

The Newly-Amended False Claims Act is Beginning to Stir Trouble in Courts

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With the passage of the Fraud Enforcement and Recovery Act of 2009 ("FERA") on May 20, 2009, several landmark changes to the False Claims Act were signed into law (an analysis of those changes is found [here](#)). Early indications are that Congress's attempt to make the newly-amended False Claims Act retroactive is proving troublesome in federal courts.

It is no secret that FERA's changes were efforts by Congress to rebuke several noteworthy federal cases, such as *Allison Engine Co., Inc. v. U.S. ex rel. Sanders*, 128 S.Ct. 2123 (2008), that increased the government's burden of proof. In *Allison Engine*, the Supreme Court required the government to prove fraudulent intent in order to establish liability under the False Claims Act. With FERA, Congress attempts to nullify the *Allison Engine* decision by removing the intent requirement under the False Claims Act.

Although FERA's amendments to the False Claims Act were signed into law on May 20, 2009, Congress also integrated a retroactivity clause that made the amendments applicable to all "claims" pending on or after June 7, 2008, just two days before the *Allison Engine* decision. The application of the retroactivity clause was immediately brought to the surface because *Allison Engine* was already on remand to the District Court.

On October 27, 2009, the District Court granted the defendants' motion to preclude the retroactive application of the newly-amended False Claims Act, or alternatively to declare FERA's retroactivity clause unconstitutional. The District Court interpreted the retroactive clause in FERA to apply only to pending "claims" rather than pending "cases." The District Court also concluded that, even if the retroactivity clause was interpreted to apply to cases, its application would violate the Ex-Post Facto Clause of the U.S. Constitution. The District Court's interpretation is consistent with decisions in other federal courts, such as *United States v. Science Applications International Corp.*, No. 04-1543(RWR), 2009 WL 2929250 (D.D.C. Sept. 14, 2009).

The dispute is far from over. On December 28, 2009, the government intervened in *Allison Engine* and joined the relators in filing motions seeking an interlocutory appeal to the Sixth Circuit Court of Appeals to review the District Court's decision. Dinsmore & Shohl will continue to monitor these developments.

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