Supreme Court *Certiorari* Denial Allows Circuit Split Regarding Retroactivity of the 2009 False Claims Act Amendments to Remain

On June 24, 2013, the Supreme Court denied *certiorari* to review the Sixth Circuit's November 2012 decision in *United States ex rel. Sanders v. Allison Engine Co.*[1] This allows a significant circuit split over the retroactive application of a key piece of the 2009 amendments to the False Claims Act ("FCA") to remain unresolved.

The amendments to the FCA in the Fraud Enforcement and Recovery Act of 2009 ("FERA") are generally applicable only to conduct that occurred after the date of FERA's enactment. There are, however, exceptions that make certain FERA provisions retroactive. FERA retroactively expanded one change to the FCA's scienter element that eliminated the need to show a defendant's knowing use of a false statement specifically to get a claim paid by the government. Congress made that provision retroactive to "claims" pending as of June 7, 2008 – two days before a Supreme Court ruling in this very case that narrowed the FCA's scienter element. The circuit split concerns whether the statute's reference to "claims" signifies *cases* that were pending on that date, or instead *claims for payment* from the government pending as of that date. The answer can make a significant difference to a defendant's potential exposure in those cases where the revised liability standard expands the scope of conduct that a relator or Department of Justice ("DOJ") may pursue.

With the Supreme Court declining to review the Sixth Circuit's decision, the split will remain for now. The Sixth Circuit's *Allison Engine* opinion is also noteworthy for its rejection of the defendants' argument that the FERA amendments impose an after-the-fact "penalty" in violation of the Constitution's *Ex Post Facto* Clause. The denial of *certiorari* leaves this holding in place as well.

Background

Allison Engine involved allegations that the defendants, Navy subcontractors, submitted invoices for reimbursement knowing that the electrical generators they had manufactured did not meet the Navy's quality specifications. At trial, the plaintiffs showed that the defendants submitted claims for payment to the prime contractors on the project, but the plaintiff provided no evidence pertaining to the claims for payment that the prime contractors eventually submitted to the government. Although the defendants were ultimately paid using federal funds, in 2008 the Supreme Court found in favor of the defendants on appeal, concluding that no FCA liability attached unless the plaintiff could show that the defendants made false statements with the specific intent that the statements would be material to the government's decision whether to pay the claim.

With FERA, Congress expanded the scope of FCA liability. In so doing, it abrogated the Supreme Court's 2008 decision in *Allison Engine*, which had narrowed one aspect of the FCA's scienter element. Before FERA, the FCA imposed liability on any person who "*knowingly* makes, uses, or causes to be made or used, a false record or statement *to get* a false or fraudulent claim *paid or approved by the Government*."[2] The Supreme Court had interpreted that language to require a relator or DOJ to prove not only that the defendant knew the claim was false but also that the defendant intended for the government to rely on the false claim. Through FERA, Congress expressly eliminated the second aspect of the Supreme Court's interpretation of the FCA's scienter element. Now, post-FERA, the FCA imposes liability upon any person who "*knowingly* makes, uses,

[1] 703 F.3d 930 (6th Cir. 2012).

[2] § 3729(a)(1)(B) (emphasis added).

or causes to be made or used, a false record or statement *material* to a false or fraudulent claim."[3] Relators and DOJ no longer must prove that the defendant intended the government rely on its false claim.

To overrule the Supreme Court's 2008 *Allison Engine* decision, Congress made FERA's amendment to the scienter standard retroactive "as if enacted on June 7, 2008," which is two days before the Court's decision. FERA § 4(f), amending 31 U.S.C. § 3729(a)(1). Unfortunately, Congress was not perfectly clear what it meant. In some of the amended statutory text, Congress said FERA applied to all "claims" under the FCA that were pending on or after June 7, 2008; in other instances Congress used the word "cases." As a result, whether the retroactive liability standard applies only to *claims for payment* pending with the government as of June 7, 2008, or also applies to pending *cases* filed under the FCA before that date, remains in dispute.

Courts are split on this question. The Ninth and Eleventh Circuits have taken a narrower reading, holding that the amendment applies only to then-pending claims for payment but not then-pending FCA actions.[4] The Second and Seventh Circuits, by contrast, have taken the broader view and concluded that FERA retroactively changes the scienter standard for *both* pending claims for payment and pending FCA cases.[5]

Tipping the Balance of the Circuit Court Split

In the fullest treatment of the issue to date, the Sixth Circuit sided with the Second and Seventh Circuits, concluding that "claims" also includes "cases" pending as of June 7, 2008. Discussing the issue for over thirty pages – instead of in a summary footnote as many of the prior judicial opinions had done – the Sixth Circuit outlined the statutory support for the broader interpretation.

The Sixth Circuit's analysis recognized the two sides to the debate that had driven a wedge between the four circuits to previously consider the issue. On the one hand, FERA uses the word "claims" with reference to its retroactive liability standard, a word with a plain meaning that seems to preclude retroactive application to FCA "cases." On the other hand, adhering too faithfully to this maxim of statutory construction and interpreting the word "claim" literally, in light of its somewhat confusing statutory context (which applies the standard retroactively to "claims under the False Claims Act"), would lead to a "strained" reading. The Sixth Circuit concluded that the canon of construction had to give way to what the court viewed was likely the intended meaning of FERA's retroactivity provision. Accordingly, in the Sixth, Second, and Seventh Circuits, FERA's change to the FCA's scienter element applies to both cases and claims for payment pending as of June 7, 2008, while in the Ninth and Eleventh Circuits, the change applies only to claims for payment pending as of that date, but not to filed cases where claims for payment were no longer pending with the government.

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[3] Materiality is defined at § 3729(b)(4) as "having the natural tendency to influence, or be capable of influencing" the payment or receipt of money or property.

[4] *United States ex rel. Cafasso v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1051 n.1 (9th Cir. 2011) ("These amendments do not apply retroactively to this case," citing *Hopper*); *Hopper v. Solvay Pharms., Inc.*, 588 F.3d 1318, 1327 n.3 (11th Cir. 2009) (noting "[w]e interpret the word 'claim' in [FERA] to mean 'any request or demand . . . for money or property," and declining to apply FERA retroactively to a case pending on June 7, 2008).

[5] See *United States ex rel. Yannacopoulos v. Gen. Dynamics*, 652 F.3d 818, 822 n.2 (7th Cir. 2011) (FERA applies retroactive "to cases . . . pending on or after June 7, 2008); *United States ex rel. Kirk v. Schindler Elevator Corp.*, 601 F.3d 94, 113 (2d Cir. 2010) (observing that the amendment applied retroactively because the relator's case was filed in March 2005 and was "pending as of June 7, 2008"), *rev'd on other grounds*, 131 S. Ct. 1885 (2011).

Consideration of the *Ex Post Facto* Clause

Allison Engine also thoroughly analyzed whether retroactively applying FERA's liability standard violates the *Ex Post Facto* Clause of the Constitution. The Clause bars retroactive liability under a civil statute like the FCA if the purpose or effect of the civil statute is punitive. As it did with its analysis of the retroactivity question, the Sixth Circuit provided more reasoned support for the argument against finding an *Ex Post Facto* Clause violation than the prior courts to address the question. The D.C. Circuit, for example, summarily rejected such an argument in only two sentences.[6]

The Sixth Circuit explained that Congress' statements in connection with FERA did not evince a purpose to use the FCA to punish wrongdoing, but merely to create a civil scheme for combating fraud. The court recognized that in some instances the FCA can appear to border on a criminal statute—in particular, its imposition of treble damages that may vastly exceed the amount of harm suffered by the government and the fact that the FCA covers some conduct that is also proscribed by a section of the United States criminal code.[7] Yet the court concluded that these aspects of the FCA were not so punitive as to transform it from a civil penalty into a criminal one.

Conclusion

With the Supreme Court declining to re-visit the Sixth Circuit's decision that FERA's retroactivity clause applies to both cases and claims pending as of June 7, 2008, companies can expect *Allison Engine* to be cited against them when they are litigating the FCA's scienter standard in any circuit that has not yet weighed in on this issue. Furthermore, the Sixth Circuit continued what appears to be a trend, seen in the D.C. Circuit and several district courts, in finding that applying the FERA amendments retroactively is consistent with the *Ex Post Facto* Clause of the Constitution.

[6] *United States ex rel. Miller v. Bill Harber Int. Constr., Inc.*, 608 F.3d 871, 878 (D.C. Cir. 2010).
[7] *See* 18 U.S.C. § 287 (providing up to five years imprisonment for knowingly submitting false claims to the government).