FERA Enactment Brings Important Changes to the False Claims Act

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On May 6, 2009, President Obama signed into law the Fraud Enforcement and Recovery Act of 2009 ("FERA"), thereby instituting several important changes to the False Claims Act ("FCA"). This client advisory summarizes those changes.

Allison Engine is Retroactively Overturned

The most noteworthy impact of FERA is its legislative reversal of the Supreme Court's 2008 decision in *Allison Engine Co. v. United States, ex rel. Sanders, et al.*, 128 S.Ct. 2123 (2008). In *Allison Engine*, the Supreme Court interpreted the FCA's imposition of liability upon a person who knowingly uses a "false record or statement to get a false or fraudulent claim paid or approved by the Government," (31 U.S.C. § 3729(a)(2)) or "conspires to defraud the Government by getting a false or fraudulent claim allowed or paid," (31 U.S.C. § 3729(a)(3)) as requiring proof "that the defendant intended that the false record or statement be material to the Government's decision to pay or approve the false claim." Under *Allison Engine*, it was not sufficient to simply show that the funds used to pay the false claim ultimately came from the Government.

FERA has nullified *Allison Engine* by eliminating several prerequisites for liability under § 3729(a). It removes § 3729(a)(1)'s requirement that for liability to attach a false claim must be presented "to an officer or employee of the United States Government or a member of the Armed Forces of the United States." It also removes the former provision of § 3729(a)(2) that liability is imposed when one 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" and instead requires simply that a person use, or cause to be made or used, "a false record or statement material to a false or fraudulent claim." FERA amends § 3729(b) to define "material" as "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property."

Further, FERA significantly broadens the definition of "claim" to include "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*, that . . . is made to a contractor, grantee, or other recipient, *if the money or property is to be spent or used on the Government's behalf or to advance a Government program or interest*, and if the Government provided *or has provided* any portion of the money or property requested or demanded. . . . [emphasis added].

Moreover, FERA's effective date provision specifies that the amendment to § 3729(a)(1) shall be deemed to have taken effect as of June 7, 2008, the date on which *Allison Engine* was decided, to ensure that the Supreme Court's unanimous decision is rendered a nullity.

The result of these changes is to undo *Allison Engine* and the cases that followed it, and to conceivably allow for potential FCA liability in a vast array of situations in which Government funding has not played any role whatsoever.

Conspiracy Under The FCA Is Expanded

Under the former § 3729(a)(3), a person was liable under the FCA only if he conspired to "defraud the Government by getting a false or fraudulent claim allowed or paid." FERA expands liability to encompass a conspiracy to violate any provision of § 3729(a).

Liability For Overpayments By The Government Is Expanded

The former § 3729(a)(7) imposed liability on anyone who "knowingly makes, uses, or causes to be made or used, a false statement to conceal or avoid, or decrease an obligation to pay or transmit money or property to the Government." The recodified provision is now expanded to include liability if one "knowingly conceals or avoids or decreases" an obligation to the Government. In other words, an affirmative action is no longer required; if one knowingly does not pay an obligation to the Government, there is potential liability. FERA also inserts a broad definition of "obligation" in § 3729(b) which includes "an established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment."

"Relation Back" Doctrine Now Applies To Government Actions Under The FCA

In *United States v. The Baylor University Medical Center, et al.*, the Second Circuit held that the Government may not rely on the "relation back" provisions of Federal Rule of Civil Procedure 15(c)(2) for statute of limitations purposes when calculating the time by which it must file its complaint-in-intervention. The Court's reasoning was straightforward. "[T]he touchstone for relation back pursuant to Rule 15(c)(2) is notice, i.e., whether the original pleading gave a party 'adequate notice of the conduct, transaction, or occurrence that forms the basis of the claim or defense.'" Since *qui tam* complaints awaiting a decision by the Government as to whether or not it will intervene are filed under seal, the defendant is not given sufficient notice of the allegations by the *qui tam* relator's complaint to invoke Rule 15(c)(2).

FERA rebuffs *Baylor's* logic by inserting a new § 3731(c), which provides in pertinent part that "any . . .Government pleading shall relate back to the filing date of the complaint of the person who originally brought the action, to the extent that the claim of the Government arises out of the conduct, transactions, or occurrences set forth, or attempted to be set forth, in the prior complaint of that person."

Anti-Retaliation Provisions Have Been Expanded

Section 3730(h) has been expanded to provide not just employees, but "contractor[s]" and "agent[s]" with civil remedies for retaliatory acts taken against them.

The Use Of Civil Investigative Demands Has Been Broadened

FERA amends § 3733(a) to allow designees of the Attorney General to issue civil investigative demands (CIDs). Further, § 3733(a)(1)(D) now specifically permits the Attorney General or a

designee to share information obtained under a CID with a *qui tam* relator if the Attorney General or designee determines "it is necessary as part of any false claims act investigation." Finally, § 3733(k)(8) provides an expansive definition of "official use" to include, among other things, communications between DOJ and any Federal, State, or local government agency, or a contractor of a Federal, State or local agency; interviews of *qui tam* relators or other witnesses, in connection with a case, investigation or proceeding.

Conclusion

While these changes appear to be far-reaching, over the coming months we will have to monitor FCA litigation closely to ascertain their ultimate effect.

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