UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

United States Department of Housing and Urban Development, Plaintiff, v. Graham Start, Defendant.	HUDALJ 93-2038-PF Decided: March 25, 1994

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For the Defendant

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For the Department

Before: Paul G. Streb
Administrative Law Judge

INITIAL DECISION

STATEMENT OF THE CASE

The United States Department of Housing and Urban Development ("HUD" or "Government") seeks an assessment and a civil penalty against Graham Start ("Defendant"), pursuant to the Program Fraud Civil Remedies Act of 1986 ("PFCRA" or "Act"), 31 U.S.C. §§ 3801-3812, and the implementing regulations, 24 C.F.R. Part 28. HUD alleges that in June and July of 1986, Defendant knowingly and willfully participated in a scheme to defraud HUD by making false statements in documents used to obtain FHA-insured mortgages on seven residential properties; upon his default, HUD was required to pay the lender's mortgage insurance claims.

Defendant has filed a Motion To Dismiss the Complaint on the ground that the PFCRA does not apply to the conduct in which he is alleged to have engaged. He argues that any such conduct occurred before the PFCRA was enacted (October 21, 1986), and that Congress did not intend the PFCRA to be applied retroactively. In its Opposition to the

motion, the Government argues that the PFCRA covers Defendant's pre-Act conduct because the mortgage insurance claims that he caused HUD to pay were made after the PFCRA was enacted.

ANALYSIS, FINDINGS, AND CONCLUSIONS

Threshold Issues

Resolution of the issue raised in Defendant's motion first requires identification of both the conduct that he is alleged to have engaged in, and the statutory provisions that he is alleged to have violated by engaging in such conduct. The Complaint alleges that on or about June 17, 1986, Defendant made false statements in Forms HUD-92900 submitted in conjunction with each transaction; he allegedly misrepresented his financial information and falsely asserted that the properties were leased for $425 per month. The Complaint alleges further that on or about July 1, 1986, Defendant made false statements in Forms HUD-1 submitted in conjunction with each transaction; he allegedly misrepresented that he made his downpayment by use of a promissory note. It is alleged that the mortgages later went into default, causing HUD to pay mortgage insurance claims that were submitted by the lender.

The Government alleges that Defendant's conduct was in violation of 31 U.S.C. § 3802(a)(1), which creates liability when:

> Any person . . . makes, presents, or submits, or causes to be made, presented, or submitted, a claim that the person knows or has reason to know --
>
> (A) is false, fictitious, or fraudulent;
> (B) includes or is supported by any written statement which asserts a material fact which is false, fictitious, or fraudulent;
> (C) includes or is supported by any written statement that --
> (i) omits a material fact;
> (ii) is false, fictitious, or fraudulent as a result of such omission; and
> (iii) is a statement in which the person making, presenting, or submitting such statement has a duty to include such material fact; or
> (D) is for payment for the provision of property or services which the person has not provided as claimed. . .

Although the Government has not identified the subsection or subsections of § 3802(a)(1) allegedly violated by Defendant, subsection (B) is the only one that could apply.

Subsection (C) is not applicable because there is no allegation of an omission of any facts; subsection (D) is not applicable because the claim did not involve property or services. The Government's statement of the issue in its Opposition to the Motion to Dismiss suggests that the Government may believe that subsection (A) applies. The Government asserts that the issue is "whether 31 U.S.C. § 3802(a)(1) creates liability for a *false* claim submitted after the effective date of the statute . . . where such claim was caused by a false statement submitted prior to that date." (Emphasis added). Thus, the Government believes that the lender's claim was rendered false by the false statements of the Defendant which supported the claim.

However, when this matter is analyzed, it becomes clear that subsection (A) is not applicable. In this regard, I agree with the reasoning in *HUD v. Robertson* (HUDALJ 93-2008-PF, Dec. 20, 1993), an Order of another judge of this tribunal addressing the same issue that is presented in Defendant's motion. The Government's theory in both *Robertson* and the instant case is that HUD paid FHA mortgage insurance claims that the Defendants caused to be made, and that those claims were supported by the false, fictitious, or fraudulent statements made by the Defendants to obtain the insurance. The Complaint in the instant case covers a little more than seven pages. Most of it addresses the FHA mortgage insurance program and the statements that Defendant allegedly made. The term "claim" first appears in paragraph 29 on page six, which reads, "Defendant participated in a scheme to defraud HUD by knowingly presenting or causing to be presented false or fraudulent claims and by knowingly making, using or causing to be made or used false and fraudulent documents and statements to obtain FHA mortgage insurance for the subject properties." Nowhere else in the Complaint is there a suggestion that Defendants in fact *presented* false claims, quite a different charge than *causing* claims to be presented. *See Robertson* at 13-14.

Paragraphs 31 and 32 apparently more accurately reflect the facts. Those paragraphs read as follows:

> 31. Defendant knowingly made, used, or caused to be made, used false documents, [*sic*] or statements which resulted in a false claim being made, submitted and presented to HUD.
>
> 32. Causing a false claim to be made, presented or submitted to HUD creates liability under the PFCRA, 31 U.S.C. § 3802(a)(1).

The Government argues that if false or fraudulent statements are made to acquire FHA mortgage insurance, later claims on that insurance are necessarily also false or fraudulent. "Counsel's position on this matter not only ignores the plain language of the statute, but it also violates a fundamental rule of statutory construction, and does nothing to further the Government's cause." *Robertson* at 14. As was explained in *Robertson* at 14-16:

> Although clearly separate, the four categories of claims are not mutually exclusive. For example, a claim supported by a false, fictitious, or fraudulent written statement is itself false, fictitious, or fraudulent if the statement was made by the claimant. Such a case would fall within

both subsection (A) and subsection (B). But not every case involves a false, fictitious, or fraudulent *claim*. There may be cases, such as the instant case, where the claim is caused by, based on, and supported by a statement that is false, but the false statement was not made by the claimant, an innocent third party. Such cases fall within the plain language of subsection (B), but do not fall within the plain language of subsection (A). Despite the plain language of the statute, counsel for the Government argue to the effect that every case involving a claim supported by a false, fictitious, or fraudulent statement falls within subsection (A). This argument ignores the distinction between subsection (A) and subsection (B) and makes subsection (A) superfluous and redundant. In other words, according to the Government's line of reasoning, subsection (A) could be deleted from the PFCRA without changing the statute's effect. That reasoning violates a fundamental canon of statutory construction. As stated in 2A *Sutherland Stat. Const.* § 46.06 (4th ed. 1984):

> It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute. A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error.

Unlike in the PFCRA, in the False Claims Act the word "claim" is consistently modified by the adjectives "false" or "fraudulent."[1] If Congress had wanted to make a false or fraudulent claim the essential predicate for an assessment in the PFCRA, it could have easily and efficiently done so by inserting the words "false or fraudulent" before the word "claim" in the introductory sentence in § 3802(a)(1). By failing to use the language of the False Claims Act as a model, Congress obviated the need to plead and prove a "false or fraudulent" claim in PFCRA cases where a false statement causes or supports a claim that HUD paid

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[1]Section 3729 regarding false claims provides:

> (a) **Liability for certain Acts.** -- Any person who --
> (1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a *false or fraudulent claim* for payment or approval;
> (2) 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;
> (3) conspires to defraud the Government by getting a *false or fraudulent claim* allowed or paid . . . .

> to an innocent party. Thus, the False Claims Act cases cited by the Government where courts have construed claims made by innocent third parties as "false" for purposes of the False Claims Act are inapposite. This interpretation of the statute avoids creating the unnecessary legal fiction that a claim is false and fraudulent for purposes of the PFCRA but legitimate for purposes of payment to the claimant.
>
> The Government's argument regarding the proper characterization of "claim" does nothing to advance the Government's cause. As shown above, under the circumstances of this case, it is not necessary to label claims "false" or "fraudulent" in order for the statements and the claims to fall within subsections 3802(a)(1)(B) or (C) and justify assessments. The Complaint may state a cause of action without characterizing the claims as "false" or "fraudulent." Jurisdiction is not conferred upon this tribunal by appending the adjectives "false" or "fraudulent" to the word "claim."

Thus, the applicable provision is § 3802(a)(1)(B), which imposes liability on "[a]ny person who . . . causes to be made . . . a claim that the person . . . has reason to know . . . is supported by any written statement which asserts a material fact which is false . . ." In this case, Defendant allegedly caused the lender to make a claim after the PFCRA's enactment which he had reason to know was supported by his false statements on HUD forms submitted prior to the PFCRA's enactment to obtain the loan. Stated concisely, his alleged conduct under § 3802(a)(1)(B) was the making of false pre-Act statements that resulted in the filing of a legitimate post-Act claim by the lender.

Dispositive Issue

Statutory Language

The remaining issue -- and the dispositive one -- is whether Defendant's pre-Act conduct is actionable. Congress addressed the issue of whether the PFCRA would operate prospectively or retroactively in § 6104 of Pub. L. 99-509 (a note following § 3801 of the PFCRA), which states:

> This subtitle and the amendments made by this subtitle shall take effect on the date of the enactment of this Act [October 21, 1986], and shall apply to any claim or statement made, presented, or submitted on or after such date.

"[T]he starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). The meaning of § 6104 is clear: the PFCRA applies only to claims or statements made after October 21, 1986. When the two clauses of that section are viewed

together, their language can have only that meaning. The first clause -- "[The PFCRA] shall take effect on the date of the enactment of this Act" -- identifies the date when the Act begins to apply. The second clause -- "[The PFCRA] shall apply to any claim or statement made, presented, or submitted on or after such date" -- identifies the conduct to which the Act applies.

The essence of Defendant's alleged conduct was the making of false "statements" prohibited by § 3802(a)(1)(B). It is undisputed that each of Defendant's alleged statements is within the Act's definition of the term "statement."[2] Congress did not define that term differently for the purposes of § 6104 than for the purposes of § 3802(a)(1)(B). Section 6104 mandates that, "[The PFCRA] shall apply to any . . . statement made . . . on or after" October 21, 1986. The thrust of § 6104 is solely prospective. Congress created no exceptions from its prospective language so as to provide coverage of certain statements made prior to October 21, 1986. The Government does not allege that the Defendant's statements were made on or after October 21, 1986; rather it alleges that they were made before that date. Therefore, his statements are not covered by the prohibition of § 3802(a)(1)(B).

The Government argues that there is jurisdiction in this case because § 6104 specifically covers claims filed after October 21, 1986, and the claim by the lender was filed after that date. However, that argument does not address the issue presented here. Defendant's motion raises the issue of whether his *statements* fall within the reach of the statute. Jurisdiction over Defendant cannot be found simply because this tribunal has subject-matter jurisdiction over post-Act claims allegedly caused by him. In order for the Government to prevail, there must be subject-matter jurisdiction over Defendants' pre-Act statements as well. The Government's argument that Defendants' conduct is irrelevant to the retroactivity issue simply begs the question raised by his motion: did Defendant engage in conduct within the reach of the PFCRA? Except for vicarious liability, it is axiomatic that the law makes only *conduct* actionable. *See Robertson* at 4 n.6; 5; 6 n.9.

Although I agree in many respects with *Robertson*, I believe that it is appropriate at this juncture to explain my disagreement with one of its conclusions -- that § 6104 is latently

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[2] The Act's broad definition of the term "statement" includes "any representation . . . made . . . with respect to (including relating to eligibility for) a . . . loan . . . from . . . [a] party, . . . if the Government will reimburse such . . . party for any portion of the money . . . for such . . . loan." 31 U.S.C. § 3801(a)(9).

ambiguous.[3] As pointed out in *Robertson,* it is true that the first clause of that section -- "[The PFCRA] shall take effect on the date of the enactment of this Act" -- has been found to be ambiguous when contained in other statutes. *See, e.g., Mozee v. American Commercial Marine Serv. Co.*, 963 F.2d 929, 933 (7th Cir.), *cert. denied,* 113 S.Ct. 207 (1992). Those findings were based on the fact that the first clause could have two meanings. Standing alone, the first clause could be taken to mean that Congress intended the statute to apply prospectively only -- that is, to conduct occurring after enactment; that clause could also be taken to mean that the Act may be applied both prospectively and retroactively -- that is, to cases filed after the date of enactment, irrespective of whether the conduct addressed by the cases occurred before or after the date of enactment.

However, that clause does not stand alone in § 6104; it is linked to the second clause in that section. The statutes found to be ambiguous in *Mozee* and similar cases did not contain the language in the second clause of § 6104. There is no ambiguity in the first clause of § 6104 when it is viewed in its proper context, i.e., in conjunction with the second clause. *See Estate of Reynolds v. Martin*, 985 F.2d 470, 473 (9th Cir. 1993) (potential ambiguity of the phrase "take effect upon enactment" disappears when construed *in pari materia* with other sections of the statute). As discussed above, when the clauses are viewed together, the first clause can not be read as identifying the conduct to which the Act applies; that is the function of the second clause. The first clause -- "[The PFCRA] shall take effect on the date of the enactment of this Act" -- identifies the date when the Act begins to apply. The second clause -- "[The PFCRA] shall apply to any claim or statement made, presented, or submitted on or after such date" -- identifies the conduct to which the Act applies.

Any other construction of § 6104 would violate basic principles of statutory construction. Specifically, if the first clause were construed as meaning that the Act applies to conduct occurring after enactment, the second clause -- which specifically states that the Act "shall apply" to conduct occurring "on or after" its enactment -- would be surplusage. *See* 2A *Sutherland Stat. Const.* § 46.06 (4th ed. 1984) (quoted above). Moreover, if the first clause were construed as meaning that the Act applies to cases filed after enactment -- some of which could involve statements made before enactment -- it would be inconsistent with the language of the second clause, which makes it clear that "[The PFCRA] shall apply to any . . . statement made . . . on or after" enactment.

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[3] Upon finding that § 6104 is ambiguous, the judge concluded that the PFCRA may be applied retroactively to Robertson's pre-Act statements. He reached that conclusion by applying the rule in *Bradley v. Richmond Sch. Bd.*, 416 U.S. 696, 711 (1974), that, "[A] court is to apply a law in effect at the time it renders its decision, unless doing so would result in a manifest injustice or there is a statutory direction or legislative history to the contrary." He harmonized that presumption with the one in *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988), that:

> Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.

Furthermore, contrary to the finding in *Robertson*, no ambiguity is created by the fact that § 6104, in contrast to § 3802(a)(1), does not include the phrase, "causes [a claim] to be made, presented, or submitted" -- the conduct with which the Defendant is charged. The absence of such language in § 6104 makes no difference regarding the retroactivity issue in the present case and all other cases under § 3802(a)(1)(B). All cases under that section necessarily involve a "statement." Therefore, they are covered by § 6104, by virtue of that section's specific provision that the Act applies to "statements" made on or after October 21, 1986. Thus, the addition of the phrase, "causes [a claim] to be made, presented, or submitted," to § 6104 would have rendered it surplusage with respect to violations of § 3802(a)(1)(B).[4]

Moreover, contrary to the finding in *Robertson*, the wording of the second clause of § 6104 does not create any ambiguity or any suggestion that Congress intended it to operate retroactively. It is true that clause permits prosecution of claims submitted on the date the statute was enacted, and that many such claims would relate to events that occurred before enactment. For example, many false travel vouchers filed on October 21, 1986, would relate to travel that occurred prior to that date. However, "[a] statute is not retroactive merely because it draws upon antecedent facts for its operation." *Lewis v. Fidelity & Deposit Co. of Md.*, 292 U.S. 559, 571 (1934); *see, e.g., New York Central & Hudson River R.R. Co. v. United States,* 212 U.S. 500, 505-06 (1909) (where statute prohibited rebates of taxes on transportation of property, and rebate was paid after statute's effective date, statute not rendered retroactive due to fact that property was transported before enactment); *Reynolds v. United States*, 292 U.S. 443, 447-49 (1934) (where statute prohibited deductions from veteran's pension to pay hospital expenses, and deductions occurred after statute's effective date, statute not rendered retroactive due to fact that hospital expenses were incurred prior to effective date). Retroactive application of a statute occurs only when the conduct that it prohibits takes place before its enactment. As discussed above, Congress created no exceptions from the prospective thrust of § 6104 so as to cover the pre-Act conduct in the instant case.

The view was expressed in *Robertson* that there is ambiguity in § 6104 because Congress did not "clearly state whether a claim or statement that involves pre-act conduct falls within the reach of the statute." *Robertson* at 5. Concern was expressed that, "§ 6104 does not address cases where liability hinges on proof regarding *both* a statement and a claim, where the statement occurred before the effective date of the statute and the claim occurred after."

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[4] In its regulations implementing the PFCRA, HUD has defined the term "makes" in a manner that eliminates any difference between the act of causing a false claim to be made and the act of making a false claim. HUD has defined that term in 24 C.F.R. § 28.3 as follows:

> *Makes*, wherever it appears, shall include the term presents, and submits, and causes to be made, presented, or submitted. As the context requires, *making* or *made*, shall likewise include the corresponding forms of such terms.

Id. However, Congress' silence in that regard does not render § 6104 ambiguous. If Congress had been silent concerning the entire issue of the retroactivity/prospectivity of the PFCRA, I would agree that such silence would compel judicial resort to the application of a presumption to resolve that issue. *See, e.g., Luddington v. Indiana Bell Telephone Co.*, 966 F.2d 225, 227 (7th Cir. 1992) (retroactivity of Civil Rights Act of 1991).

However, Congress specifically addressed that issue in § 6104. It is acknowledged in *Robertson* that "the second clause of § 6104 *unequivocally* expresses a legislative intent that the Act shall apply *only* to claims or statements made after enactment of the statute." *Robertson* at 4-5. Congress was silent only insofar as it did not create an exception from that rule of prospective operation so as to provide coverage of the pre-Act conduct in the instant case. A finding that the PFCRA should operate retroactively to cover that conduct would constitute a judicially created exception to the rule set forth by Congress in § 6104. Even if Congress' omission of coverage of Defendant's conduct was inadvertent, coverage of that conduct can not be created judicially. As the Supreme Court has stated:

> What the Government asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope. To supply omissions transcends the judicial function.

West Virginia University Hospitals v. Casey, 499 U.S. 83, 101 (1991) (quoting *Iselin v. United States*, 270 U.S. 245, 250-51 (1926) (Brandeis, J.)).

Legislative History

The legislative history of the PFCRA does not reflect a legislative intention either to apply the Act retroactively or to make an exception from prospective application that would create coverage for Defendant's conduct. Thus, there is no "clearly expressed legislative intention . . . contrary" to the plain meaning of the Act. *See Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. at 108 (1980). In fact, the legislative history supports the view that Congress intended the Act to apply prospectively only.

The committee reports are silent on the retroactivity issue. *See* S. Rep. No. 99-212, 99th Cong., 1st Sess. (1985); H.R. Conf. Rep. No. 99-1012, 99th Cong., 2d Sess. (1986), *reprinted in* 1986 U.S.C.C.A.N. 3902-05. However, some evidence of legislative intent is contained in remarks of Congressmen Glickman and Berman comparing the retroactivity/prospectivity of the PFCRA to that of the False Claims Amendments Act (FCAA). The FCAA was enacted on October 27, 1986, six days after the PFCRA's enactment. In contrast to the PFCRA, the FCAA did not address the issue of whether that statute should be applied retroactively or prospectively. The Congressmen's remarks were prompted by their concern that some courts were not applying the FCAA retroactively. In this regard, Congressman Berman stated during a session of Congress that:

> As one of the [FCAA's] authors, I specifically raised the question whether it was necessary to include express language regarding retroactive application just to make clear Congress' intent. I concluded that, based on Supreme Court precedent, such express language was not necessary and that language should be added to the bill only if Congress intended it to apply prospectively. The Supreme Court ruled in [*Bradley v. Richmond Sch. Bd.*, 416 U.S. 696, 711 (1974)] that statutes are presumed to apply retroactively unless that would create a grave injustice or congressional intent was clearly to the contrary. In fact, *Bradley* expressly said that courts should presume that Congress intended retroactive application by its mere silence on the issue. It was therefore apparent that it was unnecessary to be explicit about retroactivity, as the courts would infer it from our silence.

Then Congressman Glickman, who introduced and managed the FCAA in the House, stated that:

> [O]ur reliance on the *Bradley* presumption is made pretty clear by the fact that around the same time as we enacted the [FCAA], we also enacted three other related statutes: the [PFCRA], . . . In each of the statutes, we expressly provided that each would apply only to conduct occurring after the new laws went into effect. Our decision to remain silent in the [FCAA] therefore represents a conscious decision to apply them to false claims predating the [FCAA].

133 Cong. Rec. 30,646 (Nov. 3, 1987).

Because these comments were made approximately one year after the PFCRA was enacted, they are not entitled to significant weight. However, one court has given consideration to these remarks in addressing the issue of the retroactivity of the FCAA. *United States Ex rel. La Valley v. First Nat'l. Bank of Boston,* 707 F. Supp. 1351, 1359-60 (D. Mass. 1988). Although the remarks were prompted by a concern about the retroactivity of the FCAA, Congress was drafting the FCAA and the PFCRA at the same time with full knowledge and consideration of the manner in which each statute was being drafted. During the process of drafting these statutes, at least one provision was included in the FCAA to make it conform to the PFCRA. "[L]anguage was added [to the FCAA] to further define the constructive knowledge definition so that it paralleled that found in [the PFCRA]." S. Rept. No. 345, 99th Cong., 2d Sess. 17 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5282. The drafters believed that "the definition of knowledge [in the FCAA] should not differ from the definition of knowledge for administrative adjudications [under the PFCRA]." *Id.* at 20. The House report on the FCAA, which was submitted by Congressman Glickman, shows that the version of the FCAA which he introduced provided that statute would both amend the False Claims Act and create the administrative remedy for false claims and statements that is now embodied in the PFCRA. H. R. Rep. No. 660, 99th Cong., 2d Sess. (1986) *passim.*

Although not conclusive, the remarks of these Congressmen, coupled with the other legislative history, constitute some evidence of the relationship between the PFCRA and the FCAA. While Congress intended those statutes to be alike in some respects, it intended them to be different regarding retroactivity. Congress intended the FCAA to operate retroactively; it intended the PFCRA to operate prospectively. Congressman Glickman's remark that Congress "expressly provided [in the PFCRA that it] would apply only to conduct occurring after [the PFCRA] went into effect" is consistent with the plain meaning of § 6104.

Court Decisions

It does not appear that any courts have addressed the issue presented in the instant case. However, while considering the issue of the retroactivity of the FCAA, two courts have stated, albeit in dictum, that the PFCRA is limited to prospective application. *United States v. Entin,* 750 F.Supp. 512, 516-17 (S.D. Fla. 1990) ("Congress knows how to limit the immediate application of new legislation if it desires as it did with [the PFCRA]"); *United States v. Balin*, No. 92 C 882, 1993 U.S. Dist. LEXIS 2969 at 4 n.1 (N.D. Ill. March 9, 1993) (recommendation of Magistrate) ("Congress did not expressly limit the amendments to prospective application, as it did for [the PFCRA]").

The Government also argues that Defendant's position conflicts with federal court precedent under the False Claims Act and the FCAA. However, for the following reason, that precedent is inapposite:

> To be sure, the purpose of the False Claims Act and its amendments parallels the purpose of the PFCRA in many respects, but that similarity does not justify importing wholesale the entire body of False Claims Act jurisprudence into PFCRA litigation without qualification, because the language of the statutes differs significantly . . . .The PFCRA is not an amendment to the False Claims Act; it is a different statute.

Robertson at 16. Other inapposite cases cited by the Government are *HUD v. Holman*, HUDALJ 93-1978-PF (June 9, 1993), which dealt with an entirely different issue -- construction of the PFCRA's statute of limitations; and *HUD v. Warner*, HUDALJ 93-2001-PF (June 22, 1993), in which a default judgement was entered in the Government's favor because the Defendant failed to answer the Complaint, and the retroactivity issue was not addressed.

Conclusion

The plain meaning of § 6104 is that the PFCRA applies only to claims or statements made after October 21, 1986. Both the legislative history of the PFCRA and court decisions are consistent with the plain meaning of § 6104. Congress created no exceptions to the rule of prospective operation so as to provide coverage of the pre-Act conduct in the instant case.

Even if Congress' omission of such coverage was inadvertent, it can not be created judicially. Therefore, Defendant's pre-Act conduct is not actionable under § 3802(a)(1)(B).

DECISION AND ORDER

The Defendant's motion is GRANTED, and this matter is DISMISSED for lack of jurisdiction.

RECONSIDERATION, SECRETARIAL REVIEW, AND FINALITY

Within twenty (20) days after receipt of this decision, any party may file a motion for reconsideration of this decision in accordance with 24 C.F.R. § 28.75.

Within thirty (30) days after issuance of this decision, the Defendant may file an appeal with the Secretary of HUD in accordance with 24 C.F.R. § 28.77. If a motion for reconsideration is filed, the Defendant may file an appeal with the Secretary within 30 days after the disposition of the motion. 31 U.S.C. § 3803(i)(2)(A); 24 C.F.R. § 28.77.

Unless this decision is timely appealed to the Secretary of HUD, or a motion for reconsideration is timely filed, this decision shall constitute the final decision of the Secretary of HUD and be binding on the parties 30 days after its issuance. 31 U.S.C. § 3803(i)(1); 24 C.F.R. § 28.73 (d).

Paul G. Streb

PAUL G. STREB
Administrative Law Judge