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Proposed False Claims Act Amendments Seek to Rein in *Escobar* and Granston Memo

By Emily Reeder-Ricchetti and Christian D. Sheehan*

The authors of this article discuss new proposed legislation to amend key provisions of the False Claims Act related to materiality, discovery, and the government's (c)(2)(A) dismissal authority.

Recently, a bipartisan group of senators, led by long-time False Claims Act ("FCA") champion Senator Chuck Grassley (R-Iowa), introduced new legislation to amend key provisions of the FCA related to materiality, discovery, and the government's (c)(2)(A) dismissal authority. According to the press release from Senator Grassley's office,[1] this legislation, dubbed the False Claims Amendments Act of 2021,[2] is a direct response to two recent developments—the U.S. Supreme Court's *Escobar* decision and the Granston Memo—that the senators view as "making it more difficult for plaintiffs and whistleblowers to succeed in lawsuits against the government." These amendments, which would apply to all pending and future FCA cases, have the potential to significantly increase the burden for those caught in the FCA's crosshairs, whether that be in intervened or privately litigated (i.e., non-intervened) qui tams. This article breaks down the key proposed changes.

MATERIALITY BURDEN-SHIFTING?

Following the Supreme Court's *Escobar* decision, courts have grappled with when and how to consider government knowledge of alleged fraud in determining whether the defendant's misconduct was "material" to the government's payment decision. In introducing the new FCA amendments, Senator Grassley remarked that Escobar "has made it all too easy for fraudsters to argue that their obvious fraud was not material simply because the government continued payment." He criticized[3] the central role that continued payment has

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[1] https://www.grassley.senate.gov/news/news-releases/senators-introduce-of-bipartisan-legislation-to-fight-government-waste-fraud.

[2] https://www.grassley.senate.gov/imo/media/doc/117s2428_-_false_claims_amendments_act.pdf.pdf.

[3] https://www.grassley.senate.gov/imo/media/doc/false_claims_amendments_act_summary.pdf.

played in post-Escobar materiality jurisprudence, noting that "government bureaucrats are highly segmented and often unable to make key decisions [about payment] for their monolithic organizations." He also noted, in what we suspect would come as a surprise to many federal regulators, that agencies are not "highly motivated to stop fraud," thus presumably making their decisions to continue payment less probative.

In an effort to make materiality an easier hurdle for relators to clear, the False Claims Amendments Act of 2021 purports to shift the burden on materiality to defendants. But how that burden-shifting would actually work in practice is not at all clear from the proposed statutory language. The legislation states that "the Government or relator may establish materiality by a preponderance of the evidence," but "[a] defendant may rebut an argument of materiality . . . by clear and convincing evidence." This language is notably different than a traditional burden-shifting framework under which a plaintiff must simply make out a prima facie case to shift the burden to the defendant; the False Claims Amendments Act of 2021 seems to require a relator to actually prove materiality before the burden shifts, raising questions about when and how the burden would ever actually shift. After all, under current law, if the relator has proven materiality by a preponderance of the evidence, that element is established and there is nothing to rebut.

We hope and expect that Congress will clarify how this burden-shifting is intended to work if and when the bill makes its way through the legislative process. If enacted in its current form, the materiality provision is likely to generate considerable confusion among courts and practitioners, adding yet another ambiguity to what Justice Alito famously noted is a statute full of them.

GOVERNMENT'S ABILITY TO RECOVER ATTORNEYS' FEES AND COSTS FOR RESPONDING TO DISCOVERY REQUESTS IN NON-INTERVENED QUI TAM LITIGATION

At the same time that the False Claims Amendments Act of 2021 seeks to make it easier for relators to prove materiality, it appears designed to discourage defendants from obtaining the discovery necessary to "rebut an argument of materiality." The amendments allow the government to seek reimbursement of attorneys' fees and costs for responding to discovery requests in non-intervened qui tam litigation unless the requesting party can "demonstrate that the information sought is relevant, proportionate to the needs of the case, and not unduly burdensome." While the proposed amendment would apply to all parties in non-intervened qui tams, Senator Grassley made clear that it is targeting what he views as "fishing expeditions" by FCA defendants. Given that documents in the government's possession are often key materiality evidence, this provision has the potential to further increase the already astronomical costs

of defending non-intervened qui tam actions and will add yet another factor for companies to consider in deciding whether to settle even meritless cases simply to avoid the costs of litigation.

RESOLVES THE (c)(2)(A) CIRCUIT SPLIT

Making good on Senator Grassley's promise last summer, the proposed legislation would also resolve the circuit split regarding the proper standard of review for evaluating government (c)(2)(A) motions. Some circuits have held that the government must demonstrate a valid governmental purpose and a rational relation between dismissal and that purpose to obtain dismissal under (c)(2)(A), while others have held that the government has "unfettered discretion" to dismiss. The proposed legislation would codify the former view, requiring the court to hold a hearing at which "the Government shall have the burden of demonstrating reasons for dismissal, and the qui tam plaintiff shall have the opportunity to show that the reasons are fraudulent, arbitrary and capricious, or contrary to law." Although this hardly places an unsurmountable obstacle in the government's path, it makes clear that the government must make some factual showing to support a (c)(2)(A) dismissal.

EXTENDS FCA ANTI-RETALIATION PROVISION

In perhaps the least controversial change, the proposed legislation also clarifies that the FCA's existing anti-retaliation provisions apply to post-employment retaliation. Notably, these dramatic changes would apply both to pending and new FCA lawsuits, purportedly in an effort to cover fraud related to "the trillions of dollars spent on COVID relief."