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THE FALSE CLAIMS ACT AMENDMENTS: THE CURIOUS CONUNDRUM OF RETROACTIVITY

Melissa A. M. Hudzik, Esq.
David S. Greenberg, Esq.
Arent Fox LLP
Washington, DC[1]

Introduction

Much has been written in recent months about the Fraud Enforcement and Recovery Act of 2009 ("FERA") and its amendments to the False Claims Act ("FCA").[2] FERA has drawn the interest of practitioners and commentators alike because the 2009 Amendments represent the most significant overhaul to the FCA in more than twenty years.[3] Proponents of the 2009 Amendments declared that these changes were intended to "reflect the original intent" of the FCA, override certain court decisions limiting the scope of the law, and "improve[] one of the most potent civil tools for rooting out waste and fraud in Government . . . ."[4]

Accordingly, the healthcare industry, a frequent target of FCA investigations and litigation, will be well-advised to understand: (i) how liability has been expanded in "false record or statement"[5] and conspiracy[6] actions; (ii) how retaining overpayments can trigger the FCA;[7] (iii) that contractors and agents can file suit for retaliatory acts;[8] (iv) that government complaints in intervention now "relate back" to whistleblower complaints, thus extending the statute of limitations;[9] and (v) how the use of civil investigative demands may become more common.[10]

What has received far less scrutiny than the substance of the amendments is *when* these dramatic changes will affect government contractors and healthcare. Seeking to avoid any confusion about the implementation of the 2009 Amendments, Congress included the following implementation language in section 4(f) of the bill:

> (f) EFFECTIVE DATE AND APPLICATION. – The amendments made by this section shall take effect on the date of enactment of this Act and shall apply to conduct on or after the date of enactment, except that –
>
> (1) 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 (31 U.S.C. 3729 et seq.) that are pending on or after that date; and

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> (2) section 3731(b) of title 31, as amended by subsection (b); section 3733, of title 31, as amended by subsection (c); and section 3732 of title 31, as amended by subsection (e); shall apply to cases pending on the date of enactment.[11]

There appear to be two primary motivations for Congress's inclusion of this implementation language. First, Congress clearly intended for the newly-defined 3729(a)(1)(B) actions to predate (and thereby effectively overturn) the Supreme Court's June 9, 2008 decision in *Allison Engine Co., Inc. v. United States ex rel. Sanders*, which significantly limited the reach of the FCA.[12] Second, Congress sought to avoid the mass litigation related to statutory retroactivity that accompanied the 1986 amendments to the FCA and clogged federal courts for nearly seventeen years. According to Representative Howard Berman, a sponsor of both the 1986 and the 2009 Amendments, "[t]he purpose of this amendment is to avoid the extensive litigation over whether the amendments apply retroactively."[13] Yet, ironically, the implementation of the 2009 Amendments has already triggered such litigation, with more likely on the horizon.

This article provides an overview of: (1) Congress's Constitutional authority to pass retroactive laws, (2) the Supreme Court's position on the retroactivity of the 1986 Amendments to the FCA, (3) Congress's attempt to include clear implementation language with the 2009 Amendments, and (4) recent federal decisions interpreting the implementation and retroactive application of the 2009 Amendments.

Historical Context

Congress's Constitutional Authority to Pass Retroactive Laws

The U.S. Constitution prohibits Congress from creating *ex post facto* laws.[14] This means that Congress cannot punish people for engaging in conduct that was legal when committed, but subsequently became illegal through the passage of a new law.[15] In 1798, the Supreme Court construed the *ex post facto* clause to apply only to criminal and not civil laws.[16] However, since then the Court has held that those civil statutes that are punitive in nature also may implicate the *ex post facto* clause.[17] The *ex post facto* clause will prohibit the retroactive application of a civil statute where the statute has a "retroactive effect" and is punitive in nature.[18]

A "retroactive effect" occurs when application of a law "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed."[19] "Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and conform their conduct accordingly."[20] Consequently, there is a presumption against statutory retroactivity absent clear language requiring retroactive application.[21] The Supreme Court requires a statute's retroactive intent to be unambiguous to ensure that "Congress itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness."[22]

However, clear Congressional intent that a statute should be given retroactive effect still requires further analysis: namely, whether the effect of the civil statute would impose punishment on events completed before its enactment. The Supreme Court asks whether the text and the structure of the statute render retroactivity "so punitive either in purpose or effect as to negate [the intention to establish merely a civil remedy]."[23] Moreover, "'[o]nly the clearest proof' will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty."[24]

The 1986 Amendments to the False Claims Act and Retroactivity

As noted above, litigants argued over the retroactivity of amendments to the FCA long before the passage of FERA. After the enactment of 1986 Amendments to the FCA, the federal courts became flooded with litigation wrestling over the retroactivity of the amendments.[25] This occurred, in part, because the 1986 Amendments dramatically expanded the False Claims Act,[26] making it a formidable fraud-prevention tool, which has recovered in excess of $24 billion for the federal government since 1986.[27]

Litigation over the retroactivity of the 1986 Amendments was probably inevitable given the increased potential for liability and the fact that some FCA conduct would certainly pre-date and post-date the passage of the 1986 Amendments. The 1986 Amendments were silent on the retroactivity issue, leading to a decade of litigation over the question. This litigation culminated in the 1997 Supreme Court decision *Hughes Aircraft Co. v. United States ex rel. Schumer*.[28] In *Hughes Aircraft*, a former manager at Hughes Aircraft filed a *qui tam* suit under the FCA in 1989 against a defense contractor, alleging the company had misallocated costs between two separate radar system projects for the Air Force.[29] The conduct occurred several years before the 1986 Amendments, and Hughes Aircraft had been subject to multiple government audits concerning the alleged conduct prior to the filing of the whistleblower suit.[30] Hughes Aircraft raised the public disclosure jurisdictional defense,[31] prevailing at the district court level, but losing at the Ninth Circuit where the Court of Appeals applied the more-limited

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1986 version of the public disclosure bar retroactively.[32] The Ninth Circuit's retroactive application of the 1986 Amendments allowed the whistleblower to proceed with the suit. Hughes Aircraft appealed to the Supreme Court, challenging the Ninth Circuit's retroactive application of the 1986 Amendments to "pre-amendment" conduct.

Justice Thomas, delivering a unanimous opinion, wrote: "We have frequently noted, and just recently reaffirmed, that there is a 'presumption against retroactive legislation [that] is deeply rooted in our jurisprudence.'"[33] He then explained that the presumption must be honored absent clear Congressional intent to the contrary and concluded: "Nothing in the 1986 amendment evidences a clear intent by Congress that it be applied retroactively, and no one suggests otherwise."[34] He then proceeded to identify how the 1986 Amendments modified the scope of liability under the FCA by eliminating a prior affirmative defense and extending the right to sue to *qui tam* relators, private parties who had not previously had such a right.[35] This "attach[ed] a new disability, in respect to transactions or considerations already past," rendering retroactive application of the 1986 Amendments impermissible.[36]

Whereas the *Hughes Aircraft* decision ended much of the debate over the retroactivity of the 1986 Amendments, litigants continued to battle this aspect of the 1986 Amendments until 2003, seventeen years after the statute had been revised.[37] Given this history, it is easy to understand why Congress included implementation language in the 2009 Amendments to the FCA.

Retroactivity and The 2009 FCA Amendments – Addressing *Allison Engine*

As mentioned above, Congress explicitly included statutory language in FERA requiring the retroactive application of §3729(a)(1)(B). This was not necessarily surprising because Congress enacted the 2009 Amendments, in part, to overrule what some members of the legislature believed was an erroneous decision in *Allison Engine*. Senator Charles Grassley (R. Iowa) stated that the amendments would "address a loophole that was created in the False Claims Act by the Supreme Court decision in the *Allison Engine* case . . . ."[38] Likewise, Senator Patrick Leahy (D. Vermont), an author of the 1986 Amendments, commented, "in recent years, litigation fueled by powerful Government defense and health care contractors has created legal loopholes that threaten the application of this powerful tool . . . . This legislation fixes this, thus ensuring that no fraud can go unpunished by simply navigating through the legal loopholes."[39] And Representative Howard Berman (D. California) opined that the *Allison Engine* ruling "severely limits the reach of the law" and that "[t]he primary impetus for [FERA] is to reverse these unacceptable limitations and restore the False Claims Act to its original status as the protector of all Government funds or property."[40]

Prior to FERA, the FCA imposed civil 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*."[41] As a result of the FERA amendments, 31 U.S.C. §3729(a)(1)(B) now states that any person who "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim" is liable for a civil monetary penalty.

Therefore, in order to overrule *Allison Engine* retroactively, Congress removed the "to get" and "paid or approved by the Government" requirements from the FCA, which the Supreme Court had seized upon to limit the scope of liability under the Act, preventing it from functioning "as a general anti-fraud statute."[42] The Amendment was enacted to pre-date the *Allison Engine* decision by two days – applying "as if enacted on June 7, 2008, and [] to all claims under the False Claims Act (31 U.S.C. 3729 et seq.) that are pending on or after that date."[43]

It is apparent that Congress tailored this retroactivity provision to forestall the mass litigation that had erupted after the 1986 Amendments were enacted. In fact, Representative Berman stated "[t]he purpose of this amendment is to avoid the extensive litigation over whether the amendments apply retroactively, as occurred following the 1986 False Claims Act amendments."[44] He further explained that the only substantive change of the FCA under section 4(a) of FERA was the expansion of conspiracy liability, and that the other amendments "merely clarify the law as it currently exists under the False Claims Act."[45] He advised the courts to "rely on these amendments to clarify the existing scope of False Claims Act liability, even if the alleged violations occurred before the enactment of these amendments" and to "consider and honor these clarifying amendments, for they correctly describe the existing scope of False Claims Act liability under the current and amended False Claims Act."[46] Perhaps foreseeing the battles that lay ahead, Senator Ted Kaufman (D. Delaware), a co-sponsor of FERA, declared that Congress was "not creating new

crimes, or establishing entirely new paths to recovering ill-gotten gains."[47] Instead, Senator Kaufman pointed out, Congress was making "narrow changes" to the FCA to ensure that "lawbreakers don't slip through the gaps in existing law."[48]

But legislative history does not trump the text of a statute. And after the enactment of the 2009 Amendments, it took mere months for the first disputes to arise over the implementation language of section 4(f) and the retroactivity of 31 U.S.C. §3729(a)(1)(B).

Recent Decisions Dealing with The Retroactivity of The 2009 Amendments

Recent wrangling over the 2009 Amendment implementation language suggests that section 4(f) is not the model of clarity. For instance, the implementation language in section 4(f)(1) of FERA states that the amendments to section 3729(a)(1)(B) of the FCA "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."[49] That language alone raises questions, such as what does the term "claim" mean. Is a "claim" a legal action or a request for payment? The FCA (as amended by FERA) would appear to clear up any confusion in that regard, since a claim:

(A) means 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:

> (i) is presented to an officer, employee, or agent of the United States; or
>
> (ii) 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 United States Government:
>
> > (I) provides or has provided any portion of the money or property requested or demanded; or
> >
> > (II) will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.[50]

However, even if the term "claim" has the meaning defined above, is there a difference between what a "claim" is and what a "claim under the False Claims Act that [is] pending is?" If an FCA suit is brought, is a claim pending "under the FCA" until the resolution of the case? Or is any false claim potentially pending "under the FCA?" Does a claim even need to be false or will a mere allegation of FCA liability suffice to implicate the statute? Furthermore, what is a pending claim? In the healthcare context, is it a claim that has been submitted for payment, but not paid? What about a claim that has been paid, but can be reopened through Medicare's or Medicaid's various administrative procedures? Will this status render a claim "pending" for the purposes of the 2009 Amendments?

Once the courts work out the meaning of "claim," they will need to determine whether the language of section (4)(f)(1) unambiguously requires retroactive application of 31 U.S.C. §3729(a)(1)(B). If so, do the amendments make section 3729(a)(1)(B), a civil statute, "punitive in nature," thereby causing a violation of the *ex post facto* clause?

In the short time since the passage of FERA, multiple courts have tackled the implementation language of section 4(f)(1) of FERA. In September 2009, the District Court for the District of Columbia in *United States v. Science Applications International Corp.* determined that the 2009 Amendments were intended to have some retroactive effect.[51] However, despite the government's argument that section 4(f)(1) of FERA applied to all *cases* pending on or before June 7, 2008, the court held that the retroactivity clause applies to all *claims* under the FCA pending on or before June 7, 2008 and further noted that a "claim" is well defined in the FCA as a "request or demand . . . for money or property."[52] The court stated that if Congress had intended section 4(f)(1) of FERA to apply to cases instead of claims, "it would have said so as it did in subsection (4)(f)(2)."[53] Thus, FERA had no impact on that case, because although the case was pending before June 7, 2008, the claims were not.[54]

In October 2009, the District Court for the Southern District of Ohio – in the remand of the *Allison Engine* case – looked at: (1) whether §4(f)(1) applies to "claims" or "cases" under the FCA and (2) whether retroactive application of 31 U.S.C. §3729(a)(1)(B) violates the *ex post facto* clause.[55] Although the *Allison Engine* case had been pending since 1995, the claims were paid in the late 1980s and early 1990s and were no longer pending.[56] Like the court in *Science Applications*, the court in *Allison Engine* stated that "claim" was defined in the FCA but neither the FCA nor FERA defined "case;" therefore, the "plain reading of the retroactivity language reveals that the relevant change is applicable to 'claims' and not 'cases.'"[57]

Upon review of the retroactivity clause in FERA, the court declared that even if §4(f)(1) applied retroactively, the application would violate the *ex post facto* clause of the Constitution.[58] The court pointed out that although the FCA is a civil statute, there were numerous statements from members of Congress and the Attorney General declaring that the FCA was intended to punish fraud and wrongdoing.[59] In particular, the court noted that the legislative history of FERA reveals that the goals of the FCA amendments were to "track down and punish people" and "ensur[e] that no fraud can go unpunished."[60]

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The court held that "retroactive application of the amendments to the FCA violates the *Ex Post Facto* Clause because retroactive application of the amendments to the FCA would impose punishment for acts that were not punishable prior to enactment of the amendments."[61] Somewhat ironically, the court found that FERA amendments would not actually apply to *Allison Engine* because the claims were not pending on or before June 7, 2008. Moreover, the court stated, even if the claims were pending, FERA violated the *ex post facto* clause by imposing "punishment for acts that were not punishable prior to the enactment of the amendments."[62]

In December 2009, in *Hopper v. Solvay Pharmaceuticals,* the only circuit court opinion thus far dealing with the retroactivity issue, the Eleventh Circuit agreed with the district courts in *Science Applications* and *Allison Engine* that the retroactivity language of FERA applies to "claims" that were pending on or before June 7, 2008 and not "cases" that were pending.[63]

Although those courts have found that "claim" has the meaning defined in the FCA, none have analyzed what it means for a claim to be "under the FCA" and whether that qualifying language alters the meaning of "claim" in the FCA. Given that issue, the host of other issues discussed above, and the recent decisions in *Science Applications*, *Allison Engine*, and *Solvay Pharmaceuticals*, courts are certainly only at the beginning of scrutinizing the application of §4(f)(1) of the 2009 Amendments.

Conclusion

Congress's implementation language in section 4(f) of FERA leaves a good deal of wiggle room for FCA plaintiffs and defendants to fight over whether the changes to the FCA apply retroactively and to a given case. The cases discussed above only scratch the surface of the litigation that may arise over the implementation of the FCA amendments. This will be an area to watch this year and in years to come.

Melissa A. M. Hudzik is an attorney in the health care practice group of Arent Fox LLP. Ms. Hudzik graduated Cum Laude from the University of Baltimore and Cum Laude from the University of Baltimore School of Law. Her practice focuses on federal investigations, audits, and evaluations for clients such as long-term care facilities, nursing homes, and other health care providers. Prior to joining Arent Fox, Ms. Hudzik was an associate counsel for the U.S. Department of Health & Human Services Office of Inspector General. She may be reached at *hudzik.melissa@arentfox.com*.

David S. Greenberg is an attorney in the Washington, D.C. office of Arent Fox LLP. He is a member of the firm's national health care group and concentrates his practice on representing institutional providers and suppliers. While much of David's work focuses on representing clients throughout the country in False Claims Act investigations and litigation, he also maintains an active practice counseling clients on fraud and abuse issues, as well as handling administrative disputes and commercial litigation in state and federal courts. Prior to joining Arent Fox, David worked at a national law firm handling complex antitrust and ERISA litigation and was a trial attorney at the U.S. Department of Justice. He may be reached at *greenberg.david@arentfox.com*.

Endnotes

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2 Pub. L. No. 111-21, 123 Stat. 1621 (2009); 31 U.S.C. §3729 *et seq.; see also* Robert T. Rhoad & Matthew T. Fornataro, *A Gathering Storm: The New False Claims Act Amendments and Their Impact on Healthcare Fraud Enforcement*, *The Health Lawyer*, Vol. 21, No. 6, at 14-22 (Aug. 2009).

3 The last significant amendments to the FCA occurred in 1986. Pub. L. No. 99-562, 100 Stat. 3153 (1986).

4 Sen. Rep. No. 111-10 at 4, 9 (2009).

5 31 U.S.C. §3729(a)(1)(B).

6 *Id.* §3729(a)(1)(C).

7 *Id.* §§3729(a)(1)(G) & (b)(3).

8 *Id.* §3730(h).

9 *Id.* §3731(b) & (c).

10 *Id.* §3733.

11 Pub. L. No. 111-21, 123 Stat. at 1625.

12 128 S. Ct. 2123 (2008).

13 Cong. Rec. E1295, E1200 (daily ed. June 3, 2009) (statement of Rep. Berman).

14 There is an identical clause in the Constitution prohibiting states from passing *ex post facto* laws. U.S. Const., art. 1, §9.

15 U.S. Const., art. 1, §10.

16 *Calder v. Bull*, 3 U.S. 386, 390 (1798).

17 *Landsgraf v. USI Film Prod.*, 511 U.S. 244, 281 (1994).

18 *Id.*

19 *Id.* at 280.

20 *Id.* at 265.

21 *Id.* at 270.

22 *Id.* at 268.

23 *United States. v. Ward*, 448 U.S. 242, 249 (1980).

24 *Hudson v. United States*, 522 U.S. 93, 100 (1997) (quoting *Ward*, 448 U.S. at 249).

25 *See* Michael L. Waldman, *The 1986 Amendments to the False Claims Act: Retroactive or Prospective?*, 18 Pub. Cont. L. J. 469 (1989); *see also* Robert S. Metzger & Robert D. Goldbaum, *Retroactivity of the 1986 Amendments to the False Claims Act,* 22 Pub. Cont. L. J. 684 (1993).

26 The 1986 Amendments (i) incentivized *qui tam* whistleblowers to bring suits on behalf of the federal government, (ii) lowered the state of mind required to trigger liability, (iii) lowered the jurisdictional bar (public disclosure), and (iv) and raised the penalties for violators. Pub. L. No. 99-562, 100 Stat. 3153 (1986).

[27] Justice Dep't Recovers $2.4 Billion In False Claims Cases in Fiscal Year 2009, More than $24Billion since 1986 (Nov. 19, 2009) at http://www.justice.gov/opa/pr/2009/November/09-civ-1253.html.

[28] 520 U.S. 939 (1997).

[29] *Id.* at 942-43.

[30] *Id.* at 943-944.

[31] *Id* at 944; 31 U.S.C. §3730(e)(4)(A) ("No court shall have jurisdiction over an action under the section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.").

[32] *Id.* at 946.

[33] *Id.* at 946 (quoting *Landsgraf v. USI Film Prod.*, 511 U.S. at 265).

[34] *Hughes Aircraft Co.*, 520 U.S. at 946.

[35] *Id.* at 947-50.

[36] *Id.* at 947 (quoting *Landsgraf*, 511 U.S. at 269).

[37] *See, e.g., United States v. United Technologies Corp.*, 255 F. Supp. 2d 787 (S.D. Ohio 2003). The district court dealt with the issue of the retroactivity of the 1986 Amendments in this case in 2003 because some alleged conduct occurred before 1986. *See also, United States v. United Technologies Corp.*, 255 F. Supp. 2d 779, 783-85 (S.D. Ohio 2003) (explaining why the case was not dismissed on statute of limitations grounds).

[38] 155 Cong. Rec. S4412 (daily ed. Apr. 20, 2009) (statement of Sen. Grassley).

[39] 155 Cong. Reg. S4737 (daily ed. Apr. 27, 2009) (statement of Sen. Grassley).

[40] 155 Cong. Rec. E1296 (daily ed. June 3, 2009) (statement of Rep. Berman).

[41] 31 U.S.C. §3729(a)(2) (emphasis added).

[42] Pub. L. No. 111-21, 123 Stat. 1625.

[43] *Id.* FERA renumbered certain sections of the FCA.

[44] 155 Cong. Rec. E1300 (daily ed. June 3, 2009) (statement of Rep. Berman).

[45] *Id.*

[46] *Id.*

[47] 155 Cong. Rec. S4413 (daily ed. Apr. 20, 2009) (statement of Sen. Kaufman).

[48] *Id.*

[49] Pub. L. No. 111-21, 123 Stat. 1625, §4(f)(1) (emphasis added).

[50] 31 U.S.C. §3729(b)(2).

[51] *United States v. Sci. Applications Int'l. Corp.*, 653 F. Supp. 2d 87 (D.D.C. Sept. 14, 2009).

[52] *Id.*

[53] *Id.*

[54] *See also, Boone v. Mountainmade Foundation*, 2010 WL 519759, *5 n.7 (D.D.C. Feb . 15, 2010) (making same distinction as in *Science Applications International Corp.* between "claims" and "cases" in interpreting the FERA's retroactivity clause for §3729(a)(1)(b)); *But see, United States ex rel. Westrick v. Second Chance Body Armor, Inc.*, 2010 WL 623466, *7 (D.D.C. Feb. 23, 2010) (reaching opposite interpretation of implementation language for 3729(a)(1)(B), finding "[b]ecause this suit was pending on June 7, 2008, the amended provision applies here").

[55] *United States ex rel. Sanders v. Allison Engine*, 2009 WL 3626773 (S.D. Ohio Oct. 27, 2009).

[56] *Id.* at *3.

[57] *Id.* at *4.

[58] *Id.*

[59] *Id.* at *6-7.

[60] *Id.* at *6.

[61] *Id.* at *7.

[62] *Id.*; *See also, United States v. Aguillon*, 628 F. Supp. 2d 542, 550-51 (D. Del. 2009) (where the court stated in a parenthetical that Congress did not "unambiguously preclude[] retrospective application of the FCA amendments…[however] retrospective application of the [FERA] amendments would cause retroactive effects" by increasing the defendant's liability for past conduct and concluded that "Congress has not provided the requisite instruction necessary for the amendments to be used to cause retroactive effects").

[63] *Hopper v. Solvay Pharms. Inc.*, No. 08-15810, 2009 WL 4429519 (11th Cir. Dec. 4, 2009).