

“To Be or Not to Be (Retroactive)” — That is the FERA Question

Developing Case Law Suggests There May Be Nothing to *Fear* in FERA’s Retroactivity Provision

The Fraud Enforcement and Recovery Act of 2009 (FERA),¹ signed into law on May 20, 2009, made the most significant changes to the federal civil False Claims Act (FCA) since the 1986 amendments. Notably, FERA amended the FCA to eliminate the actual payment or approval requirement and applied this amendment retroactively to all “claims” under the FCA that were pending on or after June 7, 2008. The asserted purpose of this amendment and the retroactive provision was to reverse the landmark Supreme Court decision in *Allison Engine Co. v. United States ex rel. Sanders*² and to have this new standard of liability apply retroactively to *Allison Engine* (now on remand) and its progeny.

Following the enactment of FERA, however, three federal courts, including the district court in *Allison Engine*, have rejected the application of the retroactivity provision to cases pending as of June 7, 2008. Collectively, these three courts held that FERA’s retroactivity provision does not apply retroactively to “cases” because (i) Congress did not explicitly provide for such “retroactive effects;” (ii) the retroactivity provision applies only to “claims” pending, not “cases;” and (iii) the retroactive application of the FCA would violate the U.S. Constitution. FERA’s retroactivity provision and these three cases are discussed below.³

While this question will continue to be litigated, the developing case law provides company counsel and compliance personnel with important and compelling precedent that will aid in the assessment and defense of FCA matters. These developments are of particular note to the pharmaceutical industry, which has been the target of increased government investigations and FCA enforcement actions in recent years. Organizations nonetheless



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should note that while the retroactivity provision may be subject to judicial challenge, the amended FCA is here to stay, and therefore, compliance personnel should ensure that corporate compliance programs effectively monitor claims activities.

THE FALSE CLAIMS ACT

Since the expansion of the FCA's scope through the 1986 amendments, the FCA has been the government's chief weapon in combating fraud in the procurement of federal contracts and funds. This weapon has been used most effectively against the health care industry in general, and the pharmaceutical industry in particular, where FCA actions have resulted in historic settlement amounts. Indeed, the Department of Justice (DOJ) reported on November 19, 2009 that, working with relators' counsel, it had recovered \$1.6 billion via FCA settlements and judgments against the pharmaceutical and health care industry in fiscal year 2009 alone.⁴

The FCA provides for treble damages and civil monetary penalties of \$5,500 to \$11,000 per claim and authorizes whistleblowers, known as *qui tam* relators, to file suit on behalf of the United States against those who fraudulently claim funds from the federal government.⁵ A successful *qui tam* relator can share in as much as 30 percent of the government's recovery under the FCA. Accordingly, the FCA has long played a large role in companies' assessment of risk and monitoring of their claims activity.

FERA'S AMENDMENTS AND RETROACTIVITY PROVISION

Among other amendments to the FCA, FERA amended former Section 3729(a)(2) (now renumbered and codified at Section 3729(a)(1)(B)) to eliminate the requirement that government prosecutors or relators' counsel show actual payment or approval of a claim by the government.⁶ Accordingly, this amendment, in connection with FERA's revised definition of "claim," extends the FCA's coverage to any false or

fraudulent claim for government money or property, irrespective of whether (i) the claim is presented to a government official or employee, (ii) the government holds title or has physical custody of the money, or (iii) the defendant specifically intended to defraud the government.

As written, this amendment effectively reverses the Supreme Court's decision in *Allison Engine* (holding that the FCA requires the government to prove that a defendant intended for the government itself, rather than a government contractor, to pay the claim to establish a violation),⁷ and the U.S. Circuit Court for the District of Columbia's decision in *United States ex rel. Totten v. Bombardier Corp.* (holding that to establish liability under the FCA the government must prove that the claim was presented to an officer or employee of the U.S. government, not just a government grantee).⁸

Section 4(f)(1) of FERA applies the amended FCA provision retroactively to all claims under the FCA pending as of June 7, 2008,⁹ two days prior to the date of the Supreme Court's *Allison Engine* decision. This provision threatens to expose companies who interact with the government — government contractors, subcontractors, health care providers, public or private grantees and sub-grantees, and other entity or individual who pays money to or receives federal funds from the government — to the risk of FCA liability that could not previously have been anticipated and avoided.

Three federal courts, however, have recently rejected the application of the retroactivity provision to pending "cases." This may be the beginning of valuable precedent for company counsel and compliance officers to assess potential claims liability and defend FCA matters.

United States ex rel. Sanders v. Allison Engine Co.

On October 27, 2009, the U.S. District Court for the Southern District of Ohio in *United States ex rel. Sanders v. Allison Engine Co.*, now on remand from the Supreme Court,

granted the defendants' motion to preclude retroactive application of the amended FCA provision (or alternatively to declare FERA unconstitutional) and held that (i) the plain language of the FERA retroactivity provision applies only to "claims" pending on or after June 7, 2008, not "cases;" and (ii) even if the retroactivity provision applied to "cases," application of the retroactivity provision would violate the Ex Post Facto Clause of the Constitution.¹⁰

In *Allison Engine*, the relator asserted a substandard quality theory of liability deriving from the defendant's submission of claims for payment with knowledge that the generators manufactured for the Navy Destroyers did not conform to contract specifications or Navy regulations. At the close of the relator's trial, the district court granted the defendants' motion for judgment as a matter of law on the relator's substandard quality theory, finding a lack of evidence that the defendants presented any false claim to the government. The Sixth Circuit reversed and the Supreme Court subsequently vacated the Sixth Circuit's decision and remanded, holding, in relevant part, that "a plaintiff asserting a § 3729(a)(2) claim must prove that the defendant intended that the false record or statement be material to the Government's decision to pay or approve the false claim."¹¹

In other words, the former FCA provision demanded "that the defendant made a false record or statement for the purpose of getting a false or fraudulent claim paid or approved by the Government."¹² Accordingly, the Court held that "a subcontractor violates § 3729(a)(2) if the subcontractor submits a false statement to the prime contractor intending for the statement to be used by the prime contractor to get the Government to pay its claim."¹³

On remand, the district court held that the plain language of the retroactivity provision applied only to "claims" — defined in FERA's amendments to the FCA as "any request or demand, whether under a contract or otherwise, for money or property

and whether or not the United States has title to the money or property" — not to "cases" and, therefore, was not applicable to the defendants' claims for payment, which were paid in the late 1980s and early 1990s. Relying heavily on the decision by the U.S. District Court for the District of Columbia in *United States v. Science Applications International Corp.* (discussed below), the district court found that this conclusion was supported by FERA's legislative history and a comparison with Section 4(f)(2), which specifically applies to "cases" rather than "claims." In the alternative, the district court held that even if Section 4(f)(1) applied to "cases," application of the retroactivity provision would violate the Ex Post Facto Clause of the Constitution because the FCA is punitive in purpose and effect and "retroactive application of the amendments to the FCA would impose punishment for acts that were not punishable prior to enactment of the amendments."

United States v. Science Applications International Corp.

On September 14, 2009, the U.S. District Court for the District of Columbia in *United States v. Science Applications International Corp.* (SAIC) held that the retroactivity provision only applies retroactively to "claims," not "cases," pending on or before June 7, 2008.¹⁴

In SAIC, the government alleged that SAIC violated the FCA by failing to disclose organizational conflicts of interest (OCI) under its 1992 and 1999 contracts with the Nuclear Regulatory Commission (NRC) and making false statements and certifications "that SAIC had no OCIs, for the purpose of getting the NRC to pay SAIC's false and fraudulent vouchers." Following a jury verdict and entry of judgment in favor of the government, SAIC moved for judgment as a matter of law. The government countered that the retroactivity provision applies the amended FCA to all cases pending on or before June 7, 2008, and therefore, "FERA eliminates the United States' bur-

den of proving that SAIC made false statements for the purpose of getting claims paid [by the government] and moots SAIC's argument that the government failed to do so at trial."

Affirming the jury verdict on alternative grounds, the court found FERA's statutory definition of "claims" to refer only to "requests or demands...for money or property" and, thus, rejected the government's arguments that FERA's retroactivity provision applies to pending "cases." The court similarly held that "FERA's legislative history supports applying the statutory definition of 'claim' when interpreting the reach of" the retroactivity provision.

Moreover, the court held that a comparison between Section 4(f)(1), which refers only to "claims," and Section 4(f)(2), which refers to "cases," "supports the conclusion that Congress did not intend 'claims' in subsection 4(f)(1) to mean 'cases.'" Accordingly, the court concluded that the amended FCA provision did not apply in this case because none of SAIC's claims at issue were pending before June 7, 2008. The court declined to address SAIC's constitutional arguments.

United States v. Aguillon

On June 24, 2009, the U.S. District Court for the District of Delaware held in *United States v. Aguillon* that FERA's amendment to the FCA did not apply retroactively under the Supreme Court's *Landgraf* analysis because Congress did not explicitly provide for such "retroactive effects."¹⁵

In *Aguillon*, the defendant, a physician, was alleged to have "submitted false Medicare claims by billing the United States at a higher rate 'than was warranted by the medical services necessary or actually performed in order to receive a higher rate of reimbursement.'" Although the court preserved the government's Section 3729(a)(1) claim, the court dismissed the government's subsection (a)(2) claim because it found that the government failed to allege "actual payment or approval" by admitting that the initially false Medicare claims were

either denied or subsequently "down coded" to the correct, lower rate of reimbursement prior to being paid by the government. While the court noted that the FCA was amended by FERA "to eliminate the actual payment or approval requirement," the court applied the Supreme Court's two-step *Landgraf* "retroactive effects" analysis to conclude that the new subsection (a)(1)(B) did not apply retroactively because "Congress has not provided the requisite instruction necessary for the amendments to be used to cause retroactive effects."

The government filed a motion for reconsideration on June 30, arguing that the court misread FERA by failing to note FERA's retroactivity language. This argument is likely to be dismissed in light of the courts' decisions in *Allison Engine* and *SAIC*.

LESSONS FOR COMPLIANCE OFFICERS

The 2009 amendments to the FCA dramatically expand the scope of liability for all industry sectors and significantly alter the rules by which companies assess their FCA exposure risk. If this burgeoning case law develops into strong precedent, however, company counsel and compliance officers may find some comfort that FERA's retroactivity provision will not expose companies to unanticipated and unavoidable FCA liability. To the extent the substantive liability amendments are not retroactive, company counsel and compliance officers may continue to evaluate their companies' liability forecasts for any pending matters and potential violations that may have occurred before May 20, 2009, in the context of the Supreme Court's decision in *Allison Engine* and other important decisions.

Regardless of the outcome of these cases or survival of the retroactivity provision, FERA's amendments to the FCA task organizations with the added responsibility of preventing even inadvertent false claims from being submitted, either to the government or a government contractor or grantee. As always, each company's corporate compliance team should ensure that suffi-

cient checks and balances are in place to detect potentially fraudulent claims before they are submitted.

Endnotes:

1. Pub.L. 111-21, 123 Stat. 1617 (2009).
2. 128 S. Ct. 2123 (2008).
3. One case, *United States ex rel. Walner v. Northshore University Health System*, nominally applied the new Section 3729(a)(1)(B) retroactively because the relator's case was pending as of June 7, 2008. ___ F. Supp. 2d ___, No. 08-C-2642, 2009 WL 3055357 (N.D. Ill. Sept. 18, 2009). The court, however, continued to apply the pre-amendment analysis for former Section 3729(a)(2), in the absence of any guidance from other courts within the circuit, and dismissed the relator's claim without prejudice for failure to state his claim with particularity as required by Federal Rule of Civil Procedure 9(b).
4. Press Release, *Department of Justice, Justice Department Recovers \$2.4 Billion in False Claims Cases in Fiscal Year 2009; More Than \$24 Billion Since 1986* (Nov. 19, 2009) (DOJ Press Release).
5. See 31 U.S.C. § 3729, et seq.
6. See 31 U.S.C. § 3729(a)(1)(B) (applying to any person who "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim.") (formerly 31 U.S.C. § 3729(a)(2)).
7. 128 S. Ct. 2123.
8. 380 F.3d 488 (D.C. Cir. 2004).
9. Pub.L. 111-21, § (4)(f)(1), 123 Stat. 1617 (2009).
10. ___ F. Supp. 2d ___, Case No. 1:95-cv-970, 2009 WL 3626773 (S.D. Ohio Oct. 27, 2009).
11. 128 S.Ct. 2123, 2126 (2008).
12. *Id.* at 2130.
13. *Id.*
14. ___ F. Supp. 2d ___, No. 04-1543(RWR), 2009 WL 2929250 (D.D.C. Sept. 14, 2009).
15. See 628 F. Supp. 2d 542 (D. Del. 2009).

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