False Claims Amendments Act (S. 2428)
Manager's Amendment Section by Section

Section 2- Materiality

Background: The False Claims Act defines materiality as "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property." This definition was adopted from the common law definition of materiality as it relates to fraud. However, in Escobar the Supreme Court stated 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."[1] Since this portion of the opinion was dicta, the court did not provide any further context which has led to ambiguity and misinterpretations. In particular, courts have dismissed cases based solely on the government's decision to continue paying a claim without inquiring why the government kept paying.

There are many reasons why the government would continue to pay a claim despite actual knowledge of fraud, such as: national security concerns; potential harm to the public if payment was suspended for a scarce drug or service, or even something as simple as an uninterested government bureaucrat who witnesses fraud but does not care to stop it. Several courts have also recognized this and have rejected motions for dismissal based solely on the government's payment decision when there were other reasons for the government's continued payment.[2]

Proposed language: In determining 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.

What the language does: This very narrow and specific addition clarifies what should already be common sense. That the government's continued payment of a claim, despite knowledge of fraud, is only probative of materiality when no other reasons can be articulated for the government's continued payment. Simply relying on the government's payment decision

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[1] Universal Health Servs., Inc. v. United States ex rel. Escobar, 136 S. Ct. 1989, 2003–04 (2016).

[2] *See, e.g.,* United States v. Aegerion Pharm., Inc., 13-CV-11785-IT, 2019 WL 1437914 at *7, (D. Mass. Mar. 31, 2019) ("[A]s this court has previously recognized, actual knowledge may not be determinative of materiality as there may be other reasons why the government continues to pay these claims."); *see also* U.S. ex rel. Campbell v. KIC Dev., LLC, EP-18-CV-193-KC, 2019 WL 6884485 at *10 (W.D. Tex. Dec. 10, 2019) ("[C]ourts have held that 'the Government may still maintain an FCA claim if it can muster allegations, taken as true, that explain why continued payments are not probative of immateriality in the circumstances presented by a specific case . . . there may be other reasons why the government continues to pay these claims."); United States ex rel. v. Mortg. Inv'rs Corp., 987 F.3d 1340, 1350 (11th Cir. 2021) ("While we agree . . . that the government action relevant to the materiality inquiry is typically the payment decision, the significance of continued payment may vary depending on the circumstances . . . Consequently, the facts . . . require that we cast our materiality inquiry more broadly to consider the 'full array of tools' at the VA's disposal for 'detecting, deterring, and punishing false statements.").

without context or understanding of the decision making that went behind it will lead to erroneous outcomes and an increase in fraud.

Why it matters: The government has haphazardly spent trillions of dollars in the past few months, during a global pandemic, which will inevitably led to an increase in fraud.[3] In fact, we know that fraud has already been committed against the government.[4] In the midst of a global pandemic, it is also very unlikely that the government would discontinue payment for services under these programs despite knowledge of fraud. This amendment is needed to protect taxpayers and ensure fraudsters are not exploiting a gap in the law to enrich themselves at the expense of everyone else.

Section 3: Discovery Costs Provision

Background: Fed. R. Civ. P. 45(d) allows the government to avoid "undue burden[s] or expense[s]" incurred from a subpoena. However, in qui tam cases, the government may not have the opportunity to raise an objection to the unduly burdensome discovery requests. This includes the obligation to respond to subpoenas for documents and testimony.[5]

Proposed language: "If the Government elects not to intervene in an action brought under section 3730(b), the court shall, upon a motion by the Government, order the requesting party to pay the Government's expenses, including costs and attorneys' fees, for responding to the party's discovery requests, unless the party can demonstrate that the information sought is relevant and proportionate to the needs of the case."

What the language does: The Amendment's provision addressing discovery costs already exists in Fed. R. Civ. P. 45. In fact, the provisions in the FRCP are broader than what is included in this bill. Further, this rule was specifically requested by DOJ to ensure its enforcement and that the government has the ability to defend itself against discovery costs that are not relative or proportional to the needs of the case.

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[3] Press Release, U.S. Department of Justice, Justice Department Takes Action Against COVID-19 Fraud (Mar. 26, 2021), https://www.justice.gov/opa/pr/justice-department-takes-action-against-covid-19-fraud ("As of [March 26, 2021], the Department of Justice has publicly charged 474 defendants with criminal offenses based on fraud schemes connected to the COVID-19 pandemic. These cases involve attempts to obtain over $569 million from the U.S. government and unsuspecting individuals through fraud and have been brought in 56 federal district courts around the country."). *See also* Jetson Leder-Luis, *The $1 Trillion Infrastructure Bill is Historic Legislation. It Could Also Lead to Historic Fraud,* Fast Company (Oct. 1, 2021), https://www.fastcompany.com/90681643/the-1-trillion-infrastructure-bill-is-historic-legislation-it-could-also-lead-to-historic-fraud ("About 15$ of the PPP loans given out are suspected of fraud. That's based on certain red flags, such as filings that include unregistered or recently incorporated businesses, many at the same residential address, or implausibly high employee salaries.").

[4] *See e.g., DOJ's First False Claims Act Settlement Against PPP Borrower Signals Robust Fraud Enforcement Ahead,* JDSupra (Feb. 8, 2021), https://www.jdsupra.com/legalnews/doj-s-first-false-claims-act-settlement-2788430/ (SlideBelts, Inc., a California-based internet retailer admitted that they made false statements to banks in order to obtain PPP funds).

[5] *See* Exxon Shipping Co. v. U.S. Dep't of Interior, 34 F.3d 774, 779 (9th Cir. 1994); Yousuf v. Samantar, 451 F.3d 248, 256–57 (D.C. Cir. 2006); John T. Boese, *Civil False Claims and Qui Tam Actions* Sec. 5.07 (4th ed. 2011) (explaining the use of Rule 45 subpoenas to obtain discovery from government agencies in FCA cases).

Why it matters: In fiscal year 2020 alone, whistleblowers filed 672 *qui tam* suits.[6] This statistic emphasizes the immense caseload that the Justice Department receives each year. While these suits helped to recover over $1.6 billion in fraud against the government, the Justice Department only has so many resources to expend during the discovery process of each case. The discovery cost provision of the 2021 Amendments serves to (1) prevent the use of DOJ operational resources to benefit private litigants; and (2) further reduce fishing expeditions that impose financial burdens on taxpayers.

Section 4: Dismissal Authority

Background: The original False Claims Act did not have a mechanism for the government to dismiss a relator's claim. The dismissal authority that the Department of Justice (DOJ) currently enjoys was inserted into the text in 1986 by Senator Grassley. The statute allowing for dismissal currently reads: "The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a **hearing** on the motion." (emphasis added). A three-way circuit split has developed over the meaning of the word "hearing." The DC Circuit believes that the word hearing means an opportunity to be heard and that a court has no authority to deny a motion to dismiss regardless of how arbitrary and capricious it is. The 9th Circuit has said that a hearing requires that a court provide parties with the minimum due process allowed by the Constitution, rational basis. Therefore, the 9th Circuit will deny a motion to dismiss if the government's reasons are arbitrary and capricious. The 7th Circuit believes that a motion to dismiss by the government shall be treated as a motion to intervene in the case and then dismiss. However, in order for the government to intervene in a case after it has been unsealed, they must show good cause. So ultimately, the 7th Circuit will only allow the government to dismiss a case if it can show good cause.

Proposed Language (in red with existing law in black):

The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion **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**.

What the language does: This language clarifies Congress' intent of a common sense definition of the word "hearing" and requires that such a hearing be provided before the government can dismiss a claim. It codifies the rational basis test which prevents the government from dismissing a case over arbitrary and capricious grounds. Not only is the rational basis test what

[6] Press Release, U.S. Department of Justice, 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

the original drafters (Sen. Grassley) envisioned, but it also makes the most sense. The DC Circuit's analysis that the government has unfettered discretion to dismiss a case and that the court is simply there as passive observer is contrary to separation of powers principles and an enormous waste of judicial resources and time.

Why it matters: On principle, the government should never be dismissing a case on arbitrary and capricious grounds and the federal judiciary should always act as a check against such abuses. As a more practical matter, relators and their attorneys spend hundreds of thousands and sometimes even millions of dollars to bring these cases. Historically, the government has sought to dismiss cases after years of expensive litigation; as a matter of fairness and due process, the government ought to publically explain the reasons for its request for dismissal and the courts should ensure that those reasons are not arbitrary and capricious.

Section 5: Anti-Retaliation Provision

Background: This provision attempts to settle a circuit split. The 6th Circuit has held that the False Claims Act (FCA) anti-retaliation provision protects former employees alleging post-termination retaliation.[7] This decision diverges from a 10th Circuit opinion holding that the FCA's anti-retaliation provision excludes relief for retaliatory acts occurring after the employee has left employment.

The 6th Circuit found that the term "employee," as it appears in the FCA's anti-retaliation provision, includes both current and former employees. In reaching this conclusion, the 6th Circuit adopted the approach used by the Supreme Court in Robinson v. Shell Oil Co.[8] In *Robinson,* the Supreme Court held that the term "employees" as used in 704(a) of Title VII of the Civil Rights Act of 1964 could be read to refer to both current and former employees.[9]

Because the Supreme Court in *Robinson* ultimately found that the meaning of the term "employee" refers to both current and former employees, the Sixth Circuit adopted the same analysis to broader context and purpose of the FCA. The court explained that the purpose of the FCA's anti-retaliation provision is to encourage the reporting of fraud and to facilitate the federal government's ability to stymie crime by protecting individuals who assist in its discovery and prosecution.

Proposed language (in red with existing law in black):

Any **current or former** employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent is

[7] *See* United States ex rel. Felton v. William Beaumont Hosp., No. 20-1002, 2021 U.S. App. LEXIS 9387 (6th Cir. Mar. 31, 2021); *see also* Potts v. Center for Excellence in Higher Education, Inc., 908 F.3d 610 (10th Cir. 2018).
[8] 519 U.S. 337 (1997).
[9] *Id.* at 345.

discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, agent or associated others in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter.

What the language does:
This provision settles a circuit split, clarifying that the existing anti-retaliation provisions of the False Claims Act apply to post-employment retaliation.

Why it matters:
The 6th Circuit correctly concluded that excluding former employees from the FCA's anti-retaliation protections would frustrate the purpose of this provision by allowing employers to threaten, harass, and discriminate against employees without repercussions so long as they fire them first.