

Fraud Enforcement and Recovery Act of 2009 (FERA)

On April 28, 2009 the US Senate passed the Fraud Enforcement and Recovery Act (FERA, S. 386), a bipartisan bill co-sponsored by Patrick Leahy (D-VT) and Chuck Grassley (R-IA). While the bill primarily focuses on expanding government resources to combat fraud in the housing and mortgage arena, it also expands the scope of the False Claims Act (FCA).¹ On May 6, 2009, the House of Representatives approved the bill with a few textual changes to the FCA provisions. On May 14, 2009, the Senate concurred with the House of Representatives' textual changes and the bill will be sent to President Obama for his signature.²

FERA changes the definition of "*knowingly*" used in the FCA to ensure the definition is more in line with the intent of the law. In *Allison Engine v. US*, the Supreme Court held that the FCA requires prosecutors to prove that "*a defendant must intend that the Government itself pay the claim,*" excluding subcontractors from liability for claims if they intended to defraud only the general contractor.³ FERA co-sponsor Chuck Grassley called the decision in the Allison-Engine ruling a "*loophole*" that would allow those who violated the FCA to avoid responsibility for their actions.⁴ If FERA is enacted, the bill will overturn the Supreme Court's definition of "*knowingly*" and it will be redefined as a person who "*1) has actual knowledge of the information; 2) acts in deliberate ignorance of the truth or falsity of the information; or, 3) acts in reckless disregard of the truth or falsity of the information.*" Further, the government's burden of proof will be reduced as it will not be required to provide "*proof of specific intent to defraud.*"⁵

FERA also expands the definition of "*claim*" to include any request for money or property offered to a government employee or official as well as requests to contractors working on behalf of the government.⁶ The expanded definition would also include *any* attempt to fraud the government regardless of whether the government is currently in possession of the money or whether the accused party intended to defraud the government.⁷ Further, changes proposed by the House of Representatives clarified that organizations are only liable if they "*knowingly*" retained improper payments, as opposed to the Senate's original wording that imposed liability for the mere acceptance of overpayment.⁸

Several recent decisions highlight the effects these changes would have in expanding the net the FCA uses to catch those who are involved in making fraudulent claims and strengthening the legal framework already in use. Although several companies have unsuccessfully claimed that they were unaware they were causing false claims to be filed with Medicare, at least one physician has been dismissed from a FCA suit under this theory.⁹ The American Hospital Association and eleven [11] other organizations have expressed concern that the bill's retroactivity could complicate pending cases where action has already been taken under the old interpretation of the law, and that the new language could be interpreted too broadly, imposing liability on recipients of federal funds who shouldn't be subject to the FCA's damage provisions.¹⁰ An overly expansive interpretation of the new provisions could find almost anyone making false statements or claims to a Medicare provider liable on the theory that the fees charged or claims made are included in the hospitals cost reports made to the federal government.¹¹

Co-sponsor of the bill, Senator Leahy asserts that the broadened definitions of the FCA will bring the United States one step closer to successfully prosecuting individuals who have defrauded the government and harmed the U.S. economy.¹² According to Senators Leahy and Grassley, the FCA has assisted the government in recovering \$15 billion since 2000, for a total of \$22 billion since its enactment in 1986. Therefore, an expansion of its scope will likely uncover more fraudulent activities and return money to the government.¹³

The bill has received support from the Obama Administration, the FBI, and the Inspector General of the Department of Housing and Urban Development.¹⁴ The Obama administration "*strongly supports*" the bill, adding that the amendments to the FCA would ensure the FCA is a "*potent and useful weapon against the misuse of taxpayer funds.*"¹⁵

¹ Sec. 4 Clarifications to the False Claims Act to Reflect the Original Intent of the law," United States Senate, Fraud Enforcement and Recovery Act S.386, April 2009, <http://thomas.loc.gov/cgi-bin/query/F?c111:3:./temp/~c111f3yFGF:e10867>: (Accessed 5/01/09)
² "S. 386," The Library of Congress, May 14, 2009, <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:s.00386>: (Accessed 5/18/09)

(Continued from previous page)

³ “Allison Engine Co, Inc et al. vs. United States ex rel Sanders et al.,” By the United States Supreme Court, No. 07-214, June 9, 2008, <http://www.supremecourt.us/opinions/07pdf/07-214.pdf> (Accessed 5/1/09)

⁴ “False Claims Act and Fraud Enforcement,” By Senator Chuck Grassley, Prepared Statement for Senate Floor Debate on FERA, April 20, 2009, http://grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=20209 (Accessed 5/01/09)

⁵ “Sec. 4 Clarifications to the False Claims Act to Reflect the Original Intent of the law,” United States Senate, Fraud Enforcement and Recovery Act S.386, April 2009, <http://thomas.loc.gov/cgi-bin/query/F?c111:3:./temp/~c111f3yFGF:e10867>: (Accessed 5/01/09)

⁶ “Sec. 4 Clarifications to the False Claims Act to Reflect the Original Intent of the law,” United States Senate, Fraud Enforcement and Recovery Act S.386, April 2009, <http://thomas.loc.gov/cgi-bin/query/F?c111:3:./temp/~c111f3yFGF:e10867>: (Accessed 5/01/09)

⁷ “Fraud Recovery Bill Has Healthcare Implications,” By Ben Amirault, Healthleaders Media, April 29, 2009

⁸ “Letter to the United State Senate,” American Hospital Association, April 21, 2009, <http://www.aha.org/aha/letter/2009/090421-FCA-Sen-ltr.pdf>

⁹ “USA ex. rel. Barlett v. Tyrone Hospital, Inc.” By the United States District Court for the W. District of Pennsylvania, 2009 U.S. Dist. LEXIS 31609, April 14, 2009, pg. 3-4.

¹⁰ AHA letter to Patrick Leahy and Arlen Specter, March 5th 2009.

¹¹ “USA ex. Rel. Katy Kennedy v. Aventis Pharmaceuticals, Inc.” By the United States District Court for the N. District of Illinois, E. Division, 2009 U.S. Dist. LEXIS 34107, April 20, 2009, pg. 4-5.

¹² “Closing Statement of Senator Patrick Leahy (D-Vt), Chairman, Senate Judiciary Committee, On S. 386, The Fraud Enforcement and Recovery Act of 2009,” By Senator Patrick Leahy, United States Senate, April 28, 2009, <http://leahy.senate.gov/press/200904/042809c.html> (Accessed 5/01/09)

¹³ “Closing Statement of Senator Patrick Leahy (D-Vt), Chairman, Senate Judiciary Committee, On S. 386, The Fraud Enforcement and Recovery Act of 2009,” By Senator Patrick Leahy, United States Senate, April 28, 2009, <http://leahy.senate.gov/press/200904/042809c.html> (Accessed 5/01/09); “False Claims Act and Fraud Enforcement,” By Senator Chuck Grassley, Prepared Statement for Senate Floor Debate on FERA, April 20, 2009, http://grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=20209 (Accessed 5/01/09)

¹⁴ “Leahy-Authored Anti-Fraud Bill Overwhelmingly Passes Senate,” By the Office of Senator Leahy, United States Senate, April 28, 2009, <http://leahy.senate.gov/press/200904/042809c.html> (Accessed 5/01/09)

¹⁵ “Statement of Administration Policy: S.386 – Fraud Enforcement and Recovery Act of 2009,” By the Executive Office of the President Office of Management and Budget, April 20, 2009, <http://whistleblowers.nonprofitsoapbox.com/storage/whistleblowers/documents/saponfraudact.pdf> (Accessed 5/01/09)



(800) FYI - VALU

*Providing Solutions
in the Era of
Healthcare Reform*

Founded in 1993, HCC is a
nationally recognized healthcare
economic financial consulting firm

- [HCC Home](#)
- [Firm Profile](#)
- [HCC Services](#)
- [HCC Experts](#)
- [Clients Projects](#)
- [HCC News](#)
- [Upcoming Events](#)
- [Contact Us](#)
- [Email Us](#)

HEALTH CAPITAL CONSULTANTS (HCC) is an established, nationally recognized healthcare financial and economic consulting firm headquartered in St. Louis, Missouri, with regional personnel nationwide. Founded in 1993, HCC has served clients in over 45 states, in providing services including: valuation in all healthcare sectors; financial analysis, including the development of forecasts, budgets and income distribution plans; healthcare provider related intermediary services, including integration, affiliation, acquisition and divestiture; Certificate of Need (CON) and regulatory consulting; litigation support and expert witness services; and, industry research services for healthcare providers and their advisors. HCC's accredited professionals are supported by an experienced research and library support staff to maintain a thorough and extensive knowledge of the healthcare reimbursement, regulatory, technological and competitive environment.



Robert James Cimasi, MHA, ASA, FRICS, MCBA, AVA, CM&AA, serves as President of **HEALTH CAPITAL CONSULTANTS (HCC)**, a nationally recognized healthcare financial and economic consulting firm headquartered in St. Louis, MO, serving clients in 49 states since 1993. Mr. Cimasi has over thirty years of experience in serving clients, with a professional focus on the financial and economic aspects of healthcare service sector entities including: valuation consulting and capital formation services; healthcare industry transactions including joint ventures, mergers, acquisitions, and divestitures; litigation support & expert testimony; and, certificate-of-need and other regulatory and policy planning consulting.

Mr. Cimasi holds a Masters in Health Administration from the University of Maryland, as well as several professional designations: Accredited Senior Appraiser (ASA – American Society of Appraisers); Fellow Royal Intuition of Chartered Surveyors (FRICS – Royal Institute of Chartered Surveyors); Master Certified Business Appraiser (MCBA – Institute of Business Appraisers); Accredited Valuation Analyst (AVA – National Association of Certified Valuators and Analysts); and, Certified Merger & Acquisition Advisor (CM&AA – Alliance of Merger & Acquisition Advisors). He has served as an expert witness on cases in numerous courts, and has provided testimony before federal and state legislative committees. He is a nationally known speaker on healthcare industry topics, the author of several books, the latest of which include: *“The U.S. Healthcare Certificate of Need Sourcebook”* [2005 - Beard Books], *“An Exciting Insight into the Healthcare Industry and Medical Practice Valuation”* [2002 – AICPA], and *“A Guide to Consulting Services for Emerging Healthcare Organizations”* [1999 John Wiley and Sons].

Mr. Cimasi is the author of numerous additional chapters in anthologies; books, and legal treatises; published articles in peer reviewed and industry trade journals; research papers and case studies; and, is often quoted by healthcare industry press. In 2006, Mr. Cimasi was honored with the prestigious *“Shannon Pratt Award in Business Valuation”* conferred by the Institute of Business Appraisers. Mr. Cimasi serves on the Editorial Board of the Business Appraisals Practice of the Institute of Business Appraisers, of which he is a member of the College of Fellows.



Todd A. Zigrang, MBA, MHA, ASA, FACHE, is the Senior Vice President of **HEALTH CAPITAL CONSULTANTS (HCC)**, where he focuses on the areas valuation and financial analysis for hospitals and other healthcare enterprises. Mr. Zigrang has significant physician integration and financial analysis experience, and has participated in the development of a physician-owned multi-specialty MSO and networks involving a wide range of specialties; physician-owned hospitals, as well as several limited liability companies for the purpose of acquiring acute care and specialty hospitals, ASCs and other ancillary facilities; participated in the evaluation and negotiation of managed care contracts, performed and assisted in the valuation of various healthcare entities and related litigation support engagements; created pro-forma financials; written business plans; conducted a range of industry research; completed due diligence practice analysis; overseen the selection process for vendors, contractors, and architects; and, worked on the arrangement of financing.

Mr. Zigrang holds a Master of Science in Health Administration and a Masters in Business Administration from the University of Missouri at Columbia, and is a Fellow of the American College of Healthcare Executives. He has co-authored *“Research and Financial Benchmarking in the Healthcare Industry”* (STP Financial Management) and *“Healthcare Industry Research and its Application in Financial Consulting”* (Aspen Publishers). He has additionally taught before the Institute of Business Appraisers and CPA Leadership Institute, and has presented healthcare industry valuation related research papers before the Healthcare Financial Management Association; the National CPA Health Care Adviser's Association; Association for Corporate Growth; Infocast Executive Education Series; the St. Louis Business Valuation Roundtable; and, Physician Hospitals of America.



Anne P. Sharamitaro, Esq., is the Vice President of **HEALTH CAPITAL CONSULTANTS (HCC)**, where she focuses on the areas of Certificate of Need (CON); regulatory compliance, managed care, and antitrust consulting. Ms. Sharamitaro is a member of the Missouri Bar and holds a J.D. and Health Law Certificate from Saint Louis University School of Law, where she served as an editor for the Journal of Health Law, published by the American Health Lawyers Association. She has presented healthcare industry related research papers before Physician Hospitals of America and the National Association of Certified Valuation Analysts and co-authored chapters in *“Healthcare Organizations: Financial Management Strategies,”* published in 2008.