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CIVIL FALSE CLAIMS ACT: Here They Go Again, Round III: Financial Reform Bill Contains More FCA Amendments

It seems that Congress cannot let any opportunity to amend the False Claims Act go to waste, and this month's legislative frenzy brings with it yet another amendment to the FCA, the third amendment in a little over a year. The House-Senate Conference Committee for the financial reform bill has approved two amendments to the so-called "whistleblower protection" provision of the FCA, 31 U.S.C. § 3730(h). *See* H.R. 4173, 111th Cong. (2010). After Congress completely botched the amendment of this section in the FERA amendments in 2009, *see* FraudMail Alert No. 09-05-21, the Committee has approved amendments that will (1) once again revise the definition of "protected conduct," and (2) provide, for the first time, a three-year statute of limitations for actions brought under Section 3730(h), resolving the issue the Supreme Court addressed in *Graham County Soil & Water Conservation District v. United States ex rel. Wilson*, 545 U.S. 409 (2005) ("*Graham County I*"). *See* FraudMail Alert No. 05-06-20. A redline comparison of the Committee's and FERA's retaliation amendments is attached.

Because the Committee's amendments redefining "protected conduct" would remove defenses to retaliation suits, if enacted, these amendments should only apply prospectively to conduct occurring after their date of enactment. Even applying the amendments prospectively introduces new terms and issues for interpretation that will add to the thicket of alternatives already facing litigants and judges in this fast-changing area of the law.

"Protected Conduct" Amendments

Prior to the FCA amendments in the Fraud Enforcement and Recovery Act of 2009 ("FERA"), a retaliation claim under Section 3730(h) required three basic elements: (1) the employee engaged in "protected conduct," defined as lawful acts in furtherance of an FCA action, (2) the employer knew about the protected conduct, and (3) the employer retaliated against the employee because of the protected conduct. See John T. Boese, Civil False Claims and *Qui Tam* Actions §4.11[B] (Aspen Publishers, Wolters Kluwer Law & Business) (3d ed. 2006 & Supp. 2010-1). FERA expanded the group of protected persons to "any employee, contractor, or agent," and it removed the reference to discrimination by an "employer." The reason for these changes was to eliminate the requirement that an employee-employer relationship was necessary for a retaliation violation—a requirement that excluded independent contractors from bringing retaliation actions. *See id*. at §4.11[B][2][b].

FERA also changed the conduct required for protection—from lawful acts "in furtherance of an action under this section," to "other efforts to stop 1 or more violations." Thus, to prove retaliation under FERA, rather than investigating the fraud in order to file a *qui tam* suit, the person must actually try *to stop* the fraud itself. This narrowed, rather than enlarged, the retaliation cause of action. The Committee's amendment restores the original scope of protected conduct so that lawful acts in furtherance of a *qui tam* suit as well as "other efforts to stop 1 or more violations" are both covered. However, the Committee amendment also broadens the definition of conduct beyond the new boundaries established under FERA by expanding the group of actors who may engage in the conduct to include "associated others." This ambiguous terminology undoubtedly will be used to support whistleblower retaliation claims based on the conduct of persons and businesses that are not in any relationship with employers, and therefore would apply in circumstances well beyond FERA's independent contractor rationale. The only other requirement for this protection is that the conduct of the associated others must be "lawful."

In any event, the new relationships and requirements in FERA and the latest amendments are subject to conflicting interpretations. Defining protected conduct of an "employee," "contractor," "agent," and "associated others," as well as determining what qualifies as discrimination "in the terms and conditions of employment" by non-employers, will surely be subject to debate and litigation. Because these amendments are substantive—they seemingly would enlarge liability and remove defenses—any dispute over which version of Section 3730(h) applies should be resolved under the principles that govern retroactive application of amendments to conduct occurring before their enactment, rather than by simply applying the newest version of the law. *See Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 130 S. Ct. 1396, 1400 n.1 (2010); *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 948 (1997).

Statute of Limitations Amendment

For the first time, the Committee has added a statute of limitations for retaliation in Section 3730(h), which requires these claims to be brought no more than three years from the date when the retaliation occurred. The lack of any statute of limitations for retaliation had prompted the Supreme Court to determine what limitation should be applied in *Graham County I*. The relator and the United States took the position in *Graham County I* that applying the FCA's six-year limitation on *qui tam* actions would serve the purposes of uniformity and certainty, but the Court rejected their interpretation as unsupported by the statute itself and because it would lead to absurd results. Indeed, the Court found that substantive FCA violations and retaliation were separate causes of action, that a substantive violation of the FCA was not required for a violation of Section 3730(h), and that the limit for retaliation should begin to run when the cause of action for that violation accrued rather than when a substantive FCA violation occurred. The Court established a default rule under which state statutes of limitations for analogous state causes of action are applied to FCA retaliation actions.

The Committee's three-year statute of limitations amendment finally fills the void that the Supreme Court's default rule addressed in *Graham County I*. While a three-year limitation is longer than many analogous state statutes of limitations, uniformity will eventually be achieved when this amendment takes effect.

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