

**A LOOK AT THE CONSTITUTIONAL  
IMPLICATIONS OF RETROSPECTIVE LAWS: THE  
CASE OF THE FALSE CLAIMS ACT**

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## I. INTRODUCTION

Healthcare fraud and abuse costs government programs and taxpayers tens of billions of dollars each year.<sup>1</sup> In 1986, in search of better ways to recover public monies lost to fraud, the federal government set out to revive and improve an antifraud statute from the Civil War Era, which enlisted private citizens in the government's fight against fraud.<sup>2</sup> In just twenty-five years since its revival, the antifraud statute, known today as the False Claims Act (the Act), has become the single-most powerful antifraud enforcement tool in the history of the United States.<sup>3</sup> However, as is usually the case with powerful legislation, the False Claims Act has faced significant legal challenges since its Civil War inception and, thereafter, since its 1986 rebirth.<sup>4</sup> The purpose of this Article is to explore the latest of

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1. See, e.g., *Reducing Fraud, Waste and Abuse in Medicare: Hearing Before the Subcomm. on Health and Oversight of the H. Comm. on Ways & Means*, 111th Cong. (2010) (statement of Lewis Morris, Chief Counsel, Office of Inspector General, U.S. Dept. of Health & Human Servs.), available at [http://www.oig.hhs.gov/testimony/docs/2010/morris\\_testimony61410.pdf](http://www.oig.hhs.gov/testimony/docs/2010/morris_testimony61410.pdf). Most agree, therefore, that curbing fraud and abuse in healthcare is a critical national goal. See OFFICE OF INSPECTOR GEN., U.S. DEP'T OF HEALTH & HUM. SERVS., JUSTIFICATION OF ESTIMATES FOR APPROPRIATIONS COMMITTEES (2011), available at [http://oig.hhs.gov/publications/docs/budget/FY2011\\_HHSOIG\\_Congressional\\_Justification.pdf](http://oig.hhs.gov/publications/docs/budget/FY2011_HHSOIG_Congressional_Justification.pdf). In 2009 alone, total healthcare expenditures in the United States reached \$2.5 trillion, with government programs in the United States accounting for nearly \$1 trillion of that expenditure. See CTRS. FOR MEDICARE & MEDICAID SERVS., NATIONAL HEALTH EXPENDITURES 2009 HIGHLIGHTS 1 (2009), available at <http://www.cms.gov/NationalHealthExpendData/downloads/highlights.pdf>. Remarkably, between \$75 billion and \$250 billion of those expenditures were lost to fraud and abuse in that year alone. See FBI, FINANCIAL CRIMES REPORT TO THE PUBLIC 2007 (2007), available at [http://www.fbi.gov/stats-services/publications/fcs\\_report2007/](http://www.fbi.gov/stats-services/publications/fcs_report2007/).

2. See David L. Haron, Mercedes Varasteh Dordeski & Larry D. Lahman, *Bad Mules: A Primer on the Federal and Michigan False Claims Acts*, 88 MICH. B.J. 22, 23–24 (2009).

3. The False Claims Act was amended in 1943, 1986, and 2009. Though the 1943 amendments weakened the Act, it is widely acknowledged that the 1986 and 2009 amendments have widely strengthened the effectiveness of the Act as an antifraud enforcement tool. See *id.*; see also 31 U.S.C. § 3729 (2006 & Supp. III 2010). Since 1987, recoveries under the Act have totaled over \$24 billion. U.S. DEP'T OF JUSTICE, FRAUD STATISTICS-OVERVIEW (2010), available at <http://taf.org/FCA-stats-2010.pdf>. In 2009 alone, False Claim Act recoveries topped \$5.6 billion. *Fiscal Year 2009 False Claims Act Settlements*, TAXPAYERS AGAINST FRAUD, <http://www.taf.org/total2009.htm> (last visited Oct. 12, 2011).

4. See CHARLES DOYLE, CONG. RESEARCH SERV., R40785, QUI TAM: THE FALSE CLAIMS ACT AND RELATED FEDERAL STATUTES (2009), available at

such challenges arising out of the 2009 amendments to the False Claims Act.

In a nutshell, critics of the False Claims Act claim that the 2009 amendments constitute an ex post facto law, which violates the United States Constitution. Courts are split on the matter. To facilitate discussion of the pertinent issues, Part II of this Article provides a basic overview of the False Claims Act. Part III provides a brief history of the False Claims Act and its amendments. Part IV discusses, in detail, the 2009 amendments that are the focus of the ex post facto challenge. Part V discusses the judicial split triggered by the 2009 amendments. Part VI discusses the constitutional prohibition against ex post facto laws, as well as the existing jurisprudence for resolving ex post facto challenges. Part VII concludes that the 2009 amendments do not make the Act an ex post facto law.

## II. A BASIC OVERVIEW OF THE FALSE CLAIMS ACT

The False Claims Act makes it unlawful for individuals to knowingly use false information to obtain, retain, or cause the government to spend government funds.<sup>5</sup> Most commonly though, the government uses the Act to recover charges by private persons for goods or services that are not reimbursable at the level billed (or at all) and to recover payments for goods or services that are defective or do not comply with government specifications.<sup>6</sup> The Act specifically holds a person liable who:

(A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;

(B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;

(C) conspires to commit a violation of subparagraph (A), (B), (D), (E), (F), or (G);

(D) has possession, custody, or control of property or money used, or to be used, by the Government and

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<http://www.fas.org/sgp/crs/misc/R40785.pdf> (surveying the constitutional challenges to the False Claims Act to that date for members and committees of Congress).

5. § 3729.

6. 31 U.S.C. § 3730(e)(1)–(2) (2006). The False Claims Act excludes certain government officials from liability under the Act, as well as false records, claims, or statements made under the Internal Revenue Code of 1986. *Id.*

knowingly delivers, or causes to be delivered, less than all of that money or property;

(E) is authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(F) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge property; or

(G) knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government.<sup>7</sup>

Persons who violate the False Claims Act are subject to civil penalties between \$5,000 and \$10,000 plus triple the damages that the violations caused the government.<sup>8</sup>

Apart from its significant penalty and treble-damages provisions, the most notable feature of the False Claims Act, to which most of the Act's success is attributed, is that any private person with knowledge of government fraud may bring a civil action on behalf of the government for a violation of the Act.<sup>9</sup> The genesis and importance of this private-enforcement mechanism in American jurisprudence dates back to the Civil War.<sup>10</sup>

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7. § 3729(a)(1)(A)–(G) (Supp. III 2010).

8. § 3729(a)(1)(G); see H.R. REP. NO. 99-345, at 11 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5276 (demonstrating that by enacting treble damages, Congress unambiguously expressed its view that the damages were remedial); see also *Cook Cnty. v. United States ex rel. Chandler*, 538 U.S. 119, 131–32 (2003) (stating that the False Claims Act provided “make-whole recovery beyond mere recoupment of the fraud” and that treble damages “do[] not equate with classic punitive damages”).

9. § 3729(a)–(b).

10. See Evan Caminker, *The Constitutionality of Qui Tam Actions*, 99 Yale L.J. 341, 351 (1989).

### III. A BRIEF HISTORY OF THE FALSE CLAIMS ACT

The genesis of the False Claims Act in the United States was unscrupulous Civil War defense contractors draining the United States Treasury with fraudulent claims for goods that were either substandard or not provided.<sup>11</sup> Amid rampant and covert fraudulent conduct, government officials could not police or enforce the laws themselves, so in 1863, President Abraham Lincoln urged Congress to pass the original False Claims Act, then commonly known as “Lincoln’s Law” or the “Informer’s Law.”<sup>12</sup>

Lincoln’s Law reaffirmed that it was illegal to present fraudulent claims for payment to the federal government.<sup>13</sup> More importantly, Lincoln’s Law enlisted the private sector in the government’s antifraud efforts by giving private citizens standing to file lawsuits on behalf of the federal government to recover stolen monies and receive a reward of up to fifty percent of the recovery.<sup>14</sup> The mechanism for allowing private citizens, known today as *relators*, to blow the whistle on fraudsters by suing them on behalf of the government is known as *qui tam*.<sup>15</sup>

Lincoln’s Law was widely instrumental in curbing defense-spending fraud until 1943. It came under attack as a result of widespread concerns that allegedly parasitic lawsuits, which rested on information already known to the government, were yielding generous rewards for “undeserving” relators. In response to such concerns, Congress rolled back the *qui tam* provisions of the original False Claims Act by imposing additional requirements on relators’ right to sue and recover a reward.<sup>16</sup>

Among other requirements, the 1943 amendments required relators to provide the government with the evidence on which their lawsuits were based, gave the government up to sixty days to intervene and, thus, assume primary prosecution of *qui tam* cases under the False Claims Act, and

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11. See CLAIRE SYLVIA, *THE FALSE CLAIMS ACT: FRAUD AGAINST THE GOVERNMENT* 33 (2d ed. 2010).

12. See Haron, Dordeski & Lahman, *supra* note 2, at 22.

13. *Id.*

14. *Id.*

15. Though most agree that *qui tam* has been the key to the success of the False Claims Act, many do not know that *qui tam* was not a creation of the 1863 law. Rather, *qui tam* litigation has a long lineage dating back to the early English common law. See DOYLE, *supra* note 4, at 1. Further, the False Claims Act is not the only contemporary American statute containing a *qui tam* provision; a *qui tam* provision is also found in the Patent Act and in an Indian protection law. *Id.* at 4; Vermont Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 768–69 n.1 (2000).

16. DOYLE, *supra* note 4, at 6–7.

precluded relators from filing cases on the basis of information that was already in the government's possession.<sup>17</sup> The latter provision, which later became known as the *public-disclosure bar*,<sup>18</sup> proved to be highly problematic to the Act's potency because it removed a court's jurisdiction to hear a suit involving public information regardless of whether the government actually knew the information or had pursued the defendants.<sup>19</sup> Finally, the 1943 amendments reduced a relator's reward from fifty percent of the government's recovery to no more than twenty-five percent.<sup>20</sup>

The 1943 weakening of the *qui tam* provisions caused Lincoln's Law to fall into disuse for the better part of half a century. It was not until 1986, when significant concerns about extensive defense-spending fraud once again troubled Congress, that the old antifraud statute became a renewed tool of interest and the subject of new amendments.<sup>21</sup> It was the 1986 amendments to Lincoln's Law that rendered the old statute into the *qui tam* statute of today.<sup>22</sup>

The 1986 amendments sought to reinvigorate the False Claims Act by expanding the scope of liability and rewards under the Act.<sup>23</sup> For example, the amendments increased the penalties on the defendants from \$2,000 and double damages<sup>24</sup> to no less than \$5,000 and no more than \$10,000 in penalties and treble damages.<sup>25</sup> In addition to increasing the penalties for violating the Act, the amendments increased the maximum award available

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17. *Id.*

18. Lawsuits that were based on the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing; in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation; or from the news media were jurisdictionally barred. 31 U.S.C. § 3730(e)(4)(A) (2006).

19. DOYLE, *supra* note 4, at 7.

20. *Id.*

21. See S. REP. NO. 99-345, at 2 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5267 ("In 1985, . . . 45 of the 100 largest defense contractors, including 9 of the top 10, were under investigation for multiple fraud offenses. Additionally, the Justice Department has reported that in the last year, four of the largest defense contractors . . . have been convicted of criminal offenses while another . . . has been indicted and awaits trial." (citations omitted)).

22. See *supra* note 3 and accompanying text.

23. See S. REP. NO. 99-345, at 1-2, reprinted in 1986 U.S.C.C.A.N. 5266, 5266-67.

24. An Act to Prevent & Punish Frauds Upon the Government of the United States, ch. 67, § 3729, 12 Stat. 696 (1863) (providing for only a \$2,000 penalty since 1863).

25. 31 U.S.C. § 3729(a) (2006), amended by 31 U.S.C. § 3729(a) (Supp. III 2010).

to relators from twenty-five to thirty percent of the government's recovery.<sup>26</sup> Additionally, the 1986 amendments created a new cause of action to protect relators from employment retaliation and also created an explicit cause of action for reverse false claims (false statements calculated to reduce an obligation to pay the United States).<sup>27</sup> Importantly, in addition to broadening the penalties and the potential relator rewards, the 1986 amendments provided an express and broad definition of the scienter required for a violation of the False Claims Act, making it clear that specific intent on the part of defendants was unnecessary.<sup>28</sup> The 1986 amendments also revised the public-disclosure bar, which the 1943 amendments created by exempting from the bar frauds where the relator was an original source (i.e., had knowledge of the fraud at issue in the lawsuit independent from any public disclosure).<sup>29</sup> Finally, the 1986 amendments expanded the statute of limitations under the Act,<sup>30</sup> firmly established that the Act was a civil statute with a preponderance-of-the-evidence burden of proof,<sup>31</sup> and authorized the government to use civil investigative demands to investigate defendants.<sup>32</sup>

#### IV. RECENT DEVELOPMENTS AND THE CURRENT STATE OF THE FALSE CLAIMS ACT

The 1986 amendments successfully reinvigorated qui tam litigation in the United States. Indeed, between 1986 and the end of the 2009 fiscal year

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26. § 3730(d)(2) (2006).

27. § 3729(a)(7) (2006), *amended by* 31 U.S.C. § 3729(a)(7) (Supp. III 2010); 31 U.S.C. § 3730(h) (2006), *amended by* 31 U.S.C. § 3730(h) (Supp. III 2010).

28. § 3729(e) (2006), *amended by* 31 U.S.C. § 3729(e) (Supp. III 2010).

29. § 3730(e)(4) (2006).

30. § 3731(b) (2006).

31. Prior to the 1986 amendment, some courts imposed more demanding standards. S. REP. NO. 99-345, at 6 (1986) (citing *United States v. Ueber*, 299 F.2d 310 (6th Cir. 1962)) (“Some courts have required that the United States prove its case by clear and convincing, or even by clear, unequivocal and convincing evidence.”), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5272; H.R. REP. NO. 99-660, at 25–26 (1986).

32. § 3733 (2006), *amended by* 31 U.S.C. § 3733 (Supp. III 2010). Civil investigative demands are a form of administrative subpoena that vest on the government investigatory powers much wider than those available for discovery under the Federal Rules of Civil Procedure. *See generally* Brian Hill & Josephine Nelson Harriot, *FCA Amendments Broaden Government's Investigative Power*, ABA HEALTH ESOURCE (Aug. 2009) [http://www.americanbar.org/content/newsletter/publications/aba\\_health\\_esource\\_home/Hill.html](http://www.americanbar.org/content/newsletter/publications/aba_health_esource_home/Hill.html).

the FCA returned \$28 billion to the United States Treasury.<sup>33</sup> However, notwithstanding the Act's significant successes, two decades of *qui tam* litigation produced judicial interpretations that diluted the Act's potency.<sup>34</sup>

The numerous misinterpretations of the Act's provisions became particularly problematic for Congress in 2009 in light of the projected \$1 trillion of government expenditures under the Troubled Asset Relief Program and stimulus bill.<sup>35</sup> As a preemptive response to the expected, renewed wave of fraud, Congress signed into law the Fraud Enforcement and Recovery Act of 2009 (FERA) for the express purposes of reinforcing the 1986 amendments, clarifying provisions of the Act,<sup>36</sup> and increasing the tools available to the government to fight fraud.<sup>37</sup>

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33. *Statistics*, THE FALSE CLAIMS ACT LEGAL CTR., TAXPAYERS AGAINST FRAUD, [www.taf.org/statistics.htm](http://www.taf.org/statistics.htm) (last visited Oct. 12, 2011). The success of the False Claims Act is widely credited for the wave of state false-claims statutes and enforcement actions modeled after the federal statute. While the scope of the state false-claims statutes varies, they generally hold persons liable who use false statements to obtain state funds in the same fashion as the federal False Claims Act. See James F. Barger, Jr. et al., *States, Statutes, and Fraud: An Empirical Study of Emerging State False Claims Acts*, 80 TUL. L. REV. 465, 471 (2005).

34. See *Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662, 671 (2008). The United States Supreme Court held that for a claim to be false within the meaning of § 3729(a)(1) (2006), amended by 31 U.S.C. § 3729(a)(1) (Supp. III 2010), such a claim had to be presented directly to the federal government, something that became known as the presentment requirement; however, § 3729(a)(1) does not impose such a requirement. See *Allison Engine*, 553 U.S. at 671; see also *United States v. Baylor Univ. Med. Ctr.*, 469 F.3d 263, 268 (2d Cir. 2006). The Second Circuit held that the statute of limitations for filing the government's complaint in intervention began to run at the time of the relator's filing, and the complaint in intervention did not relate back to the relator's complaint, effectively limiting the government's recovery in False Claims Act cases. *Id.* A complaint in intervention is the pleading by which the government assumes primary prosecution of a *qui tam* action after completing its investigation and typically clarifies, either by streamlining or expanding, the scope of the action against the defendant. *Id.*

35. Jeffery L. Handwerker, Matthew H. Solomson, Mahnu V. Davar & Kathleen H. Harné, *Congress Declares Checkmate: How the Fraud Enforcement and Recovery Act of 2009 Strengthens the Civil False Claims Act and Counters the Courts*, 5 J. BUS. & TECH. L. 295, 322 (2010).

36. *Id.* at 296–97.

37. Press Release, Senator Patrick Leahy, Senate Crosses Procedural Hurdle, Set to Vote on Leahy-Authored Anti-Fraud Bill Tuesday (Apr. 27, 2009), [http://leahy.senate.gov/press/press\\_releases/release/?id=ada1da8d-088d-4c2b-9978-3ba59b9033e2](http://leahy.senate.gov/press/press_releases/release/?id=ada1da8d-088d-4c2b-9978-3ba59b9033e2). In an April 27, 2009 press release, Senator Patrick Leahy (D-Vermont), who along with Senator Chuck Grassley (R-Iowa) sponsored FERA,

Among the corrections to the False Claims Act, FERA eliminated language from the earlier iteration of the False Claims Act that suggested that a false claim had to be submitted *directly to* a federal officer or employee to meet the presentment requirement for liability under the Act.<sup>38</sup> It did so by redefining *claim* under the False Claims Act to mean “any request or demand, whether under a contract or otherwise, for money or property and whether or not the United States has title to the money or property” that is presented directly to the United States *or to a contractor or other recipient of federal monies* if the government provides or reimburses any portion of the requested funds.<sup>39</sup>

In addition, FERA also secured the government’s clawback ability to recover fraudulently obtained funds by providing that the government’s complaint in intervention in an FCA case relates back to the date of the relator’s filing (which often predates the government’s intervention by several years).<sup>40</sup> FERA also added specific materiality language for liability under the FCA, providing that any false statement “having a natural tendency to influence” payments was material to payment and, thus, a basis for liability under the FCA.<sup>41</sup> FERA further expanded the conspiracy provisions of the Act, clarifying that these provisions applied to all violations of the Act<sup>42</sup> and further enlarged the reverse-false-claims provision of the Act by making it clear that FERA covered not only making false statements to the government, but also not returning improperly

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explained that the amendments would provide new resources and legal tools needed by law-enforcement agencies to combat fraud effectively by authorizing the hiring of more agents, prosecutors, forensic analysts, and support staff. *Id.*

38. § 3729(a)(1)(A) (Supp. III 2010); see also *Allison Engine*, 553 U.S. at 673.

39. § 3729(b)(2)(A).

40. § 3731(c) (Supp. III 2010). Therefore, FERA superseded the shortened statute of limitations and relation-back problem created by the Second Circuit in *United States v. Baylor Univ. Med. Ctr.*, 469 F.3d 263, 268–70 (2d Cir. 2006).

41. § 3729(a)(1)(B), (a)(1)(G), (b)(4). Prior to the FERA amendments, the False Claims Act provided that any person who “knowingly makes, uses, or causes to be made or used, a false record or statement *to get* a false or fraudulent claim *paid or approved by the Government*” was liable. § 3729(a)(2) (2006) (emphasis added), amended by 31 U.S.C. § 3729(a)(1)(B) (Supp. III 2010). This subsection of the False Claims Act was amended by FERA to provide that any person who “knowingly makes, uses, or causes to be made or used, a false record or statement *material to a false or fraudulent claim*” is liable. § 3729(a)(1)(B) (Supp. III 2010). Thus, FERA eliminated as requirements for liability the terms *to get paid* and *paid or approved by the Government*, which served as the basis for the Supreme Court’s finding of a presentment requirement in *Allison Engine*, 553 U.S. at 671–72.

42. § 3729(a)(1)(A).

obtained monies to the government.<sup>43</sup> Additionally, FERA expanded the antiretaliation provisions of the Act by including contractors and agents of defendants in the class of persons who are entitled to protection under the Act.<sup>44</sup>

Then, in March 2010, just a few months after FERA's enactment, Congress made additional corrections to the False Claims Act, seemingly missed by the FERA amendments, through the passage of the Patient Protection and Affordable Care Act (PPACA).<sup>45</sup> The most important correction involved the issue of public disclosure. Because the 1943 amendments to the False Claims Act elevated any public disclosure of information leading to the fraud charges to jurisdictional-bar status, arguments about the public-disclosure bar, rather than the wrongful conduct of the defendants, often took center stage in most qui tam litigation. In the 1986 amendments, Congress modified the jurisdictional bar in an attempt to correct the foregoing problem by providing that a relator could maintain a qui tam suit, notwithstanding a public disclosure, if the relator was an original source of the information and, thus, not a parasitic relator.<sup>46</sup> However, a number of judicial decisions interpreting the amended law weakened the original-source exemption to the public-disclosure bar by reading additional requirements into the statute, including the requirement that the relator be a source of the public disclosure to qualify as an original source under the False Claims Act.<sup>47</sup> The PPACA corrected these misguided judicial pronouncements by narrowing what constitutes a public disclosure through expanding what constitutes an original source and by giving the government the ability to veto the dismissal of an otherwise appropriate case from being automatically dismissed on the basis of public disclosure.<sup>48</sup>

In general, the foregoing False Claims Act amendments were given prospective effect, with one exception: Congress provided that § 3729(a)(1) was to take effect "as if enacted on June 7, 2008, and apply to all claims

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43. § 3729(a)(1)(G).

44. § 3730(h)(1).

45. *See generally* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010); H.R. Res. 3590, 111th Cong. (2010) (codified as amended in scattered sections of 42 U.S.C.).

46. § 3730(e)(4)(A) (2006).

47. Mark R. Fitzgerald, *Should You Make a Voluntary Disclosure to the OIG? Check Your Circuit Map First*, BNA, <http://healthcenter.bna.com/pic2/hc.nsf/id/BNAP-55TM53> (last visited May 16, 2011) (giving examples of requirements that different courts have read into the statute).

48. § 3730(e)(4) (Supp. III 2010).

under the False Claims Act . . . that are pending on or after that date.”<sup>49</sup> It is the retrospective effect of this provision that triggered the ex post facto challenges on which the courts are split.<sup>50</sup>

## V. THE JUDICIAL SPLIT

Since the FERA amendments, many courts have had the opportunity to consider the retrospective effect of FERA in the context of determining whether the defendant had a claim that was pending as of June 7, 2008, so as to bring the pending case within the retrospective purview of FERA.

Naturally, because the impetus of FERA is to broaden the scope of FCA liability, defendants usually argue for the narrowest possible definition of *claims pending* to escape from the purview of FERA. The converse is true as well: the government and relators argue for the broadest possible definition to bring all cases pending on June 7, 2008 within the purview of FERA. Thus far, judicial interpretations of claims pending range from a very narrow reading of *pending* (suggesting that it is a request for federal funds that is still open or unpaid) to a broader reading (including either open or closed requests for payments that were, or could have been, the subject of an enforcement action under the FCA on the effective date of the amendment).

There is already a circuit split on the meaning of claims pending under FERA. The United States Courts of Appeals for the Eighth and Eleventh Circuits have endorsed the narrow view that a claim is pending within the meaning of FERA if it had not been resolved (i.e., it had not been paid or denied) by the effective date of June 7, 2008.<sup>51</sup> The majority of the district courts have followed this view.<sup>52</sup> In contrast, the Second Circuit has held

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49. Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 4(f), 123 Stat. 1617, 1625, (codified as amended at 31 U.S.C. §§ 3729-33). Congress included the following language in section 4(f) of the bill: “The amendments made by this section shall take effect on the date of enactment of this Act and shall apply to conduct on or after the date of enactment . . .” *Id.*

50. In general, laws are not applied retroactively absent a clear indication from Congress that it intended such result. *INS v. St. Cyr*, 533 U.S. 289, 315–16 (2001) (citing *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988)).

51. *See* *United States v. Hawley*, 619 F.3d 886, 894 (8th Cir. 2010) (indicating that there were no pending claims because they had been paid prior to June 7, 2008); *Hopper v. Solvay Pharm., Inc.*, 588 F.3d 1318, 1327 n.3 (11th Cir. 2009). *Claim* means any request or demand for money, so there can be no pending claims on a case that was already pending on June 7, 2008. *Id.*

52. *See, e.g.,* *United States ex rel. Burroughs v. Cent. Ark. Dev. Council*, No. 4:08-CV-2257-JMM, 2010 WL 1875580, at \*2 (E.D. Ark. May 10, 2010) (stating that “claim” refers to defendant’s request for payment and not to pending cases);

that a claim pending under section 4(f) refers not only to a defendant's pending demand for payment to the government, but also to any cases that were pending as of June 7, 2008.<sup>53</sup> A number of district courts in and outside of the Second Circuit adhere to this broader view of claims pending.<sup>54</sup> That said, though the definition of claims pending is an important one, the constitutionality of the 2009 amendments does not hinge on it.

Naturally, the constitutionality of FERA is an issue in those cases in which a district court affirmatively answers the question of whether there were claims pending as of June 7, 2008, thus placing the case within the retrospective purview of FERA. In such cases, a district court would then be expected to determine whether the retrospective effect of FERA poses a constitutional problem.<sup>55</sup> So far, two courts have taken up the

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United States *ex rel.* Baker v. Cmty. Health Sys., 709 F. Supp. 2d 1084, 1107 (D.N.M. 2010) (stating that FERA applies to claims pending on June 7, 2008 but not to cases); United States *ex rel.* Bender v. N. Am. Telecomms., Inc., 686 F. Supp. 2d 46, 49 n.4 (D.D.C. 2010) (stating that "claims" were not "pending" given that they had been paid prior to the case being filed in August of 2006); United States *ex rel.* Boone v. Mountainmade Found., 684 F. Supp. 2d 1, 7 n.7 (D.D.C. 2010) (stating FERA did not apply because the false claims for payment made in 2006 and were not pending on June 7, 2008, even though FCA case was); United States *ex rel.* Parato v. Unadilla Health Care Ctr., Inc., No. 5:07-CV-76(HL), 2010 WL 146877, at \*4 n.4 (M.D. Ga. Jan. 11, 2010) ("claim" is a request or demand for money or property, rather than a case).

53. United States *ex rel.* Kirk v. Schindler Elevator Corp., 601 F.3d 94, 113 (2d Cir. 2010) (vacating a pre-FERA dismissal of a case on the basis of section 4(f) because the case was still in the litigative pipeline on June 7, 2008).

54. See, e.g., United States *ex rel.* Pervez v. Beth Israel Med. Ctr., 736 F. Supp. 2d 804, 811 n.38 (S.D.N.Y. 2010) (applying the amendment to all legal claims pending before a court on or after June 7, 2008); United States *ex rel.* Drake v. NSI, Inc., 736 F. Supp. 2d 489, 497 (D. Conn. 2010) ("[Section] 4(f)(1) applies to 'claims' in the sense of cases before a court."); United States *ex rel.* Westrick v. Second Chance Body Armor, Inc., 685 F. Supp. 2d 129, 140 (D.D.C. 2010) (stating that because the suit was pending on June 7, 2008, the FERA amendments apply); United States *ex rel.* Walner v. Northshore Univ. Healthsystem, 660 F. Supp. 2d 891, 895 n.3 (N.D. Ill. 2009) (FERA applies to legal claims pending as of June 7, 2008); United States *ex rel.* Carter v. Halliburton Co., No. 1:08CV1162(JCC), 2009 WL 2240331, at \*5 n.3 (E.D. Va. July 23, 2009) (stating that the amendment applied because the case was pending on June 7, 2008).

55. At least one court has taken up the constitutionality of section 4(f)(1), even after concluding that it did not apply in that case because the claims were not pending as of FERA's effective date. See Allison Engine Co. v. United States *ex rel.* Sanders, 667 F. Supp. 2d 747, 752 (S.D. Ohio 2009) ("Even if the retroactivity clause enacted as part [of] FERA was to be found by a reading of its plain language

constitutionality of FERA in light of its retrospective effect, while many more have avoided the issue altogether.<sup>56</sup> Of the courts taking up the matter, one concluded that FERA violates the Ex Post Facto Clause of the Constitution.<sup>57</sup> The other court concluded that it does not.<sup>58</sup>

## VI. THE CONSTITUTIONAL LANDSCAPE

The Ex Post Facto Clause of the Constitution prohibits passing retroactive laws.<sup>59</sup> Significant confusion exists between the terms *retroactive* and *retrospective* in judicial opinions addressing the subject and in literature applying the Ex Post Facto Clause to FERA. Clarification of the terminology, therefore, is necessary before the issue of FERA's constitutionality can be undertaken.

FERA became law on May 20, 2009. However, Congress made section 4(f) of FERA (codified as amended at 31 U.S.C. §§ 3729-33) effective on June 7, 2008, a date that predates FERA's enactment. The retrospective effect of the law is sometimes referred to as *retroactivity*. However, retrospectivity and retroactivity are not interchangeable terms in constitutional parlance. That being said, the misnomer has invaded the legal commentary and has obscured the legal analysis of whether FERA is a "retroactive" law.

### *A. FERA Is Not Constitutionally Retroactive Because It Does Not Impair Rights*

A law is not constitutionally retroactive merely because it has an effective date that predates the signing of the law. A statute that has an

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to apply to the 'claims' pending in this case, application of this retroactivity language to these Defendants would violate the Ex Post Facto Clause of the U.S. Constitution." Curiously, it was the Supreme Court's opinion in the appeal to this very case that Congress set out to overturn through the passage of FERA. *See infra* text accompanying notes 69–76.

56. *See, e.g.*, United States *ex rel.* Snapp, Inc. v. Ford Motor Co., 618 F.3d 505 (6th Cir. 2010); United States *ex rel.* Loughren v. Unum Grp., 613 F.3d 300 (1st Cir. 2010); United States *ex rel.* Folliard v. CDW Tech. Servs., Inc., 722 F. Supp. 2d 20 (D.D.C. 2010); United States *ex rel.* Crennen v. Dell Mktg., L.P., 711 F. Supp. 2d 157 (D. Mass. 2010); United States *ex rel.* Wall v. Circle Constr., L.L.C., 700 F. Supp. 2d 926 (M.D. Tenn. 2010); United States v. Aguillon, 628 F. Supp. 2d 542 (D. Del. 2009).

57. *See Allison Engine*, 667 F. Supp. 2d at 752.

58. *See Drake*, 736 F. Supp. 2d at 499.

59. *Weaver v. Graham*, 450 U.S. 24, 28–29 (1981) ("[T]he framers [of the U.S. Constitution] sought to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed.").

effective date earlier than its creation is only retroactive, in the constitutional sense of the term, if the new provision “would impair rights a party possessed when he acted, increase a party’s liability for past conduct, or impose new duties with respect to transactions already completed.”<sup>60</sup> Furthermore, a law is not retroactive in the constitutional sense if it does not interfere with settled expectations or reasonable reliance interests.<sup>61</sup> In even simpler terms, the government may not “enact a law that punishes an act that was innocent prior to the enactment.”<sup>62</sup> The inquiry into the retroactivity of a law is not a “mechanical task,” but a “functional” one.<sup>63</sup> To begin such a functional task, one must look to what exactly FERA changed to determine if that change impaired a person’s rights or imposed new duties.

Prior to FERA, the FCA imposed civil liability on any person who “knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government.”<sup>64</sup> However ineloquent this language may have been, it is amply clear that Congress intended it to protect federal funds from fraud, whatever the modality for perpetrating such fraud. Indeed, it goes without saying that, even before the FCA was ever enacted, defendants never had a right to obtain federal funds through fraud.

Though Congress intended for the FCA to function as a general antifraud statute, a United States Supreme Court case changed that. In *Allison Engine Co. v. United States ex rel. Sanders*, the Court interpreted the “to get . . . paid or approved . . . by the Government” language of the FCA as creating a presentment requirement of the false claim *directly* to the federal government (as opposed to someone else possessing or managing federal money) before liability could attach.<sup>65</sup> In other words, *Allison Engine* created a judicial safe harbor that allowed persons to knowingly commit fraud on the federal government with impunity as long as the fraud was committed *indirectly* by simply submitting the false claims to third parties managing or charged with spending federal funds.<sup>66</sup> FERA set out to change that.

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60. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994).

61. *Id.* at 269–70 (“[F]unctional conceptions of legislative ‘retroactivity’ have found voice in this Court’s decisions and elsewhere.”); see *Bradley v. Sch. Bd. of Richmond*, 416 U.S. 696, 711–12 (1974).

62. *Hobbs v. Cnty. of Westchester*, 397 F.3d 133, 157 (2d Cir. 2005).

63. *Landgraf*, 511 U.S. at 268.

64. 31 U.S.C. § 3729(a)(2) (Supp. III 2010).

65. *Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662, 671 (2008).

66. *Id.* at 671–72. The *Allison Engine* case involved contracts between the United States Navy and two shipyards for the production of a new fleet of

The legislative history of FERA makes it clear that a significant impetus of the FERA amendments was Congress's desire to correct the *Allison Engine* error. For example, Senator Charles Grassley (R-Iowa) stated that the amendments would "address a loophole that was created in the False Claims Act by the Supreme Court decision in the *Allison Engine* case."<sup>67</sup> Furthermore, Senator Grassley stated that "in recent years, litigation fueled by powerful Government defense and health care contractors has created legal loopholes that threaten the application of this powerful tool . . . . This legislation fixes this, thus ensuring that no fraud can go unpunished by simply navigating through the legal loopholes."<sup>68</sup> Joining in the sentiment, Representative Howard Berman (D-California) explained that the *Allison Engine* ruling "severely limits the reach of the law" and that "[t]he primary impetus for [FERA] is to reverse these unacceptable limitations and restore the False Claims Act to its original status as the protector of all Government funds or property."<sup>69</sup>

Thus, for the explicit purpose of overruling *Allison Engine* and restoring the original scope of the False Claims Act as a general antifraud statute, FERA changed § 3729(a)(1)(B) of the Act to impose liability on any person "who knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim."<sup>70</sup> In so doing, Congress removed the "to get" and "paid or approved by the Government" language from the 1986 iteration of the statute from which the Supreme Court read a presentment requirement into the FCA.<sup>71</sup> Further, Congress made the amendment effective on June 7, 2008, which predated

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destroyers. *Id.* at 662–64. Each destroyer required an electrical-generator set to provide electricity. *Id.* Several companies (subcontractors) became involved in the project to build the generator sets. *Id.* None of these subcontractors billed the federal government but rather billed the company directly above them in the chain of production. *Id.* The company directly above them did not include these bills when submitting for payment from the government but, nonetheless, obtained payment from the government that was based, in part, on the subcontractors' bills, which turned out to be fraudulent. *See id.* The Supreme Court concluded that the subcontractors had no liability under the False Claims Act because the fraudulent claims had not been presented to the United States Government. *See id.*

67. 155 CONG. REC. S4412 (daily ed. Apr. 20, 2009) (statement of Sen. Charles Grassley).

68. 155 CONG. REC. S4737 (daily ed. Apr. 27, 2009) (statement of Sen. Grassley).

69. 155 CONG. REC. E1296 (daily ed. June 3, 2009) (statement of Rep. Howard Berman).

70. 31 U.S.C. § 3729(a)(1)(B) (Supp. III 2010).

71. § 3729(a)(2) (2006), amended by 31 U.S.C. § 3729(a)(2) (Supp. III 2010); see also *supra* note 65 and accompanying text.

the *Allison Engine* decision by two days, with the clear purpose of overruling *Allison Engine*.<sup>72</sup>

In sum, Congress intended the foregoing amendment to be treated as a correction, but one that was to be given the broadest of scopes considering the original intent and remedial nature of the statute. In fact, Representative Berman confirmed that the amendment was intended to correct the Supreme Court's misreading of the original scope of the Act; he explained that the only substantive changes to the FCA under FERA was the expansion of conspiracy liability and that the other amendments "merely clarify the law as it currently exists under the False Claims [Act]."<sup>73</sup> Representative Berman further advised the courts to "rely on these amendments to clarify the existing scope of False Claims Act liability, even if the alleged violations occurred before the enactment of these amendments" and to "consider and honor these clarifying amendments, for they correctly describe the existing scope of False Claims Act liability under the current and amended False Claims Act."<sup>74</sup> Agreeing with him, Senator Ted Kaufman (D-Delaware), a co-sponsor of FERA, stated that Congress was "not creating new crimes, or establishing entirely new paths to recovering ill-gotten gains";<sup>75</sup> rather, Congress had made narrow changes to ensure that "lawbreakers don't slip through the gaps in existing law."<sup>76</sup>

Given the foregoing and the fact that defendants never had a right to and could not reasonably have relied on the existence of a right to obtain federal funds from *any parties* through fraud, it is difficult to find merit in the argument that FERA's correction of the judicially created presentment requirement somehow "impaired" the rights of defendants or imposed new liabilities or duties on them.

### *B. FERA Is Not Constitutionally Retroactive Because It Is Not a Criminal Statute*

Even if it could be argued that the amendments in question somehow impair a right or impose new liabilities or duties on defendants, the amendments still do not violate the United States Constitution's Ex Post Facto Clause.<sup>77</sup>

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72. § 3729(a)(1)(B) (Supp. III 2010).

73. 155 CONG. REC. E1300 (daily ed. June 3, 2009) (statement of Rep. Berman).

74. *Id.*

75. 155 CONG. REC. S4413 (daily ed. Apr. 20, 2009) (statement of Sen. Ted Kaufman).

76. *Id.*

77. U.S. CONST. art. I, § 9, cl. 3.

It is well established in American jurisprudence that the Ex Post Facto Clause applies only to criminal or penal provisions.<sup>78</sup> Thus, in considering an ex post facto challenge to any statute, courts must consider whether “the legislature intended the statute to establish civil proceedings.”<sup>79</sup> A court’s consideration must start with the statute’s text.<sup>80</sup> “[O]nly the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty”<sup>81</sup> so as to fall within the ambit of the Ex Post Facto Clause.<sup>82</sup>

That the text of the statute treats the False Claims Act as a civil statute is unassailable. For example, the statute is codified in Title 31 of the United States Code as a civil statute, rather than as a criminal statute codified in Title 18.<sup>83</sup> Moreover, § 3730, which governs the procedures by which the Attorney General and private individuals can bring causes of action, is entitled “Civil actions for false claims,” which again underscores the civil nature of the Act.<sup>84</sup> Further, the legislative histories of the 1986 and 2009 amendments to the False Claims Act underscore Congress’s intention to enact a civil statute.<sup>85</sup> Thus, by its terms and legislative intent, the False Claims Act is a civil statute, not a criminal statute.<sup>86</sup> Accordingly, under

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78. *See Seling v. Young*, 531 U.S. 250, 261–62 (2001); *E. Enters. v. Apfel*, 524 U.S. 498, 533 (1998) (“*The Ex Post Facto* Clause is directed at the retroactivity of penal legislation . . . .”); *Burr v. Snider*, 234 F.3d 1052, 1054 (8th Cir. 2000) (“[I]t is well established that this provision applies only to criminal punishments.”).

79. *Seling*, 531 U.S. at 261.

80. *Id.* at 262 (“[T]he civil or punitive nature of an Act must begin with reference to its text.”).

81. *Smith v. Doe*, 538 U.S. 84, 92 (2003) (citations omitted) (internal quotation marks omitted).

82. *Lundeen v. Canadian Pac. Ry. Co.*, 532 F.3d 682, 691 (8th Cir. 2008), *cert. denied*, 129 S. Ct. 2379 (2009).

83. 31 U.S.C. § 3729(a) (Supp. III 2010). *Cf.* 18 U.S.C. § 287 (2006) (detailing a criminal false-claims provision).

84. 31 U.S.C. § 3730 (2006 & Supp. III 2010). This is the very textual analysis the Supreme Court conducted in *Hudson v. United States*, 522 U.S. 93 (1997). Noting that the statute “expressly provide[s] that such penalties are civil,” the Court concluded that the monetary penalty scheme in that case, which was akin to the False Claims Act’s, was civil and not punitive in nature. *Id.* at 103.

85. Congress referred to FERA as “one of the most potent civil tools” to stop fraud. S. REP. NO. 111-10, at 4 (2009); *see also* S. REP. NO. 99-345, at 11 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5276 (“The statute is a remedial one. It is intended to protect the Treasury against the hungry and unscrupulous host that encompasses it on every side . . . .” (citation omitted)).

86. It is now well settled that the treble damages of the False Claims Act serve deterrent and compensatory functions, which do not convert the False Claims Act into a criminal statute. *See Cook Cnty. v. United States ex rel. Chandler*, 538 U.S.

well-established Supreme Court precedent, a civil designation is entitled to significant deference.<sup>87</sup>

That said, the Ex Post Facto Clause *could* apply, even if Congress's intention was to enact a civil regulatory scheme, but *only* if the statutory scheme is "so punitive either in purpose or effect as to negate [Congress's] intention to deem it 'civil.'"<sup>88</sup> Again, however, "only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty."<sup>89</sup>

In this regard, commentators have pointed to the treble-damages and penalty provisions of the FCA as evidence that it is so punitive as to amount to a penal statute. These arguments are for naught in light of clear Supreme Court precedent to the contrary. Less than a decade ago, the Court took up the treble-damages and penalty provisions of the FCA and recognized that there was a punitive aspect to them.<sup>90</sup> However, the Court also made it clear, as did decades of judicial precedent prior to the Court's decision, that a statute's punitive aspect is *not enough* to render the civil scheme in which the statute operates "so punitive" as to negate the text and Congress's intention to deem it civil.<sup>91</sup> The Court recognized that the treble-damages provision of the False Claims Act serves appropriate compensatory and deterrence functions that predominate and imprint the statute as civil.<sup>92</sup> Likewise, the Court has taken up the issue of deterrence as a purpose of the False Claims Act. In this regard, the Court specifically held that the deterrence functions of the Act did not render the Act's

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119, 130 (2003) (stating that the False Claims Act's "treble damages have a compensatory side, serving remedial purposes in addition to punitive objectives"); *see also Hudson*, 522 U.S. at 102 ("[A]ll civil penalties have some deterrent effect."); *id.* at 105 ("[D]eterrence 'may serve civil as well as criminal goals.'").

87. *Smith v. Doe*, 538 U.S. 84, 92 (2003).

88. *Id.*

89. *Id.* (quoting *Hudson*, 522 U.S. at 100).

90. *See Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 784–86 (2000), *abrogated by Cook Cnty.*, 538 U.S. 119.

91. *See Cook Cnty.*, 538 U.S. at 130–32.

To begin with it is important to realize that treble damages have a compensatory side, serving remedial purposes in addition to punitive objectives. While the tipping point between pay-back and punishment defies general formulation, being dependent on the workings of a particular statute and the course of particular litigation, the facts about the [False Claims Act] show that the damages multiplier has compensatory traits along with the punitive.

*Id.* at 130 (citations omitted); *see also United States v. Halper*, 490 U.S. 435, 442 (1989), *abrogated by Hudson v. United States*, 522 U.S. 93 (1997).

92. *Cook Cnty.*, 538 U.S. at 130.

sanctions punitive within the meaning of the Ex Post Facto Clause.<sup>93</sup> In light of the foregoing pronouncements, the Supreme Court has consistently held that “proceedings and penalties under the civil False Claims Act are indeed civil in nature, and that a civil remedy does not rise to the level of ‘punishment’ merely because Congress provided for civil recovery in excess of the Government’s actual damages . . . .”<sup>94</sup> For purposes of analysis, therefore, the Supreme Court’s pronouncements of the civil nature of the False Claims Act should suffice to end the ex post facto inquiry.

In the interest of thoroughness in the analysis, however, one can take the analysis a step further, as there exists a legal framework *that is applicable in the absence of Supreme Court precedent* regarding the civil nature of a statute. Assuming a lack of Court precedent on the subject, the legal framework requires courts to apply seven factors when determining whether a civil scheme is *so punitive* that it should be treated as criminal for purposes of the Ex Post Facto Clause. The seven factors laid out by the Court require courts to consider (1) “[w]hether the sanction involves an affirmative disability or restraint”; (2) “whether [the sanction] has been historically regarded as a punishment”; (3) “whether [the sanction] only comes into play upon a finding of scienter”; (4) “whether [the sanction will] promote[] the traditional aims of punishment—retribution and deterrence”; (5) “whether the behavior to which [the sanction] applies is already a crime”; (6) “whether [there is] an alternative [non-penal] purpose to which [the sanction] may rationally be connected”; and (7) “whether [the sanction] appears excessive in relation to the alternative purpose assigned.”<sup>95</sup> Again, “these factors must be considered in relation to the statute *on its face*[,]”<sup>96</sup> and “‘only the clearest proof’ will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty.”<sup>97</sup> An analysis of all seven factors except

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93. Doe v. Bredesen, 507 F.3d 998, 1005 (6th Cir. 2007).

94. Halper, 490 U.S. at 442.

95. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168–69 (1963).

96. United States *ex rel.* Drake v. NSI, Inc., 736 F. Supp. 2d 489, 500 (D. Conn. 2010) (emphasis added) (quoting *Hudson*, 522 U.S. at 99–100).

97. Smith v. Doe, 538 U.S. 84, 92 (2003) (quoting *Hudson*, 522 U.S. at 100). Ignoring the existence of Supreme Court precedent to the contrary, one court applied the seven-factor test to conclude that the False Claims Act was *so punitive* that the Ex Post Facto Clause applied to it and rendered section 4(f) of FERA unconstitutional. See United States *ex rel.* Sanders v. Allison Engine Co., 667 F. Supp. 2d 747 (S.D. Ohio 2009). In this Author’s view, the court’s analysis is critically flawed. The court not only ignored Supreme Court precedent regarding the remedial and deterrent nature of the False Claims Act, but it also ignored all applicable presumptions in favor of the text of the False Claims Act. Worse, in an apparent effort to justify tipping the scale in favor of labeling the False Claims Act

one, which will be addressed last, handsomely supports treating the False Claims Act as a civil statute.

Factor one involves the consideration of whether the sanction imposes an “affirmative disability or restraint.”<sup>98</sup> A sanction imposes an “affirmative disability or restraint” when it approaches imprisonment.<sup>99</sup> However, the penalties in the False Claims Act neither impose nor approach imprisonment. Thus, factor one does not militate toward finding that the False Claims Act is penal in nature.

Factor two requires courts to look at the historical treatment of the statute in question. The False Claims Act is a statute that has been historically regarded as remedial and compensatory in nature.<sup>100</sup> Therefore, factor two does not bode in favor of finding that the statute is penal.

Factor four requires courts to evaluate whether the scheme promotes retribution and deterrence, attributes that are shared by criminal schemes.<sup>101</sup> In this regard, it must be kept in mind that, historically, disgorgement and money penalties are not, in and of themselves, punishment.<sup>102</sup> Indeed, many civil schemes recognize and operate on the assumption that penalties and

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as punitive (the court found that four of the seven factors weighed toward that result), the court quoted selective statements of lawmakers regarding the need to punish fraudsters while ignoring the plain legislative history of the False Claims Act to the contrary. Most remarkably, the court, seeming hell-bent on reaching and rejecting the constitutionality of the statute, took up a constitutional analysis that was uncalled for in the case that, by the court’s own conclusion, did not fall within the purview of FERA (rendering the court’s constitutional analysis, at best, dicta). This Author is not alone in her assessment of the *Allison Engine* opinion. See *Drake*, 736 F. Supp. 2d at 499 (“Defendants point to the decision in *United States ex rel. Sanders v. Allison Engine Co.*, in which the district court found that the [False Claims Act] was so punitive as to raise ex post facto concerns. The Court does not find these opinions persuasive on this point in light of the historical view of the [False Claims Act] and the relevant legislative history.” (citation omitted)).

98. *Hudson*, 522 U.S. at 104.

99. *Id.*

100. See, e.g., *United States ex rel. Colucci v. Beth Israel Med. Ctr.*, 603 F. Supp. 2d 677 (S.D.N.Y. 2009) (finding that False Claims Act actions survive death of relator because they are primarily remedial); *United States v. Vill. of Island Park No. 90 CV992 (ILG)*, 2008 WL 4790724, at \*6 (E.D.N.Y. Nov. 3, 2008) (stating that the Excessive Fines Clause did not apply because the False Claims Act is remedial).

101. *SEC v. Palmisiano*, 135 F.3d 860, 865 (2d Cir. 1998).

102. *United States v. Lamanna*, 114 F. Supp. 2d 193, 198 (W.D.N.Y. 2000) (“[N]either disgorgement nor money penalties have historically been viewed as punishment. Rather the payment of fixed or variable sums of money is a sanction that has long been recognized as civil.” (citations omitted) (quoting *Palmisiano*, 135 F.3d at 866)).

treble damages are often necessary to provide full restitution to victims of wrongful conduct. With respect to the False Claims Act, it is fair to say that courts have recognized that the penalties and treble damages have a punitive aspect to them. However, the courts have also historically recognized that these penalty and treble-damages provisions are not retributive in nature.<sup>103</sup> To the contrary, courts have historically concluded that treble damages and penalties under the False Claims Act are calculated to provide the government with “complete indemnity for the injuries done [to] it.”<sup>104</sup> In light of the foregoing, neither the treble damages nor the penalties of the False Claim Act support turning it into a criminal statute.<sup>105</sup>

Factor five requires courts to consider whether the behavior proscribed by the False Claims Act is already the subject of a criminal statute, such that treating the civil scheme as a criminal one would be superfluous or redundant.<sup>106</sup> Here, the conduct proscribed by the Act is, indeed, proscribed by a criminal statute; to wit, criminal healthcare fraud is prohibited by Title 18 of the United States Code.<sup>107</sup> Factor five, therefore, does not support transforming the False Claims Act into a penal scheme.

Factor six requires courts to evaluate whether the statute has an alternative purpose other than to punish.<sup>108</sup> The legal precedent on the False Claims Act overwhelmingly establishes that the statute has a compensatory purpose because it seeks to make the government whole.<sup>109</sup> Factor six, therefore, also fails to color the FCA as a criminal scheme.

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103. *United States v. Halper*, 490 U.S. 435, 442 (1989) (“[P]roceedings and penalties under the civil False Claims Act are indeed civil in nature, and . . . a civil remedy does not rise to the level of ‘punishment’ merely because Congress provided for civil recovery in excess of the Government’s actual damages . . .”), *abrogated by Hudson*, 522 U.S. 93.

104. *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 549 (1943), *overruled by Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 130 S. Ct. 1396 (2010).

105. *Cook Cnty. v. United States ex rel. Chandler*, 538 U.S. 119, 130 (2003) (“[T]reble damages have a compensatory side, serving remedial purposes in addition to punitive objectives.”).

106. *Kennedy*, 372 U.S. at 168.

107. 18 U.S.C. § 1347(a) (2006) (“Whoever knowingly and willfully executes, or attempts to execute, a scheme or artifice . . . to defraud any health care benefit program . . . shall be fined under this title or imprisoned not more than 10 years . . .”).

108. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963).

109. Upon passage of the 1986 amendments of the False Claims Act, the Senate Judiciary Committee said, “The purpose of . . . the False Claims Reforms Act[] is to enhance the Government’s ability to recover losses sustained as a result of fraud against the Government.” S. REP. NO. 99-345, at 1 (1986), *reprinted in* 1986

Factor seven requires the courts to evaluate whether the damages that are recoverable under the False Claims Act exceed the compensatory function they serve.<sup>110</sup> In this regard, some courts have advanced, as a truism, the conclusion that treble damages and penalties, in general, and with respect to the False Claims Act, in particular, always do more than merely compensate the government for its losses and are, thus, punitive.<sup>111</sup> However, there is no basis in reality for such a broad generalization. With respect to the False Claims Act, the economic injury that fraud imposes on the federal government and its programs far exceeds, on a pro rata basis, the single measure of damages suffered by the government in any given case.<sup>112</sup> Thus, if violators of the False Claims Act were merely required to disgorge their improper gains,<sup>113</sup> as would be the case with a nontreble-damages statute, significant costs of the violators' wrongful actions would have to be absorbed by the government and, ultimately, the innocent taxpayer. In this instance, therefore, the penalty and treble-damages provisions of the False Claims Act serve as an equitable and well-established way to ensure full indemnity to the government for the injuries caused by the proscribed conduct.<sup>114</sup> Factor seven, therefore, does not color the False Claims Act as a criminal scheme.

In contrast to factors one, two, four, five, six, and seven, factor three looks to whether the FCA contains a scienter requirement, which is more characteristic of a criminal law than a civil law.<sup>115</sup> The FCA arguably does contain a scienter requirement, prohibiting only *knowing* violations of the

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U.S.C.C.A.N. 5266, 5266. *See also Marcus*, 317 U.S. at 549 (holding that the False Claims Act is remedial in purpose and effect), *overruled by Graham*, 130 S. Ct. 1396.

110. *Kennedy*, 372 U.S. at 168.

111. *See United States ex rel. Drake v. NGI, Inc.*, 736 F. Supp. 2d 489, 501 (D. Conn. 2010).

112. Indeed, in 2011 alone, the Office of the Inspector General will spend \$324 million to protect the programs and operations of the U.S. Department of Health and Human Services from waste, fraud, and abuse. *See OFFICE OF INSPECTOR GEN., supra* note 1, at 5.

113. Though there are no published statistics to this effect, it is common knowledge among qui tam practitioners that a great number of False Claims Act cases settle for double the amount of the fraud, rather than for the statutory penalties and treble damages. Thus, False Claims Act violators already receive significant discounts for their misconduct.

114. *See Marcus*, 317 U.S. at 549 (finding that damages under the False Claims Act are calculated to provide the government with "complete indemnity for the injuries done it" (citing *Helvering v. Mitchell*, 303 U.S. 391, 401 (1938))).

115. *Kennedy*, 372 U.S. at 168.

statute.<sup>116</sup> However, the FCA does not require *criminal intent* or *specific intent* to defraud.<sup>117</sup> Rather, liability under the FCA can attach due to false claims for government funds made in deliberate ignorance or reckless disregard of their falsity.<sup>118</sup> Thus, the scienter requirement of the Act barely weighs on the penal side of the framework.<sup>119</sup>

On balance, the mandatory factors pertinent to the inquiry overwhelmingly support the conclusion that the False Claims Act is not so punitive as to warrant being treated as a criminal statute subject to the Ex Post Facto Clause. Certainly, the factors in question, individually and collectively, do not come anywhere close to the level of clearest proof that is required under the law to defeat the plain text of the statute and Congress's intent to create a civil framework to prevent fraud.

*C. FERA's Retrospective Effect Is Otherwise Constitutionally Permissible*

Opponents of the FERA amendments have sought to fit FERA within the realm of the constitutional prohibition against ex post facto laws. For the reasons set forth above, those efforts are misplaced because the False Claims Act is a civil statute. This is not to say that the retrospective effect of FERA does not warrant constitutional evaluation. Rather, it is to say that the ex post facto framework is inapplicable.

The False Claims Act regulates fraudulent business conduct with the government and, thus, falls within the realm of legislation that regulates economic and business affairs subject to the Due Process Clause of the Constitution.<sup>120</sup> Civil legislation that regulates economic and business affairs is subject to a “highly deferential rational basis” standard of review.<sup>121</sup> Further, “[L]egislative acts adjusting the burdens and benefits of economic life come to the [c]ourt[s] with a presumption of constitutionality, and . . . the burden is on the one complaining of a due

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116. 31 U.S.C. § 3729(a)(1) (Supp. III 2010).

117. § 3729(b)(1)(B).

118. § 3729(b)(1)(A)(ii)–(iii).

119. See, e.g., *Hagood v. Sonoma Cnty. Water Agency*, 81 F.3d 1465, 1477 (9th Cir. 1996) (“Thus, a violation of the False Claims Act requires scienter.” (citing *United States ex rel. Anderson v. N. Telecom, Inc.*, 52 F.3d 810, 815 (9th Cir. 1995)), *cert. denied*, 516 U.S. 1043 (1996)).

120. U.S. CONST. amend. V. See also *Lundeen v. Canadian Pac. Ry. Co.*, 532 F.3d 682 (8th Cir. 2008) (holding that a highly deferential standard of review applies to whether legislation regulating economic and business affairs violates due process).

121. *Lundeen*, 532 F.3d at 689–90; see, e.g., *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992).

process violation to establish that the legislature has acted in an arbitrary and irrational way.”<sup>122</sup>

Retrospective legislation is subject to a rational-basis standard of review, even though it can present problems of unfairness to the extent that it unsettles legitimate expectations.<sup>123</sup> Retrospective legislation meets the test of due process under the rational-basis standard of review if the legislation is a rational means for accomplishing a legitimate legislative purpose.<sup>124</sup>

The FERA amendments in question meet the foregoing standard. It has long been recognized that “[t]he enactment of a retrospective statute ‘to correct the unexpected results of [a judicial] opinion’ qualifies as a legitimate legislative purpose which survives scrutiny under the deferential rational basis standard of review.”<sup>125</sup> Further, a legislature may pass retrospective legislation in civil matters so long as the intention for retrospective application is clearly expressed.<sup>126</sup>

The text and legislative history of FERA make it clear that Congress enacted the amendments to reiterate the original intent of the False Claims Act and to correct an unexpected and erroneous judicial interpretation of the scope of the Act.<sup>127</sup> Congress was concerned that frauds committed

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122. *Lundeen*, 532 F.3d at 689–90 (quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976)).

123. *Romein*, 503 U.S. at 191. The Court recognized that “retroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions. . . . ‘[T]he retroactive aspects of [economic] legislation, as well as the prospective aspects, must meet the test of due process’” when they are the rational means by which a legitimate legislative purpose is advanced. *Id.* (alterations in original) (quoting *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 426 U.S. 717, 730 (1984)).

124. *Id.* at 191.

125. *Lundeen*, 532 F.3d at 690 (quoting *Romein*, 503 U.S. at 191).

126. *Landgraf v. USI Film Products*, 511 U.S. 244, 268 n.21 (1994) (“Congress has ample power to provide for retroactive [sic] application of § 102 [of the Civil Rights Act of 1991].”).

127. Unquestionably, FERA is the most significant overhaul of the False Claims Act in a quarter of a century, which is potentially the reason why the amendments have been perceived as substantive changes rather than mere clarifications of what was always the law up until the *Allison Engine* decision. The reality is that the legislative history of FERA makes it clear that its proponents did not believe that FERA constituted a departure from the original law. Instead, proponents of the 2009 amendments declared that FERA was intended to “reflect the original intent” of the False Claims Act, override certain court decisions limiting the scope of the law, and improve one of the most potent civil tools for rooting out waste and fraud in the government. S. REP. NO. 111-10, at 4 (2009). At the end of the day, whether

against the United States through third parties should not be insulated from False Claims Act liability as a result of the unexpected presentment requirement that the United States Supreme Court created in *Allison Engine*. To resolve such concerns, Congress reaffirmed, through the amended text of the statute, that False Claims Act liability may be imposed upon persons who cheat the United States “without regard to whether the wrongdoer deals directly with the Federal Government.”<sup>128</sup> Congress also gave special treatment to the provision by pegging its new § 3729(a)(1) language to predate the *Allison Engine* decision by two days, effectively overturning it.<sup>129</sup> Given Congress’s concern and purpose, it was appropriate for Congress to take steps to realign the statute’s terms more explicitly with its underlying intent and the legislative purpose of combating persistent fraud against the federal fisc and to do so retrospectively to undo the incorrect interpretation of the Act’s scope under *Allison Engine*.<sup>130</sup> This ameliorative legislation to protect the treasury, consistent with the False Claims Act’s long-standing purposes, is fully consistent with the due-process requirement that retrospective legislation rationally serve a legitimate legislative purpose.

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Congress characterizes the amendment as a “clarification” of existing law or a “substantive change” to existing law is completely without consequence from a constitutional perspective. See *Lundeen*, 532 F.3d at 289; see also *Porter v. Comm’r*, 856 F.2d 1205, 1209 (8th Cir. 1988) (“Our objective in interpreting a federal statute is to achieve the intent of Congress.”).

128. S. REP. NO. 111-10, at 11.

129. *Lundeen*, 532 F.3d at 691 (“Congress can rationally decide to pick an effective date for legislation which will address the particular event which attracted its attention.”). *Pension Benefit Guar. Corp.*, 467 U.S. at 731 (quoting *United States v. Darusmont*, 449 U.S. 292, 296–97 (1981) (per curiam)) (“[T]he enactment of retroactive statutes ‘confined to short and limited periods required by the practicalities of producing national legislation . . . is a customary congressional practice.’”).

130. It is further appropriate for the amendments to affect the outcome of pending cases. See *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995) (making it clear that Congress possesses the power to amend existing law even if it affects the outcome of pending cases); *id.* at 225–26 (noting that the separation-of-powers doctrine could be violated when Congress tries to apply a new law to a case that has already reached a final judgment). Even then, however, “Congress can always revise the judgments of Article III courts in one sense: When a new law makes clear that it is retroactive, an appellate court must apply that law in reviewing judgments still on appeal that were rendered before the law was enacted, and must alter the outcome accordingly.” *Id.* at 226.

## VII. CONCLUSION

As discussed in this Article, the False Claims Act serves a vital function in the United States's arsenal against fraud on government programs. The Act has been amended numerous times and has been the subject of numerous constitutional challenges, including the latest challenge based on the prohibition against ex post facto laws. Thus far, the False Claims Act has escaped unscathed, and that should be its fate once again.

For the reasons set forth in this Article, the False Claims Act, as amended by FERA in 2009, does not constitute an ex post facto law and does not otherwise violate due process. Accordingly, retrospective application of the statute should be given full effect by the courts.