Expanded False Claims Liability

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Besides its changes to criminal law described on page 1, the Fraud Enforcement and Recovery Act of 2009 (FERA), signed into law on May 20, 2009, significantly increases companies’ exposure to civil lawsuits brought by the government and whistleblowers. FERA amends — for the first time in 23 years — the False Claims Act (FCA), 31 U.S.C. § 3729, often employed by *qui tam* relators to pursue fraud against the government, including alleged fraud involving health care providers, government contractors, and now the use of Troubled Asset Relief Program (TARP) funds. These expansions invite both new legal battles and a likely increase in FCA lawsuits, including those involving parallel criminal and civil proceedings.

‘Presentment’ Unnecessary

FERA greatly increases the potential liability of federal subcontractors and subgrantees. The FCA amendments specifically respond in part to two court decisions — *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488 (D.C. Cir. 2004), and *Allison Engine Co. v. United States ex rel. Sanders*, 128 S. Ct. 2123 (2008) — that, according to a Senate Judiciary Committee report, undermined the FCA’s effectiveness by “limiting the scope of the law and allowing subcontractors and non-governmental entities to escape responsibility for proven frauds.”

The former FCA provision addressed by *Totten*, 31 U.S.C. § 3729(a)(1), involved the issue of the “presentment” of a claim. Prior to FERA, former § 3729(a)(1) imposed liability on any person who “knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval.” In an opinion authored by now Chief Justice John G. Roberts, *Totten* interpreted this provision to require that a claim be directly presented to an officer or employee of the government. This meant that § 3729(a)(1) did not reach false claims presented by subcontractors and subgrantees to government contractors and grantees, even though the claims ultimately were paid with government funds. The *Totten* court, writing that its job was to read statutes as written, not rewrite them “in an effort to achieve that which Congress is perceived to have failed to do,” stated that to hold otherwise would create interpretive problems and make the potential scope of the FCA boundless.

In response to these “perceived failures,” FERA amends § 3729(a)(1) as a new § 3729(a)(1)(A), imposing liability on “any person who … knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval.” By removing the language that required a false claim to be presented to “an officer or employee of the United States Government or a member of the Armed Forces,” the amendment means that direct presentment need not be proven in order for liability to attach. Rather, a subcontractor or subgrantee — or any other defendant — violates § 3729(a)(1) whenever he knowingly makes a false claim to obtain money or property, any part of which is provided by the federal government, regardless of whether he deals with the government directly or through a private third-party. In the health care field, this amendment may have a significant impact on entities which contract with managed care organizations receiving Medicare and Medicaid funds.

Intent Requirement Stricken

Section 3729(a)(2) of the pre-FERA version of the FCA imposed liability on any person who “knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government.” In *Allison Engine*, the other case targeted in the Senate Judiciary Committee report regarding FERA, the Supreme...
FERA states that it is clarifying the law, and provides that the amendments embodied in § 3729(a)(1)(B) are retroactive to June 7, 2008, the date of the Allison Engine decision. This provision regarding retroactive application is controversial and will be subjected to opposition and litigation on ex post facto and due-process grounds.

**Retention of Overpayments**

FERA provides the FCA’s first definition of “obligation,” specifying that “obligation” now includes “an established duty arising … from the retention of any overpayment.” The impact is significant to what’s now § 3729(a)(1)(g), which prohibits the knowing use of a false record material to “an obligation to pay or transmit money or property to the Government,” and the knowing concealment or improper avoidance of such an obligation. Applying the new definition to § 3729(a)(1)(g) opens numerous interpretive issues. For example, what does it mean to “improperly avoid” an obligation to repay the government? Can “improper avoidance” occur in the absence of evidence of concealment or deception? Such uncertainties create thorny decisions for institutions — and the FCA action.

**Other Provisions**

FERA makes other changes that may significantly impact FCA litigation. In a move embraced by whistleblower and plaintiffs’ attorneys, the FCA no longer requires the Attorney General to approve all requests for a civil investigative demand (CID), which allows the Department of Justice (DOJ) to require the production of testimony, documents, and other information before the filing of an FCA litigation. Now, the Attorney General may delegate within DOJ the ability to approve a CID. Perhaps more importantly, DOJ may share any information obtained from a CID with any qui tam relator, if DOJ determines that such sharing “is necessary as part of any false claims act investigation.” This authority to share information will hone the ability of the government and private litigants to assist each other in developing their respective cases against a common opponent.

Other expansions abound. The prohibition against whistleblower retaliation relating to allegations of FCA violations has grown and now protects contractors and agents in addition to employees. FERA extends the limitations period by providing that the government’s complaint intervening in a qui tam case generally relates back to the filing date of the relator’s original complaint, thereby overruling United States v. Baylor University Medical Center, 469 F.3d 263 (2d Cir. 2006). Further, if a state or local government is a co-plaintiff with the federal government, then the federal government or a relator may serve them with the complaint, pleadings, and evidence while the case remains under seal. Finally, the government may recover from the defendant its costs in bringing the FCA action.

**Conclusion**

These and other changes will be the subject of litigation for years to come. The bottom line is that the arsenal of weapons available to the government and private plaintiffs under the FCA has grown, both quantitatively and qualitatively.

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