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### FEATURE COMMENT: *U.S. ex rel. Miller v. Bill Harbert Int'l Constr., Inc.*—D.C. Circuit Joins The Retroactivity Debate Over FERA

*U.S. ex rel. Miller v. Bill Harbert Int'l Constr., Inc.*, 2010 WL 2487962 (D.C. Cir. June 22, 2010)

**Introduction**—The passage of the Fraud Enforcement and Recovery Act of 2009 (FERA), P.L. 111-21, marked the most significant overhaul of the False Claims Act (FCA), 31 USCA § 3729 et seq., in the last 20 years. Although most of FERA's provisions were slated to apply prospectively to conduct occurring on or after the statute's May 20, 2009 effective date, Congress intended certain provisions under FERA to apply on a retroactive basis. However, Congress' attempt at retroactivity has been met with opposition, with numerous courts having been pressed upon to determine whether the provisions may be applied retroactively.

Although most of the dispute to date has taken the form of a statutory debate concerning the types of conduct that fall within the retroactivity provisions, courts have also more broadly held that any retroactive application of the FCA, regardless of its statutory construction, would be unconstitutional under the Ex Post Facto Clause of the Constitution. See *U.S. ex rel. Sanders v. Allison Engine Co.*, 667 F.Supp.2d 747 (S.D. Ohio 2009). However, in *U.S. ex rel. Miller v. Bill Harbert Int'l Constr., Inc.*, 2010 WL 2487962 (D.C. Cir. June 22, 2010), the U.S. Court of Appeals for the D.C. Circuit apparently rejected this position. In addressing a limited, procedural defense raised by the defendants in that case, the D.C. Circuit broadly held that the retroactive application of the FCA in any

context does not violate Ex Post Facto requirements. Whether this expansive holding was intentional or unintentional, given the narrow issue that was before the court, the ruling nevertheless sows confusion as to the constitutional permissibility of retroactive FCA liability and perhaps even creates the potential for a circuit split on this important issue.

***U.S. ex rel. Sanders v. Allison Engine Co.***—In *Allison Engine*, Judge Rose held that the FCA could not be applied retroactively pursuant to the Ex Post Facto Clause because it was a punitive statute in both purpose and effect. See Nadler and Yang, Feature Comment, “A Look Back—Judicial Review Of The Retroactivity Provisions Of The Fraud Enforcement And Recovery Act of 2009,” 52 GC ¶ 69. With regard to the punitive purpose behind the FCA, Judge Rose determined that there was ample evidence in the legislative history to the statute pointing to Congress' intent that the FCA should serve a primarily punitive objective. *Allison Engine*, 667 F.Supp.2d at 753–755. Likewise, regarding the FCA's effects, Judge Rose concluded that the majority of the factors laid out by the U.S. Supreme Court for assessing whether a statute is punitive or remedial in nature demonstrate that, on balance, the FCA is more punitive than civil in application. *Id.* at 756–758. Accordingly, as the FCA is a punitive statute in both purpose and effect, Judge Rose held that any retroactive application of the FCA would violate the Ex Post Facto Clause's prohibition against the passage of laws that punish individuals for past acts.

In December 2009, the relator, joined by the U.S. (which intervened for this limited purpose), moved the court to certify its decision that the retroactive application of the FCA is unconstitutional for interlocutory appeal to the U.S. Court of Appeals for the Sixth Circuit. On February 19, Judge Rose granted the motions for certification. Judge Rose stated that a “substantial ground for difference of opinion exists” regarding the retroactivity of the FCA, as “courts have said that the FCA is punitive in nature and they have, in other instances, said the FCA is remedial in nature.” See *U.S. ex rel. Sanders v. Allison Engine Co.*,

Case No. 1:95-cv-970 (S.D. Ohio), doc. no. 737 (Feb. 19, 2010) at 4. On July 2, the Sixth Circuit granted the U.S.’ and relator’s petitions for permission to appeal Judge Rose’s interlocutory order. The matter is pending before the Sixth Circuit (doc. nos. 10-0303/0304).

**U.S. ex rel. Miller v. Bill Harbert Int’l Constr., Inc.**—*Miller* involved a qui tam action under the FCA, in which the U.S. subsequently intervened, alleging that the defendants engaged in a bid-rigging scheme to overcharge on contracts funded by the U.S. Agency for International Development. *Miller*, 2010 WL 2487962, at \*1–2. The defendants argued that the Government’s claims were time-barred under the FCA’s statute of limitations because the events giving rise to the claims occurred more than six years before the claims were asserted. *Id.* at \*4. In response, the Government argued that its claims were not untimely under the relation-back doctrine provided under the Federal Rules of Civil Procedure. The district court agreed, holding that the Government’s claims related back to the relator’s initial complaint, which had been timely filed.

On appeal, the D.C. Circuit affirmed, but noted that the relation-back doctrine was no longer based on procedural grounds because it was now rooted in the FCA itself. The D.C. Circuit noted that after the trial concluded, but before the case was briefed on appeal, Congress amended the FCA through FERA to expressly provide for relation back in FCA cases. Thus, the provision was retroactively available to all cases pending as of the date of FERA’s enactment. *Miller*, 2010 WL 2487962, at \*4. For its part, the defendant contended, among other arguments, that FERA’s amendments could not be applied retroactively without violating the Ex Post Facto Clause.

The D.C. Circuit disagreed, concluding that the Ex Post Facto Clause applies only to penal legislation. *Id.* at \*5. Although the D.C. Circuit could have addressed the issue more narrowly, the court went beyond that task by broadly holding that because the FCA is not a criminal statute, it is not penal. Accordingly, the Court appears to have pronounced that *any* retroactive application of the FCA is permissible under the Constitution. However, in so holding, the D.C. Circuit seems to have ignored the well-settled tenet recognized by Judge Rose in *Allison Engine* that even civil statutes can be deemed punitive (and hence penal) if they are sufficiently punitive in purpose and effect that they are tantamount to a criminal sanction. Indeed, the D.C. Circuit’s holding is peculiar also because the primary case on which it relies—*Hudson v. U.S.*, 522

U.S. 93 (1997)—acknowledged this point. Moreover, in *Hudson*, the Supreme Court did not conclude that the retroactive application of the FCA is permissible under Ex Post Facto Clause requirements. *Hudson*, 522 U.S. at 100–103. Most importantly, however, in *Miller* the D.C. Circuit skipped altogether the detailed and well-supported analysis articulated in *Allison Engine* that correctly concluded that the FCA is so fundamentally punitive in both purpose and effect that any retroactive application would be constitutionally impermissible. *Miller*, 2010 WL 2487962, at \*5.

Although the D.C. Circuit’s failure to address the *Allison Engine* retroactivity analysis may have been due to the fact that the procedural matter before the Court differed from the more substantive, liability-driven issues that were before Judge Rose, the expansive language employed by the D.C. Circuit is nevertheless unqualified and could also be construed as applicable to any retroactive application of FCA liability. As noted, Judge Rose has certified his decision for interlocutory appeal to the Sixth Circuit, and the appeal is presently pending. Accordingly, at a minimum, the *Miller* decision has muddied the waters regarding the retroactive reach of FCA liability and possibly even laid the groundwork for a circuit split on this important issue.

**Conclusion**—In *Allison Engine*, Judge Rose meticulously examined the intent and application of the FCA under applicable Supreme Court precedent to conclude that the act is punitive in both respects and, thus, cannot be applied retroactively under the Ex Post Facto Clause of the Constitution. The D.C. Circuit, in taking an apparently contrary position in *Miller*, entirely bypassed the *Allison Engine* analysis by seizing solely on the fact that the FCA is not a criminal statute to conclude that its retroactive application does not implicate constitutional concerns. However, this conclusion ignores the fact that the history, objective and remedies of the FCA all speak to the punishment of individuals who violate its provisions as opposed to any solely remedial purpose to compensate the Government for the losses it incurs. Finally, as *Allison Engine* has been certified for interlocutory appeal to the Sixth Circuit, the D.C. Circuit’s entrance into the fray may well have also set the stage for a circuit split that will require the Supreme Court’s intervention to resolve.



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