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CIVIL FALSE CLAIMS ACT: D.C. District Court Decision Limits Retroactive Effect of FERA Amendment to Pending "Claims," Not Pending Cases

The first major decision interpreting the retroactivity of one amendment to FCA liability in the Fraud Enforcement and Recovery Act of 2009 ("FERA") has limited the retroactive application of that amendment, holding that it applies to FCA "claims"—not FCA cases—that were pending as of June 7, 2008. Prior to FERA, liability for false statements made to get the government to pay or approve a false claim has been governed by 31 U.S.C. § 3729(a)(2) (now 31 U.S.C. § 3729(a)(1)(B)). In *Allison Engine Co., Inc. v. United States ex rel. Sanders,* 128 S. Ct. 2123 (U.S. 2008), the Supreme Court interpreted this provision to require proof that the defendant made the false statement for the purpose of getting the government to pay or approve the claim. FERA amended this provision to remove the intent requirement. *See* FraudMail Alert No. 09-05-21. Section 4(f)(1) of the FERA also attempts to apply this new liability provision retroactively as of two days before *Allison Engine* was decided.

In *United States v. Science Applications International Corp.,* No. 04-1543, 2009 WL 2929250 (D.D.C. Sept. 14, 2009) ("*SAIC*"), the government argued that the amendment applied to all *cases* pending on June 7, 2008.[1] The D.C. District court rejected this argument, holding that the FERA's statutory language and legislative history were contrary to the government's position. Because the requests for payment at issue in this case occurred well before June 7, 2008, no "claims" were pending as of that date. The FERA amendment—even assuming it could be constitutionally applied retroactively—did not cover the conduct at issue because the claims occurred before the amendment's effective date. The court did not reach the more searching constitutional question of whether retroactive application of the FERA's amendment would violate the ex post facto and due process clauses.[2]

Procedural Background

The United States alleged that the defendant failed to disclose organizational conflicts of interest under two contracts it entered into in 1992 and 1999 with the Nuclear Regulatory Commission.

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[1] The reader should note that the authors and their firm have represented this defendant in other matters but did not appear for the defendant in this case.

[2] Moreover, a number of the court's other holdings (particularly its validation of "collective knowledge" as a basis for scienter under the FCA) are troubling and highly questionable.

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The government asserted that the defendant violated sections 3729(a)(1) and (a)(2) of the FCA by making false statements and certifications that it would not enter into other contracts or consulting agreements with any organization that could create a conflict of interest under the NRC contracts. After the jury returned a verdict for the government, the defendant moved for judgment as a matter of law and for a new trial, arguing, among other things, that its other work did not conflict with the requirements in the NRC contracts, that its interpretation of its organizational conflict of interest obligations was reasonable, and that the judgment improperly relied on the "collective knowledge" theory.

Post trial, the United States filed a notice of supplemental authority, arguing that it did not have the burden of proving that the defendant made false statements for the purpose of getting claims paid by the government (known as the *Allison Engine* intent requirement) because the FERA eliminated that requirement retroactively. While finding alternative grounds to affirm the jury verdict, the court soundly rejected the argument that the 2009 amendments could be retroactively applied to this case.

The Court's Interpretation of the Word "Claims"

Section 4(f)(1) of FERA provides that:

> Subparagraph (B) of section 3729(a)(1) . . . shall take effect as if enacted on June 7, 2008, and apply to all *claims* under the False Claims Act . . . that are pending on or after that date. (emphasis added).

The remainder of the FCA amendments in FERA relating to substantive liability specifically apply only to conduct occurring after May 20, 2009, the day the President signed FERA into law. The court in *SAIC* found that the term "claims" in this effective date provision was defined in section 3729(c) of the statute as a "request or demand . . . for money or property." Because no such "claims" were pending on June 7, 2008, the FERA's amendment removing the *Allison Engine* intent requirement simply did not apply to the defendant's claims to the NRC, the court held. Additionally, the court found that the Senate report accompanying the FERA supported this interpretation because it referred to "claims" when discussing a defendant's request for payment, and to "cases" when discussing civil actions for FCA violations. The court also pointed out that the full text of the FERA's effective date provision further supported this interpretation because FERA section 4(f)(2) referred to the effective date for other amendments in "cases" pending on the FERA's date of enactment. For this reason, the court did not have to resolve the constitutional validity of the retroactive effective date of the FERA's liability amendment under the ex post facto and due process clauses, an issue that will be litigated until it is definitively resolved.

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