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FALSE CLAIMS ACT RECENT DEVELOPMENTS

The U.S. Supreme Court's recent denial of a writ of certiorari in a False Claims Act ("FCA") case and two other opinions in the Ninth Circuit and by the Seventh Circuit Court of Appeals leave the circuits split on two important FCA issues: (i) whether the Fraud Enforcement Recovery Act of 2009 ("FERA") applies retroactively to cases filed by June 7, 2008, or only to claims for payment made to the government by that date; and (ii) the extent to which the specific fraud on the government must have been disclosed for the FCA's jurisdictional Public Disclosure Bar to apply. This *Commentary* discusses those recent court actions, the remaining splits among the circuits, and the implications for defendants in FCA cases.

U.S. SUPREME COURT DECLINES OPPORTUNITY TO RESOLVE SCOPE OF FERA'S RETROACTIVE REACH

The U.S. Supreme Court's recent denial of a petition for writ of certiorari in *Allison Engine Co. v. United States ex rel. Standers*, Dkt. No. 12-1057 (June 24, 2013), leaves a split among the circuit courts as to which "claims under the False Claims Act" FERA retroactively applies—to all FCA *lawsuits* pending on or after June 7, 2008, or to *claims for payment* for work provided to the government that were pending on or after June 7, 2008.

In 2008, in an earlier opinion in *Allison Engine Co. v. United States ex rel. Standers* ("*Allison Engine I*"), the U.S. Supreme Court unanimously held that liability under the FCA requires that the "defendant *intended* that the false record or statement be *material to the Government's decision* to pay or approve the false claim." 553 U.S. 662, 665 (2008) (emphasis added). The Senate Report for FERA described the bill as an effort to "correct" what Congress believed to be the Supreme Court's "erroneous interpretations of the law" in *Alison Engine I,* including that intent and materiality standard. S. Rep. No. 10, 111th Cong., 1st Sess. 10 (2009). Under Section 4(f)(1) of FERA, the legislation "took effect as if enacted on June 7, 2008," two days before the *Allison Engine I* opinion was issued, and would apply to "all *claims* under the False Claims Act…that are pending on or after that date."

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Circuit Court Split. The U.S. circuit courts of appeals have split on that provision's retroactive effect because they have interpreted "claims" in Section 4(f)(1) differently. Some courts interpret "claims" to mean legal actions before a court or other adjudicative body (i.e., court claims pending on or after June 7, 2008), and accordingly do not require (in cases pending on July 7, 2008) proof of the defendant's intent for the government's reliance on a material misrepresentation. *United States ex rel. Yannacopoulos v. Gen. Dynamics*, 652 F.2d 818, 822 n.2 (7th Cir. 2011); *United States ex rel. Kirk v. Schindler Elevator Corp.*, 601 F.3d 94, 113 (2nd Cir. 2010), *rev'd on other grounds*, 131 S. Ct. 1885 (2011). Other courts have interpreted, albeit with little analysis, "claims" to mean requests to the government for payment (i.e., alleged false claims to the government) regardless of when the case was filed. *United States ex rel. Cafasso v. Gen. Dynamics C4 Sys., Inc.,* 637 F.3d 1047, 1051 n.1 (9th Cir. 2011); *Hopper v. Solvay Pharm., Inc.,* 588 F.3d 1318, 1327 n.3 (11th Cir. 2009).

The other circuits' positions are unclear. The Fifth Circuit, for example, held that the FERA provision concerning fraudulent intent applies when a complaint was pending on June 7, 2008, regardless of when the requests for payment were made. *United States ex. rel. Steury v. Cardinal Health, Inc.*, 625 F.3d 262, 267 n.1 (5th Cir. 2010). Two years later, however, the Fifth Circuit affirmed a district court ruling that had adopted the opposite view. *Gonzalez v. Fresenius Med. Care N. Am.*, 689 F.3d 470, 475 & n.4 (5th Cir. 2012). District courts in the Fifth Circuit have expressed uncertainty about which approach to follow. *See*, e.g., *United States ex rel. Jamison v. McKesson Corp.*, 2012 WL 4499136, at 10 n.5 (N.D. Miss. Sept. 28, 2012).

The First, Third, Fourth, Eighth, Tenth, D.C., and Federal Circuits have not yet expressly decided the meaning of "claims" in Section 4(f)(1), in some instances because the difference in interpretation was immaterial to the underlying case. *See*, e.g., *United States v. Hawley*, 619 F.3d 886, 894-895 (8th Cir. 2010); *United States ex rel. Lemmon v. Envirocare of Utah, Inc.*, 614 F.3d 1163, 1167 n.3 (10th Cir. 2010); *United States ex. rel. Loughren v. Unum Group*, 613 F.3d 300, 306 n.7 (1st Cir. 2010); *United States ex rel. Owens v. First Kuwaiti Gen. Trading & Contracting Co.*, 612 F.3d 724, 728 n.* (4th Cir. 2010). District courts in the First and Third Circuits have interpreted "claims" to mean claims for payment, while district courts in the Eighth and Tenth Circuits have interpreted the term to mean legal actions. *See Sanders v. Allison Engine Co.*, 703 F.3d at 940.

Denial of Certiorari. On June 24, 2013, the Supreme Court declined Allison Engine's petition for writ of certiorari to clarify to what "claims" FERA retroactively applies—to legal claims or claims for payment. The appeal to the Supreme Court arose out of the Sixth Circuit, which on interlocutory appeal held that the term "claim" means pending lawsuits and that the FERA provision eliminating fraudulent intent as an FCA element applied to lawsuits pending as of June 7, 2008, even if those lawsuits were predicated on alleged fraud that occurred years in the past and to claims for payment that were no longer pending on that date. *Sanders v. Allison Engine Co.*, 703 F.3d 930 (6th Cir. 2012).

Impact of Supreme Court's Action. The Court's decision not to clarify to which "claims" FERA retroactively applies carries important implications for FCA liability and involves possibly billions of dollars of potential liability. *See* U.S. Dep't of Justice, Civil Division, Fraud Statistics—Overview: October 1, 1987–September 30, 2012 (Oct. 24, 2012), http://www.justice.gov/civil/docsforms/C-FRAUDS FCA Statistics.pdf. Although it is impossible to quantify exactly how many ongoing FCA cases were pending on June 7, 2008, because many of those cases remain under seal, industry experts estimate that more than 1,000 FCA cases are pending nationwide.

As long as the courts of appeals remain divided, FCA defendants may be subject to different liability standards depending on the circuit in which they are sued, when the defendant made claims for payment to the government, and when the case was filed. In the Second, Sixth, and Seventh Circuits, FERA's new, less demanding standard applies in FCA cases pending on or after June 7, 2008. These circuits, therefore, are less favorable to defendants on this issue because the less demanding standard applies to older claims for payment. The Ninth and Eleventh Circuits, on the other hand, apply the stricter standard from the Supreme Court's 2008 *Allison Engine* opinion, which requires a showing of fraudulent intent of material reliance, only to claims for payment pending on or after the trigger date. The other circuits have not clarified their interpretations, and the Supreme Court chose not to clarify the issue in the *Sanders v. Allison Engine* case.

SEVENTH CIRCUIT AND CENTRAL DISTRICT OF CALIFORNIA IMPOSE HIGH STANDARDS FOR THE FCA'S PUBLIC DISCLOSURE BAR

***United States v. Aurora Las Encinas, LLC, et al.*, No. CV 10-01031 (C.D. Cal. Apr. 12, 2013)**

The Central District of California recently reiterated what a defendant must show in the Ninth Circuit to avail itself of the FCA's jurisdictional "Public Disclosure Bar," 31 U.S.C. § 3730(e)(4).

The Central District of California denied the defendant hospital's motion to dismiss an FCA case that was brought based on facts that, according to the defendant, had previously been published in past litigation, the *Los Angeles Times*, and elsewhere. Although the court found that certain facts underlying the FCA claim had been publicly disclosed, those facts did not constitute a "substantially similar allegation of fraud that would constitute the necessary elements of an FCA claim" or "a transaction that shows a misrepresentation to the government." *Aurora*, at *9 (Dkt. 405).

Background. Plaintiff Shelby Eidson was employed as a mental health worker by defendant Aurora Las Encinas Hospital, LLC ("Aurora") from 2005 through 2011. Starting in 2008, Eidson reported to government regulators and the *Los Angeles Times* allegations of the hospital's substandard care. On February 11, 2010, Eidson filed her complaint on behalf of the government against Aurora, alleging violations of the FCA and the California False Claims Act. Eidson alleged that Aurora violated the FCA by "fail[ing] to provide adequate care for mentally ill and vulnerable patients" and, in the process, defrauding the government by seeking reimbursement from Medicare for care that "was either non-existent or so inadequate as to be worthless." Aurora Fourth Am. Compl. (Dkt. 150), at ¶ 2.

In its motion to dismiss, Aurora argued that the court lacked subject matter jurisdiction based on the Public Disclosure Bar. In support of its argument that the allegations had been publicly disclosed, Aurora pointed to four sources of information: (i) a complaint in an employment wage hour action against Aurora, in which the plaintiff alleged staffing problems that led to substandard care; (ii) a complaint that was filed by one of its patients who alleged she was raped as a result of the hospital's practices and that the hospital committed fraud on her and her family by (a) telling them the facility was safe and (b) falsifying records regarding whether 15-minute checks of patients were performed; (iii) *Los Angeles Times* articles that contained allegations about the hospital's failure in patient care and maintenance of false records regarding patient checks; and (iv) CMS Survey Reports, containing information similar to that found in the newspaper articles. None of the publicly disclosed documents referred expressly to misrepresentations to the government.

Court's Discussion of the Public Disclosure Bar. The court determined that none of the four disclosures identified by Aurora was sufficient to bar the case. Although all four sources of information relate to the alleged substandard care, the court found the disclosure insufficient to trigger the public disclosure bar:

> Prior allegations cannot merely disclose the true set of facts, *viz.*, that the facility in question provided substandard care. When only those allegation[s] are made, any allegations that the named defendants misrepresented the level of care to the government and received payment for that alleged substandard care are conspicuously missing and such prior allegations do not constitute prior public disclosure of the allegations of a complaint stating an FCA claim.

Aurora, at *4 (Dkt. 405) (internal quotations and citations omitted). The *Aurora* court concluded that "none of [the public disclosures cited by defendants] constitutes an allegation or evidence with respect to a transaction that shows any misrepresentation made to the government or shows that payment from the government was received for the alleged substandard care." *Aurora*, at *5 (Dkt. 405).

Holding's Relevance. The *Aurora* opinion highlights a lingering tension among the federal circuits with respect to the Public Disclosure Bar. Whereas the *Aurora* decision reiterates the Ninth Circuit's requirement that the true set of facts and the misrepresented facts to the government be publicly disclosed, the Sixth Circuit took a different approach in *U.S. ex rel. Jones v. Horizon Healthcare Corp.*, 160 F.3d 326

(6th Cir. 1998), in which it applied a lower standard where the publicly disclosed material suggested an "inference of impropriety." *Id.* at 332. In *Jones*, the Sixth Circuit held that the Public Disclosure Bar had been met even though the public disclosure had not referred to an explicit misrepresentation to the government. *Id.* The public disclosure created an "inference of impropriety" such that it was unnecessary that the public disclosure explicitly allege either fraud or the essential elements of fraud. *Id.*

***Leveski v. ITT Educational Servs., Inc.*, Nos. 12-1369, 12-1979, 12-2008 & 12-2891 (7th Cir. July 8, 2013)**

Even more recently, the Seventh Circuit rejected a defendant's effort to dismiss a case under the Public Disclosure Bar when the previous case that the defendant raised covered an additional aspect of arguably the same scheme over a different time period.

Background. Debra Leveski worked at defendant ITT's Troy, Michigan campus for more than 10 years. In 1996, Leveski began working as an Inside Recruitment Representative, responsible for contacting potential students and persuading them to enroll. In 2002, she was promoted to Financial Aid Administrator. Leveski claimed that ITT evaluated its recruitment officers based solely on the number of students whom they enrolled and who started and that the other evaluation criteria, which included professional development, appearance, and "being a team player," were a sham. Leveski alleged that evaluations in ITT's financial aid office operated similarly. Although financial aid administrators were salaried, Leveski claimed that pay raises were determined based on the number of students successfully "packaged" and the amount of federal award money secured. Leveski also claimed that, as part of this scheme, ITT employees, including her supervisor, allowed students to falsify their income on the Federal Application for Student Financial Aid and other government forms.

The complaint invoked the Higher Education Act ("HEA"), which prohibits universities from "providing [employees] any commission, bonus, or other incentive payment based directly or indirectly on success in securing enrollments or financial aid." Educational institutions must certify compliance with HEA in order to receive federal grants. Leveski accordingly alleged that "ITT knowingly submitted false claims to the Department of Education in order to receive funding from federal student financial assistance programs." *Leveski*, at *2.

The Department of Justice formally declined to intervene in the case in November 2008. One U.S. district judge granted a motion to dismiss based on Rule 9(b), letting the plaintiff replead, but declined to dismiss the case based on the Public Disclosure Bar. The judge granted a second motion to dismiss only in part, based on the FCA's six-year statute of limitations. After the case was reassigned, a second district judge dismissed the case after finding that Leveski's allegations had already been publicly disclosed in a previous action against ITT.

Seventh Circuit's Ruling. In a unanimous 51-page opinion, the Seventh Circuit reinstated Leveski's claims. The court acknowledged that Leveski's case looks similar to a previously filed case. The opinion states: "The relators in both cases are former employees of ITT and even held the same job title. The relators in both cases also allege that ITT violated the incentive compensation provision of the HEA. But this is where the similarities between the two cases end." The court found "four critical differences between the two cases": (i) ITT employed Leveski for a longer period than the first plaintiffs; (ii) Leveski's allegations accordingly applied to a later, although overlapping, time period; (iii) although Leveski and the previous employees were all in the recruitment department, Leveski also worked in financial aid; and (iv) even the allegations about the recruitment office were distinguishable.

The court was satisfied that "Leveski's allegations are different enough from the [previous] allegations to bring her suit outside the public disclosure bar." *Leveski*, at *31. Unlike the previous complaint, which alleged that ITT "had minimum enrollment quotas" and fired recruiters who failed to meet them, "the scheme alleged by Leveski ... involves a much more sophisticated—and more difficult to detect—violation of the Department of Education requirements," *Id.* at *29. The court also noted that the conduct alleged by Leveski

took place over a different time period than that alleged in the other complaint and involved the financial aid office as well as the recruitment office. "Indeed, Leveski's allegations against ITT are only similar to the [other] allegations when viewed at the highest level of generality," the court wrote. Although "serious questions have been publicly raised about whether some for-profit educational institutions have violated the incentive compensation provisions of the HEA," the appeals court found that Leveski's claims rest on new information, based on her personal experiences.

Holding's Relevance. Plaintiffs likely will argue that, in *Leveski,* the Seventh Circuit interpreted the Public Disclosure Bar to mean that the previous documents must have disclosed the same facts about the same scheme over the same time period. Although that argument likely goes too far, the Seventh Circuit demanding standard for the FCA's Public Disclosure Bar contributes to the divergence on this issue among the circuit courts.

LAWYER CONTACTS

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com.

Eric P. Berlin
Chicago
+1.312.269.4117
epberlin@jonesday.com

James R. Daly
Chicago
+1.312.269.4141
jrdaly@jonesday.com

Richard H. Deane, Jr.
Atlanta
+1.404.581.8502
rhdeane@jonesday.com

Toni-Ann Citera
New York
+1.212.326.8376
tcitera@jonesday.com

Laura E. Ellsworth
Pittsburgh
+1.412.394.7929
leellsworth@jonesday.com

Karen P. Hewitt
San Diego
+1.858.314.1119
kphewitt@jonesday.com

R. Christopher Cook
Washington, DC
+202.879.3734
christophercook@jonesday.com

Ellenna V. Berger, an associate in the Chicago Office, assisted in the preparation of this Commentary.

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