Westlaw Today
powered by Reuters

Grassley reintroduces significant amendment to FCA's materiality requirement

By Emily Reeder-Ricchetti, Esq., and Christian D. Sheehan, Esq., Arnold & Porter Kaye Scholer LLP*

AUGUST 10, 2023

After a long-hiatus from False Claims Act-related legislative activity, a bipartisan group of senators — led by FCA champion Senator Chuck Grassley (R-Iowa) — introduced "new" legislation in July to amend the FCA's materiality requirement and, less controversially, clarify that the FCA's whistleblower protections extend to post-employment retaliation.

As long-time Qui Notes readers may recall, in 2021 Senator Grassley led an effort to overhaul the FCA's provisions relating to materiality, discovery, and the government's (c)(2)(A) dismissal authority. While that legislation was voted out of the Judiciary Committee in late 2021, it was never put up for a full Senate vote and effectively died on the vine.

Senator Grassley has narrowed the scope of the proposed legislation, but his primary target remains the same — the Supreme Court's Escobar *decision.*

Now, in the wake of the Supreme Court's (c)(2)(A) decision in *Polansky* (which Qui Notes covered here[1]), Senator Grassley has narrowed the scope of the proposed legislation[2] (this time dubbed the False Claims Amendments Act of 2023), but his primary target remains the same — the Supreme Court's decision in *Universal Health Servs. v. United States ex rel. Escobar*,[3] which Grassley has characterized[4] as "creat[ing] a loophole for fraudsters to avoid accountability[.]"

The "materiality" language in the False Claims Amendments Act of 2023 (2023 Act) mirrors the materiality provision of the ill-fated False Claims Amendments Act of 2021, which we discussed extensively at the time that legislation was pending (here,[5] here[6] and here[7]).

The 2023 Act provides that "In determining materiality, the decision of the Government to forego a refund or to pay a claim despite actual knowledge of fraud or falsity shall not be considered dispositive ***if other reasons exist*** for the decision of the Government with respect to such refund or payment."

As we previously explained, the proposed materiality provision would effectively codify one line of post-*Escobar* cases, including *United States ex rel. Campie v. Gilead Sciences Inc.*,[8] in which courts have refused to dismiss cases on materiality grounds if there may have been "other reasons" for the government to continue paying, despite having awareness of the defendant's purported fraud.

This requirement would apply to any case filed on or after the legislation is enacted, and like the previous iteration of this legislation, the 2023 Act provides absolutely no guidance for courts charged with enforcing an amorphous "other reasons" standard. If enacted, it is likely to have at least two far-reaching effects: (1) prolonged litigation of unmeritorious cases and (2) increased discovery disputes and related costs.

With respect to the former, at a minimum the new language would make it even more of a challenge to win a motion to dismiss on materiality grounds, as in all but the most extreme cases, relators will likely be able to articulate some "other reason" why the government might continue payment.

At the summary judgment stage, the deck may be even more stacked against defendants: under the ill-defined standard, defendants could be forced to prove a negative, i.e., that the government's decision to continue payment did not consider "other reasons," but rested solely upon a judgment that the alleged misconduct was not important enough to stop paying claims.

If enacted, it is likely to have at least two far-reaching effects: (1) prolonged litigation of unmeritorious cases and (2) increased discovery disputes and related costs.

It's possible that this uncertain and unequal burden of proof — which may force companies and individual defendants to make the difficult decision to settle meritless cases simply to avoid the costs of prolonged litigation — is exactly the aim of this legislation, but as we discussed previously,[9] the "other reasons" requirement would

also likely significantly increase costs for the government in both intervened FCA cases and non-intervened qui tams.

The new provision will compel far greater scrutiny for the government's "reasons" for acting as it did, necessarily requiring more probing discovery into agencies' deliberative processes and decision-making.

In addition to the costs and diversion of attorney resources associated with responding to discovery requests (even when those requests are not disputed), agencies may argue that the government's deliberations and ultimate decisions for continued payment are protected by the deliberative process privilege, setting up a dilemma for courts where a federal statute seemingly requires the government to provide insight into its internal processes that otherwise would be largely immune from discovery.

The "other reasons" requirement would also likely significantly increase costs for the government in both intervened FCA cases and non-intervened qui tams.

Notably, these increased costs could have minimal upside; an analysis conducted by the Congressional Budget Office (CBO) during the pendency of the False Claims Act Amendments of 2021 determined that the amendments are *not* likely to have a substantial impact on the United States' recoveries under the FCA.

Rather, the CBO's prior analysis[10] found that the 2021 legislation's identical materiality requirement would most likely result in DOJ "succeed[ing] in about *three* FCA cases each year that would not otherwise have been won," resulting in increased collection of damages of about US$35 million (CBO did not consider the offsetting discovery and appeal costs).

This wasn't exactly a ringing endorsement for Senator Grassley's characterization[11] of *Escobar* as "gut[ting] the FCA" and a "disjustice" [sic] to Congress's anti-fraud efforts.

Despite the important open questions about the impact of the proposed legislation, it's unlikely that the False Claims Amendments Act of 2023 will face much of an uphill battle getting out of the Senate Judiciary Committee and to the full Senate, given that it is sponsored by not only the current Democratic Chair (Sen. Durbin, D-Ill), but two of its Republican members (Sen. Grassley and Sen. Kennedy, R-La.).

Notes

[1] https://bit.ly/3DROWi0

[2] https://bit.ly/3qhfBRV

[3] 579 U.S. 176 (2016).

[4] https://bit.ly/3YtWUXV

[5] https://bit.ly/3BMNfly

[6] https://bit.ly/3eLkXyl

[7] https://bit.ly/3qKZkBs

[8] 862 F.3d 890 (9th Cir. 2017).

[9] https://bit.ly/3eLkXyl

[10] https://bit.ly/3qjKVQ1

[11] https://bit.ly/3YnRoGj

About the authors

Emily Reeder-Ricchetti (L), a senior associate with **Arnold & Porter Kaye Scholer LLP**, focuses on white-collar defense and investigations, including litigation brought under the False Claims Act. She is a co-managing editor of the firm's Qui Notes FCA blog and can be reached at emily.reeder-ricchetti@arnoldporter.com. **Christian D. Sheehan** (R), a partner in the firm, assists government contractors and life sciences companies with False Claims Act investigations and litigation. He is the managing editor of the firm's Qui Notes FCA blog and can be reached at christian.sheehan@arnoldporter.com. The authors are based in Washington, D.C. This article was originally published July 31, 2023, on the firm's website. Republished with permission.

This article was published on Westlaw Today on August 10, 2023.