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How the US Senate's Proposed Amendments to the Federal False Claims Act Could Influence State False Claims Acts Nationally

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On October 28, 2021, a majority of members on the Senate Judiciary Committee voted 15-7 to advance to the full U.S. Senate a bipartisan bill that would make a number of amendments to the federal False Claims Act (FCA). These proposed amendments are significant for two primary reasons: (1) a bipartisan group of senators drafted the proposed legislation with the intent of strengthening the FCA as a tool for the government to prosecute fraud perpetrated against the United States; and (2) the proposed amendments portend, regardless of their actual enactment, potential future changes to the various state false claims acts across the country, which are modeled after the federal FCA but are often more aggressive than their federal counterpart.[1]

I. Background on the Federal FCA and Its State Analogs

The FCA applies to anyone who knowingly submits false or fraudulent claims for payment to the U.S. Government or who knowingly fails to return funds that are owed to the government.[2] The origins of the law date back to the Civil War when unscrupulous contractors defrauded the Union Army, selling it, among other things, faulty rifles and ammunition, rancid rations, and lame horses. According to the courts, Congress passed the FCA with the general intent to "reach any person who knowingly assisted in causing the government to pay claims which were grounded in fraud."[3] Today, liability under the FCA involves the following: (1) a false statement or fraudulent course of conduct; (2) made or carried out with knowledge of the falsity; (3) that was material; and (4) that involved a claim.[4] Those found guilty under the FCA are liable to the government for a civil penalty, as well as treble damages sustained by the government for each false claim submitted.[5] Depending on how a "violation" is defined in a given case, exposure for a company, like a pharmaceutical manufacturer, could amount to ***billions*** of dollars for the civil penalties alone—before even considering the total arising out of the treble damages at play.

More than thirty states now have their own false claims statutes drafted to mirror the FCA. However, the state false claims acts typically vary in minor ways from their federal counterpart. For example, the District of Columbia, Illinois, and New York have expanded their false claims acts to encompass tax fraud.[6] Meanwhile, the Colorado Medicaid False Claims Act focuses exclusively on Medicaid fraud.[7] Despite such deviations, courts nonetheless consistently look to federal caselaw and other sources interpreting the federal FCA for guidance in determining the meaning of key provisions in state false claims statutes. That is due to the relative paucity of case law interpreting the state analogs,[8] the reality that many state false claims acts "are of very recent vintage,"[9] and the fact that the state false claims acts were largely modeled after the successful federal FCA. While some states such as California passed their false claims acts as early as the 1980s, several states amended or passed new false claims acts in response to the Deficit Reduction Act of 2005, which created federal incentives for states to do

so.[10]

The FCA applies broadly. For example, the FCA applies in cases where a physician submits a bill to Medicare for medical services he or she knows were not performed. Similarly, the FCA applies if a company submits a misleading bid for a government contract or if a company submits fraudulent claims for payment under an already-secured government contract—or materially withholds monies or property it owes to the U.S. Government. The state analogs operate in the same way. States have also increasingly used their FCAs for a greater variety of cases, such as environmental, defective product, and mining royalty claims.[11]

Notably, not all federal or state FCA claims originate with the U.S. Government or a state regulatory body.[12] Rather, the federal FCA and its state analogs contain a qui tam provision under which an individual or entity with knowledge of fraud against the U.S. Government may file a lawsuit under seal on behalf of the United States—i.e., the famous "whistleblower" provision. The whistleblower, formally known as a "relator," may share in any monetary recovery made by the U.S. Government (often in the range of 15-35%) obtained via dispositive motion, trial verdict, or settlement.[13] Relators also receive attorneys' fees and costs if the case is successful. Ultimately, the qui tam provision incentives relators to expose fraud on government bodies so that the governments can recover as many of these stolen funds as possible. Once a whistleblower initiates an FCA suit, the U.S. Government may decide to intervene in the case, allow the whistleblower to proceed on his or her own, or move the court for dismissal of the suit.[14]

II. Proposed Amendments

In July 2021, Senator Chuck Grassley issued a press release announcing the introduction of the False Claims Amendments Act of 2021 (S.2428), a set of proposed amendments to the federal FCA.[15] According to the press release, a bipartisan group of senators drafted the amendments with the intent to "beef up the government's most potent tool to fight fraud," an important goal in light of the trillions Congress recently appropriated for COVID-19 relief. As originally introduced in July, the amendments proposed four changes to the FCA. The version approved by the Senate Judiciary Committee on October 28, 2021, is a slightly watered-down version of the original July 2021 proposal.[16] If enacted, they would retroactively apply to any pending FCA litigation. The key substantive changes are four-fold: (a) the addition of a materiality burden-shifting mechanism; (b) a discovery cost-shifting provision; (c) a clarification to resolve a federal circuit split on the standard DOJ must meet to dismiss a relator's complaint; and (d) a clarification to resolve a federal circuit split regarding whether the FCA's anti-relation provisions applies in the post-employment context.

A. Materiality Burden-Shifting Mechanism

The proposed amendments recommend a change to the FCA's materiality element. The materiality element requires the relator or government to show that the false statement made to the U.S. Government was material, meaning it impacted the U.S. Government's decision to purchase the good or service that it paid for and that is now the subject of the FCA complaint. For example, suppose a government contractor agreed to build a building for the federal government and certified that all materials in the building were manufactured in the United States when it supported its invoice for payment to the federal government at the completion of the project. Now, suppose that the government later discovered that some material was actually manufactured abroad. If the government pursued an FCA violation for supporting a false claim for payment, the materiality analysis would require the

government to demonstrate that it would not have paid for the good or service if it knew that the manufacturer's false certification was in fact not true.

In 2016 the U.S. Supreme Court issued its landmark opinion in *United Health Services, Inc. v. United States ex rel. Escobar*,[17] which set forth the standard that the U.S. Government or a relator must meet to prove materiality. *Escobar* notes that the materiality element presents a "demanding" standard and enumerates different factors a court should consider in deciding whether a plaintiff has provided proof of materiality.[18] In doing so, the *Escobar* Court 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."[19] In practice, the *Escobar* materiality standard has proven to impose a particularly challenging burden upon the U.S. Government and relators.

The bipartisan group of senators drafted the proposed amendment on materiality in direct response to the Court's decision in *Escobar*. It proposes to create a burden-shifting mechanism such that once the relator or government proves materiality by a preponderance of the evidence, defendants may then "rebut" that initial materiality showing "only by clear and convincing evidence that the Government regards the matter as immaterial." This change is meant to make it more difficult for FCA defendants to defeat claims by attacking the element of materiality.

While there is insufficient case law to say that *Escobar* materiality has been adopted by the state courts interpreting the state analogs to the FCA, it is likely that many would follow *Escobar*'s reasoning. Therefore, this proposal to weaken the practical impact of *Escobar* is likely to attract interest and attention from state legislatures across the country who might want to mimic it to augment their ability to combat fraud and recover funds for state coffers—especially in an age where they have been ravaged by the effects of COVID in many ways.

B. Discovery Cost Shifting

Generally, parties bear their own costs for responding to discovery requests in federal civil actions. The second proposed amendment to the FCA would create an exception, requiring courts to order defendants to pay the government's costs and attorneys' fees for responding to discovery requests *unless* the defendant provides that the information sought is "relevant and proportionate to the needs of the case." Essentially, the amendment requires private parties to prove their need for the information requested, obligating them to pay for any discovery costs where it is not obvious that the information sought is important to the case at hand. The senators proposed this amendment to punish private parties who attempt to abuse the discovery process and take advantage of the respective asymmetry of available resources.

C. Resolution of Circuit Split Related to Standard for DOJ Dismissal

The third proposed amendment would resolve a circuit split at the federal appellate court level regarding the proper standard of review for evaluating DOJ FCA dismissals. As noted above, the U.S. Government may intervene in a relator's FCA case or decline to do so, in which case the relator is usually permitted to proceed with the case at their own expense. However, under 31 U.S.C, § 3730(2)(A), the DOJ also has the authority to dismiss meritless or frivolous cases. This proposed amendment would essentially codify the standard for such dismissals as announced by the U.S. Court of Appeals for the Ninth Circuit in *United States ex rel. Sequoia Orange Company*

v. Baird-Neece Packing Corporation.[20] While some courts have provided that the government has "unfettered discretion" to dismiss FCA claims, the standard announced by the amendments—and in accordance with *Sequoia*—would require the government to demonstrate (i) a valid governmental purpose and (ii) a rational relationship between the requested dismissal and that purpose.

While this proposed amendment would change the legal obligations imposed on DOJ under the FCA, it is unlikely to have much effect in practice—at least under the current Administration. In October 2021, U.S. Attorney General Merrick Garland directed that the Justice Manual be amended to require that DOJ attorneys identify reasons supporting dismissal of a qui tam FCA action, regardless of the proper standard of review. If enacted, this amendment is likely to codify the Garland directive and provide greater clarity for posterity with respect to the limited circumstances in which the government decides to dismiss qui tam actions.

D. Extension of the FCA Anti-Retaliation Provision

The final proposed amendment deals with the FCA's anti-retaliation provision. The FCA protects whistleblower employees, contractors, or agents who are discharged, demoted, suspended, threatened, harassed, discriminated against, or otherwise harmed in some way by their employer or former employer as a result of their lawful acts taken to stop violations of the FCA. The final proposed amendment would clarify that the FCA's existing anti-retaliation provision applies in the post-employment retaliation context. Examples of post-employment retaliation might include blacklisting a whistleblower or bringing a retaliatory lawsuit against the whistleblower to pressure the whistleblower to drop the qui tam FCA suit.[21] This amendment would also resolve a circuit split created by the U.S. Courts of Appeal for the Sixth and Tenth Circuits on whether post-employment relationship falls under the umbrella of the FCA's anti-relation provision.[22]

III. The Likely Impact on Industry

The DOJ obtained more than $2.2 billion in settlements and judgments from civil cases involving fraud and false claims against the government in 2020.[23] The total recovery for 2021 is expected to be even higher. If the False Claims Amendments Act of 2021 is enacted and functions as intended by its drafters, the FCA should become an even more potent tool for the U.S. Government in its efforts to combat fraud—an especially important development, particularly at a time when enforcement of the FCA is at its zenith in response to the trillions of dollars spent by the United States related to the COVID-19 pandemic. Given the historical pattern of state law developing in the wake of changes and improvements to the federal FCA, it is wise to expect that the states will not lag far behind in implementing similar measures.

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[1] *See, e.g.*, D.C. Code Ann. § 2-381.01 *et seq.*; N.Y. State Fin. Law § 187 *et seq.* In January 2021, the District of Columbia joined New York and Illinois in taking the novel step of expanding its FCA to apply to tax fraud. *See* Amy Pritchard Williams, Miranda Hooker, Ryan J. Strasser, & Rachel Miklaszewski, *Amending DC's False Claims Act: Expansion of the DC AG's Power Through Removal of the Tax Bar*, Troutman Pepper (Feb. 2, 2021), https://www.troutman.com/insights/amending-dcs-false-claims-act-expansion-of-the-dc-ags-power-through-

removal-of-the-tax-bar.html#_ftnref2.

[2] *See* 31 U.S.C. § 3729.

[3] *See, e.g.*, United States ex rel. Marcus v. Hess, 317 U.S. 537, 544-47 (1943).

[4] *See* United States v. Bollinger Shipyards, Inc., 775 F.3d 255, 259 (5th Cir. 2014).

[5] 31 U.S.C. § 3729(a)(1).

[6] *See* Williams, et al., *supra* note 1.

[7] *See* Colo. Rev. Stat. § 25.5-4-303.5 *et seq.*

[8] *See* Scannell v. Att'y Gen., 872 N.E.2d 1136, 1138 n.4 (Mass. App. Ct. 2007) (noting that "[t]here is little decisional law interpreting the [Massachusetts False Claims Act]" but that the statute was "modeled on the similarly worded Federal False Claims Act," and, therefore, the court "look[s] for guidance to cases and treatises interpreting the Federal False Claims Act").

[9] Pamela Bucy, et al., *States, Statutes, and Fraud: A Study of Emerging State Efforts to Combat White Collar Crime*, 31 Cardozo L. Rev. 1523, 1535-36 (2010).

[10] *Id.* at 1536.

[11] *See* Bucy, et al., *supra* note 9.

[12] Certain localities like Miami-Dade County also have local false claims act statutes that apply when local funds are implicated. Miami-Dade Code § 21-255 *et seq.*

[13] Some states allow for larger rewards when the state secures monetary recovery pursuant to their state false claims act. For example, in California relators may recover between 25% and 50% in a successful case when the State or subdivision does not intervene. *See* Cal. Gov't Code § 12650 *et seq.*

[14] *See* 31 U.S.C. § 3730.

[15] Press Release, Chuck Grassley, *Senators Introduce Bipartisan Legislation to Fight Government Waste, Fraud* (July 26, 2021), https://www.grassley.senate.gov/news/news-releases/senators-introduce-of-bipartisan-legislation-to-fight-government-waste-fraud.

[16] *See* Proposed Amendments.

[17] 136 S. Ct. 1989 (2016).

[18] *Id.* at 2003-04.

[19] *Id.* at 2003 (emphasis added).

[20] 151 F.3d 1139 (9th Cir. 1998).

[21] *See e.g.*, United States ex re. Felten v. William Beaumont Hosp., 993 F.3d 428 (6th Cir. 2021) (relator claimed that he had been unable to obtain a comparable position in academic medicine because his former employer had sought to undermine his applications to almost forty institutions).

[22] *See Felten*, 993 F.3d at 435 (6th Cir. 2021); Potts v. Ctr. for Excellence in Higher Educ., 908 F.3d 610 (10th Cir. 2018).

[23] *See* Press Release, Dep't of Just., *Justice Department Recovers Over $2.2 Billion from False Claims Act Cases in Fiscal Year 2020* (Jan. 14, 2021), https://www.justice.gov/opa/pr/justice-department-recovers-over-22-billion-false-claims-act-cases-fiscal-year-2020#:~:text=January%2014%2C%202021-,Justice%20Department%20Recovers%20Over%20%242.2%20Billion%20from%20False,Cases%20in%20Fiscal%20Year%202020&text=Recoveries%20since%201986%2C%20when%20Congress,total%20more%20than%20%2464%20billion.

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