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Contract Fraud: One Year After FERA

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Contract Fraud: One Year After FERA

- Overview of Fraud Enforcement and Recovery Act of 2009 “FERA”
- Retroactive Application of FERA
- Recent Legislative Developments
  - Patient Protection and Affordable Care Act
  - The Franken Amendment
- Recent Important Cases and Enforcement Trends

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Overview of FERA

- Expanded liability relating to submission of a false statement in support of a false claim
  - Statement need not be intended to influence U.S.
- Changes to definition of "claim"
  - No showing that claim was presented to government
  - Includes claims to third party for money "used on the Government's behalf"
  - Includes claims for non-U.S. funds administered by U.S.
- Definition of "material" – "natural tendency to influence"
  - No showing of actual reliance required

Overview of FERA

- Expanded liability for reverse false claims
  - Applicable even before the fixed amount of debt is established
  - Liability for failure to disclose overpayments
- Expanded conspiracy liability
  - Applies to reverse false claims and false statements
- Expanded whistleblower protections
  - Covers employees who do not plan to file qui tam
  - Covers non-employees
- Relation back of government complaints in intervention
- Sharing with state and local authorities

Overview of FERA

- Delegation of Authority to Issue Civil Investigative Demands
  - Jan. 2010 – AG delegates authority to AAG for the Civil Division
  - March 2010 – AAG re-delegates authority to U.S. Attorneys

- Implications:
  - Use of CIDs rather than GJ subpoenas to compel testimony
  - Information can be shared with throughout the government and with relators, potentially thwarting the gate-keeping protections of Rule 9(b)

FERA: Disputes Over Retroactivity

- Prior law, under *Allison Engine*, held that a false statement must have been intended "to get" a false claim paid
- New law makes all false statements actionable if they are "material"
- New law "shall take effect as if enacted on June 7, 2008, and apply to all **claims** under the [FCA] [ ] that are pending on or after that date." (FERA, § 4(f))

FERA: Disputes Over Retroactivity

- Majority View

  "Claim" as used in § 4(f) means a claim for money or property

- Minority View (and DOJ's view)

  "Claim" as used in § 4(f) means "cases"

- Minority view raises constitutional issues

Patient Protection and Affordable Care Act "PPACA"

- PPACA eviscerates the FCA's "Public Disclosure" provision which barred parasitic suits
  - Sec. 10104 of PPACA (page 783 of the 906 page Act)

- Effect of PPACA
  - Limits the triggering types of public information
  - Eliminates the "direct" knowledge requirement from the original source provision
  - "unless opposed by the Government"
  - No reference to jurisdiction

Patient Protection and Affordable Care Act "PPACA"

- Impact on Pending Cases
  - Supreme Court: PPACA "makes no mention of retroactivity, which would be necessary for its application to pending cases." (*Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson*, March 30, 2010)
  - *Graham County* governs pre-PPACA cases
- Impact on Future Cases from FERA and PPACA
  - Expect an increase in qui tam suits filed
  - Possible decrease in dismissals at the initial motion to dismiss stage
  - Increased IG and DOJ resources
  - Aggressive enforcement

The Franken Amendment

- Sec. 8116 of the DoD FY 2010 Appropriations Act (enacted December 19, 2009)

- ***Prohibits*** the use of appropriated or other funds made available under the Act, on **any Federal contract for an amount *in excess of $1 million*** that is awarded ***more than 60 days after*** the effective date of this Act, ***unless the contractor agrees not to:***

The Franken Amendment

- Enter into any agreement with any of its ***employees or independent contractors*** that requires arbitration of
  - ***any claim under title VII*** of the Civil Rights Act of 1964 ***or***
  - ***any tort related to or arising out of sexual assault or harassment,*** including assault and battery, intentional infliction of emotional distress, false imprisonment, or negligent hiring, supervision, or retention ***and***

- Take any action to enforce any such provision of an ***existing*** agreement.

Impetus For Franken Amendment

- *Jones v. Halliburton Co.,* 625 F. Supp. 2d 399 (S.D. Tex. 2008)
- In 2007, Jamie Leigh Jones, a former employee of KBR, filed a lawsuit alleging that 7 KBR employees drugged her and gang-raped her in 2005 at Camp Hope in Baghdad, Iraq.
- Defendants (KBR, its related entities, and its former parent company, Halliburton) sought to compel arbitration.

Impetus For Franken Amendment

- In May 2008, the Court held that the mandatory arbitration provision was valid, ***but*** found that several of Ms. Jones claims were outside of the scope of that provision and not subject to mandatory arbitration.
- The 4 claims which the Court found to be ***outside*** the scope of the provision were:
  1. vicarious liability for assault and battery;
  2. intentional infliction of emotional distress;
  3. negligent hiring, retention, and supervision; and
  4. false imprisonment.

Impetus For Franken Amendment

- Fifth Circuit affirmed holding that the claims listed were outside the scope of the arbitration clause because "**in most circumstances, a sexual assault is independent of an employment relationship**."
- **Factors supporting the conclusion:**
  1. She was sexually assaulted by several employees in her bedroom, after-hours,
  2. while she was off-duty,
  3. following a social gathering outside of her barracks,
  4. which was some distance from where she worked,
  5. at which social gathering several co-workers had been drinking (which, notably, at the time was only allowed in non-work spaces).

The Franken Amendment: Congressional Testimony

- Prior to its passage, Ms. Jones testified before the Senate Judiciary Committee regarding the Franken Amendment.
- As a result, the Franken Amendment received significant media attention because it was reported that it was designed ***solely*** to prohibit Federal contractors from requiring their employees to arbitrate sexual assault claims.
- **This is *not* the case.**

The Franken Amendment's Scope

- While sexual assault claims are ***among*** the categories of claims of which the Franken Amendment prohibits mandatory arbitration, it ***also prohibits*** mandatory arbitration of ***any claims*** **related to or arising out of sexual assault *or harassment***, including:
  - assault and battery;
  - intentional infliction of emotional distress;
  - false imprisonment; and
  - negligent, hiring, supervision, or retention.

The Franken Amendment's Scope

- ***Also prohibits*** mandatory arbitration for any claims under Title VII of the Civil Rights Act of 1964, which incorporates claims of discrimination on the basis of race, color, religion, sex, or national origin.
- Thus, the scope of the amendment is **significantly broader** than that which has been reported in the media.

Franken Amendment's Implications For FCA Enforcement

- Enforcement officials and whistleblowers may assert that:
  - claims for payment by a noncompliant contractor or based on invoices submitted by noncompliant subcontractors/vendors constitute false claims (through certification theories of liability), and/or
  - all claims submitted under a contract awarded to a noncompliant contractor can be rendered false under a fraud-in-the-inducement theory of liability.

Franken Amendment's Requirements

- DoD contractors and subcontractors who currently have arbitration provisions are **required to eliminate these or sign new arbitration agreements** in order to exclude the claims covered by the Franken Amendment.
- **Required to investigate the compliance of their subcontractors and vendors** with the new law.
- Businesses who are not currently engaged in DoD contracting (and subcontracting), but wish to do so, need to assess the potential costs of litigation, compared to arbitration.

Steps To Mitigate Risks Of FCA Qui Tam Suits By Employees

1. Continue to Utilize Tailored **Arbitration Provisions** (With Appropriate Franken Amendment "Carve Outs")
2. Utilize **Employee Releases** With Severance Agreements
3. Utilize **Affirmative Attestations** With Severance Agreements

Tailored Arbitration Provisions

- Contractors and subcontractors are now faced with the prospect of litigating certain types of employee claims, which would previously have been arbitrated, including:
  - Sexual harassment claims and
  - Sexual or racial discrimination claims.

- ***However***, other claims may ***still*** properly be within the scope of arbitration clauses, such as:
  - Wage and hour claims;
  - ***Whistleblower retaliation claims***; and
  - "Routine" wrongful termination claims

Employee Releases

- Recent Cases Upholding Employee Releases In FCA *Qui Tam* Context
  - ***See, e.g., U.S. ex rel. Radcliffe v. Purdue Pharma***, No. 09-1202, __ F.3d __ (4th Cir. 2010).
- "Sea Change" in Enforceability
- What To Include

Affirmative Attestations

- In addition to standard provisions, the language used in the release should ensure that the employee attests that he or she has no knowledge of violations or potential violation of the law by the employer.
- Can specifically reference FCA.
- Even if release itself isn't upheld, affirmative attestation will impeach whistleblower.

Recent FCA Case Law Developments

- Defendants can sue third parties for indemnification
- FOIA response is a public disclosure
- Dangerous trend of expanded liability for implied certifications and damages awards based on total contract value

FCA Settlement Does Not Bar Third-Party Claims

- *Cell Therapeutics Inc. v. Lash Group Inc.*
  - (9th Cir., Nov. 2009)
  - Holding: defendant that settles qui tam action is not barred from seeking contractual indemnity from third parties
  - Rationale:
    - Claims are independent of alleged FCA liability
    - No admission of liability in settlement

Is a FOIA Response a Public Disclosure?

- *U.S. ex rel Ondis v. City of Woonsocket (1st Cir. Nov. 2009)*
  - Holding: FCA actions based on information released through FOIA requests are barred by public disclosure rule
    - But see *Schindler* 2nd Cir. holding that the released information must be a government audit
  - Rationale: allegations "substantially similar" to information publicly disclosed are "based upon" public disclosures
    - 1st Circuit joins majority view; only 4th Circuit in the minority

Implied Certifications & Damages

- *United States v. SAIC*
  - (District Court of D.C., Sept. 2009)
  - False claims liability for failure to disclose OCIs
    - Implied Certification theory extended to contract in which certification of OCI compliance was not an express pre-condition of payment
  - "Collective knowledge" theory of scienter applied
  - Outstanding damages:
    - Entire contract value trebled: $5.9 million
    - $577,500 in civil penalties for FCA claims
    - Only $78 in damages for the contract claim

Expansion of California FCA To Implied Certifications

- *San Francisco Unified School District ex rel. Contreras v. Laidlaw Transit, Inc.*, 182 Cal.App.4th 438 (2010)
- Bus company's contract required it to maintain buses in excellent condition, control emissions and keep accurate and complete maintenance records
- Relator alleged "knowing" breaches of contract and asserted that invoices impliedly certified compliance with all material contract terms
- Defendant argued that invoices contained no certification or anything false
- Court held that payments were conditioned on satisfactory performance of the contract and that materiality was evidenced by the contract's liquidated damages provision
- Court distinguished *U.S. ex rel. Wilson v. KBR* (4th Cir. 2008) because vehicle maintenance requirements there were not sufficiently precise

Fraud in the Inducement & Damages

- *U.S. ex rel Longhi v. Lithium Power Technologies, Inc.*
  - (5th Cir. July 2009)
  - Fraud in the inducement -- false statements made in proposal to secure research grant
  - ~$5 million in trebled damages: Court rejected argument that government is not entitled to damages because it had suffered no injury
  - Court relied on contracting officer declaration that false statements influenced his decision

Materiality of Implied Certification

- *US ex rel. Kirk v. Schindler Elevator Corp*., 2010 WL 1292143 (2nd Cir., Apr. 6. 2010).
- Defendant allegedly obtained contracts while representing that it had filed VET-100 reports when it had not or had filed false reports.
- "An *implied* false certification takes place when a statute expressly conditions payment on compliance with a given statute or regulation, and the contractor, while failing to comply with the statute or regulation (and while knowing that compliance is required), submits a claim for payment."
- How can materiality be challenged?

Good News: Defendant Awarded Attorneys' Fees

- *United States ex rel. Ubi v. IIF Data Solutions, et al.*, Case No. 1:06cv641, 2010 WL 1726767 (E.D.Va.)
- U.S. did not intervene but rejected a proposed $8.9 million settlement, forcing a trial
- Jury returned a defense verdict
- Court awarded defendant's attorneys' fees of $501K under the high "frivolous, vexatious, or primarily for the purpose of harassment" standard

More Good News: Court Confirms Government Has Unfettered Right to Dismiss Qui Tam Action

- *United States ex rel. Stephanie Schweizer v. Oce' N.V.* (D.D.C., Feb. 2010)
- Government declined intervention but entered into settlement with defendant
- Once government notifies relator of motion to dismiss and relator is given an opportunity to object, court must grant the motion
- Government's decision is "beyond judicial review," so even though FCA directs the court to assess the fairness of the settlement, such an assessment would "infringe on the Executive's ability to conduct litigation on behalf of the U.S."
- Could this prompt DOJ to dismiss more qui tam suits? Not likely.