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Courts Reject Application of FERA's Retroactivity Provision to Pending "Cases"

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Since the Fraud Enforcement and Recovery Act of 2009 (FERA) was signed into law by President Obama on May 20, three federal courts have rejected the application of FERA's retroactivity provision to "cases" pending on June 7, 2008. Collectively, these three courts held that FERA's amendment to former 31 U.S.C. § 3729(a)(2) (now renumbered and codified at 31 U.S.C. § 3729(a)(1)(B)) does not apply retroactively to "cases" because (i) Congress did not explicitly provide for such "retroactive effects" per the Supreme Court's *Landgraf* analysis; (ii) Section 4(f)(1) of FERA applies only to "claims" pending, not "cases"; and (iii) the retroactive application of the False Claims Act (FCA) would violate the U.S. Constitution's Ex Post Facto Clause. FERA's retroactivity provision and these three cases are discussed below.[1] While this question will continue to be litigated, the developing case law provides important and compelling precedent that will aid in the assessment and defense of FCA matters.

The Fraud Enforcement and Recovery Act's Retroactivity Provision

In Section 4(f)(1) of FERA, Congress sought to apply retroactively FERA's amendment to former Section 3729(a)(2) (new Section 3729(a)(1)(B))—eliminating the "actual payment or approval" requirement—to all claims under the FCA pending as of June 7, 2008, two days prior to the date of the Supreme Court's landmark decision in *Allison Engine Co. v. United States ex rel. Sanders*, 128 S. Ct. 2123 (2008).

FERA's amendment to former Section 3729(a)(2) extends the FCA's coverage to any false or fraudulent claim for government money or property, irrespective of whether the claim is presented to a government official or employee, whether the government holds title or has physical custody of the money, or whether the defendant specifically intended to defraud the government. As written, this amendment effectively reverses the Supreme Court's decision in *Allison Engine* (holding that Section 3729(a)(2) of the FCA requires the government to prove that a defendant intended for the government

[1] One case, *United States ex rel. Walner v. Northshore University Health System*, nominally applied new Section 3729(a)(1)(B) retroactively because the relator's case was pending as of June 7, 2008. No. 08-C-2642, 2009 WL 3055357 (N.D. Ill. Sept. 18, 2009). However, the court 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).

itself, rather than a government contractor, to pay the claim to establish a violation), and the U.S. Circuit Court for the District of Columbia's decision in *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488 (D.C. Cir. 2004) (holding that to establish liability under Section 3729(a)(1) the government must prove that the claim was presented to an officer or employee of the United States government, not just a government grantee). FERA's other amendments to the FCA are discussed in detail in two previous LawFlashes, published May 20, 2009 (available online at http://www.morganlewis.com/pubs/LIT-LF_ObamaSignsFERA2009_20may09.pdf) and April 30, 2009 (available online at http://www.morganlewis.com/pubs/LIT_ScourgeOfFraud_LF_30apr09.pdf), respectively.

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

On October 27, 2009, the U.S. District Court for the Southern District of Ohio in *United States ex rel. Sanders v. Allison Engine*, now on remand from the Supreme Court, granted the defendants' "Motion to Preclude Retroactive Application of 31 U.S.C. § 3729(a)(1)(B) or Alternatively to Declare FERA Unconstitutional" and held (i) that the plain language of Section 4(f)(1) applies only to "claims" pending on or after June 7, 2008, not "cases"; and (ii) 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. Case No. 1:95-cv-970 (S.D. Ohio Oct. 27, 2009) (slip op.) (available online at http://www.morganlewis.com/documents/AllisonEngineSlipOp.pdf).

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." 128 S.Ct. 2123, 2126 (2008). In other words, Section 3729(a)(2) demands "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." *Id.* at 2130. 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." *Id.*

On remand and upon review of defendants' specific motion, 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 Section 4(f)(1) only applies retroactively to "claims," not "cases," pending on or before June 7, 2008. No. 04-1543(RWR), 2009 WL 2929250 (D.D.C. Sept. 14, 2009).

In *SAIC*, the government alleged that SAIC violated former Sections 3729(a)(1) and (a)(2) 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 or, in the alternative, for a new trial. In its briefing, the government filed a notice of supplemental authority arguing "that section 4(f)(1) retroactively applies the new § 3729(a)(1)(B) to all cases pending on or before June 7, 2008" and, therefore, "FERA eliminates the United States' burden 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 clause applies to pending "cases" under former Section 3729(a)(2). The court similarly held that "FERA's legislative history supports applying the statutory definition of 'claim' when interpreting the reach of FERA section 4(f)(1)." 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 new Section 3729(a)(1)(B) "[did] not apply in this case because none of SAIC's claims at issue here were pending before June 7, 2008." The court declined to address SAIC's Ex Post Facto Clause 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 former Section 3729(a)(2) did not apply retroactively under the Supreme Court's *Landgraf* analysis because Congress did not explicitly provide for such "retroactive effects." *See* Civ. No. 08-789-SLR, 2009 WL 1789894 (D. Del. June 24, 2009).

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*.

The 2009 FCA amendments expand the scope of liability for all industry sectors and present a game changer for assessing a company's exposure risk. To the extent the substantive liability changes are not retroactive, the liability forecast for many pending matters and potential violations that may have occurred before May 1, 2009, may be assessed in the context of important judicial decisions including the Supreme Court's decision in *Allison Engine*.

Morgan Lewis will continue to monitor and report on these developments in future LawFlashes.

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