5 Years After FERA, FCA Landscape Still Unsettled
By Jeff Overley

*Law360, New York (April 28, 2014, 5:40 PM ET)* -- Five years after Congress added even more bite to the already ferocious False Claims Act, some of the worst fears of government contractors and health care companies have come true, and experts say more threats loom as courts and regulators wrestle with how aggressively to apply new statutory language.

Approved in May 2009 by lopsided votes in Congress, FERA was ostensibly about safeguarding taxpayer funds that were rescuing the financial industry and stimulating the economy. But there were many other purposes, such as broadening definitions of fraud and overturning the U.S. Supreme Court’s Allison Engine decision, which curbed the False Claims Act's application to subcontractors and other entities that don't directly bill the government.

“FERA did exactly to the False Claims Act what the Allison Engine [ruling] said it shouldn’t do, which was turn it into an all-purpose fraud statute,” said Robert T. Rhoad of Crowell & Moring LLP.

Here’s what the Fraud Enforcement and Recovery Act has wrought so far and what legal battles are still being waged:

**Whistleblower Suits Surge**

One important gauge of FERA’s impact may be the well-known surge of FCA litigation that began right around the time the law was signed. Whistleblowers, who gained additional anti-retaliation protections under FERA, brought more than 750 FCA complaints last year — by far the highest tally in history and nearly double the 379 that were lodged in 2008.

Experts caution that other factors are also at play, such as FCA amendments added by the Affordable Care Act, greater awareness of whistleblower windfalls and the government’s increasingly urgent need to protect Medicare’s cash-strapped coffers. But they also say it’s hard to believe that the sudden growth of fraud suits since FERA’s passage is just a coincidence.

“I think there’s a pretty interesting increase,” said Drew A. Harker of Arnold & Porter LLP. “Since passage of the statute, there’s been a steady rise.”

**Civil Investigative Demands Soar**

Although much was made of FERA provisions related to FCA liability, a pivotal change turned out to
involve a procedural reform. Before FERA, only the U.S. attorney general could authorize so-called civil investigative demands that allow government attorneys to obtain corporate documents, depose employees and acquire responses to interrogatories, and subordinates in the U.S. Department of Justice weren't fond of having to bother the boss.

“They were reluctant to ask for them, and when they did, it took a lot of time,” said Rodger A. Heaton, a partner at Hinshaw & Culbertson LLP and a former U.S. attorney.

The alternative was to seek an inspector general’s subpoena, which carried the same powers but was also viewed as inefficient. Now, after FERA, there’s no real hurdle to issuing a civil investigative demand, as the law allowed the attorney general to delegate the authority. He did so in 2010, allowing more than 90 U.S. attorneys across the country to fire off CIDs whenever they get a whiff of possible fraud.

“Since the delegation of authority ... there has been an explosion of CIDs,” said Peter B. Hutt II, a partner at Akin Gump Strauss Hauer & Feld LLP who complained that the demands are often “vastly overbroad and not factually grounded.”

While corporations grumble about the cost of complying, lawyers say it can be a crucial opportunity to nip an inquiry in the bud, before it blossoms into a thorny mess.

“One of the most important things defense counsel does in this case is interface with the government when the CID arrives,” Rhoad said. “Engaging the government in a dialogue ... and addressing their concerns in such a way that they don’t intervene in the case.”

Unfortunately for companies facing fraud investigations, FERA didn’t just make investigative demands easier to get — it also allowed everything a company says in response to be shared with a whistleblower. So, even if the government declines to enter the fray, its investigation may help a relator forge ahead with a stronger case.

“FERA gives [prosecutors] the ability to kind of deputize qui tam relators,” Rhoad said.

**Direct Intent Isn’t Important**

The issue in the Allison Engine case was whether subcontractors who allegedly delivered shoddy electricity generators had made false statements that they intended the government to rely on when deciding whether to pay. The justices found no such direct intent and as a result said that the FCA did not apply.

In response, FERA revised the standard, saying FCA liability results when someone makes a false statement that is “material” to a government payment, regardless of intent. That raises the possibility that subcontractors several tiers below prime contractors could face FCA liability, even if they didn’t realize they were working on a government-funded project.

“There are companies that in some cases may not even have reason to know they are taking federal funding,” Hutt said. “That does raise real concerns of fairness.”

There’s no shortage of cases that show FERA accomplished its goal of preserving far-reaching FCA liability. Science Applications International Corp. inked an $11.75 million settlement last year of allegations it inflated its labor charges when working as a subcontractor for a company that paid it with
federal grants. In 2012, Robbins LLC settled a whistleblower’s claims that it supplied inferior rubber compounds as a subcontractor under a $33 million contract with the U.S. Navy.

And under a deal announced this month, five California masonry companies and two individuals agreed to pay almost $2 million to resolve FCA allegations that they provided false information to larger contracting firms in order to land subcontracting jobs.

**Retroactivity Still in Dispute**

FERA also contained a controversial clause making the materiality provision retroactive so that it was effective two days before the Allison Engine decision. There are a host of disputes over the propriety and technical meaning of what Congress did, and the U.S. Chamber of Commerce asserts that more than 1,000 cases hinge on how things are resolved.

“I think the biggest issue that’s still pending is the retroactivity of the act,” said Robert C. Blume of Gibson Dunn.

One objection to that backdating has been that it may breach the constitutional prohibition on ex post facto laws. It’s not clear that any appellate courts have embraced that argument, however, and the Sixth Circuit found in 2012 that the retroactivity wasn’t punitive enough to trigger the prohibition.

Another hotly debated issue is what Congress meant when it said that retroactivity would apply to “all claims under the False Claims Act” that were pending on or after June 7, 2008. According to Ropes & Gray LLP, at least two circuit courts have said that the phrase only covers billing claims that were pending, but three other circuits have concluded that it was really a reference to pending cases, since billing claims aren’t really paid under the FCA.

The question is hugely important, because an FCA case that was pending on June 7, 2008, could involve billing claims stretching back up to 10 years. But how it gets answered depends for now on what circuit a case is in, because the U.S. Supreme Court last year declined to settle the matter.

**Courts Push Back on Materiality**

Yet another issue tied to materiality is that FERA defined the term as a false statement “capable of influencing” a government payment decision, which at first seemed like a low bar to clear for plaintiffs.

“Almost anything can be capable of influencing the government’s decision not to pay,” said John T. Boese of Fried Frank Harris Shriver & Jacobson LLP. “That is such a weak standard that there’s really no standard at all.”

Fortunately for the defense bar, courts have taken hard looks at whether actions truly influence a government decision to pay. Increasingly, they have refused to view legal compliance miscues as tantamount to fraud unless explicit conditions of payment were flouted. Judges have recently dismissed an array of complaints on such grounds, including a lawsuit involving a failure to submit technical paperwork and litigation over doctors seeking Medicare reimbursement using another physician’s billing number.

With that in mind, it could be that FERA’s seemingly broad definition of materiality backfired on the government, calling extra attention to whether something really influences payments.
“I think courts looked at that and said, ‘No, no, no, that’s not what the False Claims Act is really all about,’” Boese said. “I think the 2009 amendments did focus the courts on this issue.”

**Overpayment Policies Still in Flux**

One of the most profound elements of FERA extended FCA liability to entities that knowingly fail to return government overpayments, even if they don’t take any overt action to conceal the overpayment. The ACA made clear that Medicare and Medicaid overpayments were covered by that provision, and it created a 60-day window for giving money back to Uncle Sam once an overpayment is identified.

Federal regulators in 2012 floated proposed regulations on how the 60-day time frame would work, but they still haven’t been finalized — something defense lawyers call a reflection of just how complex and overwhelming the policy will prove to be.

“I don’t think anybody thought through what they were doing here,” Boese said. “There’s a reason why they were proposed two or three years ago and haven’t been finalized yet — they are a nightmare.”

Even after five years, that uncertainty extends to many other parts of FERA, and so depending on how things shake out, companies may ultimately find that the law isn’t quite as bad as they feared, or it may turn out to be every bit the monster they imagined.

“I think it’s still in play,” Heaton said, “to figure out how dramatic the total effect will be.”

--Editing by Jeremy Barker and Philip Shea.

All Content © 2003-2014, Portfolio Media, Inc.