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Viewpoint: FCA Changes Threaten Federal Aid Recipients

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It was sheer coincidence that many preeminent financial institutions collapsed months after the Supreme Court announced a unanimous decision setting reasonable limitations on potential liability under the federal False Claims Act.

Nonetheless, these events combined to create unique circumstances that led Congress to "fix" what was not broken by enacting dramatic changes to the law's scope. The result will expose unsuspecting banks, investment companies and other financial institutions to devastating penalties under a statute originally aimed at Civil War profiteers.

The FCA was enacted in 1863 in response to pervasive fraud by Union defense contractors, who reportedly provided soldiers with cardboard boots instead of leather ones, sawdust in place of gunpowder and lame mules and horses. To account for the federal government's scarce resources in pursuing these fraud claims, the act included a "qui tam" provision, which allowed private citizens, called "relators," to bring allegations of fraud on the government's behalf — and rewarded them with a healthy portion of any recovery.

After 120 years of intermittent use, Congress amended the act in 1986 to increase recoveries. The amendments lowered the bar for liability, raised the available damages and penalties, reimbursed attorneys' fees for successful relators and sought to punish those who retaliated against employees for blowing the whistle. As a result, since 1986 judgments and settlements under the FCA have exceeded $21.5 billion.

Following the 1986 amendments, new targets — health-care providers, educational institutions, disaster relief organizations and other entities doing business with the government — found themselves facing the prospect of treble damages and civil penalties of $11,000 for each alleged false statement or invoice.

Finally, in June of last year the Supreme Court drew the line. Recognizing that "government money today is in everything," the court, in Allison Engine Co. v. U.S. ex rel. Sanders, overturned an appellate court decision that would have made any invoice submitted by one private entity to another in the context of a government-funded program subject to the FCA.

After years of expansion of the statute's scope, the Allison Engine case stood guard against the possibility of FCA liability for simple contract or fraud claims between private companies.

The reaction from relators' lawyers and their allies in Congress was immediate. Sen. Charles Grassley, R-Iowa, the sponsor of the 1986 amendments, lamented that the Supreme Court had created a "free fraud zone for subcontractors," and he vowed to "fix this problem." As his proposed amendments wound through Congress, global financial markets collapsed in September.

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The congressional response to the economic crisis, through the Troubled Asset Relief Program, the Capital Purchase Program and stimulus funding, made previous concerns that government money was "in everything" seem quaint. With billions of dollars flowing into every nook of the economy, the FCA was primed to be applied to more industries and with more frequency than ever before. And that was without amendments intended to encourage lawsuits.

However, the government's funding programs were precisely what proponents of FCA expansion needed to push through radical changes. Even though the act, as written, clearly would have captured false claims involving Tarp or stimulus funding, Congress cited the need to reach fraud by financial institutions as the principal purpose for passing the Fraud Enforcement and Recovery Act of 2009, which President Obama signed into law in May.

The FCA amendments contained in that act threaten to open the floodgates of liability for any entity that receives federal funding through any mechanism. The statute overturns the Supreme Court's Allison Engine decision, eliminating the long-standing rule that the FCA is meant to redress fraud against the government.

To be actionable under Fera, the government does not need to have title to the money or property being sought by the defendant, and the defendant does not need to have any intent to induce an improper payment by the government. Instead, Fera covers any request for money or property to any entity so long as the money or property will be used "on the government's behalf or to advance a government program or interest." The potential scope of this provision is staggering; as one example, any invoice to or by a Tarp, CPP or stimulus funding recipient could be construed as a claim related to a "government program or interest," and thus subject to FCA penalties.

Ultimately, the boundless scope of FCA liability provided by Fera invites years of litigation regarding the meaning of its terms. And the effects will not end there. By removing many of the pretrial defenses to liability, Fera's abolition of the common-sense restrictions articulated in the Allison Engine case sets the stage for a dramatic increase in the number of FCA cases that survive until trial — where the very viability of an institution will be at stake.

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