FCA – ACA = ?

This Thursday, June 28, 2012, the United States Supreme Court will decide the fate of the Patient Protection and Affordable Care Act, aka "Obamacare." In so doing, it may also make significant changes in one of the newest and most complicated amendments the False Claims Act, with results that are almost impossible to predict.

In 1986 Congress rewrote the False Claims Act, the government's primary weapon against fraud. With this rewrite of the Civil War era "Lincoln Law" whistleblowers were empowered as never before to bring lawsuits on behalf of the government. In Federal Fiscal Year (October 1 – September 30) 1988, *qui tam* lawsuits accounted for $2 million[1] in fraud settlements and judgments, a mere 1.3% of all federal fraud recoveries. By 2010 *qui tam* cases made up the bulk of fraud recoveries, with whistleblowers leading to an astounding $2.5 billion in fraud settlements and judgments, almost 80% of all recoveries. There can be little doubt that the government was successful in deputizing whistleblowers in policing fraud.

From 1986 through 2009 False Claims Act analysis was guided by a simple rule, there could not be a false claim without a claim that was false.[2] Even in the limited arena of what came to be known as "reverse false claims," failure to repay a debt owed to the government, there could be no violation of the FCA unless the defendant knowingly made or used a false record or statement to conceal the obligation. That changed in 2009, with the passage of the Fraud Enforcement Recovery Act of 2009. FERA was an omnibus bill aimed at fraud prevention, identification, and prosecution. One of the crown jewels of the statute was the first major amendments to the FCA since 1986. FERA made numerous changes, some addressed at expanding whistleblower opportunities, others aimed directly at prior Supreme Court rulings that hindered Congress' impression of how the FCA should be enforced.

One of the most significant changes found in FERA was an abrogation of the old rule that it took a false claim to violate the False Claims Act. Where, previously, there was no violation for failure to repay a debt absent a knowing false statement or record, under FERA the mere retention of a debt or overpayment, once identified, was a violation of the Act unless it was repaid. The 1986 statute stated one violated the FCA if they:

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

Under FERA, that language was amended to read:

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 knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government***

The new language in bold, above, created an entirely new claimless type of false claim, one in which a party owing a debt to the government knowingly fails to repay it.

One of the most significant points to observe about the FCA as amended by FERA was that it did not define when a known and unpaid debt became an actionable false claim. Some experts, relying upon the legislative history, suggested that liability would likely not arise while overpaid contractors went through established administrative reimbursement procedures, but warned that the same history hinted that a perfectly routine appeal during such a process might be in violation of the statute.[3] That may well be correct, but it is equally likely that expert statutory analysis, evaluation of the cold print and utterances of legislators, fails when addressing a statute such as the FCA, where the first act is the filing of a lawsuit. At that point, statutory analysis often hinges, not on the history of the legislation or the intent of the legislator, but rather upon whether a whistleblower has stated a plausible claim, assuming all the whistleblower's allegations to be true and making all inference in his or her favor.[4] Fine points of statutory construction often disappear in a courtroom, bowled over by a plaintiff's allegations and set aside for later analysis.

Fortunately for all FCA litigants, courts were never forced to answer the question. On March 23, 2010, as part of the Patient Protection and

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Affordable Care Act, a specific time limit was set by statute. Once a debt to the government was discovered, the debtor had sixty days to repay it before it became a violation of the FCA. Courts had little trouble working with the combination of FERA and the PPACA's sixty day time limit. One case in the Northern District of Illinois[5] set the rule, a rule which was quickly adopted by the government itself in the Government Contract Compliance Handbook, section 1:15.[6] The court ruled that there could be no violation of the FCA until, at a minimum, May 22, 2010, sixty days after the passage of the PPACA, and moving forward no violation until sixty days had passed since the identification of a debt or overpayment.[7]

This Thusday, June 28, 2012, the United States Supreme Court will hand down its ruling on the constitutionality of the PPACA, also known as "Obamacare." One possibility is that the statute will be struck down in its entirety. If that happens, what happens to FERA's new debt/overpayment false claim? What grace period, if any, does a government contractor have upon identification of an overpayment? Also, will the May 22, 2012 date, based upon the PPACA, remain a hard limit, or will whistleblowers be able to reach all the way back to May 20, 2009, the date of FERA's passage, for these claims?

The last question is the most easily answered. If the PPACA is struck in its entirety, there will no longer be any basis for the May 22, 2010 date, and that ruling will neither control nor persuade future courts.

On the other hand courts, left rudderless without the PPACA's binding 60 day limit, might turn to the same 60 days as a reflection of Congress' intent. Even that decision would move the needle back from May 22, 2010, 60 days from the passage of the PPACA, to July 19, 2009, sixty days from the enactment of FERA. Even doing that calculation points out the *ex post facto* nature of such a decision, making it unlikely.

In the absence of the PPACA, courts are likely to find themselves bound to a "reasonable" time limit to interpret just how long a government contractor can retain a debt or overpayment before it becomes "knowing," and therefore in violation of the FCA. (While it is true the statute also requires that the retention be "improper," the word offers no additional information, as once it is determined that the money is owed to the government, a whistleblower can sufficiently plead that any retention at all was "improper.") In other words, just when the retention tipped into "knowing and improper" could become a question of fact, rather than law. The procedural result of such a finding would be to allow the issue to go to a jury, rather than using the time of retention as a determining factor for dismissal as a matter of law. Given the enormous risks to a defendant in a False Claims Act lawsuit (treble damages plus up to $11,000 per claim), this would mean even more settlements in favor of the government and whistleblowers, a boon to them but a bane to anybody trying to do their best in dealings with the government, but not meeting the arbitrary deadlines set by others with a motive to set them as short as possible.

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