FCA Proposal Is Unfair And Would Hinder Economic Growth

By **Robert Salcido and Emily Gerry** (September 22, 2021)

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As American industry moves toward building back better in the face of a continuing pandemic, Sens. Chuck Grassley, R-Iowa, and Patrick Leahy, D-Vt., have introduced the False Claims Amendments Act of 2021, proposing revisions to the False Claims Act that could scuttle these efforts before they start by dramatically changing a key unanimous U.S. Supreme Court precedent.

The FCA is the government's primary weapon for combating fraud against the federal government. The FCA arms law enforcement officials with a penal remedy of treble damages and civil penalties against those who knowingly or fraudulently present false claims to the government.

It also empowers private citizens, known as relators, to bring qui tam actions — suits brought on the behalf of the government — and to obtain a substantial bounty if they prevail.

Congress first enacted the FCA during the Civil War to prosecute unscrupulous contractors who sold the Union army faulty rifles and gunpowder that was actually sawdust.

Because unfounded allegations of fraud can do serious damage to the goodwill of a business or person, the common law, to deter meritless lawsuits, imposes a heightened burden on plaintiffs who must prove such allegations by clear and convincing evidence. Before 1986, some courts applied this heightened standard in FCA actions.

In 1986, Congress made several changes to the FCA, one of which transformed the FCA's burden of proof. Congress amended the act to provide that plaintiffs need only prove FCA allegations by a simple preponderance of evidence.

The FCA amendments have generated large amounts of money for the government, with more than $64 billion recovered since 1986. But the lure of large recoveries — made much easier by dramatically lowering the traditional burden of proof for plaintiffs — has drawn out purported whistleblowers, as the U.S. Court of Appeals for the Fourth Circuit noted in its 1999 U.S. v. Wagner decision, like "moths to a flame."[1]

To share in the penal treble damages and civil penalty recoveries the FCA can generate, relators frequently allege FCA liability in cases involving minor or technical breaches of rules and regulations — like imposing liability on a physician who accurately reports a service but uses a rubber-stamp signature, rather than a printed or electronic signature for billing.

To strike the right balance, the Supreme Court, in its 2016 decision in Universal Health Services v. U.S. ex rel. Escobar, clarified the types of potential misrepresentations that are material or meaningful under the FCA to the government's decision to pay a claim.

Justice Clarence Thomas — writing for a unanimous court that included Justices Sonia Sotomayor, Elena Kagan, Ruth Bader Ginsburg and Stephen Breyer — explained that the FCA's materiality element is demanding and rigorous because of the statute's potentially

penal application.

The court underscored that the FCA "is not 'an all-purpose antifraud statute' or a vehicle for punishing garden-variety breaches of contract or regulatory violations." To ensure that the FCA stayed within appropriate bounds, the court required the plaintiff to prove that the alleged misrepresentation went to the very essence of the bargain.

There was no — and never has been — corresponding burden, much less a higher one, placed on defendants to disprove a plaintiff's contentions in this context. The proposed Grassley-Leahy amendment seeks to upend the Supreme Court's unanimous ruling in Escobar and complete the inversion — begun in 1986 — of the traditional burden of proof for claims of fraud.

The proposed amendment provides that plaintiffs must prove materiality by a preponderance of evidence and, if established, would for the first time shift the burden to defendants to disprove materiality by clear and convincing evidence.

Further, the proposed amendment would penalize defendants for obtaining the evidence they need from the government to satisfy the heightened burden that now would be placed on them to disprove their guilt: If defendants seek too much information from the government, they must pay the government for its costs and attorney fees in producing it.

And in a final act of unfairness, the proposed amendment would be retroactive and apply to any FCA case pending on the date of enactment — including those that have been in litigation for years and that defendants have litigated based upon the expectation that the current law would apply.

The Grassley-Leahy amendment would subvert the Supreme Court's reasoning in Escobar, turn the traditional burden-of-proof standard for fraud claims on its head and stack the deck against the defendant in any FCA action.

Not only would defendants have to prove their innocence under a heightened standard, they would potentially have to pay the government to engage in discovery to establish that innocence. In many cases, this would impose insurmountable obstacles on defendants seeking to defend against an allegation of fraud and the severe penalties that come with it.

Given where federal funds have flowed since the onset of pandemic, the likely targets of this enhanced FCA would be companies on the front lines of building back our economy and working to protect us from the COVID-19 scourge — that is, hospitals and nursing facilities that care for the ill; laboratories that discover and test new treatments; pharmaceutical and durable medical equipment suppliers that manufacture and distribute supplies; universities that conduct clinical research; government contractors that formulate and produce vaccines; and small companies that seek aid from the government to restore their businesses.

The Supreme Court got it right in Escobar by requiring a balanced approach that punishes wrongdoers while ensuring fair standards are in place to protect universities, hospitals and other important industries from frivolous and crippling lawsuits.

This basic fairness has not prevented FCA plaintiffs from prevailing — the U.S. Department of Justice recovered over $11.7 billion from FCA settlements and judgments between 2017 and 2020.[2]

The Grassley-Leahy amendment puts vital companies and institutions at serious and unnecessary risk. If American industry is going to get back on track, unfair and economically debilitating legislation like this must not be enacted.

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[1] U.S. ex rel. LaCorte v. Wagner, 185 F.3d 188, 191 (4th Cir. 1999).

[2] Press Release, DOJ, Justice Department Recovers Over $3.7 Billion From False Claims Act Cases in Fiscal Year 2017 (Dec. 21, 2017), https://www.justice.gov/opa/pr/justice-department-recovers-over-37-billion-false-claims-act-cases-fiscal-year-2017; Press Release, DOJ, Justice Department Recovers Over $2.8 Billion from False Claims Act Cases in Fiscal Year 2018 (Dec. 21, 2018), https://www.justice.gov/opa/pr/justice-department-recovers-over-28-billion-false-claims-act-cases-fiscal-year-2018; Press Release, DOJ, Justice Department Recovers over $3 Billion from False Claims Act Cases in Fiscal Year 2019 (Jan. 9, 2020), https://www.justice.gov/opa/pr/justice-department-recovers-over-3-billion-false-claims-act-cases-fiscal-year-2019; Press Release, DOJ, 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.