressing false claims, false statements supporting false claims, conspiracy, and the reverse false claims and obligation provisions. These provisions have been renumbered as well as expanded to cover additional conduct. The new sections 3729(a)(1)(A), (B), (C), and (G) extend liability to any person who:

- (A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;
- (B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;
- (C) conspires to commit a violation of subparagraph (A), (B), (D), (E), (F), or (G);
[. . .] or
- (G) knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government.

Many of the key changes are in the definitions, found in section 3729(b).

Elimination of *Allison Engine's* Intent Requirement: Under the Supreme Court's unanimous decision in *Allison Engine Co. v. United States ex rel. Sanders*, 128 S. Ct. 2123 (2008), FCA liability was limited to fraudulent statements that were designed “to get” false claims paid or approved “by the Government.” See [FraudMail Alert No. 08-06-09](#). See also John. T. Boese, Civil False Claims and Qui Tam Actions §2.06[G] (3d ed. 2006 & Supp. 2009-1). The Supreme Court's interpretation in *Allison Engine* no longer applies after the FERA because the new law removes both the “to get” language and the “by the Government” limitation in section 3729(a)(2)—as well as comparable language in sections 3729(a)(3) and (a)(7). Further, it attempts to make those changes in section 3729(a)(1)(B) effective as of June 7, 2009—the date *Allison Engine* was decided.

The Court in *Allison Engine* found that, without a clear link between a false claim and payment or approval by the government, the FCA would be “boundless” and become an “all-purpose antifraud statute.” 128 S. Ct. at 2128, 2130. To replace this rational limitation, the FERA adds a new definition of “claim,” and FCA liability will be limited only by requiring some sort of nexus to the government. The FCA now covers requests for funds to a contractor, grantee, or other recipient, if the money or property requested “is to be spent or used on the Government's behalf or to advance a Government program or interest.” The legislation does not define the key terms “used on the Government's behalf” or “to advance a Government program or interest,” and presumably courts will have to decide their meaning on a case by case basis. No one knows the scope. Are government funds invested in GM or AIG “advanc[ing] a Government program” so that a false

claim to those entities will violate the FCA and be enforced by *qui tam* relators? Recognizing that this new language is not very clear, Senator Kyle attempted to limit its scope:

[p]revious understanding, as well as commons sense, dictate that a particular transaction does not “advance a Government program or interest” unless it is predominantly federal in character—something that at least would require . . . that the claim ultimately results in a loss to the government . . . [rather than] any garden-variety dispute between a general contractor and a subcontractor simply because the general receives some federal money.

155 Cong. Rec. S4540 (daily ed. Apr. 22, 2009) (statement of Sen. Kyl). One hopes that Senator Kyle’s interpretation is accepted. Future FCA case law will determine whether and to what extent Congress succeeded in overturning *Allison Engine* through the FERA.

Materiality Requirement: In addition to the nexus to the government requirement, the FERA, at long last, specifically incorporates a materiality requirement in the False Claims Act (a position the government and relators fought, without success, for over 15 years), but it defines “material” as “having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property,” which is the “weaker” materiality standard that has been applied in some FCA cases. See John T. Boese, *Civil False Claims and Qui Tam Actions* §2.04 (Aspen Publishers) (3d ed. & Supp. 2009-2). How much of a difference will this make? That depends entirely on how literally courts will read this provision. Almost every violation or mistake is arguably “capable of influencing” a payment decision by the government, but many courts in the past have read this test as strongly limiting the application of the FCA. For example, despite applying this “weaker” materiality standard, at least two courts have held that violations of “conditions of participation” in a Federal healthcare program do not result in FCA violations. See *United States ex rel. Conner v. Salina Reg'l Health Ctr.*, 543 F.3d 1211 (10th Cir. 2008); *United States ex rel. Landers v. Baptist Mem'l Health Care Corp.* 525 F. Supp. 2d 972 (W.D. Tenn. 2007).

Conspiracy: Under the prior FCA, the conspiracy section was drafted to cover only a conspiracy “to get a false claim paid or approved.” Courts had properly interpreted this language to limit the conspiracy section to apply only to violations of then-subsection 3729(a)(1), and not to violations of the reverse false claim provision. Moreover, the conspiracy section required that the government pay the false claim. The new conspiracy section, 31 U.S.C. § 3729(a)(1)(C), expands the conspiracy section to include a conspiracy to commit a violation of any other substantive section of the FCA. The amendment also eliminates the need for the false claim to be paid or approved, and assesses liability for conspiring to commit the violation. Importantly, the word “knowingly” still does not appear in the language of the new conspiracy section, so the argument remains that a common law liability, including specific intent, is still required to prove a conspiracy under the FCA.

Liability for Overpayments: The amended reverse false claims liability provision in section 3729(a)(1)(G) quoted above extends new liability to “knowingly and improperly avoid[ing] or decreas[ing] an obligation to pay or transmit money or property to the Government.” Under this provision, there is no need for a person to have taken an affirmative act—a false statement or record—in order to conceal, avoid, or decrease the obligation to the government. This new

provision is even more dangerous because an “obligation” is specifically defined to include within the scope of FCA liability the retention of an overpayment from the government. The term “improperly” is intended to limit this liability, and would presumably exclude overpayments such as those under Medicaid that undergo a reconciliation process. Practitioners will be required, almost immediately after passage, to begin to advise clients whether they have received “overpayments” and the potential liability that could result from retention of such overpayments. Moreover, even though this provision is not retroactive, an overpayment is an overpayment, whether it occurred before or after May 20, 2009. The government and relators are almost certain to argue that this provision applies to overpayments made before the date of the legislation.

Expanded Definition of “Obligation”: The definition of “obligation” that triggers reverse false claims liability is expanded to encompass “an established duty, whether or not fixed” that arises from a contractual, grantee, licensee, or fee-based relationship, from a statute or regulation, or from the retention of any overpayment. According to government statements, this is intended to overturn, among other cases, the Sixth Circuit's decision 10 years ago in *United States ex rel. American Textile Manufacturers Institute, Inc. v. The Limited, Inc.*, 190 F.3d 729 (6th Cir. 1999) (“*ATMI*”), which defined “obligation” to include only established obligations to pay money to the government. In addition to extending new liability to the retention of overpayments, this expanded definition seeks to extend liability to duties to pay fees that were not covered previously because they were not fixed in all particulars. Whether much of an expansion is actually achieved under this provision remains to be seen because even the DOJ concedes that the new language is not intended to extend FCA liability to penalties or fines. (The reader should note that the author represented many of the defendants in the *ATMI* case.)

Effective Date: Under the effective date provision in the FERA, the FCA liability amendments would apply prospectively, with one important exception. The amendment to section 3729(a)(2) takes effect on the date that *Allison Engine* was decided—June 7, 2008—making that amendment retroactive. The retroactivity of this amendment will raise a host of practical problems in pending cases, and is almost certain to be challenged as unconstitutional because conduct which the Supreme Court defined as outside the scope of FCA liability is, retroactively, now a violation. Were this a normal civil statute, such retroactivity would be allowable. But the Supreme Court has already defined the FCA as an “essentially punitive” statute. *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765 (2000). Whether a clearly punitive statute can be applied retroactively is a completely different question.

Additional FCA Amendments

In addition to amending the FCA's liability provisions, the FERA includes four other amendments that make recoveries and investigations under the FCA easier. These amendments are as follows:

Retaliation: The prohibition against retaliation is expanded to include a “contractor, or agent,” in addition to an employee—without requiring prohibited retaliatory acts to be taken by an “employer.” Under this unusually broad definition, a retaliation action could be based on many different types of relationships that do not involve an employment contract, which could lead to unintended consequences.

Civil Investigative Demands: Under the FCA as passed in 1986, the Attorney General had to personally approve a CID, which can require deposition testimony under oath, clearly a power and a potentially abusive power. Under FERA, the Attorney General is now authorized to appoint a designee to approve a civil investigative demand, and the Attorney General or designee may share the information obtained with “any *qui tam* relator if the Attorney General or designee determine it is necessary as part of any false claims act investigation.” In addition, “official use” is broadly defined, allowing the Justice Department to use the information in communications with government personnel, consultants, and counsel for other parties in matters concerning an investigation, case, or proceeding. The expanded use and sharing of CID responses with any *qui tam* relator, consultant, and counsel is potentially harmful to businesses and individuals, and in recognition of this, one hopes it will be narrowly and carefully circumscribed by the Justice Department to curb abuses.

Relation Back: The government's complaint in intervention or amendment to a relator's complaint relates back to the date of the original complaint. Under this amendment, the government could delay its intervention in ways that could dramatically undermine a defendant's ability to defend itself. See, e.g., *United States v. Baylor Univ. Med. Ctr.*, 469 F.3d 263 (2d Cir. 2006); *United States ex rel. Health Outcomes Techs. v. Hallmark Health Sys., Inc.*, 409 F. Supp. 2d 43 (D. Mass. 2006).

Service on State or Local Authorities: The seal provision would not prevent the government or relator from serving the written disclosure, a *qui tam* complaint, or other pleading on state and local law enforcement authorities that investigate the case.

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