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As Courts Assess Impact of New FCA Amendments,
Senate Looks Toward Making Further Changes

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The Fraud Enforcement and Recovery Act of 2009 (FERA) has already begun to make its mark. In the less than two months following its passage, at least two courts have issued opinions interpreting and applying FERA's amendments to the False Claims Act (FCA), 31 U.S.C. § 3729 et seq.

On June 24, the U.S. District Court for the District of Delaware held in *United States v. Aguillon* that FERA's amendment to former Section 3729(a)(2) (renumbered and codified at 31 U.S.C. § 3729(a)(1)(B))—eliminating the "actual payment or approval" requirement—did not apply retroactively under the Supreme Court's *Landgraf* analysis because Congress did not explicitly provide for such "retroactive effects." *See* ___ F. Supp. 2d ___, 2009 WL 1789894 (D. Del. June 24, 2009).

In *Aguillon*, the defendant, a physician, was alleged to have "submitted false Medicare claims by billing the United States at a higher rate 'than was warranted by the medical services necessary or actually performed in order to receive a higher rate of reimbursement.'" Although the court preserved the government's Section 3729 (a)(1) claim, the court dismissed the government's subsection (a)(2) claim because it found that the government failed to allege "actual payment or approval" by admitting that the initially false Medicare claims were either denied or subsequently "down coded" to the correct, lower rate of reimbursement prior to being paid by the government. While the court noted that the FCA was amended by FERA "to eliminate the actual payment or approval requirement," the court applied the Supreme Court's two-step *Landgraf* "retroactive effects" analysis to conclude that the new subsection (a)(1)(B) did not apply retroactively because "Congress has not provided the requisite instruction necessary for the amendments to be used to cause retroactive effects."

The government filed a motion for reconsideration on June 30, arguing that the court misread FERA by failing to note that Section 4(f)(1) of FERA specifically states "subparagraph (B) of section 3729(a)(1) . . . shall take effect as if enacted on June 7, 2008, and apply to all claims under the False Claims Act (31 U.S.C. § 3729 et seq.) that are pending on or after that date." The retroactivity of this subsection is certain to continue to be the subject of active litigation and is likely to be challenged on a number of grounds, including constitutional, *ex post facto* grounds.

On July 9, the U.S. Court of Appeals for the Fifth Circuit in *United States ex rel. Longhi v. Lithium Power Technologies, Inc.* cited FERA's broad definition of materiality to support its adoption of the "natural tendency" test for materiality, holding that the technology company's false statements regarding its qualifications to engage in its proposed research were material because they had "the natural tendency to influence and were capable of influencing the extremely competitive process for selecting small businesses to receive [Small Business Innovation Research Program] grants." *See* ___ F.3d ___, 2009 WL 1959259 (5th Cir. July 9, 2009).

In *Longhi*, defendants Lithium Power Technologies, Inc. and its president submitted four proposals to the Ballistic Missile Defense Office (BMDO) and the U.S. Air Force to receive Small Business Innovation Research Program (SBIR) grants. These proposals falsely asserted that the company was six years older than it was, that certain key personnel would conduct the research, that it already had the necessary facilities and equipment, and that it had cooperative arrangements with a notable university and laboratory facilities. The court found these false statements "gave the [Department of Defense] the mistaken impression that Lithium Power was far more qualified than it actually was to engage in the proposed research."

Noting that Congress declined to adopt a more restrictive materiality requirement in FERA, the court rejected the so-called "outcome materiality" and "claim materiality" standards and embraced the "natural tendency" test followed by the Fourth, Sixth, and Ninth Circuits. Under this standard, "[a]ll that is required under the test for materiality, therefore, is that that the false or fraudulent statements have the potential to influence the government's decisions." Applying this test, the court found:

> Lithium Power's false statements had the potential to influence the BMDO and Air Force's decisions to award Lithium Power the SBIR grants. Lithium Power painted a picture of an established company that was so well-respected in the community that it had developed a strong relationship with two notable research organizations. In reality, Lithium Power was a company that was in its preliminary stages of development that had yet to demonstrate any proven success.

Although the company "went on to successfully design and manufacture lithium-based batteries that the BMDO and the Air Force found to be satisfactory," the court ruled that the "ends" did "not justify the means it employed to receive the SBIR grants" and, thus, affirmed the district court's grant of summary judgment in favor of the government and its award of nearly $5 million in damages and penalties.

Even as the courts are assessing the impact of these amendments, the Senate Committee on Health, Education, Labor, and Pensions approved by a vote of 23-0 an amendment to the Affordable Health Choices Act (AHCA) (S. ____) introduced by Sen. Bernie Sanders (I-Vt.) on July 13, 2009 that would double the current penalties imposed under the FCA for fraudulently billing an "American Health Benefit Gateway," defined in the bill as a mechanism that "facilitates the purchase of health insurance coverage and related insurance products through the Gateway at an affordable price by qualified individuals and qualified employer groups." The FCA already provides for treble damages and civil monetary penalties of $5,500 to $11,000 per claim and authorizes a whistleblower to share in as much as 30% of the government's recovery under the FCA. The AHCA and Sanders amendment, if passed, would substantially expand liability for those who violate the FCA "by, through, or in connection with a Gateway."

Significant further developments are expected in the coming months, including the district court's treatment of the Supreme Court's decision in *Allison Engine Co. v. United States ex rel. Sanders*, 128

S. Ct. 2123 (2008) (holding that Section 3729(a)(2) of the FCA requires the government to prove that a defendant intended for the government itself, rather than a government contractor, to pay the claim to establish a violation), which was abrogated by FERA and is now on remand to the U.S. District Court for the Southern District of Ohio. *See* Docket No. 1:95-cv-00970-TMR-TSH. Morgan Lewis will continue to monitor and report on these developments in future LawFlashes.

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