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## Congress Declares Checkmate: How the Fraud Enforcement and Recovery Act of 2009 Strengthens the Civil False Claims Act and Counters the Courts

### I. INTRODUCTION

THE CIVIL FALSE CLAIMS ACT (FCA)<sup>1</sup> IS ONE OF THE MOST effective tools in the federal government's arsenal to combat schemes that defraud, and attempt to defraud, the United States treasury and, by extension, the country's taxpayers. In fiscal year 2009, the United States recovered \$2.4 billion in settlements and judgments under the FCA, representing the second largest annual recovery in the Act's history.<sup>2</sup> Since 1986, when the FCA was last strengthened legislatively, total recoveries have exceeded \$24 billion.<sup>3</sup> The 1986 amendments enhanced the FCA primarily by revising its *qui tam* provisions to encourage whistleblowers to come forward with allegations of fraud.<sup>4</sup>

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1. 31 U.S.C. §§ 3729–3733 (2006), amended by Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1617.

2. Press Release, Dep't of Justice, Justice Department Recovers \$2.4 Billion in False Claims Cases in Fiscal Year 2009; More Than \$24 Billion Since 1986 (Nov. 19, 2009) (available at <http://www.justice.gov/opa/pr/2009/November/09-civ-1253.html>).

3. *Id.*

4. The purposes of the 1986 amendments are beyond the scope of this article. For a description of these purposes, see S. REP. NO. 99-345, at 1–2, 4 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5266–67, 5269.

## CONGRESS DECLARES CHECKMATE

In May 2009, the Fraud Enforcement and Recovery Act of 2009 (FERA) was signed into law.<sup>5</sup> Unlike the 1986 amendments, FERA's primary purpose is to overrule court decisions with which Congress disagreed. Indeed, section 4 of FERA, which contains the FCA revisions, is entitled "Clarifications to the False Claims Act to Reflect the Original Intent of the Law."<sup>6</sup> And the Senate Report accompanying the 2009 FCA amendments explained:

*One of the most successful tools for combating waste and abuse in Government spending has been the . . . [FCA], which is an extraordinary civil enforcement tool used to recover funds lost to fraud and abuse. The effectiveness of the FCA has recently been undermined by court decisions limiting the scope of the law and allowing subcontractors and non-governmental entities to escape responsibility for proven frauds. In order to respond to these decisions, certain provisions of the FCA must be corrected and clarified in order to protect the Federal assistance and relief funds expended in response to our current economic crisis.*

*This section amends the FCA to clarify and correct erroneous interpretations of the law that were decided in Allison Engine Co. v. United States ex rel. Sanders, 128 S. Ct. 2123 (2008), and United States ex rel. Totten v. Bombardier Corp., 380 F.3d 488 (D.C. Cir. 2004).<sup>7</sup>*

This article analyzes the significant changes in the FCA effectuated by FERA, particularly with respect to court decisions that Congress sought to undo, and thus we presume the reader has a basic familiarity with the FCA's structure and operation.<sup>8</sup>

Accordingly, we first discuss the significant FCA changes related to liability under the statute, now contained in 31 U.S.C. § 3729(a). Those changes primarily

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5. Pub. L. No. 111-21, 123 Stat. 1617 (to be codified at 31 U.S.C.); Posting of Jesse Lee to The White House Blog, <http://www.whitehouse.gov/blog/protecting-homeowners-protecting-the-economy> (May 20, 2009, 18:49 EST) (providing a link to a video of the FERA-signing ceremony); see also American Health Lawyers Association, False Claims Act 2009—Redline Version, [http://www.healthlawyers.org/Events/Teleconferences/fca090617/Documents/FCA2009Amendments\\_Redline.pdf](http://www.healthlawyers.org/Events/Teleconferences/fca090617/Documents/FCA2009Amendments_Redline.pdf).

6. Pub. L. No. 111-21, sec. 4, 123 Stat. 1617, 1621.

7. S. REP. NO. 111-10, at 10 (2009), reprinted in 2009 U.S.C.C.A.N. 430, 438; see also Press Release, Dep't of Justice, *supra* note 2.

8. For more background on the False Claims Act, see AM. BAR ASS'N, *QUI TAM LITIGATION UNDER THE FALSE CLAIMS ACT* (Howard W. Cox & Peter B. Hutt II eds., 2d ed. 1999); Gregory G. Brooker, *The False Claims Act: Congress Giveth and the Courts Taketh Away*, 25 *HAMLIN L. REV.* 373 (2002); Matthew H. Solomson & Sarah M. Brackney, *What Would Scalia Do?—A Textualist Approach to the Qui Tam Settlement Provision of the False Claims Act*, 36 *PUB. CONT. L.J.* 39 (2006); Gretchen L. Forney, Note, *Qui Tam Suits: Defining the Rights and Roles of the Government and the Relator Under the False Claims Act*, 82 *MINN. L. REV.* 1357 (1998); Christopher C. Frieden, Comment, *Protecting the Government's Interests: Qui Tam Actions Under the False Claims Act and the Government's Right to Veto Settlements of Those Actions*, 47 *EMORY L.J.* 1041 (1998); Valerie R. Park, Note, *The False Claims Act, Qui Tam Relators, and the Government: Which Is the Real Party to the Action?*, 43 *STAN. L. REV.* 1061 (1991); Note, *The History and Development of Qui Tam*, 1972 *WASH. U. L.Q.* 81.

deal with the meaning of (claim) presentment to the government, false statements and records, reverse false claims, and the delivery of property to the government. In the next section, we deal with the new definitions of the FCA's key functional terms. Finally, in section four, we address the controversy surrounding the effective date of FERA's FCA amendments and the issue of retroactivity. Given the government's enforcement focus on health care and defense contractor fraud, we endeavor, where possible, to use specific examples and cases from those fields.<sup>9</sup>

## II. FERA'S SIGNIFICANT ALTERATIONS TO THE FCA'S LIABILITY PROVISIONS

As noted above, the Senate's Report on FERA reflects the Senate's deep disappointment with several prominent, relatively recent court decisions that limited the scope of the FCA.<sup>10</sup> In particular, the Senate Report characterized the recent decisions in *Allison Engine Co. v. United States ex rel. Sanders*<sup>11</sup> and *United States ex rel. Totten v. Bombardier Corp.*<sup>12</sup> as "erroneous interpretations of the law," and described the recent judicial creation of what Congress believed were new FCA defenses and elements as "contrary to Congress's original intent."<sup>13</sup> Overall, FERA enhances the government's (or a relator's) ability to establish "clear liability" for false or fraudulent claims submitted to contractors or federal grantees,<sup>14</sup> to hold perpetrators of Medicare and Medicaid fraud accountable,<sup>15</sup> and, in general, to expand liability to individuals or entities involved in the use or making of false or fraudulent claims to obtain federal government dollars.<sup>16</sup>

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9. According to the Department of Justice, "[a] top priority for this administration is fighting health care fraud" and "[i]n fiscal year 2009, health care fraud recoveries reached \$1.6 billion, two-thirds of the year's total." Press Release, Dep't of Justice, *supra* note 2. Moreover, the Department states:

The largest health care recoveries came from the pharmaceutical and medical device industries, which accounted for \$866.7 million in settlements, including Aventis Pharmaceuticals Inc., Bayer HealthCare LLC, Eli Lilly & Company and Quest Diagnostics Inc. and its subsidiary, Nichols Institute Diagnostics Inc. In addition to federal recoveries, these pharmaceutical and medical device fraud cases returned \$402 million to state Medicaid programs.

*Id.* ("Procurement fraud accounted for a quarter of fiscal year 2009 recoveries with \$608.4 million in settlements and judgments, including \$422 million attributable to Department of Defense contracts.")

10. S. REP. NO. 111-10, at 4.

11. 128 S. Ct. 2123 (2008).

12. 380 F.3d 488 (D.C. Cir. 2004).

13. S. REP. NO. 111-10, at 10.

14. Christopher C. Burris, Michael E. Paulhus, & Louisa B. Childs, *Converging Events Signal a Changing Landscape in False Claims Act and Whistle-Blower Litigation and Investigations*, FED. LAW., Nov./Dec. 2009, at 59, 60.

15. See *infra* Part II.A-B.

16. See *infra* Part II.A-C.

*A. Presentment to the Federal Government: FERA Legislatively Overrules Totten & Allison Engine*

Prior to FERA, courts in FCA cases closely scrutinized whether alleged false or fraudulent claims actually were presented to the federal government. As explained in more detail below, FERA eliminates any direct presentment requirement for FCA liability to attach.<sup>17</sup> To put the revised presentment requirement in context, we first review the basic changes in statutory language,<sup>18</sup> the influential cases of *Totten* and *Allison Engine*,<sup>19</sup> and recent cases that illustrate how the absence of a direct presentment requirement may alter the outcome of FCA cases going forward.<sup>20</sup>

*1. Changes in Statutory Language: § 3729(a)(1) to § 3729(a)(1)(A)*

Under § 3729(a)(1) of the pre-FERA FCA, a defendant was liable when he “knowingly present[ed], or cause[d] 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.”<sup>21</sup> In early FCA cases, plaintiffs were required to establish, among other things, that: (1) the defendant submitted false claims to an entity that constituted an instrumentality of the United States; and (2) the individual who received the claims was, in fact, an employee of that instrumentality.<sup>22</sup>

For example, in 1958, in *Rainwater v. United States*,<sup>23</sup> the Supreme Court adopted a multi-factor test in determining that the Commodity Credit Corporation (CCC) was a federal government instrumentality, and that the defendant’s direct submission of false claims to the instrumentality therefore satisfied the FCA’s presentment requirement.<sup>24</sup> In so holding, the Court considered both that Congress had created the CCC and that the federal government generally had supervised the CCC.<sup>25</sup> In addition, the Court found that congressional appropriations provided all of the CCC’s capital and that the corporation’s officers and personnel were federal employees.<sup>26</sup> The Court considered the general purpose of the CCC, which was to provide an “administrative device . . . for the purpose of carrying out federal farm programs with public funds.”<sup>27</sup> Finally, the Court noted that the CCC’s incorpor-

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17. See *infra* Part II.A.1.

18. See *infra* Part II.A.1.

19. See *infra* Part II.A.2.

20. See *infra* Part II.A.3.

21. 31 U.S.C. § 3729(a)(1) (2006), amended by Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, sec. 4, 123 Stat. 1617, 1621.

22. See *Rainwater v. United States*, 356 U.S. 590, 591 (1958).

23. *Id.*

24. *Id.* at 591–94.

25. *Id.* at 591.

26. *Id.*

27. *Id.* at 592.

ation statute expressly provided that the CCC is an “agency and instrumentality of the United States.”<sup>28</sup> Given the totality of these factors, the FCA applied because the CCC was “wholly owned and closely controlled” by the federal government.<sup>29</sup>

After FERA, the *Rainwater* analysis is no longer necessary. The new FCA amendment mandates liability for a defendant if it “knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval.”<sup>30</sup> FERA eliminates the requirement that the claim be presented directly to a government official or employee.<sup>31</sup> Thus, courts may now hold a defendant liable whenever an alleged false or fraudulent claim is presented to any individual or entity in the chain of a transaction with the federal government, such as a federal contractor or grantee.<sup>32</sup> As the Senate Report explains, FERA ensures that “direct presentment [to the United States government] is not required for liability to attach.”<sup>33</sup> This change is perhaps the most significant expansion of the FCA’s scope resulting from FERA.

## 2. Congress Targets Totten and Allison Engine

The decision of the United States Court of Appeals for the District of Columbia Circuit in *United States ex rel. Totten v. Bombardier Corp.*<sup>34</sup> and the Supreme Court’s decision in *Allison Engine Co. v. United States ex rel. Sanders*<sup>35</sup> were Congress’s primary targets in its relaxation of the direct presentment requirement.<sup>36</sup>

In *Totten*, the relator alleged that several contractors had delivered defective railway cars to Amtrak and therefore had submitted false invoices (i.e., claims) for payment to an Amtrak account via which federal funds would be used.<sup>37</sup> Although the relator maintained that Amtrak had paid the defendants with federal funds, the relator did not allege that any claims were presented directly to a government official or employee.<sup>38</sup> Because Amtrak was not “the Government,” the court found the FCA inapplicable and dismissed the complaint.<sup>39</sup> The court rested its analysis on Amtrak’s organic statute, which provided that Amtrak “is not a department, agency,

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28. *Id.* at 591 (quoting Commodity Credit Corporation Charter Act, Pub. L. No. 80-806, sec. 2, 62 Stat. 1070, 1070 (1948) (current version at 15 U.S.C. § 714 (2006)) (internal quotation marks omitted).

29. *Id.* at 594.

30. 31 U.S.C.A. § 3729(a)(1)(A) (West 2009).

31. Compare 31 U.S.C. § 3729(a)(1) (2006) (including a requirement that a claim be presented directly to a government official or employee), with 31 U.S.C.A. § 3729(a)(1)(A) (eliminating the “to a government official or employee” language).

32. 31 U.S.C.A. § 3729(a)(1)(A), (b)(2)(A)(ii).

33. S. REP. NO. 111-10, at 11 (2009), reprinted in 2009 U.S.C.C.A.N. 430, 439.

34. 380 F.3d 488 (D.C. Cir. 2004).

35. 128 S. Ct. 2123 (2008).

36. S. REP. NO. 111-10, at 10.

37. 380 F.3d at 490.

38. *Id.*

39. *Id.* at 490–92.

or instrumentality of the United States Government.”<sup>40</sup> The court concluded that this provision of the Amtrak statute distinguished Amtrak from the CCC at issue in *Rainwater*.<sup>41</sup>

The court also rejected the relator’s argument that “a claim submitted to Amtrak is *effectively* a claim presented to the Government.”<sup>42</sup> Instead, the court relied upon the FCA’s “clear textual requirement” of presentment to a United States official or employee<sup>43</sup> to conclude that Congress had intended a direct presentment requirement.<sup>44</sup> Similarly, the court rejected the relator’s argument that a direct presentment requirement was inconsistent with the definition of “claim” under § 3729(c), which prior to FERA included payment requests to federal grantees “if the United States Government provides any portion of the money” requested.<sup>45</sup> According to the court, the two provisions were harmonious in providing for FCA liability under two conditions: (1) “if the Government *provides* the funds to the grantee *upon presentment of a claim* to the Government;” or (2) “if, after the grantee presents the claim, the Government *provides* the funds directly to the claimant.”<sup>46</sup>

In general, *Totten* illustrates the dispositive role the presentment requirement often played in pre-FERA FCA cases.<sup>47</sup> As in *Totten*, the Supreme Court in *Allison Engine* interpreted the presentment requirement based on a plain reading of the statutory language, and further confirmed that an FCA defendant must have presented a claim directly to the federal government for FCA liability to attach under § 3729(a)(1).<sup>48</sup>

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40. *Id.* at 491 (quoting 49 U.S.C. § 24301 (a)(3) (2000) (internal quotation marks omitted)).

41. *Id.* at 492 (noting that *Rainwater* is “clearly distinguishable” because the statute in that case “expressly provided” that the CCC was an agency of the United States government).

42. *Id.*

43. *Id.*

44. *See id.* at 495–96 (noting that Congress did not amend subsection (a)(1) in 1986 although it could have done so and removed the language requiring claims be presented to a government officer or employee).

45. *Id.* at 492–93 (quoting 31 U.S.C. § 3729(c) (2000) (internal quotation marks omitted)).

46. *Id.* at 493; *see also id.* at 496 (warning that an “effective” presentment interpretation would “make the potential reach of the Act almost boundless”). For example, the court noted that under an effective presentment interpretation, liability attaches “for any false claim made to any college or university, so long as the institution has received some federal grants—as most of them do.” *Id.* at 496. The court further held that under § 3729(a)(2), regarding false records and statements, direct presentment to the federal government also was mandatory. *See id.* at 498–99. However, the Supreme Court overruled this interpretation in *Allison Engine Co. v. United States ex rel. Sanders*, 128 S. Ct. 2123, 2129–30 (2008).

47. *See, e.g.*, 380 F.3d at 493.

48. *Allison Engine*, 128 S. Ct. at 2129. In dicta, however, the Court noted that under § 3729(a)(1), liability may be established when a claim is presented to “a contractor, grantee, or other recipient of federal funds and then forwarded to the Government.” *Id.* at 2129 n.1. The Court explained that, unlike § 3729(a)(1), presentment is unnecessary under § 3729(a)(2), the section dealing with false records and statements. *Id.* at 2129. The Court reasoned that Congress’s use of the word “presentment” in subsection (a)(1), and its failure to use that term in (a)(2), showed that Congress intended only to make presentment a requirement for a claim under (a)(1). *Id.* at 2129–30; *see also* *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002) (“[W]hen Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”)

FERA's revision to the FCA's presentment language effectively pulls the plug on a series of FCA decisions mirroring *Allison Engine* and *Totten*.<sup>49</sup> Indeed, had FERA's presentment provision applied to the facts at issue in *Totten*, the FCA would have applied because presentment of invoices to Amtrak, a federal grantee, would satisfy the new FCA § 3729(a)(1)(A).<sup>50</sup>

### 3. Recent Cases Reflect How FERA May Alter the Balance of Power in FCA Litigation in Favor of the Government and Relators

A number of recent FCA cases reflect not only the continuing evolution of the presentment requirement, but also, more importantly, how FERA would affect the outcome of those decisions and expand the reach of the FCA. In particular, FERA's elimination of the FCA's direct presentment requirement likely would permit a wider range of viable FCA suits than the pre-FERA version of the statute.

For example, in a 2008 decision in *United States ex rel. Sterling v. Health Insurance Plan of Greater New York, Inc.*,<sup>51</sup> the United States District Court for the Southern District of New York considered whether the FCA's presentment requirement was satisfied where Health Insurance Plan of Greater New York (HIP), a federal government contractor, submitted falsified data to the National Committee for Quality Assurance (NCQA), HIP's accrediting agency, in order to obtain accreditation vital for obtaining federal contracts with Medicaid and Children's Health Insurance Program (CHIP).<sup>52</sup> The relator alleged that the government's reliance upon the fraudulently acquired accreditation derived from HIP's falsified data.<sup>53</sup>

Because presentment to NCQA was not presentment to the government for the purposes of the FCA, the court dismissed the FCA action under § 3729(a)(1).<sup>54</sup> Citing *Allison Engine*, the court noted that, while the outcome may have been different if the claim was subsequently forwarded to the United States, the absence of government involvement was dispositive.<sup>55</sup> The district court dismissed the

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(quoting *Russello v. United States*, 464 U.S. 16, 23 (1983) (internal quotation marks omitted)). Similarly, the Court found that presentment was unnecessary under § 3729(a)(3), which imposed liability on any one who "conspires to defraud the Government by getting a false or fraudulent claim allowed or paid," given the absence of specific presentment language as contained in subsection (a)(1). *Allison Engine*, 128 S. Ct. at 2130 (citing 31 U.S.C. § 3729(a)(3)).

49. See S. REP. NO. 111-10, at 10 (2009), reprinted in 2009 U.S.C.C.A.N. 430, 438.

50. See *Totten*, 380 F.3d at 496 (noting that Congress could have amended subsection (a)(1) "to provide that claims be presented to the Government or a grantee or recipient of Government funds. But Congress did not touch (a)(1) at all . . .") (emphasis omitted).

51. No. 06 Civ. 1141, 2008 WL 4449448, at \*1 (S.D.N.Y. Sept. 30, 2008).

52. *Id.* at \*1-\*2.

53. *Id.* at \*2.

54. *Id.* at \*6.

55. *Id.* The court emphasized that NCQA was not "funded by, in contract with, or related to the Government in any way." *Id.*



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§ 3729(a)(1) claim because the relator failed to “establish presentment of the false claim to the Government.”<sup>56</sup>

Because the FCA no longer requires presentment directly to the government or one of its agents, the outcome of the relator’s § 3729(a)(1) claim post-FERA would not have turned on the presentment issue. Instead, because NCQA is an independent entity, and is not a federal grantee, contractor, or recipient of federal funds (something that remains necessary under FERA’s definition of a “claim”), the relator’s allegations may not have passed muster<sup>57</sup> for the separate reason that there was no FCA claim.<sup>58</sup>

Similarly, in *United States ex rel. DRC, Inc. v. Custer Battles, LLC*,<sup>59</sup> the Court of Appeals for the Fourth Circuit held that false claims submitted by Custer Battles, an international security company, to the Coalition Provisional Authority (CPA), a temporary administrative entity created to govern Iraq and staffed by both United States and coalition country personnel,<sup>60</sup> satisfied the presentment requirement under § 3729(a)(1).<sup>61</sup> The court explained that because United States government officials were acting in their official capacity, albeit for the CPA, Custer Battles had presented the claims for payment to government officials.<sup>62</sup> Although this case did not address the then-applicable *Rainwater* instrumentality test, *Custer Battles* likely remains sound law post-FERA because, even if the CPA were simply a grantee or recipient of federal funds—as opposed to an instrumentality of the United States—the FCA’s presentment requirement would be satisfied.<sup>63</sup>

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56. *Id.*

57. *But see* *United States ex rel. Main v. Oakland City Univ.*, 426 F.3d 914, 916 (7th Cir. 2005) (“If a false statement is integral to a causal chain leading to payment, it is irrelevant how the federal bureaucracy has apportioned the statements among layers of paperwork.”); *United States v. Chapman Univ.*, No. SACV 04-1256JVSRCX, 2006 WL 1562231, \*2–\*3 (C.D. Cal. May 23, 2006).

In this case, phase-one is Chapman’s submission of documents for accreditation by WASC. Phase-two is Chapman’s submission of documents for specific state and federal loans and grants, which depend on Chapman’s accreditation by WASC. Therefore, Relators assert that but for the alleged false statements contained in phase-one, Chapman would not have been granted certain loans and grants. No more is required to state a claim under the FCA or CFCA at this point in the proceedings.

*Id.*

58. Under the amended FCA, the term “claim” means:  
[A]ny request or demand, whether under a contract or otherwise, for 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 . . . .

31 U.S.C.A. § 3729(b)(2)(A) (West 2009).

59. 562 F.3d 295 (4th Cir. 2009).

60. *Id.* at 297.

61. *Id.* at 307.

62. *Id.*

63. *See* 31 U.S.C.A. § 3729(a)(1)(A), (b)(2)(A) (West 2009).

Finally, in the May 2009 case of *United States Department of Transportation ex rel. Arnold v. CMC Engineering*,<sup>64</sup> relators alleged that CMC Engineering, consultants who provide services to the Pennsylvania Department of Transportation (PennDOT), falsified credentials to “obtain overpayments for engineering, inspection, and consultant services on federally-funded highway projects administered by PennDOT.”<sup>65</sup> The district court concluded that submitting claims to state agencies, such as PennDOT, did not satisfy the presentment requirement under § 3729(a)(1), because none of the claims had been presented to, or approved by, the federal government.<sup>66</sup> In light of *Allison Engine*, however, the United States Court of Appeals for the Third Circuit remanded the case, emphasizing that, if the federal government was involved in disbursing funds from PennDOT to CMC Engineering upon submission of its claims, then the FCA indeed may apply.<sup>67</sup>

*B. False Statements and Records: The Elimination of Allison Engine’s Intent Requirement*

Prior to FERA’s enactment, liability existed under § 3729(a)(2) of the FCA if an individual or entity “knowingly ma[de], use[d], or cause[d] to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government.”<sup>68</sup> FERA expands this section—and renumbers the provision to § 3729 (a)(1)(B)—by attaching liability to anyone who “knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim.”<sup>69</sup> In so doing, FERA removes the prior statutory requirements, as interpreted in *Allison Engine*, of intent to influence the government’s payment decision and that the government must play some role in paying or approving the claims.<sup>70</sup> Additionally, the new amendment adopts *Allison Engine*’s “material” requirement, defining it as “having a natural tendency to influence, or being capable of influencing, the payment or receipt of money or property.”<sup>71</sup>

*1. Allison Engine’s Intent Requirement*

In *Allison Engine*, the Supreme Court considered whether the FCA applied to a subcontractor that had submitted fraudulent invoices to two shipbuilders who were

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64. 564 F.3d 673 (3d Cir. 2009).

65. *Id.* at 675.

66. *Id.* at 676.

67. *Id.* at 679.

68. 31 U.S.C. § 3729(a)(2) (2006).

69. 31 U.S.C.A. § 3729(a)(1)(B) (West 2009).

70. S. REP. NO. 111-10, at 10–11 (2009), *reprinted in* 2009 U.S.C.C.A.N. 430, 438–39.

71. *Id.* at 12 (internal quotation marks omitted).

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parties to a contract with the Navy.<sup>72</sup> The Court examined whether the plaintiff had stated an FCA claim under § 3729(a)(2) where the Navy already had disbursed government funds in advance to the shipbuilders without any additional federal involvement.<sup>73</sup> The Court unanimously concluded that a proper FCA claim did not exist merely where “the false statement’s use . . . resulted in obtaining or getting payment or approval of the claim, or that government money was used to pay the false or fraudulent claim.”<sup>74</sup> Rather, the relator “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>75</sup> The Court focused on the phrases “to get” and “paid or approved by the Government” within § 3729(a)(2)<sup>76</sup> and concluded that a defendant must have an actual purpose, or “must intend that the Government itself pay the claim.”<sup>77</sup> Echoing prior cases, including *Rainwater* and *Totten*, the Court reasoned that failing to impose some “intent” requirement would render § 3729(a)(2) “almost boundless.”<sup>78</sup>

The Court also held that proof of intent did not require presentment of a claim to the federal government.<sup>79</sup> Thus, the Court clarified that a violation of § 3729(a)(2) exists when “the subcontractor submits a false statement to the prime contractor intending for the statement to be used by the prime contractor to get the Government to pay its claim.”<sup>80</sup> However, the Court distinguished that circumstance from one in which a subcontractor made a fraudulent statement to a private entity, but did not intend for the government to rely on the false statement to induce payment; in the latter case, no liability would attach under § 3729(a)(2).<sup>81</sup>

In sum, absent an intent requirement, the Court reasoned that the link between the false statement and the government’s decision to pay the claim would be “too attenuated,” and would “threaten to transform the FCA into an all-purpose anti-fraud statute.”<sup>82</sup>

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72. *Allison Engine Co. v. United States ex rel. Sanders*, 128 S. Ct. 2123, 2126–27 (2008).

73. *Id.* at 2126–28.

74. *Id.* at 2126 (quoting *United States ex rel. v. Allison Engine Co.*, 471 F.3d 610, 621–22 (6th Cir. 2006) (citation and internal quotation marks omitted)).

75. *Id.*

76. Prior to FERA, the statute provided that liability incurs when any person “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.” 31 U.S.C. § 3729(a)(2) (2006), *amended by* Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, sec. 4, 123 Stat. 1617, 1622.

77. *Allison Engine*, 128 S. Ct. at 2128.

78. *Id.* (quoting *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488, 496 (D.C. Cir. 2004) (internal quotation marks omitted)).

79. *Id.* at 2129.

80. *Id.* at 2130.

81. *Id.*

82. *Id.*

## 2. Material Changes

To succeed on a § 3729(a)(2) claim after *Allison Engine*, an FCA plaintiff had to establish that: (1) the defendant intended, or had the purpose of, getting the false claim approved or paid by the federal government; and (2) the defendant's false statement or record was material to the government's decision to approve or pay the claim.<sup>83</sup> Prior to FERA, however, the FCA did not define "material."<sup>84</sup> Instead, case law had adopted a variety of definitions of the term, and some cases even questioned whether the FCA contained a "material" requirement altogether.<sup>85</sup> Two tests for "material" ultimately emerged: (1) a broader standard, employed by most courts, defining "material" as a claim "capable of influencing" or having "a natural tendency to influence" the federal government's decision to pay the claim; and (2) the "material outcome" test—whether the federal government "*actually* relied on the information."<sup>86</sup>

FERA codified the broader definition of "material," that is: "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property."<sup>87</sup> FERA's "material" standard may open the door to additional FCA cases as plaintiffs now need only demonstrate that an alleged false claim "could have influenced" the government in its decision to pay the claim, rather than showing that it did in fact influence a government decision to pay the claim.<sup>88</sup>

## 3. Recent Cases and Potential Revised Interpretations

Even courts that continue to apply pre-FERA case law acknowledge that FERA has significantly altered the interpretive landscape with respect to FCA liability standards for false records and statements. Cases applying the pre-FERA FCA remain noteworthy because they illustrate the type of intent requirement with which FERA has dispensed. In particular, courts deciding FCA cases involving Medicare or Medicaid often reach differing results depending upon the court's view of the "material" requirement. In this section, we review a number of recent such cases that illustrate how the contours of the false records and statements liability component of the FCA may take shape under FERA.

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83. See, e.g., *United States ex rel. Snapp, Inc. v. Ford Motor Co.*, 532 F.3d 496, 505 (6th Cir. 2008).

84. Compare 31 U.S.C. § 3729(b)–(c) (2006) (defining terms such as "knowing," "knowingly," and "claim" but neither mentioning nor defining "material"), with 31 U.S.C.A. § 3729(b)(4) (West 2009) ("[T]he term 'material' means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.").

85. *Burris et al.*, *supra* note 14, at 61.

86. *Id.*

87. 31 U.S.C.A. § 3729(b)(4); see *infra* Part IIE. (discussing reverse false claim liability).

88. See *Burris et al.*, *supra* note 14, at 61.

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For example, in *United States ex rel. Ven-A-Care of the Florida Keys, Inc. v. Actavis Mid Atlantic LLC*,<sup>89</sup> the United States District Court for the District of Massachusetts considered whether the defendant could be held liable pursuant to § 3729(a)(2) for reporting inflated prices for drugs, thereby causing the state Medicaid program to pay substantially more for those drugs than was necessary.<sup>90</sup> Although the court issued its opinion in October 2009, post-FERA, the court nonetheless relied upon *Allison Engine* in concluding that the defendant could be held liable under § 3729(a)(2).<sup>91</sup> The court reasoned that there was a direct link between the claim and the federal government because “each claim submitted to Medicaid leads directly to a federal outlay . . . .”<sup>92</sup> Because the “natural consequence” was for the alleged false claim to reach the federal government, the court found that the defendant intended to defraud the government.<sup>93</sup> Moreover, the court determined that it was apparent the claims were “material” because inflating prices had a “natural tendency” to influence the government’s decision to pay an inflated amount.<sup>94</sup> Under FERA (i.e., even absent any intent requirement), the result in this case would not have differed because the “material” analysis would have sufficed.<sup>95</sup>

Conversely, in the 2009 case of *United States v. Aguillon*,<sup>96</sup> the United States District Court for the District of Delaware also relied upon pre-FERA case law, yet reached the opposite result from that in *Actavis Mid-Atlantic LLC*. In *Aguillon*, the court considered whether a doctor violated § 3729(a)(2) when he billed medical services at an unnecessarily exorbitant rate as well as services that he failed to actually perform to a private Medicare contractor.<sup>97</sup> Dismissing the relator’s claim under § 3729(a)(2), the court noted that, under Third Circuit precedent, “a plaintiff must also show that the defendant made or used (or caused someone else to make or use) a false record in order to cause the false claim to be *actually* paid or approved.”<sup>98</sup> Because the defendant-doctor’s payment requests regarding Medicare patients were not actually false at the time they were paid—and because the remaining false claims were “subsequently denied prior to payment”—no “false claims were actually paid or approved.”<sup>99</sup> Although the court declined to apply the FERA amendments retroactively, the court commented that, because the term

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89. 659 F. Supp. 2d 262 (D. Mass. 2009).

90. *Id.* at 264–65.

91. *Id.* at 270–71.

92. *Id.* at 270.

93. *Id.* at 270–71.

94. *Id.* at 271.

95. See 31 U.S.C.A. § 3729(a)(1)(B) (West 2009).

96. 628 F. Supp. 2d 542 (D. Del. 2009).

97. *Id.* at 543–46.

98. *Id.* at 549 (emphasis added) (quoting *United States ex rel. Schmidt v. Zimmer, Inc.*, 386 F.3d 235, 242 (3d Cir. 2004) (internal quotation marks omitted)).

99. *Id.*

“material” requires only that the false record be “capable of influencing[] the payment or receipt of money,” new § 3729(a)(1)(B) permits imposition of civil penalties without proof that the false claims were actually paid or approved.<sup>100</sup>

On the other hand, in another health care case decided prior to the passage of FERA, *United States ex rel. Grubbs v. Kanneganti*,<sup>101</sup> the Fifth Circuit reversed the trial court’s dismissal of an FCA claim under § 3729(a)(2) against doctors who made false records regarding Medicare and Medicaid services that they failed to actually provide.<sup>102</sup> Relying on *Allison Engine*, the court reasoned that “the recording of a false record, when it is made with the requisite intent, is enough to satisfy the statute” and that it was unnecessary to “infe[r] that the record actually caused a claim to be presented to the Government.”<sup>103</sup> Thus, because the doctors routinely falsified doctor visits with patients, it was irrelevant that they never directly presented these claims to the government in order to state a proper § 3729(a)(2) claim.<sup>104</sup>

Under FERA, however, courts will no longer need to evaluate *Allison*’s intent issue, but rather the government or a relator now need only allege facts sufficient to demonstrate that a defendant’s false record or statement was capable of influencing the payment or receipt of money.<sup>105</sup>

For example, in *United States ex. rel. Sterling v. Health Insurance Plan of Greater New York, Inc.*,<sup>106</sup> the district court considered whether the defendant, the Health Insurance Plan of Greater New York, Inc. (“HIP”) violated § 3729(a)(2) when it submitted falsified data to the National Committee for Quality Assurance (“NCQA”), HIP’s accrediting agency, in order to obtain accreditation necessary for receiving federal contracts with Medicaid and CHIP.<sup>107</sup> The court concluded that the complaint’s count under § 3729(a)(2) should be dismissed because the complaint failed to allege that HIP intended to defraud the federal government.<sup>108</sup> According to the court, the alleged falsification only supported an intent to deceive NCQA, not the government, and therefore did not satisfy *Allison Engine*’s requirement of establishing a “direct link” between the false statement and the government’s

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100. *Id.* at 549 & n.11 (quoting 31 U.S.C.A. § 3729(b)(4)). Conversely, under § 3729(a)(1), the court sustained the claim because according to settled law in the Third Circuit, a claim does not need to be actually paid for (a)(1) liability. *Id.* at 548 (citing *United States v. Merck-Medco Managed Care, LLC*, 336 F. Supp. 2d 430, 441 (E.D. Pa. 2004)).

101. 565 F.3d 180 (5th Cir. 2009).

102. *Id.* at 183, 192, 194.

103. *Id.* at 192–93 & n.37.

104. *Id.* at 193.

105. See 31 U.S.C.A. § 3729(a)(1)(B).

106. No. 06 Civ. 1141, 2008 WL 4449448, at \*1 (S.D.N.Y. Sept. 30, 2008). See *supra* Part II.A. for the presentment analysis in this case.

107. *Sterling*, 2008 WL 4449448, at \*1–\*2.

108. *Id.* at \*5.

decision to make payment.<sup>109</sup> If this case had been decided under FERA, however, the plaintiff would have had a stronger case for § 3729(a)(2) liability so long as the falsified data, and the consequential accreditation, was material to the federal government's decision to contract with HIP (i.e., removing the necessity of alleging facts that demonstrate any specific intent).<sup>110</sup>

Similarly, in *United States ex rel. Thomas v. Bailey*,<sup>111</sup> the United States District Court for the Eastern District of Arkansas concluded that a sham consulting agreement between one of the doctor-defendants and a medical supply company to compensate the doctor for using the company's products was insufficient to support a claim of liability under § 3729(a)(2).<sup>112</sup> Although the hospital purchased the instruments for use by the doctor and then requested reimbursement from various federal health programs for the services performed, which typically included the cost of the instruments used, the court dismissed the complaint because it failed to allege that the agreement "was made or used to get a false claim paid."<sup>113</sup> However, if this case had been decided under FERA, the sham consulting agreement may have resulted in FCA liability since the defendant's agreement may have been deemed material to the hospital that purchased the medical instruments for use by the doctor and then submitted reimbursement claims.<sup>114</sup> In other words, under FERA, the defendant's intent, or lack thereof, to get the government to pay the false claim paid would have been irrelevant.<sup>115</sup>

Finally, in *United States v. Hawley*,<sup>116</sup> the United States District Court for the Northern District of Iowa, Western Division, considered whether a private insurance company violated § 3729(a)(2) when it aided unqualified farmers in making falsified claims against Multi-Peril Crop Insurance Policies (MPCI) that were "sold by Hawley, issued by North Central Crop Insurance (NCCI), and reinsured by the Federal Crop Insurance Corporation (FCIC)."<sup>117</sup> Despite the allegation that Hawley had made at least one false MCPI crop insurance application or false acreage report, the court *sua sponte* granted summary judgment for the

109. *Id.* The court dismissed the link identified by the relator, who alleged:

[T]hat HIP had a contractual requirement to maintain accreditation, that the . . . statistics would have affected its accreditation, that HIP therefore falsified the results that it gave to NCQA to maintain good ratings, and then, finally, that the Government relied on this fraudulently obtained positive NCQA rating to award HIP continuing contracts.

*Id.*

110. *See* 31 U.S.C.A. § 3729(a)(1)(B).

111. No. 4:06CV00465, 2008 WL 4853630, at \*1 (E.D. Ark. Nov. 6, 2008).

112. *Id.* at \*1–\*3, \*15.

113. *Id.* (quoting 31 U.S.C. § 3729(a)(2) (2006)). *See generally* 1 JOHN T. BOESE, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS § 2.01[B] (3d ed. 2008 & Supp. 2010) (explaining direct false claims liability after FERA).

114. *See* 31 U.S.C.A. § 3729(a)(1)(B).

115. *See id.*

116. 566 F. Supp. 2d 918 (N.D. Iowa 2008).

117. *Id.* at 920.

defendant<sup>118</sup> because Hawley did not possess the requisite pre-FERA intent.<sup>119</sup> While the claims were paid with federal government funds, the government never subsequently paid any of the claims itself; rather, the government “only reimbursed NCCI pursuant to the Standard Reinsurance Agreement for claims that NCCI had paid [and] . . . did not pay any claims itself.”<sup>120</sup> Because the claims were never subsequently forwarded to the government for approval, liability under (a)(2) did not attach.<sup>121</sup> Once again, a court found insufficient the plaintiff’s allegation that a defendant intended for a non-government entity to approve or pay the claim at issue.<sup>122</sup>

Under FERA, however, this decision likely would have been different. Not only has FERA legislatively invalidated *Allison Engine*’s intent requirement, but also FERA’s definition of a “claim”—money the government has provided, provides, or will provide—now attaches liability because government funds were at some point involved in Hawley’s conduct.<sup>123</sup>

*C. Conspiracy: § 3729(a)(3) to § 3729(a)(1)(C)*

Prior to FERA, an individual could be held liable for conspiracy under § 3729(a)(3) of the FCA if he or she “conspire[d] to defraud the Government by getting a false or fraudulent claim allowed or paid.”<sup>124</sup> Under the new FERA amendments, an individual is liable if he or she “conspires to commit a violation” of any substantive section of the FCA, such as presentment, false records or statements, or reverse false claims.<sup>125</sup> Moreover, FERA eliminates *Allison Engine*’s requirement that the conspirator intended to defraud the government.<sup>126</sup>

Similar to the other new FCA provisions, the new statutory language regarding conspiracy counters judicial interpretations of “intent” under *Allison Engine*, and may lead to reversed decisions if courts apply FERA retroactively. For example, in *United States ex rel. Thomas v. Bailey*,<sup>127</sup> the United States District Court for the Eastern District of Arkansas dismissed a conspiracy claim under § 3729(a)(3) in

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118. *Id.* at 922–23.

119. *Id.* at 926–27.

120. *Id.* at 927.

121. *Id.*

122. *Id.* Senator Grassley, introducing the False Claims Act Clarification Act of 2009 three weeks after FERA, stated that *Hawley* was an example of *Allison Engine* making it “virtually impossible to prove [FCA liability] where [a] subcontractor knowingly ripped off the taxpayers.” Kevin M. Comeau, Comment, *False Certification Claims in Light of Allison Engine and False Claims Act Amendments Introduced in the 111th Congress*, 18 FED. CIR. B.J. 491, 510–11 (2009) (alteration in original) (quoting 155 CONG. REC. S2425 (daily ed. Feb. 24, 2009) (statement of Sen. Grassley)).

123. See 31 U.S.C.A. § 3729(a)(1)(B), (b)(2) (West 2009).

124. 31 U.S.C. § 3729(a)(3) (2006).

125. 31 U.S.C.A. § 3729(a)(1)(C).

126. S. REP. NO. 111-10, at 12 (2009), reprinted in 2009 U.S.C.C.A.N. 430, 439–40.

127. No. 4:06CV00465, 2008 WL 4853630, at \*1–\*2, \*15 (E.D. Ark. Nov. 06, 2008).



which a doctor and other defendants, including a medical instrument company, allegedly entered into a sham consulting agreement whereby the doctor would be compensated for using the company's instruments.<sup>128</sup> Although the complaint alleged that the defendants were aware that their conduct would result in the doctor submitting false claims to the government, the court reasoned the complaint failed to state a claim upon which relief could be granted because the complaint did not allege that the defendants' conspiracy was specifically intended to defraud the government.<sup>129</sup> Had this case been decided under the FERA regime, however, the district court would not have dismissed the conspiracy claim, as intent is no longer a required element of such a claim.<sup>130</sup>

Beyond the area of "intent," the Senate Report on FERA noted that the new FCA amendments specifically targeted court decisions that narrowly interpreted the conspiracy provision.<sup>131</sup> In particular, FERA extends conspiracy to individuals who conspired in the making or using of reverse false claims under § 3729(a)(7).<sup>132</sup> Under § 3729(a)(7), a defendant was liable for reverse false claims when he "conceal[ed], avoid[ed], or decrease[d] an obligation to pay or transmit money or property to the Government."<sup>133</sup> In *United States ex rel. Huangyan Import & Export Corp. v. Nature's Farm Products, Inc.*,<sup>134</sup> for example, the United States District Court for the Northern District of California considered whether liability under § 3729(a)(3) could attach to Nature's Farm Products, Inc. (NFP), a company that allegedly "conspired to and did evade customs duties on their imports by falsifying their products' country of origin."<sup>135</sup> Although the court sustained plaintiff's claim under § 3729(a)(7),<sup>136</sup> it dismissed plaintiff's § 3729(a)(3) claim, reasoning that "[b]y its express terms, § 3729(a)(3) does not reach conspiracies to make reverse false claims."<sup>137</sup>

Tracking the statutory language of subsection (a)(3), which requires "getting a false or fraudulent claim allowed or paid," the court reasoned that the defendants only wanted to avoid paying the duties, and did not seek the government's payment of their claim.<sup>138</sup> The court further dismissed the argument that the FCA's definition of a claim under § 3729(c) would mean that the conspiracy provision extended to reverse false claims, since the definition only expands claims made to United States

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128. *Id.* at \*1–\*2, \*15.

129. *Id.* at \*15.

130. *See supra* Part II.B.

131. S. REP. NO. 111-10, at 12–13.

132. *See* 31 U.S.C.A. § 3729(a)(1)(C) (West 2009).

133. 31 U.S.C. § 3729(a)(7) (2006). *See infra* Part II.E for an expanded discussion of FERA's changes to reverse false claims.

134. 370 F. Supp. 2d 993 (N.D. Cal. 2005).

135. *Id.* at 994, 996.

136. *Id.* at 995–96.

137. *Id.* at 1002–03.

138. *Id.* at 1003 (internal quotation marks omitted).

agents or intermediaries.<sup>139</sup> This case is but one clear example of a judicial decision that FERA intended to supersede by extending conspiracy liability to reverse false claims without requiring the defendants to get the government to pay or approve the claim.

*D. Delivery of Property: § 3729(a)(4) to § 3729(a)(1)(D)*

FERA provides a new source of liability where an individual “has possession, custody, or control of property or money used, or to be used, by the Government and knowingly delivers, or causes to be delivered, less than all of that money or property . . . .”<sup>140</sup> The new provision eliminates pre-FERA language requiring an intent to defraud, willful concealment, and out-dated requirements for receipts or certificates.<sup>141</sup> Eliminating the old section’s “intending to defraud” and “willfully to conceal” language also is consistent with FERA’s other changes discussed above (e.g., to §§ 3729(a)(1)(B) and (C)).<sup>142</sup>

*E. The Expansion of the Reverse False Claims Provision: § 3729(a)(7) to § 3729(a)(1)(G)*

The 1986 so-called reverse false claims provision created liability for a person who “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.”<sup>143</sup> FERA revises this provision to impose liability in two distinct scenarios: where a person either (1) “knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government”; or (2) “knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or

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139. *Id.*

140. 31 U.S.C.A. § 3729(a)(1)(D) (West 2009). The previous version of the statute provided liability for any person who “has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt.” 31 U.S.C. § 3729(a)(4) (2006).

141. S. REP. NO. 111-10, at 13 (2009), as reprinted in 2009 U.S.C.C.A.N. 430, 441 (“[B]ecause this section has remained unchanged from the original act that was drafted in 1863, the archaic language has made recoveries under a conversion theory contingent upon the individual receiving an actual receipt for the property.”); see also *United States ex rel. Aakhus v. Dyncorp, Inc.*, 136 F.3d 676, 680 n.3, 681 (10th Cir. 1998) (finding no violation of § 3729(a)(4) where defendant did not receive a certificate or receipt).

142. See *supra* Parts II.B.3, II.C.

143. 31 U.S.C. § 3729(a)(7). “The forbidden conduct ‘is called a reverse false claim because the action of the defendant results not in improper payment to the defendant from the Government, but rather no payment to the Government when payment is otherwise obligated.’” *United States ex rel. Branch Consultants, LLC v. Allstate Ins. Co.*, No. 06-4091, 2009 WL 3353314, at \*27 (E.D. La. Oct. 19, 2009) (quoting *United States ex rel. Doe v. Dow Chem. Co.*, 343 F.3d 325, 329 (5th Cir. 2003)).

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property to the Government.”<sup>144</sup> Thus, FERA’s amendment to the reverse false claims provision has altered its scope in a number of important ways.

First, although the first clause of the new provision now contains a “material” requirement, that clause no longer requires that a person conceal, avoid, or decrease an obligation to pay money to the government, but rather only that the false statement be material to an obligation to pay money to the government.

Second, and more significantly, the provision no longer requires a person to make a false statement to trigger liability, but only requires that a person know that he or she owes money to the government which has not been paid or returned. That second part of the post-FERA reverse false claims provision accordingly works in conjunction with the statute’s new definition of “obligation”—discussed in more detail below, and which includes the retention of an overpayment—to impose liability where a person has received federal money to which he or she either is not entitled or not entitled to retain (even if initially lawfully received).<sup>145</sup> The creation or use of a false statement or record is not required. Only time will tell how far-reaching this new reverse false claims provision will prove to be in terms of imposing FCA liability where the pre-FERA statute would not have done so.

### III. DEFINITION CHANGES

As noted, Congress sought in FERA to “clarify” the intent of the 1986 FCA amendments by overturning several notable cases and making changes to the definitions sections. We address three key definitional changes that will have an important effect on the outcome of FCA litigation in the post-FERA world. First, FERA expands the definition of a “claim” under 31 U.S.C. § 3729(b)(2) and, in doing so, the ambit of the FCA. Second, FERA explicitly adopts an expansive definition of “material.” Third, Congress altered the definition of “obligation” to

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144. 31 U.S.C.A. § 3729(a)(1)(G).

145. In contrast, see *United States ex rel. Ramadoss v. Caremark Inc.*, 586 F. Supp. 2d 668, 685–86 (W.D. Tex. 2008) (discussing 31 U.S.C. § 3729(a)(7) and “find[ing] that for claims where Caremark applied a restriction to deny a state Medicaid request for reimbursement, and the restriction actually existed in the corresponding plan, the Government cannot establish that Caremark made a ‘false record or statement’ and FCA liability does not apply”). The district court in *Allstate* also explained that “[a] claim under § 3729(a)(1)(G) requires (1) that the defendant had an obligation to pay money to the government, (2) that the defendant used a false statement to avoid or decrease that obligation, (3) that the false statement was material, and (4) that the defendant made the false statement knowingly.” 2009 WL 3353314, at \*27. But that decision’s explanation of the new provision relies on *Caremark*, which, in turn, dealt with the pre-FERA version of the statute. See *Caremark*, 586 F. Supp. 2d., at 668 (decided in 2008). As we explained above, however, the new reverse false claims provision does not require a “false record or statement” under the second clause of that provision. See S. REP. NO. 111-10, at 13–15 (2009), reprinted in 2009 U.S.C.C.A.N. 430, 441–42. But see *Little v. ENI Petroleum Co.*, No. CIV-06-120-M, 2009 WL 2424215, at \*2 (W.D. Okla. July 31, 2009) (“[I]n order to establish defendants’ liability for the alleged reverse false claims [under 31 U.S.C. § 3729(a)(1)(G)], Little must show that . . . defendants made or used statements in order to avoid or decrease their obligation to pay money to the government.”).

make it consistent with the government's long-held view of the meaning of that term.

A. "Claim"

Consistent with its intent to broaden the applicability of the FCA, Congress changed the definition of "claim" to overturn the district court's holding in *Custer Battles*.<sup>146</sup> As alluded to earlier, in the *Custer Battles* case, the court set aside a jury award finding that Iraqi funds administered by the United States government on behalf of the Iraqi people were not United States government funds within the scope of the FCA.<sup>147</sup> FERA now expands the definition of "claim" expressly to include requests or demands for money or property that "is made to a contractor, grantee, or other recipient, *if the money or property is to be spent or used on the Government's behalf or to advance a Government program or interest.*"<sup>148</sup>

The broad phrases "spent or used on the Government's behalf" and "to advance a Government program or interest" are not defined, but it is clear that they have the potential to sweep in a new class of potential defendants under the ambit of the FCA. The full scope of this change will require resolution by the courts. The legislative history may be helpful in gleaning Congress's intent. For example, Senator Jon Kyl stated that, in order to implicate the FCA post-FERA, a claim must be "predominantly federal in character."<sup>149</sup> At least one commentator has taken the view that the expansion of the definition of "claim," coupled with the removal of the "presentment clause," underlines the concern cited by the Supreme Court in *Allison Engine* that the FCA could create "boundless" liability and become an "all-purpose antifraud statute."<sup>150</sup>

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146. S. REP. NO. 111-10, at 12-13. For a discussion of *Custer Battles*, see *supra* notes 59-63 and accompanying text.

147. *United States ex rel. DRC, Inc. v. Custer Battles, LLC*, 562 F.3d 295, 297-98 (4th Cir. 2009).

148. 31 U.S.C.A. § 3729(b)(2)(A)(ii) (West 2009) (emphasis added). The new definition of "claim" also clarifies that the FCA applies even where the government "has provided" funds to a grantee—that is, upfront—and the grantee is then subsequently defrauded by the defendant; accordingly, FERA makes the timing of federal funding to a granting irrelevant to the question of FCA liability. *Id.*

149. 155 CONG. REC. S4540 (daily ed. Apr. 22, 2009) (statement of Sen. Kyl). Senator Kyl's approach is reminiscent of the view of some pre-FERA courts, particularly in the context of health care fraud. See, e.g., *United States v. Cathedral Rock Corp.*, No. 4:03CV1090 HEA, 2007 WL 4270784, at \*3 (E.D. Mo. Nov. 30, 2007) (finding that the government's "substantial role" in "funding and enforcement" of Medicaid and Medicare programs has led several courts to conclude that claims submitted to these entities are within the scope of the FCA).

150. See generally Beth C. McClain, *Health Care Fraud Enforcement Developments*, in *THE IMPACT OF RECENT HEALTH CARE LAW DEVELOPMENTS: LEADING LAWYERS ON NAVIGATING CHANGES, OVERCOMING CHALLENGES, AND ADVISING CLIENTS IN A NEW LEGAL ENVIRONMENT* (2009).

## B. “Material”

FERA also amends the FCA to include a definition of “material.” Under FERA, 31 U.S.C. § 3729(a)(1)(B) now provides that liability under the FCA may attach where a defendant “knowingly makes, uses, or causes to be made or used, a false record or statement *material* to a false or fraudulent claim.”<sup>151</sup> Section 3729(b)(4) now defines “material” as “having a natural tendency to influence, or be capable of influencing the payment or receipt of money or property.”<sup>152</sup> As explained above, prior to FERA, the concept of “material” was a central focus of health care fraud cases because courts found that a regulatory violation alone did not give rise to FCA liability under 31 U.S.C. § 3729(a)(1) & (a)(2) unless a plaintiff could show that the violation was a “material” falsehood.<sup>153</sup> To meet these requirements, plaintiffs successfully argued, for example, that a defendant pharmaceutical manufacturer’s violation of the Federal Food, Drug, and Cosmetic Act (“FDCA”) or the Federal Anti-Kickback Statute (AKS) were falsehoods which materially misled the government to cover claims for reimbursement under Medicaid or Medicare.<sup>154</sup> Further, some plaintiffs advanced the theory of implied certification, arguing that where the government would not pay funds to a party if it knew of a violation of law or regulation, merely submitting a claim for payment violates the FCA because the party fraudulently implied certification with the law or regulation.<sup>155</sup>

Now that Congress has settled the debate about how “material” should be defined, plaintiffs in the pharmaceutical and health care industries likely will continue to point to regulatory or statutory violations as the basis of FCA cases.

151. 31 U.S.C.A. § 3729(a)(1)(B) (emphasis added).

152. *Id.* § 3729(b)(4). The Senate Report states that this definition of “material” comes from a long line of cases including *United States v. Rogan*, 517 F.3d 449, 452 (7th Cir. 2008), which found that a material falsehood existed where a defendant’s kickback payments and Stark Law violations were a factor in the submission of false claims. S. REP. NO. 111-10, at 12 & n.6 (2009), *reprinted in* 2009 U.S.C.C.A.N. 430, 439 n.6. This definition was also apparently one endorsed by the Justice Department and consistent with a plaintiff-friendly view of the statute. *See McClain*, *supra* note 150, at \*5.

153. *See supra* notes 106–15 and accompanying text; *see also* *United States ex rel. Franklin v. Parke-Davis*, 147 F. Supp. 2d 39, 51 (D. Mass. 2001) (“It is true that the FCA cannot be used to enforce compliance with every federal law or regulation. . . . Nonetheless, the FCA *can* be used to create liability where failure to abide by a rule or regulation amounts to a *material* misrepresentations [sic] made to obtain government benefit.” (second emphasis added)); *United States ex rel. Hess v. Sanofi-Synthelabo, Inc.*, No. 4:05CV570MLM, 2006 WL 1064127, at \*7 (E.D. Mo. Apr. 21, 2006) (finding no FCA liability for a defendant’s promotion of an off-label drug use because the Medicare claim form did not require the doctor to distinguish between the approved use and the off-label use and thus the “fraud” in the Medicare reimbursement claim was not material to the approval for reimbursement).

154. *See, e.g.*, *Parke-Davis*, 147 F. Supp. 2d at 51–52 (noting that a pharmaceutical manufacturer could be liable for an FCA violation for promoting off-label drugs if it knowingly made a false statement to get a false claim paid or approved); *id.* at 53–55 (noting that FCA liability could attach if a pharmaceutical manufacturer violates the antikickback provision *and* it previously expressly or impliedly certified compliance with the antikickback provision in order to receive government funds).

155. *See, e.g.*, *United States ex rel. Foster v. Bristol-Myers Squibb Co.*, 587 F. Supp. 2d 805, 823 (E.D. Tex. 2008) (describing the theory of implied certification).

Thus, while the “material” requirement is another hurdle for plaintiffs to overcome, the broad definition of “material” and the relative familiarity of the concept in health care fraud cases suggest that it will not impede enforcement in this area.

### C. “Obligation”

FERA now defines an “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>156</sup> The meaning of this term often will arise in the reverse false claims context, where, for example, the government or relator alleges that a defendant has failed to repay an overpayment.<sup>157</sup>

The new definition makes clear that, to be actionable under the FCA, an obligation need not be “fixed.” Accordingly, the FERA definition overruled cases that previously held that a duty to pay the government must be entirely fixed for liability to attach under the FCA.<sup>158</sup>

While the new definition leaves some room for defendants to argue that a duty to return an overpayment must arise from an affirmative statutory, regulatory, or contractual requirement, there is authority for the proposition that an entity may not retain an otherwise improper payment.<sup>159</sup>

## IV. RETROACTIVITY

As discussed, the purpose of FERA was to overrule prior court decisions in *Allison Engine* and *Totten*.<sup>160</sup> A question has emerged as to the appropriate effective date for many of the key FERA changes. This issue may arise in one of two contexts. First, plaintiffs may seek to apply definitional changes from FERA to cases that predated FERA’s enactment. Second, plaintiffs may seek to use FERA changes as evidence of

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156. 31 U.S.C.A. § 3729(b)(3) (West 2009).

157. S. REP. NO. 111-10, at 15 (“The new definition of ‘obligation’ includes an express statement that an obligation under the FCA includes ‘the retention of an overpayment.’ The Department of Justice supported the inclusion of this provision and provided technical advice that the proper place to include overpayments was in the definition of obligation.”). There appears to be no distinction between whether funds were improperly paid by the government to (and then retained by) a defendant or whether the government funds were legitimately initially received by the defendant but then were required to be returned.

158. See, e.g., *United States ex rel. Marcy v. Rowan Cos.*, 520 F.3d 384, 390 (5th Cir. 2008); *Am. Textile Mfrs. Inst., Inc. v. Limited, Inc.*, 190 F.3d 729, 735 (6th Cir. 1999) (“To recover under the False Claims Act . . . the United States must demonstrate that it was owed a specific, legal obligation at the time that the alleged false record or statement was made, used, or caused to be made or used. The obligation cannot be merely a potential liability . . .” (quoting *United States v. Q Int’l Courier, Inc.*, 131 F.3d 770, 773 (8th Cir. 1997))).

159. *Fansteel Metallurgical Corp. v. United States*, 172 F. Supp. 268, 270 (Ct. Cl. 1959) (“[W]hen a payment is erroneously or illegally made it is in direct violation of . . . the Constitution. Under these circumstances[,] it is . . . the duty of the Government to sue for a refund thereof, and no statute is necessary to authorize the United States to sue in such a case.” (citation omitted)).

160. See *supra* Part II.A.

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how ambiguous terms should be interpreted in pre-FERA cases. Each of these issues is discussed in turn.

One of the principal changes enacted in FERA relates to pleading standards for 31 U.S.C. § 3729(a)(2) claims. Prior to FERA, this provision applied where a person “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 [federal] Government.”<sup>161</sup> In *Allison Engine*, the Supreme Court interpreted this language to mean that the false or fraudulent statement was material to the government’s payment decision:

*Contrary to the decision of the Court of Appeals below, we hold that it is insufficient for a plaintiff . . . to show merely that ‘the false statement’s use . . . result[ed] in obtaining or getting payment or approval of the claim,’ . . . or that ‘government money was used to pay the false or fraudulent claim.’ . . . Instead, a plaintiff . . . 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>162</sup>

As noted, FERA reversed this aspect of *Allison Engine* by changing the language of what was 31 U.S.C. § 3729(a)(2) to provide liability now for 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.”<sup>163</sup> Although FERA was enacted on May 20, 2009, the statute expressly provides that the amendments to (a)(2) claims described above “shall take effect on the date of enactment . . . and shall apply to conduct on or after the date of enactment, except that . . . [the changes to (a)(2)] shall take effect as if enacted on June 7, 2008, and apply to all claims . . . that are pending on or after that date.”<sup>164</sup> June 7, 2008—the date specified in this clause—is two days prior to the Supreme Court’s decision in *Allison Engine*.<sup>165</sup>

Several post-FERA district court cases touching on the meaning of this retroactivity provision have concluded that the provision does not apply to “cases” filed prior to the enactment of FERA.<sup>166</sup> The circuit courts already appear to be split on the subject. The most prominent of the “retroactivity” cases is the *Allison Engine* decision itself. There, on remand from the Supreme Court, the defendants filed a

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161. 31 U.S.C. § 3729(a)(2) (2006) (emphasis added).

162. *Allison Engine Co. v. United States ex rel. Sanders*, 128 S. Ct. 2123, 2126 (2008) (alteration in original) (citations omitted) (quoting *United States ex rel. Sanders v. Allison Engine Co.*, 471 F.3d 610, 621–22 (6th Cir. 2006), *vacated*, 128 S. Ct. 2123 (2008)).

163. 31 U.S.C.A. § 3729(a)(1)(B) (West 2009).

164. *Id.* § 3729(f)(1).

165. *Compare id.*, with *Allison Engine*, 128 S. Ct. at 2123 (decided on June 9, 2008).

166. *See, e.g.*, *United States ex rel. Sanders v. Allison Engine Co.*, Nos. 1:95-cv-970, 1:99-cv-923, 2009 WL 3626773, at \*7 (S.D. Ohio Oct. 27, 2009) (holding that retroactive application of the FCA amendments violates the Ex Post Facto Clause because it would impose punishment for acts that were not punishable prior to the amendments).

motion to prevent retroactive application of the (a)(2) changes.<sup>167</sup> Defendants contended that retroactive application was either precluded by the plain language of the statute or unconstitutional.<sup>168</sup> The plaintiffs, joined by the Department of Justice, argued that Congress intended for retroactive application to cases filed in the courts at the time of the *Allison Engine* decision and that the FERA changes pass constitutional muster.<sup>169</sup>

The district court began its analysis by recognizing that the retroactive application of statutes is the exception rather than the rule. Statutes as a general rule may not apply retroactively “absent a clear indication from Congress that it intended such a result.”<sup>170</sup> Noting that the “clear indication” standard is a “demanding one,” the court focused on the plain language of FERA.<sup>171</sup> The plain language, cited above, provides that the changes made to (a)(2) 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 than [sic] date.”<sup>172</sup> Thus, the issue is whether the “all claims” language refers to claims for payment or to legal claims (i.e., cases).

The district court found that the use of the term “claims” instead of “cases” was important. Under the False Claims Act, a “claim” is a term of art that 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.”<sup>173</sup> While plaintiffs likely had a case pending as of June 7, 2008 against Allison Engine (since the complaint had been filed as of that date), there were no claims pending from Allison Engine on that date—as all of the claims at issue had been paid long before then.<sup>174</sup> Based on what the district court viewed as a plain reading of the statute, the court concluded that the FERA amendments could not apply in this case.<sup>175</sup>

The court found further support for its textual analysis in the legislative history of FERA, specifically the Senate Report, which uses the term “claims” to refer to requests for payment and the term “cases” to refer to civil actions for FCA violations.<sup>176</sup> Similarly, a section of FERA that immediately follows the retroactivity clause provides that another FERA change “shall apply to cases pending on the date of enactment.”<sup>177</sup> The court reasoned that the use of “cases” in one provision and

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167. *Id.* at \*2.

168. *Id.*

169. *Id.* at \*2–\*3.

170. *Id.* at \*3.

171. *Id.* at \*3–\*4.

172. *Id.* at \*3 (emphasis added).

173. 31 U.S.C.A. § 3729(b)(2)(A) (West 2009).

174. *Allison Engine*, 2009 WL 3626773, at \*3.

175. *Id.* at \*4.

176. *Id.* (“The Senate Report’s explanation of FERA’s amendments to the FCA uses ‘claims’ to refer to a defendant’s request for payment and ‘cases’ when discussing civil actions for FCA violations.”).

177. *Id.* (internal quotation marks omitted) (quoting 31 U.S.C.A. § 3729(f)(1)).



“claims” in the other was intentional, and reflected that Congress intended for the retroactivity clause to apply only to claims pending as of June 7, 2008 and not to cases pending as of that date.<sup>178</sup>

However, the court did not end its inquiry there. Instead, it proceeded to examine the parties’ constitutional arguments as an alternative to its statutory interpretation analysis. The court concluded that, if FERA did apply retroactively to cases pending before its effective date, such retroactive application would violate the Ex Post Facto Clause of the Constitution.<sup>179</sup> While there are some laws that Congress can enact with retroactive effect, a law that “renders an act punishable in a manner in which it was not punishable when it was committed” violates the Constitution.<sup>180</sup> After exhaustively reviewing the legislative history of FERA, including a number of statements by the bill’s sponsors as to their intention to “punish” parties that defraud the government,<sup>181</sup> the court concluded that Congress “intended to impose punishment” in enacting FERA<sup>182</sup> and that, even if it did not intend to impose punishment, FERA “is so punitive . . . in purpose or effect as to negate [the government’s] intention to deem it ‘civil.’”<sup>183</sup> The court cited a litany of cases noting the intent of the FCA to punish wrongdoers, as opposed to being remedial in nature, and cited to the treble damages and penalties under the Act as further evidence of an intent to punish past behavior and to deter future behavior.<sup>184</sup> Additionally, the court looked at the FERA changes under a prudential seven-factor test for determining punitive effect and concluded that “the civil version of the FCA is punitive in purpose and effect.”<sup>185</sup> This conclusion reinforced the court’s prior finding that FERA does not apply retroactively to cases that were pending prior to its effective date.

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178. *Id.* (“[T]he clear indication from Congress is that the revised language at issue here is applicable to ‘claims’ pending on June 7, 2008, and not to ‘cases’ pending on June 7, 2008.”).

179. *Id.* at \*7.

180. *Id.* at \*5 (quoting *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 138 (1810)). For the court’s Ex Post Facto analysis, see *id.* at \*4–\*9.

181. *See id.* at \*5–\*6.

182. *Id.* at \*7.

183. *Id.* at \*8–\*9 (quoting *Smith v. Doe*, 538 U.S. 84, 92 (2003)).

184. *Id.* at \*7 (citing several Supreme Court and district court cases addressing the FCA’s damages multiplier).

185. *Id.* at \*8–\*9 (analyzing the FCA under the seven factors noted in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963)). The seven factors are:

- (1) whether the sanction involves an affirmative disability or restraint;
- (2) whether the sanction has historically been regarded as a punishment;
- (3) whether [the sanction] comes into play only on a finding of scienter;
- (4) whether operation of the sanction will promote the traditional aims of punishment—retribution and deterrence;
- (5) whether the behavior to which the sanction applies is already a crime;
- (6) whether an alternative purpose to which it may rationally be connected is assigned to the sanction; and
- (7) whether [the sanction] appears excessive in relation to the alternative purpose assigned.

*Id.* at \*8 (citing *Kennedy*, 372 U.S. at 168–69).

Other cases decided since FERA's enactment in May 2009 have reached similar results. For example, in *United States v. Science Applications International Corp.*,<sup>186</sup> the United States District Court for the District of Columbia refused to apply FERA changes retroactively to a case that was pending prior to May 2009.<sup>187</sup> There, the government contended that Organized Conflicts of Interest (OCI) certifications made by Science Applications International Corporation (SAIC) under a technical support contract between SAIC and the Nuclear Regulatory Commission (NRC), were false, and that SAIC's claims for payment under the contract thus constituted false claims.<sup>188</sup> The jury found SAIC liable under pre-FERA standards and SAIC moved for judgment as a matter of law, asserting that the government had not met its burden of proof.<sup>189</sup> In relevant part, SAIC asserted, with regard to the government's (a)(2) claim, that the jury instruction, which eliminated the government's burden to prove that "SAIC made false statements with the *intent* and for the *purpose* of getting its false claims paid," was erroneous in light of the Supreme Court's ruling in *Allison Engine* that the government's obligation is to show that the defendant made the false record or statement at issue "*for the purpose of getting a false or fraudulent claim for payment paid.*"<sup>190</sup> Because the OCI certifications were unrelated to the government's decision to pay SAIC's claims for payment, SAIC contended that the jury instruction was material error.<sup>191</sup>

The district court rejected SAIC's argument, noting that the statements at issue here (unlike those in *Allison Engine*) were made directly to NRC and that there was sufficient evidence in the record from which the jury could have found that SAIC's OCI statements were made for the purpose of having their claims paid.<sup>192</sup> The court then turned to its analysis of the new FERA standards, including the addition of a "material" requirement in (a)(2). On this issue, the United States filed a separate motion (as it did in the *Allison Engine* remand case), arguing that FERA's changes to (a)(2) apply retroactively to all "cases" filed on or after June 7, 2008.<sup>193</sup> However, as in *Allison Engine*, the SAIC court also found that the retroactivity language applied to claims extant on or after June 7, 2008, not cases extant as of that date.<sup>194</sup>

In another recent case, however, District Judge Roberts, the same judge who decided SAIC, apparently reversed his earlier view in that case, concluding, in

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186. (SAIC), 653 F. Supp. 2d 87 (D.D.C. 2009).

187. *Id.* at 107.

188. *Id.* at 93–94.

189. *Id.* at 93–95.

190. *Id.* at 104 (quoting Memorandum of Defendant at 42, *United States v. Sci. Applications Int'l Corp.*, 653 F. Supp. 2d 87 (D.D.C. 2009) (No. 04-1543)).

191. *Id.*

192. *Id.* at 104–05.

193. *Id.* at 106.

194. *Id.* at 107; *cf.* *United States ex rel. Sanders v. Allison Engine Co.*, Nos. 1:95-cv-970, 1:99-cv-923, 2009 WL 3626773, at \*4 (S.D. Ohio Oct. 27, 2009) ("[A] plain reading of the retroactivity language reveals that the relevant change is applicable to 'claims' and not to 'cases.'").

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*United States ex rel. Westrick v. Second Chance Body Armor, Inc.*, that “[b]ecause *this suit* was pending on June 7, 2008, the amended provision applies here.”<sup>195</sup> The district court in *Second Chance* inexplicably does not discuss its holding in SAIC.<sup>196</sup>

Another “retroactivity” issue under FERA is whether the changes made in 2009 could be influential in interpreting ambiguities in the statute in cases that pre-date FERA’s enactment. The first case of this type is *United States v. Aguillon*.<sup>197</sup> In that case, the plaintiff alleged that the defendant, a health care provider, fraudulently overcharged Medicare for certain evaluation and management services that the defendant provided for his patients.<sup>198</sup> Specifically, citing (a)(2), the plaintiff maintained that the defendant-physician billed for his services using a billing code that offered greater reimbursement rates than the code that plaintiff contends should have been used for these services.<sup>199</sup> The court noted that the plaintiff had to plead four elements to support an (a)(2) claim:

(1) *the defendant made, used or caused to be made or used a false record or statement to get a claim against the United States paid or approved; (2) the claim was false or fraudulent; (3) the defendant knew the record or statement and the claim were false or fraudulent; and (4) the claim was actually paid or approved.*<sup>200</sup>

Because the plaintiff did not allege that any false claims for payment were actually paid or approved, the court dismissed the complaint.<sup>201</sup>

After analyzing the matter under pre-FERA law, the court proceeded to analyze the impact of FERA *sua sponte* because FERA had been amended “arguably to eliminate the actual payment or approval requirement.”<sup>202</sup> The court applied the two-part test for retroactivity established by the Supreme Court in *Landgraf v. USI Film Products*,<sup>203</sup> which requires the court to consider: (a) “if Congress has unambiguously restricted the statute to prospective application” and (b) whether retroactive application would create “retroactive effects.”<sup>204</sup> The district court noted that Congress had not unambiguously prohibited retroactive application of FERA.<sup>205</sup> To the contrary, the congressional record specifically provides that “courts should

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195. No. 04-280, 2010 WL 623466, \*7 (D.D.C. Feb. 23, 2010) (Roberts, J.) (emphasis added).

196. *Id.* (discussing FERA’s retroactive application); *see also supra* notes 193–94 and accompanying text (describing the SAIC holding regarding retroactive applicability).

197. 628 F. Supp. 2d 542 (D. Del. 2009).

198. *Id.* at 544.

199. *Id.* at 545–46.

200. *Id.* at 548.

201. *Id.* at 551.

202. *Id.* at 549 & n.10.

203. 511 U.S. 244 (1994).

204. *Aguillon*, 628 F. Supp. 2d at 550.

205. *Id.*

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>206</sup> However, the court went on to hold that application of FERA retroactively would have retroactive effects because “it would increase defendant’s liability for past conduct.”<sup>207</sup> For this reason, and because the court did not believe Congress had provided sufficient instruction in FERA to cause retroactive effects under *Landgraf*, the court declined to apply the FERA changes to the payment rules retroactively.<sup>208</sup>

In sum, FERA itself appears to contemplate retroactive application of certain of its provisions. At the appellate level, although the United States Court of Appeals for the Eleventh Circuit declined to apply FERA to an FCA case that was filed prior to FERA’s effective date,<sup>209</sup> the Court of Appeals for the Second Circuit recently concluded that “[t]he amendment to § 3729(a)(2) . . . was made retroactive to June 7, 2008, applicable to ‘all claims under the False Claims Act . . . that [were] pending on or after that date.’”<sup>210</sup> The Second Circuit accordingly held that “[b]ecause Kirk’s claim was filed in March 2005, and was pending as of June 7, 2008, the potentially applicable provisions in this case are former § 3729(a)(1) . . . and *current* § 3729(a)(1)(B).”<sup>211</sup> It bears watching how other circuit courts of appeal will resolve these issues in the future.

**V. CONCLUSION: FERA INCREASES RISKS FOR ENTITIES DOING BUSINESS  
WITH THE FEDERAL GOVERNMENT**

Many commentators have cautioned that FERA’s changes may have a number of unintended consequences for entities doing business with the federal government. First, FERA’s elimination of the FCA’s direct presentment requirement has been criticized as overbroad. For example, although Congress was disappointed with the decision in *Totten*, entities such as Amtrak are uncommon and represent “less than one-tenth of 1 percent of all False Claims Act cases.”<sup>212</sup>

Second, eliminating the direct presentment requirement will inevitably result in a wider range of FCA cases, as direct presentment often operated as a restraint on

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206. *Id.* (alteration in original) (quoting 155 CONG. REC. E1295–1300 (daily ed. June 3, 2009) (statement of Rep. Berman)).

207. *Id.*

208. *Id.* at 550–51.

209. *Hopper v. Solvay Pharms., Inc.*, 588 F.3d 1318, 1327 n.3 (11th Cir. 2009) (“[W]e conclude the Fraud Enforcement and Recovery Act does not apply retroactively to this case.”).

210. *United States ex rel. Kirk v. Schindler Elevator Corp.*, No. 09-1678-cv, 2010 WL 1292143, at \*14 (2d Cir. Apr. 6, 2010) (alteration in original) (quoting Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, sec. 4(f), 123 Stat. 1617, 1625).

211. *Id.* (emphasis added).

212. *The False Claims Act Correction Act (S. 2041): Strengthening the Government’s Most Effective Tool Against Fraud for the 21st Century: Hearing on S. 2041 Before the S. Comm. on the Judiciary*, 110th Cong. 31–32 (2008) (statement of John T. Boese, Partner, Fried, Frank, Harris, Shriver & Jacobson LLP).

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the statute's reach.<sup>213</sup> While the pre-FERA presentment requirement served as a check against overly aggressive FCA suits, there is some concern now that almost any business in the chain of commerce under a government contract could be subject to liability under the FCA.<sup>214</sup> This development, in turn, may lead to a flood of FCA litigation against remote federal grantees, involving the most discrete, insular cases of insignificant federal funding.<sup>215</sup>

Moreover, by removing the intent to defraud the federal government requirement, FERA may result in unanticipated consequences regarding § 3729(a)(2) liability. As Justice Breyer observed at oral argument in *Allison Engine*, "government money today is in everything."<sup>216</sup> Just as the elimination of presentment may create additional, time-consuming litigation, the absence of an intent requirement could prompt new types of FCA cases, such as cases involving universities whose funding includes only a small amount of federal grants.<sup>217</sup>

Finally, Congress enacted FERA to combat fraud principally in the mortgage and financial institutions area.<sup>218</sup> However, FERA's changes are more sweeping and may be more than was necessary in battling the financial crisis. As one commentator notes, "[w]hile the nominal targets of the recent amendments to the FCA are the financial institutions receiving stimulus funds and other federal assistance, the traditional defendants in FCA litigation, government contractors, will feel the brunt of this sweeping legislation."<sup>219</sup> Although Congress may have passed this legislation

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213. See Gerard E. Wimberly et al., *The Presentment Requirement Under the False Claims Act: The Impact of Allison Engine & The Fraud Enforcement & Recovery Act of 2009*, BRIEFING PAPERS, Aug. 2009, at 1, 10–11 (describing a federal program to help homeowners repair or relocate after hurricane Katrina that was "administered by the state [Louisiana] through a quasi-public entity"). Prior to *Allison Engine*, a homeowner's false claim would not trigger FCA liability because the claim would not be presented to the federal government. *Id.* at 11. However, this may no longer be true as liability may attach to both the state and the grant recipient. *Id.*

214. See *id.* at 11 ("Now, with the FERA amendments in place that broaden the scope of liability under the FCA, the potential exists for almost any business or company to be liable under the FCA.").

215. See *id.* at 12. Again, while the FCA still requires presentment, the statute no longer specifies to whom the claim must be presented. See *supra* Part II.A.1. Instead, the entity to which the claim must be presented for liability to attach now includes any recipient of federal money if that money will be "spent or used on the Government's behalf or to advance a Government program or interest." 31 U.S.C.A. § 3729(b)(2)(A)(ii) (West 2009).

216. Comeau, *supra* note 122, at 512 (quoting Transcript of Oral Argument at 36, *Allison Engine Co. v. United States ex rel. Sanders*, 128 S. Ct. 2123 (2008) (No. 07-214)). Justice Breyer continued: "So if it's in everything, then everything is going to become subject to this False Claims Act. And of course I exaggerate by using the word 'everything,' but only a little." Transcript of Oral Argument, *supra*, at 36.

217. *Allison Engine*, 128 S. Ct. at 2128 (citing *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488, 496 (D.C. Cir. 2004)).

218. See Wimberly et al., *supra* note 213, at 6 (describing the stated goal of FERA).

219. Glenn V. Whitaker et al., Commentary, *From Bad to Worse: Changes to False Claims Act Increase Risk to Government Contractors*, GOV'T CONT. LITIG. REP. Aug. 10, 2009, at 1, 1; see also Charles R. Ching et al., *In-House Counsel Beware: The False Claims Act Might Impact Your Business*, ACC DOCKET, Nov. 2009, at 56, 60 ("Congress appears to have overshot the mark and imposed potential FCA liability on businesses, industries and transactions that have nothing to do with 'unscrupulous mortgage brokers and Wall Street financiers.'" (quoting S. REP. NO. 111-10, at 2 (2009), reprinted in 2009 U.S.C.C.A.N. 430, 431)).

with an intent to limit the fraudulent behavior of financial institutions, there does not appear to be any clear limit to the FCA's reach where federal dollars are involved. Indeed, government contractors may now be targeted for "regulatory noncompliance,"<sup>220</sup> so long as there is some nexus between the government's payment and the regulation in question.<sup>221</sup>

On the other hand, while FERA undoubtedly brings needed clarity to a number of areas of FCA litigation—clarity that, in turn, should improve the uniformity of court decisions—a number of FCA interpretive issues remain for the courts to decide. In particular, although FERA relaxes many FCA liability requirements in favor of the government and relators, contractors and other defendants may continue to argue that claims submitted to the government based upon reasonable or good faith interpretations of ambiguous statutory, regulatory, or contractual provisions may not serve as the predicate for an FCA suit.<sup>222</sup> The Supreme Court has not yet had the opportunity to resolve the arguably conflicting views of the various circuit courts of appeal on the scope of this defense, and thus it remains a viable option that defendants may assert even after FERA. This is especially so in the health care and defense contracting areas, where regulations are highly complex and subject to multiple good faith interpretations.<sup>223</sup>

Accordingly, whether FERA will result in the overbroad sweeping changes about which some have cautioned remains to be determined in future litigation. But it is clear that certain requirements of the pre-FERA FCA—principally the presentment and intent requirements—have been relaxed and will not serve as the impediments to FCA cases that they were previously.

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220. See Comeau, *supra* note 122, at 512–13 (stating that courts have historically held that the FCA is not for punishing mere regulatory compliance violations and cautioning government contractors that they may still need to "anticipate a proliferation of suits claiming the entire value of the contract in damages"); Whitaker et al., *supra* note 219, at \*3 ("[G]overnment contractors . . . now face punitive liability never before contemplated by the FCA.").

221. *United States v. Rogan*, 459 F. Supp. 2d 692, 717–18 (N.D. Ill. 2006) ("Even in the absence of an express certification of compliance, the knowing submission of claims by a person who has violated a statute or regulation that contains, on its face, a direct nexus to the government's payment decision is also actionable under the FCA."). Although *Rogan* demonstrates that such regulatory noncompliance was actionable even pre-FERA, the revised FCA covers a wider range of federal funds and entities (e.g., Amtrak). See *supra* Part II.A.2.

222. Sarah M. Brackney & Matthew H. Solomson, *Current Issues in False Claims Litigation*, BRIEFING PAPERS, Sept. 2006, at 1, 5–7; Ralph C. Nash & John Cibinic, *Can a Reasonable Interpretation of a Contract Be Fraud?*, 14 NASH & CIBINIC REP., Mar. 2000, at ¶ 11 (discussing proving falsity and intent).

223. We note, however, that in the Court of Federal Claims—where contractors who sue the United States under government contracts pursuant to the Tucker Act, 28 U.S.C. § 1491 (2006), are subject to counterclaims under the FCA—this issue has been resolved. *Commercial Contractors, Inc. v. United States*, 154 F.3d 1357, 1366 (Fed. Cir. 1998) ("[W]hen the contractor's purported interpretation of the contract borders on the frivolous, the contractor must either raise the interpretation issue with the government contracting officials or risk liability under the FCA . . .").

CONGRESS DECLARES CHECKMATE