

Government Contracts Blog

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Federal Court Limits Retroactive Application of FCA Amendments

Congress [recently expanded](#) contractors' liability under the civil False Claims Act (FCA). The substantive changes include eliminating the presentment requirement, adding liability for claims seeking non-United States funds, expanding the scope of reverse false claims and conspiracy liability, and eliminating the intent requirement for conspiring to violate the FCA and for using false statements material to a false claim.

In a possibly unconstitutional rebuke of the Supreme Court, Congress attempted to make the changes to false statement liability retroactive to June 7, 2008. Even more brazenly, the [Congressional Record](#) argues that the other substantive amendments (except for conspiracy) do not actually expand liability; rather, they "merely clarify" the proper interpretation of the pre-amendment FCA. Thus, Congress argues, "courts should rely on these amendments to clarify the existing scope of False Claims Act liability, even if the alleged violation occurred before the enactment of these amendments."

In the first test of Congress's "an amendment is not an amendment" argument, a [federal district court](#) found that the substantive changes cannot be applied retrospectively. The court applied rules of statutory construction (not constitutional principles) and focused on whether the amendments would "reach back in time and alter the [parties'] rights or obligations." Because the amendments make it easier for plaintiffs to prove their case, the court concluded that they "would increase [the] defendant's liability for past conduct."

Where there are retroactive effects on a defendant's liability, the court stated that it would not apply the amendments retrospectively unless Congress made its intent clear and unambiguous. The statute does not mention retroactivity for the substantive amendments (with one exception noted below); on the other hand, the Congressional Record argues in favor of retroactivity. This disparity caused ambiguity, and the court therefore rejected Congress and determined that the amendments cannot apply retrospectively to past conduct. The lesson to Congress is clear: if you want to retroactively expand liability, you must explicitly do so in the statute. (And that would only help a retroactivity provision survive statutory construction; constitutionality is another issue.)

There is one caveat to the court's decision: although it specifically discussed the amendments to false statement liability, the court neglected to mention the express retroactivity provision for that change. Nevertheless, the analysis remains valid for the claimed retroactivity of the other

substantive amendments (listed in the first paragraph of this article), none of which are declared retroactive by the statute.

Authored by:

[Robbie Hurwitz](#)

(213) 617-5476

rhurwitz@sheppardmullin.com