

# UNDERSTANDING THE 2009 FERA AMENDMENTS TO THE FEDERAL FALSE CLAIMS ACT

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## I. INTRODUCTION

Last May, President Obama signed into law the Fraud Enforcement and Recovery Act of 2009 (“FERA”).<sup>1</sup> Introduced during the nation’s most serious economic crisis since the Great Depression, FERA sprang from a legislative resolve to strengthen the federal government’s ability to combat fraud and safeguard public funds used to bail out banks and financial institutions. According to the Senate Report on FERA, “[t]his legislation will increase accountability for the corporate and mortgage frauds that have contributed to the recent economic collapse and will help protect Americans from future frauds that exploit the economic assistance programs intended to restore and rebuild our economy.”<sup>2</sup> FERA thus equips the government with an array of fiscal and legal tools and resources intended to more effectively prevent, detect and prosecute frauds against the government and the public interest. These measures consist of allocating hundreds of millions of dollars to hire anti-fraud investigators and prosecutors, along with amendments that strengthen federal statutes governing money laundering, securities, financial institutions, and fraud on the government.<sup>3</sup>

The FERA amendments to the federal False Claims Act (“FCA”)<sup>4</sup> -- described by legislators as “[o]ne of the most successful tools for combating waste and abuse in Government spending” and “an extraordinary civil enforcement tool used to recover funds lost to fraud and abuse”<sup>5</sup> -- were prompted by court decisions that Congress believed had limited the scope of the statute. “In order to respond to these decisions, certain provisions of the FCA must be corrected and clarified.”<sup>6</sup> Therefore, in passing the FERA amendments, Congress intended that they serve as “clarifications,” that “reflect the original intent of the law,” correcting erroneous interpretations by the courts.<sup>7</sup> To that extent, Congress did not seek to “expand” the FCA but to restore to the FCA the meaning intended in the landmark 1986 amendments to the statute that transformed an all-but moribund Civil War-era statute into the government’s principal weapon against fraud.

Congress saw the need to do this as urgent, not just to protect in excess of \$1 trillion in public funds paid out or promised in an effort to save the economy, but in response to what it saw as two decades of ongoing abuse. “Over the course of the last twenty years, it has become increasingly evident that fraud permeates a very wide range of Government programs, ranging from welfare and food stamps benefits to multi-million dollar defense procurements, from crop subsidies to disaster relief programs; and from Government-backed loan programs to health care and homeland security.”<sup>8</sup> This highlights the crucial and enduring role of the FCA in government-funded industries, and not just its role in the current economic climate.

The FERA amendments to the FCA cover the liability provisions, relation back of complaints-in-intervention, Civil Investigative Demands, retaliatory relief for whistleblowers, and service upon the States. This article examines those amendments and their potential impact, as well as the caselaw on the amendments to date. This relates almost exclusively to retroactivity.

The entire FCA, as amended by FERA, appears in the Appendix to this article.

## **II. FERA AMENDMENTS TO THE FCA**

Section 4 of FERA is titled: “Clarifications to the False Claims Act to Reflect the Original Intent of the Law.” The amendments are addressed thematically below. As many were enacted in response to specific court rulings, those cases, where applicable, are also addressed.

### **A. Amendments to Liability Provisions**

Section 4(a) of FERA amends the liability provisions of the FCA. According to the legislative history, this section is intended “to address misreadings of the Act by the courts, to remove ambiguities created by inconsistency of language in the present provisions, and to clarify how the Act should be applied when the Government implements its programs with the help of contractors and intermediaries or administers funds on behalf of beneficiaries...”<sup>9</sup>

#### **1. Fraud Against Government Contractors and Grantees**

FERA sought to correct two key court rulings in recent years limiting the scope of FCA liability with respect to subcontractors and non-governmental entities.

##### **a) Case law Precedent**

###### **i. *U.S. ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488 (D.C. Cir. 2004)**

In a 2004 case, *U.S. ex rel. Totten v. Bombardier Corp.*, the D.C. Court of Appeals affirmed the district court’s dismissal of a qui tam action in which allegedly false invoices were submitted to a government grantee for payment.<sup>10</sup> The case turned on the meaning of the so-called “presentment clause,” FCA § 3729(a)(1), which ascribed liability to “[a]ny 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 *Totten*, the relator brought an FCA claim against two private companies that had contracted to provide rail cars to the National Railroad Passenger Corporation (Amtrak). The relator, who was a former Amtrak employee, alleged that the two companies provided rail cars to Amtrak containing “unsuitable parts that did not meet the contractual specifications.” The companies submitted invoices for the allegedly defective cars to Amtrak, which were to be paid “from an account that included federal funds.” Because the invoices were paid by Amtrak rather than by the government, and because the relator did not allege “that those companies presented

their claims to an officer or employee of the government,” the Appeals Court upheld the lower court’s dismissal of the relator’s claim. “[U]nder the plain language of *Section 3729(a)(1)*, claims must be presented to an officer or employee of the Government before liability can attach.”<sup>11</sup>

According to the Senate Report on FERA, the D.C. circuit’s interpretation of the presentment clause “runs contrary to the clear language and congressional intent of the FCA by exempting subcontractors who knowingly submit false claims to general contractors and are paid with Government funds.”<sup>12</sup> *Totten* also was used to argue that state-administered Medicaid programs are not covered by the FCA, and one federal court embraced this interpretation.<sup>13</sup> According to the Senate Report, this, too, is contrary to congressional intent.<sup>14</sup>

**ii. *Allison Engine Co., Inc. v. U.S. ex rel. Sanders*, 128 S.Ct. 2123 (2008)**

At issue in *Allison Engine*<sup>15</sup> was the meaning of FCA §§ 3729(a)(2)-(3), which read: “(a) Any person who [ . . . ] (2) 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; (3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid; [ . . . ] is liable to the United States Government. . . .”

The case stemmed from contracts between the U.S. Navy and two shipyards that were engaged to build destroyers. The shipyards both subcontracted with Allison Engine Co. to build generator sets for the destroyers, and Allison Engine Co. in turn subcontracted with another company, General Tool Co. (GTC), to assemble the generator sets. Finally, GTC subcontracted with yet another company, Southern Ohio Fabricators, Inc. (SOFCO) to manufacture parts. Two former GTC employees brought an FCA action against Allison Engine, GTC, and SOFCO, claiming that each of the defendants had falsely certified “that their work was completed in compliance with the Navy’s requirements...”<sup>16</sup> At trial, the relators produced evidence that the defendants had issued such false certifications and had submitted invoices for payment to the shipyards. However, they did not produce the invoices submitted by the shipyards to the Navy.<sup>17</sup> The District Court for the Southern District of Ohio granted the defendants judgment as a matter of law. Even though “Government funds had been used to pay the invoices that were presented to the shipyards,” the Court found that, “absent proof that false claims were presented to the Government, [the relators’] evidence was legally insufficient under the FCA.”<sup>18</sup>

The Court of Appeals for the Sixth Circuit reversed in part, holding that the relators’ §§ 3729(a)(2) and (3) claims did not require “proof of an intent to cause a false claim to be paid by the Government. Rather, it determined that proof of an intent to cause such a claim to be paid by a private entity using Government funds was sufficient.”<sup>19</sup>

However, the Supreme Court overturned the circuit court’s decision. “Contrary to the decision of the Court of Appeals below, we hold that it is insufficient for a plaintiff asserting a § 3729(a)(2) claim to show merely that the false statement’s use resulted in payment or approval of the claim or that Government money was used to pay the false or fraudulent claim. Instead, a plaintiff asserting a § 3729(a)(2) claims must prove that the defendant intended that the false record or statement be material to the Government’s decision to pay or approve the false

claim.”<sup>20</sup> Regarding § 3729(a)(3), the Court held: “[I]t is not enough for a plaintiff to show that the alleged conspirators agreed upon a fraud scheme that had the effect of causing a private entity to make payments using money obtained from the Government. Instead, it must be shown that the conspirators intended ‘to defraud the government.’ Where the conduct that the conspirators are alleged to have agreed upon involved the making of a false record or statement, it must be shown that the conspirators had the purpose of ‘getting’ the false record or statement to bring about the Government’s payment of a false or fraudulent claim... [I]t must be established that they agreed that the false record or statement would have a material effect on the Government’s decision to pay the false or fraudulent claim.”<sup>21</sup>

The Senate Report on FERA observes that as a result of *Allison Engine*, “even when a subcontractor in a large Government contract knowingly submits a false claim to [the] general contractor and gets paid with Government funds, there can be no liability unless the subcontractor intended to defraud the Federal Government, not just their general contractor. This is contrary to Congress’s original intent in passing the law and creates a new element in a FCA claim and a new defense for any subcontractor that are inconsistent with the purpose and language of the statute.”<sup>22</sup> One of the authors of the 1986 FCA amendments and of FERA, Representative Howard Berman, likewise noted: “With the Government increasingly relying on private entities to disburse Government funds, it is a rare instance in which the ‘Government itself’ would be paying the claims.”<sup>23</sup>

## **b) FERA Amendments**

As summarized in the Senate Report, FERA amends FCA § 3729(a) to clarify that FCA liability attaches “whenever a person knowingly makes a false claim to obtain money or property, any part of which is provided by the Government, without regard to whether the wrongdoer deals directly with the Federal Government; with an agent acting on the Government’s behalf; or with a third party contractor, grantee, or other recipient of such money or property.”<sup>24</sup> This is accomplished through the elimination of limiting language, such as the removal of the phrase “to an officer or employee of the Government, or to a member of the Armed Forces” from § 3729(a)(1);<sup>25</sup> this change clarifies that direct presentment of a claim to the government is not required under the FCA.<sup>26</sup> FERA also eliminates the words “to get” from § 3729(a)(2), in order to make clear that this provision does not contain an intent requirement (as the Supreme Court so held in *Allison Engine*). The word “material” has been inserted in place of “to get.” Likewise, the phrase “defraud the Government by getting a false or fraudulent claim allowed or paid” was removed from § 3729(a)(3), in order to clarify that no intent requirement exists in this provision, either. A further change to § 3729(a)(2) is the deletion of the language “paid or approved by the Government,” which, again, responds to the Supreme Court’s conclusions in *Allison Engine*, while removing any support for the notion that a new “presentment” requirement may exist in the statute.<sup>27</sup>

The relevant sections of § 3729(a) now read: “(a) Liability for certain acts. (1) In general. Subject to paragraph (2), any person who – (A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval; (B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim; (C)

conspires to commit a violation of subparagraph (A), (B), (D), (E), (F), or (G); [ . . . ] is liable to the United States Government . . .”

In order to prevent confusion regarding the meaning of the term “material” as inserted into the statute, FERA defines “material” in § 3729(b)(4).<sup>28</sup> Two conflicting standards of materiality had evolved in the courts, with the circuits split between them. The first, termed the “outcome materiality test,” requires the party alleging FCA liability to show that the false statement in question **actually caused** the government to pay the false or fraudulent claim.<sup>29</sup> Satisfaction of this test forced the alleging party to prove a challenging hypothetical – that, if the government had been aware of the false or fraudulent nature of the information submitted, it would have behaved differently in its treatment of the claim.<sup>30</sup> The second standard, known as the “natural tendency test,” requires only a showing that the false statement in question has “the natural tendency to influence, or [is] capable of influencing, the decision of the decisionmaking body to which it was addressed.”<sup>31</sup> FERA adopted the “natural tendency” test: “[T]he term ‘material’ means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.”<sup>32</sup>

According to the legislative history, another purpose of the amendments to § 3729(a) is to clarify that the FCA “may be used to redress fraud on Medicare’s new Part D prescription drug benefit program and fraud on Medicare managed care... [both of which] are administered by Government contractors.”<sup>33</sup> In addition, the amendments clarify that the FCA may reach “false claims submitted to recipients of federal block grants administered by state agencies or third parties,”<sup>34</sup> and these changes are reflective of Congress’s intent in enacting the 1986 amendments to the FCA.<sup>35</sup>

## **2. Fraud Involving Funds Administered by the United States**

### **a) Case Law Precedent**

In 2006 decision, *U.S. ex rel. DRC, Inc. v. Custer Battles, LLC*,<sup>36</sup> the Eastern District of Virginia held that false claims against “funds administered, but not owned, by the U.S. Government” were not covered by the FCA.<sup>37</sup> The funds in question were managed by the Coalition Provisional Authority (CPA), the “agency established in Iraq in 2003 to administer and rebuild Iraq during the transition from the overthrown Hussein regime to the new democratic government of Iraq.”<sup>38</sup> The CPA was controlled by and received the majority of its funding from the United States.<sup>39</sup> The defendant, Custer Battles, contracted with the CPA to provide security, housing, construction and operational services in connection with the Iraqi reconstruction.<sup>40</sup>

According to the FERA legislative history, the *Custer Battles* holding is inconsistent with the spirit and intent of the FCA.<sup>41</sup> “When the United States Government elects to invest its resources in administering funds or managing property belonging to another entity, it does so because use of such investments or property for their designated purposes will further interests of the United States . . . Accordingly, false claims made against Government-administered funds damage the interests of the United States in essentially the same way as does misappropriation or wasting of funds owned by the United States.”<sup>42</sup>

## **b) FERA Amendments**

FERA amends the FCA definition of “claim” to include, inter alia, “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 is to be spent or used on the Government’s behalf or to advance a Government program or interest [ . . . ]”<sup>43</sup> This language “clarifies that FCA liability attaches to knowingly false requests or demands upon the United States for money or property administered by the United States on behalf of another person.”<sup>44</sup>

FERA also introduces a qualification to the definition of “claim,” which explicitly excludes “requests or demands for money or property that the Government has paid to an individual as compensation for Federal employment or as an income subsidy with no restrictions on that individual’s use of the money or property.”<sup>45</sup> Thus, government payments to individuals, such as salary or Social Security benefits, are not covered by the FCA.<sup>46</sup>

## **3. Conspiracy**

The FCA’s pre-FERA conspiracy provision, § 3729(a)(3), subjected to liability any person who “conspires to defraud the Government by getting a false or fraudulent claim allowed or paid.” This wording prompted some courts to hold that liability only attached to conspiracies that violated subsections 3729(a)(1) or (2).<sup>47</sup> FERA amended the conspiracy provision to state that FCA liability attaches to any person who “conspires to commit a violation of subparagraph (A), (B), (C), (D), (E), (F), or (G).”<sup>48</sup> This change clarifies that “conspiracy liability can arise whenever a person conspires to violate any of the provisions in Section 2729 imposing FCA liability.”<sup>49</sup>

## **4. Wrongful Possession, Custody or Control of Government Property**

Prior to FERA’s enactment, FCA § 3729(a)(4) had been unchanged since 1863.<sup>50</sup> The provision held that FCA liability attached to any person who had “possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate of receipt.” The loophole created by what the Senate Report terms this “archaic” wording has permitted some defendants to escape liability for false claims submitted to the government, on the technicality that no receipt was provided.<sup>51</sup> FERA eliminated the “receipt” requirement. The provision now holds that FCA liability attaches to any person who “has possession, custody, or control of property or money used, or to be used, by the Government and delivers, or causes to be delivered, less than all of that money or property.”<sup>52</sup>

## **5. Wrongful Retention of Government Money or Property (aka “Reverse False Claims”)**

Prior to FERA, § 3729(a)(7) held that FCA liability arose when a person “knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government.” This section, commonly referred to as the “reverse false claims” provision, applies to the wrongful retention of government money or property by individuals. However, the original wording only captured false statements or representations affirmatively made in order to conceal money or property owed to the government. It did not provide liability for remaining silent or failing to act upon a known duty to return such money or property to the government.<sup>53</sup>

FERA amends this provision by extending liability to a person who “knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government.”<sup>54</sup> The FERA amendments add further clarity by defining “obligation” as, “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.”<sup>55</sup> This amendment resolves judicial differences about the meaning of “obligation,” and reflects the congressional intent, dating from the 1986 amendments, that the term encompass “the spectrum of possibilities from the fixed amount debt obligation where all the particulars are defined, to the instance where there is a relationship between the Government and a person ‘that results in a duty to pay the Government money, whether or not the amount owed is yet fixed.’”<sup>56</sup>

The FERA legislative history highlights the importance of the word “knowingly” as it appears in the definition of “obligation,” noting that, in the context of overpayment by the government, liability attaches once the recipient becomes aware of the situation and fails to notify the government.<sup>57</sup> Further, “[l]iability for all non-disclosed payments of the same type also should be imposed once an organization or other person is on notice that it has been employing a practice that has led to multiple instances of overpayment.”<sup>58</sup> However, the Senate Report specifies that it “does not intend this language to create liability for a simple retention of an overpayment that is permitted by a statutory or regulatory process for reconciliation, provided the receipt of the overpayment is not based upon any willful act of a recipient to increase the payments from the Government when the recipient is not entitled to such Government money or property.”<sup>59</sup>

## **B. Relation Back of Complaint-in-Intervention**

Section 4(b) of FERA addresses the rules of procedure pertaining to government intervention in qui tam lawsuits. The statute did not previously indicate whether Federal Rule of Civil Procedure 15(c)(1) applied to the government as an intervenor in qui tam cases.<sup>60</sup> FRCP 15(c)(1) concerns when an amendment to a pleading relates back to the original pleading.<sup>61</sup>

In a 2006 case, *U.S. v. Baylor Univ. Medical Center*,<sup>62</sup> the Second Circuit held that the “relation back” rules do not apply when the government amends a relator’s complaint in an FCA case. According to the FERA legislative history, “[t]he implication of this ruling is that the United States could sometimes be forced to forgo a thorough investigation of the merits of qui tam allegations in order to ensure that it does not lose claims due to the running of the statute of limitations.”<sup>63</sup> Thus, FERA adds a new paragraph to FCA § 3731, clarifying that: “If the

Government elects to intervene and proceed with an action brought under 3730(b), the Government may file its own complaint or amend the complaint of a person who has brought an action under section 3730(b) to clarify or add detail to the claims in which the Government is intervening and to add any additional claims with respect to which the Government contends it is entitled to relief. For statute of limitations purposes, any such 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.”<sup>64</sup>

### **C. Civil Investigative Demands**

Civil Investigative Demands (“CIDs”) are administrative subpoenas for documents, interrogatory responses and sworn testimony, incorporated into the FCA in 1986 in an effort to provide the Attorney General with needed tools for investigating FCA allegations. However, the procedure previously in place for obtaining CIDs was burdensome and inefficient and they were rarely employed.<sup>65</sup> Additionally, the CID provisions were ambiguous as to how evidence obtained through CIDs could be utilized in the course of the investigation or action and with whom it may be shared.<sup>66</sup>

FERA Section 4(c) amends FCA § 3733 to simplify the procedure for obtaining CIDs, by providing that the Attorney General “may delegate the authority to issue [CIDs],”<sup>67</sup> and by “clarifying that CIDs may be issued during the investigation of *qui tam* allegations prior to the Government’s intervention decision.”<sup>68</sup> The amendments also clarify how CID material may be used. Section 3733(a)(1) now provides that: “Any information obtained by the Attorney General or a designee of the Attorney General under this section may be shared with any *qui tam* relator if the Attorney General or designee determine it is necessary as part of any false claims act investigation.”<sup>69</sup>

### **D. Relief From Retaliatory Actions**

The government has become increasingly reliant upon *qui tam* relators in uncovering and prosecuting fraud on the government, particularly in highly specialized areas such as health care in which fraud schemes may be extremely complex and difficult to detect from the outside. FCA Section 3730(h) has been in place since 1986 to offer employees some opportunity for relief against retaliatory action by employers. In amending the anti-retaliation provisions of the FCA in FERA, Congress believed that provisions did not provide adequate protection or relief to whistleblowers and others who might be vulnerable to retaliation as a result of their actions.<sup>70</sup>

The legislative history identifies several specific types of retaliatory actions that whistleblowers commonly experience that were not previously covered by the FCA. These include: (1) “retaliation against not only those who actually file a *qui tam* action, but also against those who plan to file a *qui tam* action that never gets filed, who blow the whistle internally or externally without the filing of a *qui tam* action, or who refuse to participate in the wrongdoing . . .”<sup>71</sup> In order to extend protection to these individuals, FERA Section 4(d) amends § 3730(h) to include “lawful acts done . . . in furtherance of other efforts to stop 1 or more violations of this subchapter.”<sup>72</sup> (2) “[R]etaliation against contractors and agents of the discriminating party who

have been denied relief by some courts because they are not technically ‘employees.’”<sup>73</sup> These individuals have been incorporated into the statute through the addition of the words, “contractor, or agent” into § 3730(h).<sup>74</sup> (3) Family members and colleagues of whistleblowers who have been retaliated against but previously had no recourse.<sup>75</sup> To mend this gap, the words “or associated others” have been inserted into § 3730(h).<sup>76</sup> This subsection thus offers protection to individuals who take action to prevent the occurrence of fraudulent activity, as well as to family members, friends, or others “associated” with an individual who takes such action.

The legislative history points out that “this amendment does not in any way require that a qui tam plaintiff must have refused to engage in the misconduct or tried to stop the fraud internally before he or she may avail themselves of the incentives and protections in the False Claims Act.”<sup>77</sup> Rather, “[a]n individual who participates in the fraud, and who for whatever reason does not challenge the misconduct within his or her organization, is still entitled to a relator’s award and the protections of Section 3730(h) unless he or she is otherwise barred by a specific provision in the law.”<sup>78</sup>

#### **E. Service Upon State Plaintiffs**

With a growing number of states enacting their own False Claims statutes, it has become common for qui tam plaintiffs to include states as co-plaintiffs, along with the federal government, in filing FCA actions. The FCA previously provided for state law claims in § 3732(b), which holds: “The district courts shall have jurisdiction over any action brought under the laws of any State for the recovery of funds paid by a State or local government if the action arises from the same transaction or occurrence as an action brought under section 3730.” This provision left unanswered the question of whether the sealing of the case by a federal district court pursuant to § 3730(b) would in any way impact the qui tam plaintiff’s ability to serve a complaint or other pleadings upon the states, or to share other information and materials with the states.<sup>79</sup>

Section 4(e) of FERA adds a new subsection to § 3732, which clarifies that: “. . . a seal on the action ordered by the court under section 3730(b) shall not preclude the Government or person bringing the action from serving the complaint, any other pleadings, or the written disclosure of substantially all material evidence and information possessed by the person bringing the action on the law enforcement authorities that are authorized under the law of that State or local government to investigate and prosecute such actions on behalf of such governments, except that such seal applies to the law enforcement authorities so served to the same extent as the seal applies to other parties in the action.”

#### **F. Effective Date and Application**

Section 4(f) of FERA holds that the amendments to the FCA “shall take effect on the date of enactment of this Act [May 20, 2009] and shall apply to conduct on or after the date of enactment,” with two exceptions:

Regarding FCA § 3729(a)(1)(B) (ascribing liability to “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”), FERA states that this subsection “shall take effect as if enacted on June 7, 2008, and apply to all claims pending under the False Claims Act (31 U.S.C. 3729 et seq.) that are pending on or after that date . . .”

Additionally, FERA states that the amendments to FCA §§ 3731(b), 3733, and 3732 “shall apply to cases pending on the date of enactment.” These include the provisions regarding “relation back” of government amendments to qui tam plaintiffs’ briefs; the changes regarding CIDs; and the clarifications regarding service upon states.

The legislative history contains a significant note regarding the effective date of the remaining amendments to the liability provisions: “[W]hile the amendments state that the remainder of the Section 4(a) liability provisions are not retroactive, the courts should recognize that Section 4(a) only includes one substantive change to existing False Claims Act liability, which is the expansion of conspiracy liability. All of the other Section 4(a) amendments merely clarify the law as it currently exists under the False Claims Act. With the exception of conspiracy liability, **the courts should 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.**”<sup>80</sup> (Emphasis added.)

### III. IMPACT AND IMPLICATIONS OF FERA’S FCA AMENDMENTS

#### A. Some General Implications

In general, the FERA amendments confirm that the scope of FCA liability is broad. By reversing the holdings in *Totten* and *Allison Engine*, the amendments clarify that the FCA applies to all situations in which government money or property is implicated, regardless of whether an individual or organization in question has contracted with or received money directly from the government. In short, the FCA’s reach is at least coextensive with that of government funds: contractors, subcontractors, and others all the way down the line whose work is ultimately funded by federal funds are susceptible to FCA liability. Even where the government does not hold title to the money or property in question, but instead “administers” it, FCA liability may attach. In the current economic environment, in which more and more non-governmental organizations and financial institutions are receiving federal funds, it is extremely important for organizations to be aware of their potential exposure under the FCA and to implement compliance procedures accordingly. This is especially true as many believe that the recent amendments may spur an increase in qui tam activity.<sup>81</sup>

One of the most significant – and, for some, alarming – aspects of the amendments is that it is now clear that FCA liability may attach for wrongful retention of government money or property. In light of this, no affirmative act is necessary to incur liability; rather, the failure to act, such as the failure to notify the government of an accidental overpayment, is sufficient. This amendment, once again, implicates all entities who receive government payments. The provision indicates that liability attaches once the recipient becomes aware that it is improperly in possession of government money or property and “knowingly” retains it.

Some commentators ask how this provision will play out in FCA proceedings. Determining or proving precisely when the requisite awareness was attained may be difficult for plaintiffs as well as defendants. The statute leaves open the question of how to determine at which point an entity may be said to act “knowingly.” If one individual within the organization becomes aware of – or perhaps even merely suspects – an overpayment situation and does nothing, is that sufficient for liability to attach? Or does it only attach if the knowledge of the situation reaches a certain individual within the organization, e.g. a corporate officer or legal counsel?<sup>82</sup> As practitioners and commentators have pointed out, the application of the statute’s recklessness standard of knowledge to this provision may be particularly troublesome. A key question that has been asked is: “[I]f an entity’s internal accounting or compliance systems are not state-of-the-art and able to detect immediately each and every potential overpayment, does that constitute ‘deliberate ignorance’ or ‘reckless disregard’? . . . [H]ow often must an entity check for overpayments to avoid being ‘reckless’ or ‘deliberately ignorant’?”<sup>83</sup>

Others have observed that the amendments leave open the definitions of certain additional key terms, which they believe may invite confusion and elevate liability risk for institutions: “FERA makes no attempt to define the key terms ‘on the government’s behalf,’ ‘government program’ or ‘government interest.’”<sup>84</sup> These terms appear in the amended definition of claim, which now includes requests or demands for money or property “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 . . .”<sup>85</sup> This may become problematic, for example, in situations involving recipients of Troubled Asset Relief Program (TARP) funding. Once the government has provided such funds to a private institution, which of that institution’s expenditures qualify as “on the government’s behalf”?<sup>86</sup>

Another open question pertains to the amendments regarding CIDs. While § 3733(a)(1) now holds that the Attorney General may delegate the authority to issue CIDs, it does not specify to whom, or how far down the line, such authority may issue. The reach of delegated authority will determine the extent to which CIDs are used and are useful. At the time of writing (January 20, 2010), the Department of Justice had yet to issue any guidance on this matter.

## **B. Post-FERA Case Law**

### **1. *U.S. ex rel. Longhi v. Lithium Power Technologies*, 575 F.3d 458 (5th Cir. 2009)**

In *U.S. ex rel. Longhi v. Lithium Power Technologies*,<sup>87</sup> an intervened FCA qui tam case, the Southern District of Texas found that the defendants had made misrepresentations regarding the nature of their research firm in contract proposals submitted to the government under the Defense Department’s Small Business Innovation Research Program (SBIR). The district court granted partial summary judgment to the plaintiffs on issues of liability and damages, after finding that the government’s contract awards and payments to the defendants were “fraudulently induced.” At the crux of this holding was the court’s determination that the “false statements, omissions, and misrepresentations were ‘material,’” which it defined as “[having] a natural tendency to influence or be capable of influencing a decisionmaker.”<sup>88</sup> The court found that the defendants’ fraudulent attainment of the contracts prevented the government from fulfilling the stated policy purpose of the SBIR, which was, “to award money to **eligible**

deserving small businesses. That is precisely what [the defendants] denied to the government.” (Emphasis in original).<sup>89</sup> As the government “gained no benefit,” the court held that the proper formula for calculating damages was the amount paid out on each of the contracts awarded to the defendant, trebled.<sup>90</sup>

The defendants appealed the decision to the Fifth Circuit, contesting the liability and damages holdings, as well as the district court’s subsequent award of attorneys’ fees to the relator.<sup>91</sup> The appeals court examined the lower court’s finding of liability, adopting the Fourth Circuit’s test for FCA liability: “(1) whether there was a false statement or fraudulent course of conduct; (2) made or carried out with the requisite scienter; 3) that was material; and (4) that caused the government to pay out money or to forfeit moneys due...”<sup>92</sup> As to the element of materiality, the court was persuaded by the government’s contention that the “outcome materiality” test was incorrect: “[The government] argues that the FCA requires proof only that the defendant’s false statements ‘could have’ influenced the government’s payment decision, not that the false statements actually did so. We agree. The outcome and claim materiality definitions unnecessar[ily] narrow the ‘natural tendency to influence or capable of influencing’ standard, which is unambiguous and easily applied.”<sup>93</sup> In support of this finding, the court cited FERA’s adoption of the “natural tendency” standard in defining materiality under the FCA.<sup>94</sup> Significantly, the court noted: “While we decline to rule on whether this statute [FERA] applies retroactively or prospectively, we find this enactment to be relevant as to Congress’s intent when it enacted the FCA [amendments in 1986].”<sup>95</sup>

**2. U.S. ex rel. Sanders v. Allison Engine Co., Inc., No. 1:95-cv-970, No. 1:99-cv-923, 2008 U.S. Dist. LEXIS 111772 (S.D. Ohio, Oct. 27, 2009)**

As discussed above, in 2008 the Supreme Court vacated the Sixth Circuit’s *Allison Engine* decision which held that “proof of an intent to cause a false claim to be paid by a private entity using Government funds was sufficient” to establish FCA liability under § 3729(a)(1).<sup>96</sup> The Supreme Court remanded the case to the district court on March 9, 2009.<sup>97</sup> On May 20, 2009, FERA was enacted, with its retroactivity clause which holds, *inter alia*, that the amendments to § 3729(a)(1)(B) “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.”<sup>98</sup> As previously noted, Congress amended the subsection in question specifically in response to the Supreme Court’s holding in this same case, in order to clarify that it does not contain a requirement of intent for false claims to be paid directly by the government.

In light of FERA’s enactment, the defendants, on July 21, 2009, filed a “Motion to Preclude Retroactive Application of 31 U.S.C. §3729(a)(1)(B) or Alternatively to Declare FERA Unconstitutional.”<sup>99</sup> The defendants argued that FERA’s retroactivity clause “does not make the amendments to the FCA retroactive to their case,” and that “application of the retroactivity clause to them would violate the Ex Post Facto Clause and the *Due Process Clause of the U.S. Constitution.*”<sup>100</sup> (Italics in original.) The relators and the government both filed oppositions.<sup>101</sup>

The court first examined the defendants’ argument that the retroactivity clause did not apply to their case. The court noted that, “[a] statute may not be applied retroactively absent a clear indication from Congress that it intended such a result . . . . The standard for finding such a

clear indication is a demanding one. The retroactivity language must be so clear that it can sustain only one interpretation.”<sup>102</sup> Turning to the FERA clause in question, the court detected an ambiguity in the wording “all claims under the FCA.” The court stated: “[T]he issue becomes whether Congress intended the retroactivity language to apply to ‘cases’ pending on June 7, 2009 [sic], or to ‘claims’ pending on June 7, 2009 [sic].”<sup>103</sup> Predictably, the defendants argued that the clause does not pertain to pending “cases,” while the relators argued that “claims” in the given context signified “cases.” The court noted that, while the FCA “case” at hand had been pending since 1995, the alleged false “claims” on which it was based had been paid in the 1980s-1990s and were not pending as of June 7, 2008.<sup>104</sup> The court looked to the definitions supplied by the FERA amendments, which state that a “claim” is “any request or demand, whether upon a contract or otherwise, for money or property and whether or not the United States has title to the money or property...” Therefore, the court held that under a plain reading of the statute, the retroactivity provision applied to “claims” pending on June 7, 2009, and not to cases.<sup>105</sup> The court also cited examples from FERA’s legislative history and other portions of the text of the statute which it found confirmed this conclusion. Thus, the court held that the retroactivity provision regarding FCA § 3729(a)(1)(B) did not apply to the present case.<sup>106</sup>

The court then went on to state: “Even if the retroactivity clause enacted as part of FERA was to be found by a reading of its plain language to apply to the ‘claims’ pending in this case, application of this retroactivity language to these Defendants would violate the Ex Post Facto Clause of the U.S. Constitution.”<sup>107</sup> This clause prohibits the enactment of ex post facto laws, which have been defined by courts as “laws which impose punishment for past acts.”<sup>108</sup> According to district court in *Allison Engine*, “[t]he threshold question in an ex-post-facto analysis is whether the legislature intended to impose punishment when it enacted the law. If the legislature intended to impose punishment, the inquiry ends and the law violates the Ex Post Facto Clause. However, if the legislature’s intention was to enact a civil and nonpunitive regulatory scheme, a court must further examine whether the regulatory scheme is ‘so punitive either in purpose or effect as to negate [the State’s] intention to deem it ‘civil.’”<sup>109</sup> The district court then proceeded to conduct an ex post facto inquiry with respect to the FERA amendments to the FCA, holding the evidence weighed in favor of finding a punitive purpose to the FCA.<sup>110</sup> The district court thus held that “[t]he FCA as amended by FERA may not be applied to the Defendants in this case.”<sup>111</sup>

On December 28, 2009, the government filed a Motion to Certify the Entry and Order Precluding Retroactive Application of 31 U.S.C. § 3729(a)(1)(B) and Declaring it Unconstitutional For Interlocutory Appeal.<sup>112</sup> The memorandum in support of the motion, which is pending as of the date of writing (January 20, 2010), argues that there is ample evidence in the legislative history of the FCA and in prevailing case law supporting the finding that the FCA is not punitive in nature.<sup>113</sup> In particular, the government points out that *Vermont Agency of Natural Resources v. U.S. ex rel. Stevens*,<sup>114</sup> one of the key cases upon which the district court relied in determining that the FCA’s treble damages provision was punitive in nature, was later clarified by another Supreme Court opinion, in *Cook County, Illinois v. U.S. ex rel. Chandler*.<sup>115</sup> This held “that the False Claims Act’s treble damages provision is primarily remedial and is designed to ensure that the federal fisc is fully compensated for the effects of the defendant’s fraud, including the costs, delays, and inconveniences caused by the false claims.”<sup>116</sup> The government likewise argued that there is “a substantial ground for difference of opinion with

respect to the statutory construction and intent of Congress in using the phrase ‘claim under the False Claims Act.’”<sup>117</sup> As an example, the government cites *U.S. ex rel. Carter v. Halliburton Co.*,<sup>118</sup> decided in July 2009, in which the Eastern District of Virginia construed the word “claims” in FERA’s retroactivity clause to refer to cases, holding, “Because this case was pending on June 7, 2008, the Court has applied the amendment in §3729(a)(1)(B) (2009) to Count 4, a claim originally brought under §3729(a)(4) (1994).”<sup>119</sup>

**3. *U.S. v. Hawley*, 544 F. Supp. 2d 787 (N.D. Iowa 2008); *U.S. v. Hawley*, 566 F. Supp. 2d 918 (N.D. Iowa 2008)**

In *Hawley*,<sup>120</sup> the Northern District of Iowa in 2008 relied upon both the Sixth Circuit’s and the Supreme Court’s rulings in *Allison Engine* to dismiss the government’s FCA claims against the defendant.<sup>121</sup> The government alleged that the defendant insurance agents “participated in a scheme to obtain federally reinsured crop insurance payments for persons not eligible for such benefits.” The payments were administered by the Federal Crop Insurance Corporation (FCIC), a “wholly-owned government corporation,” pursuant to the Federal Crop Insurance Act, which provides for reimbursement to private insurance companies for claims paid under the Act’s Multi-Peril Crop Insurance (MCPI), for crop losses caused by natural events.<sup>122</sup> The government presented evidence that the defendants had submitted false and fraudulent MCPI claims, relating to cropland located in South Dakota, to a private insurance company, North Central Crop Insurance (NCCI), on behalf of several individuals. The evidence included the fact that the government had proceeded criminally against each of the alleged participants in the scheme. One of the defendants entered into a plea agreement, two entered into pretrial diversion agreements, and the last entered into a civil settlement agreement, “pursuant to which he repaid part of the overpayment alleged.”<sup>123</sup>

On April 3, 2008, the district court granted Hawley’s motion for summary judgment against the U.S. with respect to Count One of the government’s case, a claim pursuant to § 3729(a)(1) of the FCA, which alleged that the defendants had “knowingly presented or caused to be presented to the United States false or fraudulent claims for payment or approval.”<sup>124</sup> However, the court denied Hawley’s motion for summary judgment as to the government’s remaining FCA claims under § 3729(a)(2) and (3), and a common law fraud claim.<sup>125</sup> The court cited the Sixth Circuit’s *Allison Engine* decision, which “explained [that] a §3729(a)(1) claim is distinguished from claims under subsections (a)(2) and (a)(3) in that it requires proof that a ‘claim’ was ‘presented’ to the government for approval or payment...”<sup>126</sup> In contrast, the district court noted the Sixth Circuit’s holding that, “evidence that a claim was actually presented to the government is not necessary” to establish liability under § 3729(a)(2) and (3).<sup>127</sup> Focusing on the perceived “presentment” requirement in § 3729(a)(1), the court was persuaded by Hawley’s argument that, “none of the documents [comprising the false claims] were ‘presented’ to an officer or employee of the United States; the documents in question were only ‘presented’ to a private insurance company... [and] ‘presenting’ a claim to a private entity, even one that receives government funds, is not the same as ‘presenting’ it to an officer or employee of the government.”<sup>128</sup> The court found that genuine issues of material fact existed as to the government’s allegations under § 3729(a)(2) and (3), and the common law fraud claim.<sup>129</sup> A trial date was set for June 30, 2008.<sup>130</sup>

Five days before the trial was set to begin, the court issued an order of cancellation, followed by an opinion on June 27, 2008 granting summary judgment *sua sponte* against the government on its remaining three claims (§ 3729(a)(2) and (3) and common law fraud) and denying the government's request for reconsideration of the prior ruling of summary judgment on Count One (§ 3729(a)(1)). The court explained that, in the course of its trial preparations, "after further review of the *Allison Engine* decision; review of Iowa law applicable to common-law fraud claims; review of the parties' trial briefs addressing, *inter alia*, the impact of the *Allison Engine* decision on this case . . . the court came to the conclusion that the government's remaining claims in this case are not submissible."<sup>131</sup> This was because "the allegedly false crop insurance claims themselves were never forwarded to or approved by the government, nor was the payment of the crop insurance claims conditioned on review or approvals by the government, and there is no showing that the defendant intended that the false records or statements would be material to the government's decision to pay or approve the false claim. Thus, the evidence that the government ultimately reimbursed NCCI for the false claims that NCCI paid is not sufficient to make out a submissible claim pursuant to §3729(a)(2)."<sup>132</sup> Likewise, with respect to the § 3729(a)(3) claim, the court found that, "[t]he government's evidence shows, at most, that the alleged conspirators agreed upon a fraud scheme that had the effect of causing a private entity, NCCI, to make payments using money obtained from the government or, even more indirectly, to make payments for which NCCI was subsequently reimbursed by the government. Under *Allison Engine*, that evidence is not enough."<sup>133</sup>

The government has appealed the district court's decision to the Eighth Circuit.<sup>134</sup> On June 4, 2009, the government filed a Motion for Leave to File Notice of New False Claims Act Amendments and Notice of New False Claims Act Amendments.<sup>135</sup> The government noted that the FERA amendment to § 3729(a)(2) is retroactively effective as of June 7, 2008, and is specifically intended to overrule the Supreme Court's *Allison Engine* decision, issued on June 9, 2008.<sup>136</sup> Referring to the substance of the amendment, the government stated: "Thus, 'to get' and 'paid or approved by the Government' elements of the former law, upon which the district court relied, no longer apply, and are now irrelevant to the analysis. Insofar as it rests on statutory language that has been deleted from the FCA's text and is no longer operable here, the district court's summary judgment for defendants thus cannot stand."<sup>137</sup> At the same time, the government argued that "Hawley's underlying conduct...easily satisfies the new, amended language of Section 3729(a)(2), that a person 'knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim.'"<sup>138</sup>

In response to the government's motion, the defendant argued that the FERA amendment providing for retroactive effect is unconstitutional pursuant to the Ex Post Facto Clause. The defendant based this argument on the contention that the FCA, as a treble damages statute, is essentially punitive.<sup>139</sup> In its reply brief, the government argued that "[t]he Ex Post Facto clause is inapplicable here, because it applies only to criminal or penal provisions," while the FCA "is by its terms a civil statute . . . Even if it serves a deterrent role in addition to its vital remedial and compensatory functions, the False Claims Act is not properly deemed a criminal or penal provision for Ex Post Facto (or Double Jeopardy) purposes..."<sup>140</sup> In support of this assertion, the government cited the Supreme Court's ruling in *Hudson v. U.S.*,<sup>141</sup> in which the Court examined "a monetary penalty scheme akin to the False Claims Act" and concluded it was civil in nature. As for the defendant's due process argument, the government argued that, "[f]or Due Process

Purposes, Congress may legislate retroactively, as long as the statutory retroactivity is rationally related to a legitimate governmental purpose. . . . That standard is easily met here.”<sup>142</sup> The government also noted that, “a law generally has no retroactive effect if it does not interfere with settled expectations or reasonable reliance interests . . . . Under these standards, where, as here, the legislative amendments in question concern clarifying revisions to a remedial anti-fraud statute, it is not clear that Congress’ action is properly viewed as genuinely ‘retroactive.’”<sup>143</sup>

At the time of writing (January 20, 2010), the court had not ruled on the government’s motion.

#### 4. Other Noteworthy Cases

A handful of additional cases also have addressed the question of FERA’s retroactivity provision. In June of 2009, the District of Delaware addressed the retroactive application of the amendments to FCA § 3729(a)(2), in *U.S. v. Aguillon*.<sup>144</sup> The court applied a two-part test established by the Supreme Court in *Landgraf v. USI Film Products*,<sup>145</sup> in order “to determine if new federal statutes can be applied to conduct that occurred prior to enactment of the new statute.”<sup>146</sup> In the first step, the court examined Congress’s intent in enacting the relevant provisions, finding that, “Congress has not unambiguously precluded retrospective application of the FCA amendments . . . . Although FERA expressly stated that the relevant amendments apply only to ‘conduct on or after the date of enactment (May 20, 2009),’ the Congressional record states that ‘courts should rely on these amendments to clarify the existing scope of False Claims Act liability.’”<sup>147</sup> (Note that this court employed the term “retrospective” to mean “applying a statute to a pending case. ‘Retroactive effects’ occur only when retrospective application causes the statute to ‘reach back in time and alter the rights or obligations on which the parties relied prior to the statute’s passage.’”<sup>148</sup>) The court then proceeded to the second part of the retroactivity analysis, which requires the court to “determine if retrospective application of the statute would create ‘retroactive effects’ and if these effects are permissible pursuant to a congressional directive.”<sup>149</sup> The court found that “retrospective application of the amendment would cause retroactive effects . . . because it would increase defendant’s liability for past conduct.”<sup>150</sup> The court thus found that the FERA amendments to the FCA were not retroactive, because, “[a]lthough the Congressional record implies retrospective application, it directed against applying the amendments in a way that would cause retroactive effects. *See* 155 Cong. Rec. E1295-03, at E1300. (Congress intended to ‘avoid extensive litigation over whether the amendments apply retroactively, as occurred following the 1986 False Claims Act amendments.’)”<sup>151</sup>

In two cases, courts have taken the same approach as that taken in *Allison Engine*, holding that the retroactive provision in FERA applies to “claims” and not “cases.” A decision by the District of Columbia in September 2009, *U.S. v. Science Applications International Corporation* (“SAIC”), also declined to hold the FERA amendments retroactive.<sup>152</sup> Instead, the court held: “Under 31 U.S.C. §3729, a ‘claim is a ‘request or demand . . . for money or property.’ ‘Statutory definitions control the meaning of statutory words . . . in the usual case.’ Under §3729’s definition of ‘claim,’ §3729(a)(1)(B) does not apply in this case because none of SAIC’s claims at issue here were pending on or before June 7, 2008.”<sup>153</sup> In December 2009, the Eleventh Circuit followed SAIC in *Harper v. Solvay Pharmaceuticals et al.*, concluding that

FERA “does not apply retroactively to this case,” because, “[w]hile this **case** was pending on and after June 7, 2008, the relators do not allege that any **claims**, as defined by §3729(b) (2)(A), were pending on or after June 7, 2008.”<sup>154</sup>

As stated above, the Eastern District of Virginia in *U.S. ex rel. Carter v. Halliburton Co.*<sup>155</sup> held the opposite: “Because this case was pending on June 7, 2008, the Court has applied the amendment in §3729(a)(1)(B) (2009) to Count 4, a claim originally brought under §3729(a)(4) (1994).”<sup>156</sup>

#### **IV. CONCLUSION**

In his remarks in the Congressional Record, Rep. Berman foreshadowed that further amendments to the FCA are yet to come: “The bill on the floor today, S. 386, is a critical first step needed to remove...confusion and to ensure that qui tam actions continue to assist the Government in protecting its limited resources. [ . . . ] Other corrections and clarifications that are needed to the False Claims Act have not been included in S. 386 due to the particular overall purpose of S. 386. Those additional False Claims Act corrections and clarifications should be taken up in separate legislation.”<sup>157</sup>

Indeed, the Senate healthcare bill presently before Congress (as of January 20, 2010) includes an update to the FCA’s public disclosure bar. The bill proposes amending FCA § 3730(e)(4) by: (1) clarifying that only **federal** government reports, hearings, audits or investigations are subject to the public disclosure bar; (2) providing that criminal and civil proceedings will only trigger 3730(e)(4) when the **Government** is a party, so that private discovery in a non-FCA civil case will no longer trigger the bar; (3) rejecting the “third prong” element that has been read into the original source exception in some circuits; and (4) empowering the government to veto a FCA defendant’s motion to dismiss under § 3730(e)(4).<sup>158</sup> If the bill passes with these provisions intact, FCA practitioners will have a whole new set of changes to grapple with, including the uncertainties and controversies that are sure to arise. In any event, it is clear that the False Claims Act, now in its 147<sup>th</sup> year and its fourth incarnation, is still in the process of evolution.

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<sup>1</sup> Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1617 (2009) (*hereinafter* “FERA”).

<sup>2</sup> S. REP. NO. 111-10, at 3 (2009).

<sup>3</sup> *Id.* at 3-4.

<sup>4</sup> 31 U.S.C. §§ 3729 *et seq.*

<sup>5</sup> *Id.* at 10.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> 155 CONG. REC. E1295-03, at E1297 (daily ed. June 3, 2009) (remarks of Hon. Howard L. Berman) (*hereinafter* “Berman”).

<sup>9</sup> *Id.* at E1298.

<sup>10</sup> *U.S. ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488 (D.C. Cir. 2004).

<sup>11</sup> *Id.* at 490.

<sup>12</sup> S. REP. NO. 111-10, at 10-11 (2009).

<sup>13</sup> *U.S. ex rel. Atkins v. McInteer*, 345 F. Supp. 2d 1302 (N.D. Ala. 2004), *aff’d on other grounds*, 470 F.3d 1350 (11th Cir. 2006).

<sup>14</sup> S. REP. NO. 111-10, at 11 (2009).

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<sup>15</sup> *Allison Engine Co., Inc. v. U.S. ex rel Sanders*, 128 S.Ct. 2123 (2008).

<sup>16</sup> *Id.* at 2127.

<sup>17</sup> *Id.* at 2123.

<sup>18</sup> *Id.* at 2127-28.

<sup>19</sup> *Id.* at 2128.

<sup>20</sup> *Id.* at 2126.

<sup>21</sup> *Allison Engine*, 128 S.Ct. at 2130-31.

<sup>22</sup> S. REP. NO. 111-10, at 10 (2009).

<sup>23</sup> Berman, 155 CONG. REC. at E1298.

<sup>24</sup> S. REP. NO. 111-10, at 11 (2009).

<sup>25</sup> FERA, Pub. L. No. 111-21, §4(a).

<sup>26</sup> *Id.*; Berman, 155 CONG. REC. at E1298.

<sup>27</sup> FERA, Pub. L. No. 111-21, §4(a); S. REP. NO. 111-10, at 12 (2009).

<sup>28</sup> FERA, Pub. L. No. 111-21, §4(a)(2); *see also* S. REP. NO. 111-10, at 12 (2009).

<sup>29</sup> *See, e.g., Costner v. URS Consultants*, 153 F.3d 667, 677 (8th Cir. 1998) (“Essentially, then, only those actions by the claimant which have the purpose and effect of causing the United States to pay out money it is not obligated to pay, or those actions which intentionally deprive the United States of money it is lawfully due, are properly considered ‘claims’ within the meaning of the FCA.” [citations omitted]).

<sup>30</sup> *See, e.g., Longhi*, 575 F.3d at 468-9; *U.S. v. Southland Mgmt. Corp.*, 326 F.3d 669, 679 (5th Cir. 2003) (en banc); *Costner*, 153 F.3d at 677.

<sup>31</sup> *Longhi*, 575 F.3d at 468 (citing *Neder v. U.S.*, 527 U.S. 1, 16 (1999)); *see also, Harrison*, 352 F.3d at 916-17.

<sup>32</sup> FERA, Pub. L. No. 111-21, §4(a)(2).

<sup>33</sup> Berman, 155 CONG. REC. at E1298.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> 376 F. Supp. 2d 617 (E.D. Va. 2005).

<sup>37</sup> 155 CONG. REC. E1295-03, at E1298 (daily ed. June 3, 2009) (remarks of Hon. Howard L. Berman).

<sup>38</sup> *Custer Battles*, 376 F. Supp. 2d at 618.

<sup>39</sup> *Id.* at 620-22.

<sup>40</sup> *Id.* at 619.

<sup>41</sup> S. REP. NO. 111-10, at 12 (2009); *see also* Berman, 155 CONG. REC. at E1298.

<sup>42</sup> Berman, 155 CONG. REC. at E1298.

<sup>43</sup> FERA, Pub. L. No. 111-21, §4(a)(2).

<sup>44</sup> Berman, 155 CONG. REC. at E1298.

<sup>45</sup> FERA, Pub. L. No. 111-21, §4(a)(2).

<sup>46</sup> Berman, 155 CONG. REC. at E1298; S. REP. NO. 111-10, at 11 (2009).

<sup>47</sup> Berman, 155 CONG. REC. at E1298. *See, e.g., U.S. ex rel. Huangyan Import & Export Corp. v. Nature’s Farm Products, Inc.*, 370 F. Supp. 2d 993 (N.D. Cal. 2005) (holding that the conspiracy provision of the FCA does not cover conspiracies to violate subsection 3729(a)(7)).

<sup>48</sup> FERA, Pub. L. No. 111-21, §4(a)(1).

<sup>49</sup> S. REP. NO. 111-10, at 12 (2009).

<sup>50</sup> *Id.* at 13.

<sup>51</sup> *Id.*; Berman, 155 CONG. REC. at E1299; *see, e.g., U.S. ex rel. Aakhus v. Dyncorp, Inc.*, 136 F.3d 676 (10th Cir. 1998).

<sup>52</sup> FERA, Pub. L. No. 111-21, §4(a)(1).

<sup>53</sup> S. REP. NO. 111-10, at 14 (2009); Berman, 155 CONG. REC. at E1299.

<sup>54</sup> FERA, Pub. L. No. 111-21, §4(a) (1).

<sup>55</sup> *Id.* at §4(a) (2).

<sup>56</sup> S. REP. NO. 111-10, at 14 (2009) [citations omitted].

<sup>57</sup> *Id.* at 15 (2009); Berman, 155 CONG. REC. at E1299.

<sup>58</sup> Berman, 155 CONG. REC. at E1299.

<sup>59</sup> S. REP. NO. 111-10, at 15 (2009).

<sup>60</sup> Berman, 155 CONG. REC. at E1298.

<sup>61</sup> Rule 15(c)(1) provides, “An amendment to a pleading relates back to the date of the original pleading when: (A) the law that provides the applicable statute of limitations allows relation back; (B) the amendment asserts a claim or

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defense that arose out of the conduct, transaction, or occurrence set out — or attempted to be set out — in the original pleading; or (C) the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment: (i) received such notice of the action that it will not be prejudiced in defending on the merits; and (ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.”

<sup>62</sup> 469 F.3d 263, 268 (2d Cir. 2006).

<sup>63</sup> Berman, 155 CONG. REC. at E1299.

<sup>64</sup> FERA, Pub. L. No. 111-21, §4(b).

<sup>65</sup> Berman, 155 CONG. REC. at E1299.

<sup>66</sup> *Id.*

<sup>67</sup> FERA, Pub. L. No. 111-21, §4(b).

<sup>68</sup> Berman, 155 CONG. REC. at E1299.

<sup>69</sup> FERA, Pub. L. No. 111-21, §4(c).

<sup>70</sup> Berman, 155 CONG. REC. at E1300.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*; FERA, Pub. L. No. 111-21, §4(d).

<sup>73</sup> Berman, 155 CONG. REC. at E1300.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> FERA, Pub. L. No. 111-21, §4(d); *see* Berman, 155 CONG. REC. at E1300.

<sup>77</sup> Berman, 155 CONG. REC. at E1300.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *See, e.g.,* Reiss, John B., et al., *Your Business in Court: 2008-2009*, 64 FOOD DRUG L.J. 755, 762 (2009).

<sup>82</sup> *See, e.g.,* Rhoad, Robert T. and Matthew T. Fornataro, *A Gathering Storm: The New False Claims Amendments and Their Impact on Healthcare Fraud Enforcement*, 21 HEALTH LAWYER 14, 18 (Aug. 2009).

<sup>83</sup> *Id.* at 18-19.

<sup>84</sup> Anderson, Steven, *Mixed Bag: FERA provisions vary in significance for business*, INSIDE COUNSEL (Aug. 2009), at 36.

<sup>85</sup> FERA, Pub. L. No. 111-21, §4(b).

<sup>86</sup> Anderson, Steven, *Mixed Bag: FERA provisions vary in significance for business*, INSIDE COUNSEL (Aug. 2009), at 36.

<sup>87</sup> *U.S. ex rel. Longhi v. Lithium Power Technologies*, 530 F. Supp. 2d 888 (S.D. Tex. 2008), *aff'd.*, 575 F.3d 458, (5th Cir. 2009).

<sup>88</sup> *Longhi*, 575 F.3d at 464 .

<sup>89</sup> *Longhi*, 530 F. Supp 2d at 897.

<sup>90</sup> *Id.* at 899.

<sup>91</sup> *Longhi*, 575 F.3d 458 (5th Cir. 2009).

<sup>92</sup> *Id.* at 467.

<sup>93</sup> *Id.* at 469.

<sup>94</sup> *Id.* at 470.

<sup>95</sup> *Id.*

<sup>96</sup> *Allison Engine*, 128 S.Ct. at 2128.

<sup>97</sup> *U.S. ex rel Sanders .v. Allison Engine Co., Inc.*, No. 1:95-cv-970, No. 1:99-cv-923, 2008 U.S. Dist. LEXIS 111772 at \*6 (S.D. Ohio, Oct. 27, 2009).

<sup>98</sup> FERA, Pub. L. No. 111-21, § 4(f).

<sup>99</sup> *Allison Engine*, 2008 U.S. Dist. LEXIS 111772 at \*7.

<sup>100</sup> *Id.* at \*7-8.

<sup>101</sup> *Id.*

<sup>102</sup> *Allison Engine*, 2008 U.S. Dist. LEXIS 111772 at \*8. [citations omitted]

<sup>103</sup> *Id.* at \*9-10.

<sup>104</sup> *Id.* at \*10.

<sup>105</sup> *Id.* at \*10-11.

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<sup>106</sup> *Id.* at \*11-12.

<sup>107</sup> *Allison Engine*, 2008 U.S. Dist. LEXIS 111772 at \*12.

<sup>108</sup> See U.S. CONST. art. I, § 9, cl. 3; *Allison Engine*, 2008 U.S. Dist. LEXIS 111772 at \*12.

<sup>109</sup> *Allison Engine*, 2008 U.S. Dist. LEXIS 111772 at \*13-14. [citations omitted]

<sup>110</sup> *Id.* at \*15-20.

<sup>111</sup> *Id.* at \*27.

<sup>112</sup> United States’ Motion to Certify the Entry and Order Precluding Retroactive Application of 31 U.S.C. § 3729(a)(1)(B) and Declaring it Unconstitutional For Interlocutory Appeal., *U.S. ex rel. Sanders v. Allison Engine Co., Inc.*, No. C-1-95-970 (Consolidated with No. C-1-99-923) (S.D. Ohio Dec. 28, 2009) (*hereinafter*, “United States’ Motion to Certify”). The government’s motion for interlocutory appeal seeks the opportunity to argue the merits of the issue, noting that “[a] court may certify for interlocutory appeal an order denying a motion where 1) the order involves a controlling question of law; 2) a substantial ground for difference of opinion regarding the ruling exists; and, 3) an immediate appeal would materially advance the litigation.” (p 4).

<sup>113</sup> United States’ Motion to Certify at 6, *U.S. ex rel. Sanders v. Allison Engine Co., Inc.*, No. C-1-95-970 (Consolidated with No. C-1-99-923) (S.D. Ohio Dec. 28, 2009).

<sup>114</sup> 529 U.S. 765, 784 (2000).

<sup>115</sup> 538 U.S. 119 (2003).

<sup>116</sup> United States’ Motion to Certify at 7, *U.S. ex rel. Sanders v. Allison Engine Co., Inc.*, No. C-1-95-970 (Consolidated with No. C-1-99-923) (S.D. Ohio Dec. 28, 2009) ( *citing* *Chandler*, 538 U.S. 119, 130-31 (2003)).

<sup>117</sup> United States’ Motion to Certify at 7, *U.S. ex rel. Sanders v. Allison Engine Co., Inc.*, No. C-1-95-970 (Consolidated with No. C-1-99-923) (S.D. Ohio Dec. 28, 2009).

<sup>118</sup> *U.S. ex rel. Carter v. Halliburton Co.*, No. 1:08cv1162, 2009 WL 2240331 (E.D. Va. July 23, 2009).

<sup>119</sup> *Id.* at \*5 fn 3.

<sup>120</sup> *U.S. v. Hawley*, 544 F. Supp. 2d 787 (N.D. Iowa 2008); *U.S. v. Hawley*, 566 F. Supp. 2d 918 (N.D. Iowa 2008).

<sup>121</sup> See *Hawley*, 544 F. Supp. 2d at 799; *Hawley*, 566 F. Supp. 2d at 926.

<sup>122</sup> *Hawley*, 544 F. Supp. 2d at 792.

<sup>123</sup> *Id.* at 793-94.

<sup>124</sup> *Id.* at 794, 816-17.

<sup>125</sup> *Id.*

<sup>126</sup> *Hawley*, 544 F. Supp. 2d at 799 (*citing* *U.S. ex rel. Sanders v. Allison Engine Co., Inc.*, 471 F.3d 610, 617-18 (6th Cir. 2006)).

<sup>127</sup> *Hawley*, 544 F. Supp. 2d at 799, 801.

<sup>128</sup> *Id.* at 803.

<sup>129</sup> *Id.* at 808, 811.

<sup>130</sup> *Hawley*, 566 F. Supp. 2d at 922.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 927.

<sup>133</sup> *Id.* at 927-28.

<sup>134</sup> Notice of Appeal, *U.S. v. Hawley*, No. 5:06-cv-04087-MWB (N.D. Iowa Aug. 25, 2008).

<sup>135</sup> Government’s Motion for Leave to File Notice of New False Claims Act Amendments and Notice of New False Claims Act Amendments, *U.S. v. Hawley*, No. 08-2992 (8th Cir. June 4, 2009).

<sup>136</sup> *Id.* at 3.

<sup>137</sup> *Id.* at 8-9.

<sup>138</sup> *Id.* at 9-10.

<sup>139</sup> Appellees’ Response to Appellant’s Motion Served on June 4, 2009 at 3-4, *U.S. v. Hawley*, No. 08-2992 (8th Cir. June 6, 2009).

<sup>140</sup> Government’s Reply to Response to Motion to File Notice of New False Claims Act Amendments at 6-7, *U.S. v. Hawley*, No. 08-2992 (8th Cir. June 16, 2009).

<sup>141</sup> 522 U.S. 93 (1997).

<sup>142</sup> Government’s Reply to Response to Motion to File Notice of New False Claims Act Amendments at 7, *U.S. v. Hawley*, No. 08-2992 (8th Cir. June 16, 2009).

<sup>143</sup> *Id.* at 8.

<sup>144</sup> *U.S. v. Aguillon*, No. 08-789-SLR, slip op. (D. Del. June 24, 2009).

<sup>145</sup> 511 U.S. 244 (1994).

<sup>146</sup> *U.S. v. Aguillon*, No. 08-789-SLR, slip op. at 12 (D. Del. June 24, 2009).

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<sup>147</sup> *Id.* at 14 [citations omitted].

<sup>148</sup> *U.S. v. Aguilon*, No. 08-789-SLR, slip op. at 14, fn. 12 (D. Del. June 24, 2009) [citations omitted].

<sup>149</sup> *Id.* at 12-13 [citations omitted].

<sup>150</sup> *Id.* at 14.

<sup>151</sup> *Id.*

<sup>152</sup> *U.S. v. Science Applications International Corporation*, No. 04-1543, U.S. Dist. LEXIS 84021 (D.C. Sept. 15, 2009).

<sup>153</sup> *Id.* at \*45.

<sup>154</sup> *Harper v. Solvay Pharmaceuticals et al.*, No. 08-15810, 2009 U.S. App. LEXIS 26381 at \*18-19 (11th Cir. Dec. 4, 2009).

<sup>155</sup> *U.S. ex rel. Carter v. Halliburton Co.*, No. 1:08cv1162, 2009 WL 2240331 (E.D. Va. July 23, 2009).

<sup>156</sup> *Id.* at \*5 fn 3.

<sup>157</sup> Berman, 155 CONG. REC. at E1298.

<sup>158</sup> See H.R. 3590, 111th Cong. (2009), §1303(j)(2)(4)(A), (B) available at <http://democrats.senate.gov/reform/patient-protection-affordable-care-act-as-passed.pdf> (last accessed Jan. 20, 2010).