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FOCUS & FORUM • Nov. 19, 2007

## Watching Waste

### FORUM COLUMN

By Mark Labaton

Arthur Miller, the playwright best known for "Death of a Salesman," first made his mark on Broadway in 1947 with "All My Sons," a piercing World War II-era drama about greed, disillusionment and shattered dreams. Underlying these themes is the story of George Deever, a contractor who sells defective airplane cylinder heads to the military. The result: American pilots die because Deever cut corners.

Although fictional, "All My Sons" illustrates the excesses of wartime profiteering, including both the monetary and human costs. It also demonstrates the need for the False Claims Act, which detects, punishes and deters fraud committed by government contractors. Such fraud costs taxpayers billions of dollars and often endangers public safety.

The FCA empowers whistle-blowers to bring lawsuits on behalf of the government against military, health care and other contractors who defraud federal agencies.

The act imposes stiff financial penalties on contractors who submit fraudulent claims. And, as an incentive to initiate FCA lawsuits, whistle-blowers receive rewards of between 15 and 30 percent of any recovery, depending largely on the value of their services.

Also known as the Lincoln Law, Congress enacted the FCA during the Civil War, when profiteers sold the Union Army uniforms that shred in the rain, sawdust that they passed off as gun powder, and diseased mules and horses that were supposed to be fit for use in battle.

During World War II, Congress eviscerated the FCA to accelerate the military buildup. The FCA lost its effectiveness; hence, the timeliness of "All My Sons."

Later, in 1986, at the height of the Cold War, a bipartisan coalition led by Sen. Charles Grassley, R-Iowa, and Rep. Howard Berman, D-Calif., amended the FCA again.

At that time, contractors overcharged for sophisticated weapon systems and for garden-variety hardware. Headlines about \$400 hammers, \$600 toilet seats and \$1,000 coffee makers generated public outrage - and, in turn, legislation to put some teeth back into the FCA.

Congress revived the FCA to increase the opportunities for whistle-blowers to attack misconduct by government contractors, largely by: a) removing certain barriers to bringing actions that had been imposed during World War II; b) increasing whistle-blower rewards; and c) enhancing protections against employer retaliation.

Since then, the U.S. Treasury has recovered more than \$20 billion from FCA cases. The largest recoveries have come from military, pharmaceutical and health care contractors. Meanwhile, the FCA has deterred contractors inclined to defraud the government, resulting in savings to the taxpayers estimated by watchdog groups and the Department of Justice at several hundred billion dollars.

The trend from the Civil War to the present is clear: Wars often foster changes in the whistle-blower laws. Iraq is proving no different.

Sparked partly by stories of fraud committed by contractors in Iraq, Grassley and Sen. Richard Durbin, D-Ill., are now sponsoring the FCA Corrections Act of 2007.

Introduced in September, this legislation is winding its way through the Senate Judiciary Committee, which will soon schedule hearings.

Fraud in Iraq has been substantial. Stuart Bowen, the special inspector general of Reconstruction of Iraq, testified before Congress that rebuilding Iraq's infrastructure has failed despite more than \$100 billion expended by the United States. Other government officials estimate that more than \$10 billion in federal funds remains

entirely unaccounted for because of poor oversight, malfeasance and fraud.

The FCA Corrections Act of 2007 aims to strengthen the FCA. It would:

Reverse this year's Supreme Court decision in *Rockwell International Corp. v. United States*, which eliminated certain awards for whistle-blowers when the information they provide to the Department of Justice is expanded upon by the government. Although the whistle-blower in *Rockwell*, James Stone, spent 18 years pursuing his FCA case, the Supreme Court held that he nonetheless was not entitled to any whistle-blower reward simply because the government expanded its theory of liability beyond the information he provided. The new legislation gives similarly situated whistle-blowers greater opportunities to obtain rewards.

Remove the requirement imposed by some courts that entities can only be liable under the FCA for false claims that they directly present to a government agency. Most prominently, the District of Columbia Court of Appeals held in *U.S. ex rel. Totten v. Bombardier Corporation* that the government could not recover penalties from contractors who allegedly supplied inferior goods to the railroad company, Amtrak, because Amtrak is not a government agency. It didn't matter that virtually its entire funding came from the federal government.

Chief Justice of the United States John Roberts wrote the majority decision in *Totten* while on the District of Columbia Court of Appeals, prior to his elevation to the Supreme Court. This decision and similar ones make it harder to bring FCA cases against subcontractors and others who might misappropriate federal funds without directly submitting false claims to a federal agency.

Critics of the *Totten* decision think it ignores or misreads certain portions of the FCA, along with that statute's legislative intent. And, according to Judge Merrick Garland, who dissented in *Totten*, the opinion "leaves vast sums of federal monies" without FCA protection. The new legislation ensures such funds would be subject to the FCA.

The Supreme Court also regards the legal issues raised in *Totten* and similar cases as important. Late last month it decided to grant certiorari and hear *United States ex. rel. Sanders v. Allison Engine Corp.* in its 2008 term. In *Sanders*, the 6th Circuit decided the same issue in favor of the whistle-blower. If Congress fails to pass the proposed section of the FCA Corrections Act addressing this concern, the Supreme Court will presumably establish a national standard that will govern cases like *Totten* and *Sanders*. If, however, Congress adopts the measure, the case before the Supreme Court should become mooted, with the new legislation carrying the day. The legislation will:

Clarify that the FCA applies to funds controlled by the United States in Iraq, such as the Coalition Provisional Authority. A Virginia district court in *U.S. ex rel. DRC, Inc. v. Custer Battles* held that the FCA does not apply to these funds.

Clarify when a government employee who acts within the chain of command could become a whistle-blower.

Expand the FCA statute of limitations to 10 years. Currently, it generally is six years.

The FCA Corrections Act of 2007 has garnered strong congressional bi-partisan support. Meanwhile, the interest groups that historically have sought to weaken the FCA have not yet taken a public stand on this proposed legislation. Neither has the Bush administration, which supported the whistle-blowers in *Rockwell* and *Sanders*.

While the proposed new amendments would clearly strengthen the FCA, the act, no doubt, has come a long way since the days of World War II and the Cold War. History shows that the amendments in 1986 turned it into a robust statute.

"All My Sons" takes place during and immediately after World War II (between 1943 to 1947), which was the low ebb of FCA enforcement. If this play were a documentary, how would it end today? Perhaps a whistle-blower would have reported Deever before those airmen died. Or perhaps, fearing exposure, he would not have sold the defective cylinders. One can speculate about a less tragic ending - an outcome that is a possibility because of the FCA.

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