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False Claims Act amendments take more direct attack at *Escobar* and pass Senate Judiciary Committee

By Nathan F. Brown, Esq., Bass, Berry & Sims PLC*

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As previously covered,[1] the Senate is currently considering Senate Bill 2428,[2] the False Claims Amendments Act of 2021 (FCAA), which would cause several significant changes that would make it more difficult for defendants in False Claims Act (FCA) cases. On October 28, 2021, Senate Judiciary Committee (Committee) considered the bill originally introduced by Senator Chuck Grassley (R-IA) in July of this year.

After a series of negotiations with other Republican senators, the Committee passed a new, amended version of the FCAA[3] by a vote of 15-7. The Committee-approved bill was reported to the Senate on November 16, 2021. Even under the amended language passed by the Committee, the FCAA, if passed into law, will likely make FCA litigation cases more complex and costly than they already are.

The materiality burden-shift is gone, but the threat to *Escobar* is not

As previously discussed on this blog, the FCAA's most significant change is to alter the "rigorous" materiality standard set out by the U.S. Supreme Court in *United Health Services v. United States ex rel. Escobar*.

Senator Grassley even stated before the Committee[4] that the purpose of the FCAA was to "make very clear we don't have to rely on different courts interpreting it a different way. These amendments will clarify misinterpretations created by the *Escobar* court, by clarifying what should already be common sense."

Under Senator Grassley's initial proposal, the government or a relator could meet their burden to establish the materiality element by a preponderance of the evidence. If they were able to do so, the defendant may "rebut an argument of materiality ... by clear and convincing evidence."

But as discussed in our previous post, the initial burden may not have been much of a shift at all, as the government or a relator was already required to prove materiality by a preponderance of the evidence. However, the burden to rebut a materiality argument "by clear and convincing evidence" was a significant increase in the burden placed upon defendants.

The Committee ultimately rejected the original bill's burden-shifting provision in favor of a much more direct attack on the holding of *Escobar* and its progeny. The new language approved by the Committee directly contradicted *Escobar* by stating that with respect to 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."

However, in defendants' favor, the amended version made no mention of any "clear and convincing" burden for rebuttals of materiality. In opposition, Senator Tom Cotton (R-AR) argued before the Committee that the new language's absolute refusal to treat subsequent government action as dispositive goes too far, as "there may be some cases where the Government's continual payment should be dispositive, not always, but should in some cases be dispositive in favor of the healthcare provider." Senator Cotton's arguments did not prevail upon the Committee, and the bill passed as amended.

Although the bill has been lauded as bipartisan and was championed by one of the more well-respected Republicans in the Senate, seven of the Committee's 11 Republican members voted against it.

Should this new wrinkle in the materiality analysis be passed into law, it would remove the strong argument *Escobar* provided to FCA defendants, making it much more difficult for defendants to dismiss complaints at the early stages.

This change also opens the door to increased discovery requests to government agencies as parties must determine whether "other reasons" existed for the agencies' actions. The vague nature of this consequential term will also likely spawn substantially more litigation within FCA cases to determine whether any "other reasons" contributed to the government's decision-making process.

The government cannot pass the buck for discovery

The Committee also eliminated the original bill's cost-shifting provision for discovery requests sent to the government in non-intervened cases. Given the likely increase in discovery and litigation over the potential "other reasons" for government action or inaction, the Committee's decision to remove this provision is likely a very positive development for FCA defendants.

Purely discretionary government dismissals are gone

The original bill's language squarely placed the burden on the government to demonstrate a reason for dismissing FCA actions under 31 U.S.C. § 3730(c)(2)(A), while providing relators the opportunity to show that the proffered reasons are "fraudulent, arbitrary and capricious, or contrary to law." Senator Grassley stressed to the Committee that "due process requires the Government to explain its reasons for a dismissal request."

The version of the bill passed by the Committee did not directly place a burden on the government, but nonetheless required that government "identify a valid government purpose and a rational relation between dismissal and accomplishment of that purpose."

Once the government passes this rational basis test, the burden is on the relator to demonstrate that the dismissal is "fraudulent, arbitrary and capricious, or illegal." This language essentially adopts the two-part rational-basis test adopted by the Ninth Circuit in *U.S. ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*

Although the language surrounding the placement of the burden may have been slightly altered, the ultimate effect of this provision is primarily the same as the original bill. To dismiss a *qui tam* lawsuit, the government must affirmatively identify a government purpose for requesting a dismissal.

The presumable effect is that it would be slightly more difficult for the government to seek the dismissal of frivolous *qui tam* complaints, to the detriment of FCA defendants.

However, the practical effect of this change may be negligible, at least during the current administration, as the Department of Justice's (DOJ's) Justice Manual's[5] guidance on FCA *qui tam* dismissals was recently amended to state that "[r]egardless of the standard of review that applies in each case, attorneys should identify in any motion that is filed reasons supporting dismissal of the action."

Forward-looking amendments

The final substantive change of note in the version of the FCAA passed by the Committee has to do with the applicability of the amendments. Although the original bill stated that the amendments would apply to either future or currently pending FCA cases, the version approved by the Committee limited the amendments' application to prospective FCA claims rather than pending ones.

Some of the bill's provisions remain unscathed by the committee

Although the version of the FCAA passed by the Committee did change many significant details from Senator Grassley's original bill, a few of the proposed amendments proceeded relatively unscathed. The Committee approved the original bill's broadening of FCA's anti-retaliation provision, 31 U.S.C. § 3730(h)(1), to include past employees as well as current ones.

The provision to require the Comptroller General of the United States to provide a report to Congress on the effectiveness of the FCA also passed the Committee unchanged. Even the extremely stripped-down version of the bill[6] offered by Senator Cotton agreed that this report was worthwhile.

That these two updates passed the Committee without any substantial changes is unsurprising, as these were some of the less controversial changes in Senator Grassley's original bill.

A major hurdle passed, but more lie ahead

The FCAA's passage through the Committee is a significant step toward becoming a law. However, its ultimate fate is not yet clear, as the Committee's support for the bill was far from unanimous. Although the bill has been lauded as bipartisan and was championed by one of the more well-respected Republicans in the Senate, seven of the Committee's 11 Republican members voted against it.

At the Committee meeting, Senator Cotton expressed concerns that the FCAA will "be abused and can drive up costs in the healthcare system for patients," while Senator Tillis (R-NC) claimed the FCAA will "result in a massive payout for trial lawyers and disgruntled employees who want to harass and intimidate small businesses across the country."

Now that the amended bill has been reported to the Senate, the bill's influential sponsors will undoubtedly impress upon their colleagues the need to pass this legislation. However, lingering Republican concerns regarding the impact of these amendments, paired with the lack of any complimentary bill within the House of Representatives, make this bill's ultimate passage still uncertain.

But while the standard by which future FCA cases are prosecuted under these amendments may be uncertain, DOJ's increased emphasis on investigating FCA complaints is not in question. We will continue to monitor and report the progress of this important bill as it continues to move through the Senate.

Notes

[1] https://bit.ly/3A00LQb

[2] https://bit.ly/3A3LQVd

[3] https://bit.ly/3GHjpPD

[4] https://bit.ly/3nqSSy9

[5] https://bit.ly/34EYM8k

[6] https://bit.ly/31VkqEk

About the author

Nathan F. Brown is an associate at **Bass, Berry & Sims PLC** in Nashville, Tennessee. He represents clients in investigations, litigation and government actions, particularly involving the False Claims Act, Anti-Kickback Statute and Stark Law. In addition, Brown assists corporate clients with internal compliance assessments and investigations regarding regulatory compliance matters. He can be reached at nathan.brown@bassberry.com. This article was originally published Dec. 20, 2021, on the firm's website. Republished with permission.

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