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Senator Grassley's proposed amendments to the False Claims Act address *Escobar* and DOJ's "Granston Memo"

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On July 26, 2021, a bipartisan group of senators, led by long-time False Claim Act (FCA) and whistleblower champion Chuck Grassley (R-Iowa), introduced a bill entitled the *False Claims Act Amendments Act of 2021*.[1] According to its sponsors, the bill is designed "to beef up the government's most potent tool to fight fraud" by "clarifying confusion" created by the Supreme Court's decision in *Universal Health Services v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016).[2] The proposed legislation—which would apply retroactively to cases pending on the date of passage—has four principal components that may impact pending and future FCA cases:

Materiality burden of proof

In *Escobar*, the Supreme Court expounded the FCA's "rigorous materiality requirement" and noted that "if the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated, that is very strong evidence that those requirements are not material." The proposed legislation attempts to make it easier to establish materiality by adding a new subsection to 31 U.S.C. § 3729, which specifies that the government or relator may establish the materiality of a false claim or statement to the government's payment decision by "a preponderance of the evidence," but that "to rebut an argument of materiality," a defendant must come forward with "clear and convincing evidence."

Cost-shifting in declined cases

The proposed legislation would also add a new subsection to § 3731, which would allow the government to obtain its expenses, including costs and attorney's fees, from any party that requests discovery from a government agency in a declined *qui tam* action, where the party cannot

[1] False Claims Act Amendments Act of 2021, S. 2428, 117th Cong. (1st Sess. 2021).

[2] *Senators Introduce Bipartisan Legislation To Fight Government Waste, Fraud*, Sen. Chuck Grassley (July 26, 2021).

"demonstrate that the information sought is relevant, proportionate to the needs of the case, and not unduly burdensome to the Government."

Department of Justice's (DOJ's) dismissal authority

The proposed legislation would also resolve a Circuit split concerning the DOJ's dismissal authority under § 3730(c)(2)(A), which has been extensively debated since the so-called "Granston Memo" of 2018. The bill provides that a whistleblower is entitled to 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." The proposed legislation essentially codifies the "(c)(2)(A)" standard articulated by the Ninth Circuit in *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139 (9th Cir. 1998) and forecloses the more permissive standard adopted by the D.C. Circuit in *Swift v. United States*, 318 F.3d 250 (D.C. Cir. 2003), which interpreted § 3730(c)(2)(A) to give DOJ "an unfettered right to dismiss" FCA cases.

Retaliation

Finally, the bill would clarify that the FCA provision that protects whistleblowers from retaliation (§ 3730(h)(1)) covers both "current or former employee, contractor, or agent."

Potential unintended consequences of proposed reforms

The proposed revisions to the FCA described above all appear to aim at making life easier for relators (and to a lesser extent, the government), particularly in *qui tam* actions in which the government has declined to participate. But the proposed amendments change little about the current state of the law and may include unintended benefits for defendants.

Constitutional concerns

The statements by the senators who proposed the new legislation make it clear that the primary purpose for the amendments is to address the impact of *Escobar* on the government's or relator's ability to establish the materiality element of an FCA claim. Rather than simply claryfing the Supreme Court's guidance in *Escobar* about how courts should weigh the government's continued payment of allegedly false claims in assessing materiality, however, the proposed legislation purports to modify the burden of establishing materiality, including by providing that a defendant "may rebut an argument of materiality" by "clear and convincing evidence."

There are at several potential shortcomings with that approach. As an initial matter, the FCA already requires the government or relator to establish all essential elements of the cause of action, including materiality, by a preponderance of the evidence. *See* 31 U.S. Code § 3731(d). Under the current law, therefore, if the government or realtor cannot do so, the case must be dismissed regardless of whether the defendant can "rebut an argument of materiality" by a heightened standard of evidence.

To the extent that the proposed revisions are meant to relieve the government or relator of the burden of establishing that essential element of an FCA violation in certain cases (i.e., cases in which the defendant cannot rebut materiality by clear and convincing evidence), due process concerns arise. The FCA may be open to attack on the basis that by shifting the burden of proof to the defendant for a single element of the prima facie case, the statute presumes the defendant liable for treble damages and penalties without holding the government or realtor to the full measure of necessary proof.

On the other hand, the proposed changes could be read as creating two distinct opportunities for a defendant to negate materiality and defeat an FCA claim. The first opportunity remains at the pleading or summary judgment stage, during which a defendant may argue that dismissal is required because the government or whistleblower has not alleged or established materiality by a preponderance of the evidence. The second opportunity, arguably created by the proposed legislation, would take the form of an affirmative defense to liability, under which a defendant may argue that even though the government or relator has established materiality, the defendant may still rebut that "argument of materiality" with clear and convincing evidence.

Potential for increased discovery burdens

Another evident goal of the proposed legislation is to decrease the discovery burdens on the government through a cost-shifting proposal set forth in § 2(b) of the FCA Amendments Act. But the proposal is unlikely to do much, if anything, to decrease the government's discovery burdens, and the proposed materiality amendments just discussed above may actually increase those burdens.

First, the proposed cost-shifting amendment appears designed to protect the government from a particular species of third-party discovery requests—those propounded by defendants with no purpose other than to pressure the government to dismiss declined *qui tam* actions under § 3730(c)(2)(A). That is rarely the purpose, or at least the only purpose, of discovery requests for agency payment information, however, because evidence that the government continued to pay not just a particular defendant's claims but the claims of other similarly situated individuals or entities after awareness of alleged false claims is relevant under *Escobar*.

Second, the proposed amendments seek to protect the government from the expense of responding to third-party discovery requests in declined cases by shifting costs to defendants under limited circumstances—specifically, where the government moves to shift costs and the defendant cannot establish that the requested discovery is "relevant," "proportionate," and "not unduly burdensome." But that is already the standard by which all discovery requests are measured under the Federal Rules of Civil Procedure.

Third, the proposed legislation may actually increase the discovery burdens on the government as the materiality amendments discussed above would seem to bolster an FCA defendant's argument that it is entitled to more—not less—third-party discovery in order to "rebut an argument of materiality" by "clear and convincing evidence."

Potential chilling effect of proposals on DOJ's dismissal authority

The proposed amendments to § 3730(c)(2)(A) essentially codify the standard for (c)(2)(A) dismissal articulated by the Ninth Circuit in *Sequoia Orange* and reject the nominally more lenient standards articulated by the D.C. and Seventh Circuits in *Swift* and *United States ex rel CIMZNHCA LLC v. UCB Inc.*, 970 F.3d 835 (7th Cir. 2020), respectively.

Under the proposed amendments, the government's authority to dismiss a declined FCA action would not be "unfettered" but still would be very broad. The government must articulate reasons for dismissal, which relators can overcome if, and only if, they can establish that the reasons are "fraudulent, arbitrary, and capricious or contrary to law."

As explained in the *Justice Manual*, the government uses its § 3730(c)(2)(A) authority sparingly to preserve scarce government resources, advance agency and DOJ's prerogatives, protect national security interests, and curb parasitic or unmeritorious FCA actions. Providing non-fraudulent, non-

arbitrary, and legal reasons for a (c)(2)(A) dismissal is not a daunting task for the government, and it is unlikely to become one. The DOJ does not move to dismiss declined *qui tam* cases under § 3730(c)(2)(A) without providing justification; unlike criminal prosecutors, civil fraud attorneys have not dropped FCA claims as naked exercises of prosecutorial discretion. In other words, the DOJ has not relied on its "unfettered" discretion alone to support dismissal of an FCA action. Rather, the government has articulated rational reasons for dismissal, which is essentially all that *Sequoia Orange* and, if enacted, the proposed amendments require.

That said, the proposed amendments could have a chilling effect on the government's willingness to file and litigate (c)(2)(A) motions, which would be unfortunate for defendants facing astronomical and unnecessary litigation costs that unmeritorious FCA actions impose long after the government has declined to participate.

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