

# The New False Claims Act

## FERA and New Frontiers in Iraq and Afghanistan

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# The Old False Claims Act: Basic Elements

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## Basic Elements:

1. Knowingly
2. Presents or causes to be presented
3. To an officer or employee of the United States
4. A false or fraudulent claim for payment or approval

## Other Theories of Liability:

1. Using a false record/statement to get a false claim paid
2. Using a false record/statement to lessen payment obligation

## Penalties/Damages:

1. Civil penalty up to \$11,000 per false claim
2. Treble damages

# Impetus for the Recent FCA Amendments

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- In recent years, a number of court decisions have narrowed the scope of the FCA
- Congress became concerned that FCA liability was being limited to fraud against the Government, and not against non-governmental recipients of federal funds
- Concern was heightened by the passage of the stimulus package, which will expand the number of such recipients
- In May 2009, Congress passed, and President Obama signed, the Fraud Enforcement and Recovery Act (“FERA”)

# Impetus for the Recent FCA Amendments

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## *U.S. ex rel. Totten v. Bombardier Corp.* (D.C. Cir.)

- Defendant delivered defective rail cars to Amtrak
- The defendant argued that the “presentment” requirement was not satisfied, because Amtrak is not the Government
- The relator argued that a claim to a grantee like Amtrak is “effectively presented to the United States”
- Held: No FCA liability because “claims were presented only to Amtrak for payment or approval, and Amtrak is not the Government.”

# Impetus for the Recent FCA Amendments

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## Allison Engine Co. v. U.S. ex rel. Sanders (Supreme Ct.)

- Defendant was a subcontractor that submitted to the prime contractor certifications of compliance with Navy specifications
- Supreme Court held that a subcontractor violates 3729(a)(2) only if it *specifically intends* to get *the Government* to pay a false claim
- Further held that false statements under (a)(2), unlike false claims under (a)(1), need not be “presented” to the Government

# Impetus for the Recent FCA Amendments

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## Custer Battles Decisions (Eastern Dist. of VA)

- Involved claims by Iraq contractors submitted to the Coalition Provisional Authority (“CPA”) in Iraq
- Held that FCA does not apply to claims seeking funds over which U.S. Government is merely a custodian (e.g., Iraqi funds)
- Further held that relators could not meet the “presentment” requirement because the CPA was not a U.S. Government entity

# Fourth Circuit Overturns Decision in *Custer Battles*

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- Federal Funds:
  - Overturned the court's ruling that only claims paid directly from US Treasury funds were actionable
  - Held instead that liability under the FCA also attaches for claims to a recipient of federal funds, such as the CPA
  
- Presentment:
  - Overturned the court's ruling that claims were not "presented" to the Government
  - Held instead that the contracting officers, although detailed to the CPA, "were functioning as employees of the United States"

# Key Questions Addressed By the Fraud Enforcement and Recovery Act (FERA)

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1. **Presentment**: Does FCA liability attach only as to claims “presented” to an officer or employee of the Government?
2. **Federal Funds**: Does the FCA require that the Government hold title to the funds used to pay the claim?
3. **Intent**: Is a defendant liable for making a false statement even where it is made without any specific intent to get a false claim paid?
4. **Reverse False Claims**: Is an affirmative act of concealment required to trigger the reverse false claims provision?
5. **Conspiracy**: Is liability for conspiracy limited only to conspiracies to violate section (a)(1) of the FCA?



# How FERA Affects the “Presentment” Requirement

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- FERA clarifies that a claim need not be presented to an officer or employee of the Government in order to trigger FCA liability
- Rather, liability may also attach for claims presented to recipients of federal funds, provided that either:
  - The Government has provided *any portion* of the money used to pay the claim; AND
  - The money is to be spent “on the Government’s behalf” or “to advance a Government program or interest”
- What does it mean to “advance a Government interest?”

# How FERA Affects the “Federal Funds” Requirement

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- FERA endorses the 4<sup>th</sup> Circuit’s Opinion in *Custer Battles*
- Clarifies that a claim is actionable under the FCA where the U.S. administers funds, “whether or not the United States takes title to the money or property”
- Thus, claims made for U.N. or multinational funds that the U.S. merely administers fall within the ambit of the FCA

## How FERA Affects the “Federal Funds” Requirement (cont’d)

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- Open Question: What are the damages on claims for funds over which the Government does not hold title but merely administers?
- Senate Report states that false claims on Government-administered funds “harm the ultimate goals and U.S. interests and reflect negatively on the United States”
- But what are the damages for harming “U.S. interests” and “reflect[ing] negatively” on the U.S.?

# How FERA Affects the “Intent” Requirement

- Overrules *Allison Engine*'s holding that liability under (a)(2) exists only where defendant *intends* to get the Government to pay a false claim
- With FERA, FCA liability now attaches for submitting false statements that are “material” to a false or fraudulent claim
- “Material” = “having a natural tendency to influence, or be capable of influencing” payment
- Thus, a subcontractor can now be liable under the FCA even if it does not intend to defraud the Government

# How FERA Affects the “Reverse False Claims” Provision

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- Previously, liability attached for making a false statement to avoid or decrease an obligation to the Government
- With FERA, liability can now also attach where a defendant “knowingly and improperly avoids or decreases an obligation” to the Government
- Thus, a defendant can be liable under the reverse false claims provision without ever submitting a false record or statement
- “Obligation” includes “the retention of any overpayment”

# How FERA Affects the Conspiracy Provision

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- Under the old FCA, a defendant was liable for conspiring “to get a false claim paid or approved”
- Some court interpreted the old provision as covering only conspiracies to violate section (a)(1)
- FERA expands the conspiracy provision to cover conspiracies to violate *any* of the FCA’s liability provisions
- Thus, for example, contractors can now for be held liable for conspiring to violate the reverse false claims provision

# Is FERA Retroactive?

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- Almost all of FERA's amendments will apply prospectively to conduct occurring on or after May 20, 2009
- Exception: The revision to old section (a)(2) – which overrules *Allison Engine* and clarifies that there is no “intent” requirement – is retroactive to June 7, 2008
- To the extent FERA is intended to “clarify” the FCA, are such “clarifications” effectively retroactive?

## Is FERA Retroactive?

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- In *U.S. v. Aguillon*, the U.S. District Court for the District of Delaware considered the retroactivity of FERA.
- Because Congress stated that FERA was meant to “clarify” the FCA, the court found that Congress did not preclude retroactive application
- However, the court found that because Congress did not want FERA to have “retroactive effects” – i.e., creating liability where none previously existed – FERA was not retroactive.



# The Bottom Line on FERA

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- Claims need not be “presented” to a Government official in order to be actionable
- The Government need not hold title to the funds used to pay the claim
- A contractor need not “intend” to defraud the Government
- A contractor can be held liable under the FCA for nothing more than the knowing retention of an overpayment

# Litigation Challenges Unique to Overseas Fraud

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- Inability to subpoena non-party witnesses;
- Inability to compel document production from non-parties;
- Cost and difficulty of overseas travel;
- Language and cultural differences make obtaining discovery from foreign entities difficult;
- Letters rogatory can be cumbersome and lengthy process

# Litigation Challenges Unique to Overseas Fraud

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- Unsophisticated relators: The *Mayberry v. Custer Battles* example.
- Foreign witnesses: “What do I do with fourteen thousand purchase receipts in Arabic?”
- Foreign defendants: Does the court have jurisdiction?
  - There is a “presumption” against extraterritoriality
  - But FCA provides for worldwide service of process, which requires defendants to only have minimum contacts with US *as a whole*

# Questions?

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