

THE GOVERNMENT CONTRACTOR[®]

WEST[®]

Information and Analysis on Legal Aspects of Procurement

Vol. 52, No. 8

February 24, 2010

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FEATURE COMMENT: A Look Back— Judicial Review Of The Retroactivity Provisions Of The Fraud Enforcement And Recovery Act Of 2009

The Fraud Enforcement and Recovery Act of 2009 (FERA) was passed by Congress and signed into law by the president on May 20, 2009. See P.L. 111-21, 123 Stat. 1617. As has been extensively discussed in the press and elsewhere, FERA significantly expands the liability provisions of the False Claims Act, 31 USCA § 3729 et seq., which had been in effect since the statute's last amendments more than 20 years ago in 1986.

The impetus for FERA's enactment was Congress' dissatisfaction with recent court decisions that Congress believed were overly restrictive of the FCA. Although the decisions were sensible and well-reasoned, Congress believed that they were inconsistent with the purpose of the FCA and failed to protect the Government from contractor fraud. Accordingly, in a departure from the long-standing view that the FCA was not an all-purpose antifraud statute, in passing FERA, Congress dramatically transformed the FCA into an all-frauds statute, by expanding both the universe of defendants potentially liable under the FCA and the types of conduct that are actionable under the statute.

Retroactive Application of FERA—Although most of FERA's amendments to the FCA were stated to apply prospectively to cases filed on or after May 20, 2009, Congress specifically intended that one particular set of amendments—those directed at former § 3729(a)(2) of the FCA—apply on a retroactive basis. In § 4(f)(1) of FERA, Congress provided that the amendments “shall take effect as

if enacted on June 7, 2008, and apply to all claims under the False Claims Act that are pending on or after that date.” 123 Stat. at 1625. Congress did so in order to legislatively overrule the U.S. Supreme Court's unanimous decision in *Allison Engine Co. v. U.S. ex rel. Sanders*, 128 S. Ct. 2123 (2008), which was issued two days later, on June 9, 2008.

Allison Engine involved Navy contracts to build destroyers. The prime contractor shipyards subcontracted with Allison Engine Co. to build electrical generators for the vessels, and Allison Engine, in turn, subcontracted some of the work to a lower-tier subcontractor. The Navy contracts required that the generators be built according to Navy specifications and that every generator be delivered with a certificate of conformance that the unit met applicable contract requirements. In 1995, ex-employees of Allison Engine's subcontractor filed a qui tam action under the FCA.

Before Judge Thomas Rose in the U.S. District Court for the Southern District of Ohio, the relators contended that Allison Engine and its subcontractors violated former FCA § 3729(a)(2), among other provisions, by knowingly submitting invoices for nonconforming generators. See *U.S. ex rel. Sanders v. Allison Engine Co.*, 2005 WL 713569 (S.D. Ohio March 11, 2005). Former § 3729(a)(2) imposed FCA liability on any person who “knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government.” 31 USCA § 3729(a)(2).

Judge Rose held that to state a § 3729(a)(2) violation, the relators had to prove that the defendants presented false claims to the Government, and he granted the defendants' motion for judgment as a matter of law because the relators failed to do so. At trial, although the relators had evidence that the subcontractors had submitted certificates of conformance and invoices for payment to the prime contractor, they had no evidence that any of the invoices had been submitted by the prime to the Navy. Accordingly, although the relators could

show that Allison Engine and its subcontractors had been paid with federal funds, they had no evidence that any false claims were presented directly to the Government.

On appeal to the U.S. Court of Appeals for the Sixth Circuit, a divided panel of the court reversed. See *U.S. ex rel. Sanders v. Allison Engine Co.*, 471 F.3d 610 (2006). The Sixth Circuit held that liability under former § 3729(a)(2) of the FCA did not require proof of presentment or that the defendants had intended to cause a false claim to be paid by the Government. According to the Sixth Circuit, all that was needed for liability to attach under § 3729(a)(2) was evidence that the defendants had intended to cause a private entity to pay a false claim using Government funds.

The Supreme Court granted certiorari. Justice Alito, for a unanimous Court, overruled the Sixth Circuit. See *Allison Engine Co. v. U.S. ex rel. Sanders*, 128 S. Ct. 2123 (2008). The Supreme Court held that although the direct presentment of a false claim to the Government was not required to establish a violation of former § 3729(a)(2) of the FCA, the Government or a relator must still prove that a defendant made false statements for the purpose of getting a false or fraudulent claim paid by the Government, as opposed to by a private party using Government funds. This was because the statute specifically used the phrase “to get,” which the Court held denotes purpose, and also the phrase “paid by the Government.”

In response to the Supreme Court’s decision, Congress, through FERA, amended former § 3729(a)(2) of the FCA. Specifically, the amendments replaced the phrase “to get” with “material to” under former § 3729(a)(2) of the FCA, eliminated the phrase “paid or approved by the Government,” and renumbered the provision as § 3729(a)(1)(B). As amended, § 3729(a)(1)(B) now imposes liability if a person “knowingly makes, uses or causes to be made or used, a false record or statement material to a false or fraudulent claim.” 31 USCA § 3729(a)(1)(B). The amendments effectively removed the intent and presentment requirements from the FCA, thereby extending FCA liability to certain additional situations involving subcontractors and grantees that were not covered under the prior version of the statute. These parties often indirectly receive payment from federal funds from a third party, but do not intend to defraud the Government, do not directly present claims to the Government for payment and do not have claims directly paid by the Government, thus

relieving them of liability under former § 3729(a)(2) of the FCA.

Section 4(f)(1) of FERA, the effective-date provision of FERA, indicates that the amendments would “take effect as if enacted on June 7, 2008, and apply to all claims under the False Claims Act that are pending on or after that date.” 123 Stat. at 1621. By expressly stating that these amendments were effective as of June 7, 2008, Congress hoped to circumvent the Supreme Court’s decision in *Allison Engine* that FCA liability does not attach if the plaintiff cannot show that a defendant made a false statement or record for the purpose of getting the Government to pay a false claim. To date, however, courts that have substantively addressed the issue have squarely rejected the Government’s attempt to apply the provisions retroactively.

Courts Have Held that FERA is Not Retroactive to any Cases that Were Pending on or After June 7, 2008—*U.S. v. Aguillon*: The first court to address whether the amendments applied retroactively was the U.S. District Court for the District of Delaware. In *U.S. v. Aguillon*, Judge Sue Robinson addressed the retrospective application of the FERA amendments using a two-step analysis promulgated by the Supreme Court in *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994). See *U.S. v. Aguillon*, 628 F. Supp. 2d 542 (D. Del. 2009). Judge Robinson explained,

First, the court must determine if Congress has unambiguously restricted the statute to prospective application. See *Mathews v. Kidder Peabody & Co.*, 161 F.3d 156, 160 (3d Cir. 1998) (unambiguous restriction to prospective application ends the inquiry). Second, the court must determine if retrospective application of the statute would create “retroactive effects” and if these effects are permissible pursuant to a congressional directive. See *Mathews*, 161 F.3d at 159–61 (only “Congress’s **clear** intent to apply the statute retrospectively” will overcome the presumption against applying statutes with retroactive effects (original emphasis)).

Aguillon, 628 F.Supp.2d at 550. Applying this framework, Judge Robinson found that the first prong was satisfied because Congress “has not unambiguously precluded retrospective application of the FCA amendments.” She noted that the congressional record states that “‘courts should rely on these amendments to clarify the existing scope of False Claims

Act liability, [even if the alleged violations occurred before the enactment of these amendments.]" Id. at 551 (bracketed text in original).

However, the court found that the second prong—whether the retrospective application of the amendments would cause retroactive effects—was unmet. The court found that the “application of the FCA amendments would cause retroactive effects because it would increase defendant’s liability for past conduct.” Id. at 550–51. Although Judge Robinson concluded that Congress had tacitly approved the retrospective application of FERA, she also concluded that Congress had “directed against applying the amendments in a way that would cause retroactive effects.” See *id.* (citing 155 Cong. Rec. E1295-03, at E1300 (Congress intended to avoid “extensive litigation over whether the amendments apply retroactively, as occurred following the 1986 False Claims Act amendments.”)). Accordingly, because “Congress has not provided the requisite instruction necessary for the amendments to be used to cause retroactive effects,” Judge Robinson held that the amendments could not be retroactively applied. Id. at 551.

U.S. v. SAIC: Following the *Aguillon* decision, the U.S. District Court for the District of Columbia also held that the § 3729(a)(2) amendments did not retroactively apply because of the plain language of § 4(f)(1) of FERA. As noted, FERA § 4(f)(1), the effective-date clause, states that the amendments “shall take effect as if enacted on June 7, 2008, and apply to all claims under the False Claims Act that are pending on or after that date.” See 123 Stat. 1617. In *U.S. v. Sci. Applications Int’l Corp.*, 653 F.Supp.2d 87 (D.D.C. 2009), Judge Richard Roberts held that the plain language of this clause and the legislative intent behind the provision indicate that the term “claims” meant claims for reimbursement or payment pending on June 7, 2008, and not court cases.

Judge Roberts first determined that the plain meaning of the phrase “claims *under* the False Claims Act” was a reference to the word “claim” as it was used *under* the FCA. Judge Roberts concluded that because statutory definitions control the meaning of statutory language, the definition of the word “claim” in the amendments controls its meaning in the retroactivity provision, § 4(f)(1) of FERA. See *SAIC*, 653 F. Supp. 2d at 107. Therefore, because “claims” is defined as a “demand for money or property” under the FCA, it refers to claims for payment or reimbursement and not to legal actions. Id.

As further support, Judge Roberts noted that FERA specifically uses “cases” to refer to legal cases, thereby further indicating that the word “claim” does not also refer to court cases. Section 4(f)(2) of the amendments states that “section 3731(b) of title 31, as amended ... shall apply to *cases* pending on the date of enactment.” See *SAIC*, 653 F. Supp. 2d at 107 (citing 123 Stat. at 1625 (emphasis added)). Judge Roberts stated, “Surely, had Congress intended the retroactivity of subsection 4(f)(1) to be measured by ‘cases,’ it would have said so as it did in subsection 4(f)(2).” Id. Judge Roberts rejected the Department of Justice’s view that “claims under the False Claims Act” somehow meant “legal claims,” even though the most direct and straightforward reading of the phrase would mean claims as defined *under* the statute. Id. Likewise, Judge Roberts rejected the Government’s contention that FERA’s legislative history supported the Government’s interpretation. He noted that the Senate report for FERA used the term “claims” to refer to requests for payment, but the term “cases” to refer to legal actions under the FCA. Id. Because none of the claims for payment at issue in the case were pending as of June 7, 2008, Judge Roberts held that there was no basis for retroactively applying the amendments. Id. at 106–07.

Since the *SAIC* decision, two other district courts have followed suit. See *U.S. ex rel. Parato v. Unadilla Health Care Ctr., Inc.*, 2010 WL 146877, at *4 n.4 (M.D. Ga. Jan. 11, 2010); *U.S. ex rel. Sanders v. Allison Engine Co.*, 2009 WL 3626773, at *4 (S.D. Ohio Oct. 27, 2009). And, to date, one appellate court has already applied the *SAIC* decision to hold that the § 3729(a)(2) amendments are not retroactive. In *Hopper v. Solvay Pharms., Inc.*, the U.S. Court of Appeals for the Eleventh Circuit, relying on Judge Robert’s analysis, explained,

In May 2009, Congress enacted the Fraud Enforcement and Recovery Act, which amended 31 U.S.C. § 3729(a)(2) (2003), replacing the words ‘to get a false or fraudulent claim paid or approved by the Government’ with the words ‘material to a false or fraudulent claim.’ 123 Stat. at 1621. Section 4(f)(1) of the Act provides that this change ‘shall take effect as if enacted on June 7, 2008, and apply to all *claims* ... that are pending on or after that date.’ Id. § 4(f)(1), 123 Stat. at 1625 (emphasis added). We interpret the word ‘claim’ in section 4(f) to mean ‘any request or demand ... for money or property,’ as defined by 31 U.S.C. § 3729(b)(2)(A)

(as amended May 2009). While this *case* was pending on and after June 7, 2008, the relators do not allege that any *claims*, as defined by § 3729(b)(2)(A), were pending on or after June 7, 2008. Therefore, we conclude the Fraud Enforcement and Recovery Act does not apply retroactively to this case. See *United States v. Sci. Applications Int'l Corp.*, No. 04-1543, 2009 WL 2929250, at *13–14 (D.D.C. Sept. 14, 2009) (concluding Fraud Enforcement and Recovery Act not retroactive because no claims were pending on or after June 7, 2008).

Hopper at 1327 n.3.

U.S. ex rel. Sanders v. Allison Engine Co.: The most significant contribution to the retroactivity debate to date has been the district court's most recent decision in *Allison Engine*, on remand from the Sixth Circuit after the Supreme Court's June 9, 2008 decision. *U.S. ex rel. Sanders v. Allison Engine Co.*, 2009 WL 3626773 (S.D. Ohio Oct. 27, 2009). After FERA was enacted on May 20, 2009, the defendants filed a motion to preclude the retroactive application of FERA's amendments to former § 3729(a)(2) of the FCA, or to declare that a retroactive application of FERA is unconstitutional. *Id.* at *2. On Oct. 27, 2009, Judge Rose granted the defendants' motion, and in doing so, gutted any remaining argument that the amendments to former § 3729(a)(2) could ever retroactively be applied as of June 7, 2008, regardless of whether there were claims for payment pending as of that date.

First, following Judge Roberts' analysis in *SAIC*, Judge Rose held that the plain language of the retroactivity clause in § 4(f)(1) of FERA most naturally lends itself to an interpretation that "claims under the False Claims Act" means claims for payment as opposed to legal actions. *Id.* at *3–4. However, Judge Rose did not stop there. In addition to finding that the retroactivity language in § 4(f)(1) of FERA does not compel a retroactive application of the statute, Judge Rose went on to hold that any retroactive application of FERA would violate the Ex Post Facto Clause of the U.S. Constitution. *Id.* at *4–10. It is this portion of Judge Rose's opinion that completely destroys any attempt by the Government or relators to evade the Supreme Court's decision in *Allison Engine*.

Judge Rose began by observing that although Congress may enact laws with retroactive application, the laws must certainly conform to constitutional limits, including the Ex Post Facto Clause of the U.S.

Constitution, which prohibits the enactment of laws that punish individuals for past acts. See U.S. Const. Art. I, § 9, cl. 3. Judge Rose explained that the prohibition applies fully to civil laws that are punitive in intent or application:

An ex post facto law may inflict penalties on a person or it may inflict pecuniary penalties. *Id.* Traditionally, criminal statutes have been examined for violation of the Ex Post Facto Clause. However, civil statutes may also violate the Ex Post Facto Clause. *Landgraf v. USI Film Products*, 511 U.S. 244, 281, 114 S. Ct. 1483, 128 L.Ed.2d 229 (1994); *Louis Vuitton S.A. v. Spencer Handbags Corp.*, 765 F.2d 966, 971–72 (2d Cir. 1985) (the punitive nature of the treble damages provision in the Trademark Counterfeiting Act of 1984 could implicate ex post facto concerns).

The threshold question in an ex-post-facto analysis is whether the legislature intended to impose punishment when it enacted the law. *Smith v. Doe*, 538 U.S. 84, 92, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003). If the legislature intended to impose punishment, the inquiry ends and the law violates the Ex Post Facto Clause. *Id.* However, if the legislature's intention was to enact a civil and nonpunitive regulatory scheme, a court must further examine whether the statutory scheme is "so punitive either in purpose or effect as to negate [the State's] intention to deem it 'civil.'" *Id.* (quoting *Kansas v. Hendricks*, 521 U.S. 346, 361, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997)).

See *Allison Engine*, 2009 WL 3626773, at *5.

Judge Rose started with the threshold question of whether Congress intended to impose punishment when it enacted the statute. *Id.* at *5. He noted that if Congress' intention in enacting a statute is to impose punishment, then the retroactive application of the statute would violate the Ex Post Facto Clause because it would penalize acts that were not punishable before the statute's passage. *Id.* As to the FCA's punitive purpose, Judge Rose found that Congress, in debating the passage of the FCA, intended the FCA to punish fraudulent conduct. *Id.* at *6. Judge Rose thoroughly recited a litany of congressional statements attesting to the punitive nature of the FCA to conclude that the statute was in fact enacted for a punitive purpose. Judge Rose also found that Congress' punitive intent was clearly captured in the FCA's imposition of treble dam-

ages for a violation of the statute. He stated that “[t]he very idea of treble damages reveals an intent to *punish* past, and to deter future, unlawful conduct, not to ameliorate the liability of wrongdoers.” *Id.* at *7 (quoting *Texas Indus. v. Radcliffe Materials, Inc.*, 451 U.S. 630, 639 (1981) (emphasis in original)). Accordingly, Judge Rose held that Congress intended to impose punishment when it enacted the FCA and, as such, the statute cannot be retroactively applied under any circumstances, pursuant to the Ex Post Facto Clause of the Constitution. *Id.*

Next, Judge Rose held that even if it was not clear that Congress intended the FCA to serve a punitive role, the FCA still cannot be applied retroactively because the statute is clearly punitive in purpose and effect. See *Allison Engine*, 2009 WL 3626773, at *8. He noted that a civil statute may still be unconstitutional pursuant to the Ex Post Facto Clause if its regulatory scheme is so punitive either in purpose or effect as to negate its civil nature and transform the statute into a de facto criminal penalty. *Id.* In this regard, Judge Rose concluded that the retroactive application of FERA’s amendments to the FCA would violate the Ex Post Facto Clause because they would penalize past actions that were not punishable before the amendments’ enactment. *Id.*

To demonstrate that a civil remedy has been transformed into a criminal penalty, Judge Rose explained that there must be “the clearest proof” to override legislative purpose deeming the statute nonpunitive. See *Allison Engine*, 2009 WL 3626773, at *8. Judge Rose looked to the Supreme Court’s decision in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963), in which the Court provided a seven-factor test for analyzing whether a statute is punitive or regulatory: (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 is implicated only by a finding of scienter, (4) whether operation of the sanction promotes 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 with a rational connection to the sanction may be assigned to it, and (7) whether the sanction is excessive in relation to this alternative purpose. Judge Rose determined that the balance of the factors militated towards finding that the retroactivity provisions of FERA violate the Ex Post Facto Clause.

In analyzing the seven *Kennedy* factors, Judge Rose concluded that the FCA has a punitive purpose or effect. First, as noted, Judge Rose found that the FCA has historically been regarded as a punitive statute. See *Allison Engine*, 2009 WL 3626773, at *8. Second, because FCA actions also require scienter demonstrating that a knowing fraud occurred, Judge Rose concluded that the FCA’s sanctions are punitive in nature and effect. *Id.* Third, Judge Rose found that the FCA promotes retribution and deterrence, which weighs further in favor of a punitive characterization. *Id.* at * 9. Finally, Judge Rose found that the FCA’s treble damages provision is excessive because it can, and often does, result in damages that many times exceed the amount necessary to compensate the Government for fraud. *Id.* Accordingly, the court held that these factors support a finding that the FCA has a punitive purpose or effect. *Id.*

Judge Rose determined that the remaining three factors in the ex post facto analysis support a finding of civil effects: (a) the FCA’s sanctions do not approach imprisonment, (b) behavior prohibited by the civil version of the FCA may also be punished by the criminal version of the statute, and (c) the FCA serves a compensatory function as well as a punitive one. See *id.* at *8–9. But he held that they did not supplant the four other factors that indicated that the FCA’s regulatory scheme is punitive in purpose and effect. See *Allison Engine*, 2009 WL 3626773, at *10. Particularly significant to Judge Rose’s decision is the FCA’s allowance for treble damages, which he found constitutes an excessive remedy that clearly and forcefully highlights the punitive aspects of the statute. *Id.* at *7, *9. Therefore, Judge Rose concluded that both congressional intent and an analysis of the FCA’s punitive intent and effects demonstrate that any retroactive application of the FERA amendments would amount to an illegal ex post facto law under the Constitution. *Id.* at *7, *10.

Conclusion—To this day, the U.S. continues to assert that FERA should be retroactively applied, even though all courts to date that have substantively addressed the issue have rejected the argument. The courts have correctly concluded that the plain language of FERA renders any retroactivity applicable only to claims for payment or reimbursement that were pending with the Federal Government as of June 7, 2008, and not to court cases. Moreover, and absolutely fatal to the Government’s continuing arguments, is Judge Rose’s well-reasoned and well-

supported decision in *Allison Engine* that the FCA is a punitive statute, and therefore, Congress may not use the blunt instrument of civil fraud liability, which often results in serious monetary and administrative sanctions, to punish conduct that was not prohibited at the time it occurred. The law, to say nothing of fundamental fairness, demands at least this much. We can expect that the issues raised in Judge Rose's

decision in *Allison Engine* will be appealed to the Sixth Circuit and, from there, will work their way up to the Supreme Court once again.



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