Westlaw Today
powered by Reuters

Proposed False Claims Act amendments: Where's the fairness?

By Peter B. Hutt II, Esq., and Mathew F. Dunn, Esq., Covington & Burling LLP

OCTOBER 11, 2021

Recently introduced proposed changes to the civil False Claims Act ("FCA") are strikingly one-sided, unfair and would turn the law on its head. This legislation, introduced by Senators Chuck Grassley and Pat Leahy, would make several significant changes to the FCA.

First, it would impose a heightened burden of rebuttal on defendants with respect to the key element of materiality and is nakedly designed to make it easier for qui tam plaintiffs and the government to win FCA cases. A second change could make defendants in non-intervened FCA cases liable to reimburse the government for its costs of responding to discovery requests, which could hamper defendants' ability to meet the new burden imposed on them. Finally, these lopsided changes would apply retroactively to all pending FCA cases. These obvious attempts to tilt the scales of justice flout any sense of fairness and should be rejected.

The proposed 'Proving Materiality' change

The first change would add a new subsection (e) to 31 USC section 3729 entitled "Proving Materiality." This section starts off by stating that "(1) [i]n an action under [the FCA], the Government or relator may establish materiality by a preponderance of the evidence." This simply restates current law.

However, the proposed amendment goes on to state that a defendant "may rebut evidence of materiality under paragraph (1) only by clear and convincing evidence that the government regards the matter as immaterial." This would seek to impose on a defendant, for the first time, a burden to rebut an element of liability in an FCA case.

Not only would this be unprecedented, but it would conflict with the well-established principle — of which the Supreme Court unanimously reminded us — that the plaintiff bears the burden in a civil fraud action and that proving the requirement of materiality in a FCA claim is "demanding."[1]

Moreover, the burden the amendment would impose on defendants — "clear and convincing evidence" — is higher than the "preponderance of the evidence" burden imposed on the plaintiff. It is fundamentally unfair (and not surprisingly, unprecedented) to make it harder for a defendant to disprove liability than it is for a plaintiff to establish liability.

Indeed, to be consistent with traditional legal principles, Congress should amend the FCA so that plaintiffs, not defendants, have the burden of establishing materiality by clear and convincing evidence. In establishing the "preponderance of the evidence" standard as the plaintiffs' burden of proof in 1986, Congress rejected "clear and convincing evidence" as their burden because Congress erroneously assumed that the FCA was not penal in nature.[2]

Since then, the Supreme Court has pointed out that Congress's assumption was incorrect. It noted that because the statute provides for treble damages and penalties, the FCA is "essentially punitive in nature."[3] If anything, the penal nature of the FCA suggests that Congress should *increase* the protections afforded defendants in FCA cases by requiring relators and the government to meet a clear and convincing standard of proof as to all elements, including materiality.

It is fundamentally unfair (and not surprisingly, unprecedented) to make it harder for a defendant to disprove liability than it is for a plaintiff to establish liability.

The evident intent of the proposed change to the FCA's materiality requirement is to make it harder for a defendant to defend itself. Such a naked, result-oriented approach has no proper place in a civil fraud case. It is akin to telling defendants in criminal cases that they bear the burden of proving their innocence and that they must do so by a heightened standard of proof.

Such an approach turns traditional notions of justice and fairness on their heads. It cannot be justified by labelling all FCA defendants before adjudication as "fraudsters" any more than it could be justified by labelling all defendants in criminal matters before adjudication as "criminals." In both cases, that is exactly what the government is required to prove —on a level playing field.

Any presumption that a defendant is a "fraudster" — and any amendments premised on that presumption — is particularly inappropriate in the FCA context, given that any private, financially

motivated person can file an FCA complaint whether it has any merit or not, and those individuals can pursue the cases on their own even if the Department of Justice has investigated the claims and declined to pursue the case.

The proposed change regarding reimbursement of discovery costs

Senator Grassley also proposes to add a new subsection (f) to 31 USC section 3731, which would state:

> "(f) If the Government elects not to intervene in [a qui tam action], the court shall, upon a motion by the Government, order the requesting party to pay the Government's expenses, including costs and attorney's 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."

This proposed change is not needed to prevent discovery abuses; rather, like the proposed change to materiality, it appears designed to make it harder for defendants to defend themselves in FCA cases.

When the government declines to participate in a FCA case, it takes the position that it is a non-party in that matter. As a non-party, the rules of civil procedure already provide the government the right to recover its expenses (including attorneys' fees) of responding to a party's discovery request if the party fails to take reasonable steps to avoid imposing undue burden or expense on the non-party.[4]

The proposed change would give the government an additional recourse in FCA cases if *the government* decides that the "information sought" is irrelevant or disproportionate to the needs of the case (whatever that means). The change, on its face, appears to require no further showing from the government than its say-so. If it doesn't want to pay for the discovery it needs to defend itself, the defendant bears the burden of demonstrating that the discovery it seeks is relevant and proportionate.

The evident intent of the proposed change to the FCA's materiality requirement is to make it harder for a defendant to defend itself.

While couched in even-handed terms ("the requesting party"), the proposed amendment would be particularly onerous for defendants — and given the purpose of the legislation, that's probably not a coincidence. The government is the allegedly defrauded party. Much, if not all, of the evidence concerning the factors that the Supreme Court deemed relevant in *Escobar* to determine materiality typically resides in the hands of the government. Defendants have no way to obtain that evidence in a non-intervened FCA case other than by serving third-party requests on the government.

Making defendants potentially liable to pay the government's expenses for responding to such requests is patently unfair, particularly in light of the proposed change requiring defendants to disprove materiality by clear and convincing evidence. Indeed, given the significant role that evidence of the government's actions has played in determining materiality, the proposed discovery cost amendment appears calculated simply to make it more difficult for defendants to meet the heightened burden that now would be imposed upon them by the materiality amendment.

Retroactive application of the changes

Senator Grassley proposes to make these changes applicable not only to any FCA case that is filed on or after the date of their enactment, but also to any FCA case that is pending on that date. Such retroactive application is disfavored under the law, and in this case applying these changes retroactively would be grossly unfair given their major departure from current law. Moreover, their retroactive application to pending cases would raise genuine issues regarding their constitutionality.

The proposed amendments' departure from existing law and settled expectations is so great as to raise serious questions regarding their constitutionality.

The Supreme Court has held the application of laws that impose new disabilities with respect to past events are disfavored.[5] That would clearly be the case with the two changes here — applying the materiality change to pending FCA cases would impose a new and heightened burden of rebuttal on defendants for conduct that occurred before the amendment's adoption, and applying the discovery cost change to pending cases would impose potential liabilities on defendants for prior conduct that was not subject to such liabilities at the time it occurred.

No reasonable person could assert that defendants in the past were subject to any burden, let alone a clear or convincing evidence burden, in an FCA case, or that they were subject to paying the government's expenses, including attorneys' fees, for responding to reasonable discovery requests in a non-intervened case.

Retroactive application conflicts with the principle that "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly," and that therefore "settled expectations should not be lightly disrupted."[6]

Indeed, the proposed amendments' departure from existing law and settled expectations is so great as to raise serious questions regarding their constitutionality. The FCA is "essentially punitive in nature." The Ex Post Facto Clause prohibits legislation designed

to punish entities or individuals for past conduct,[7] while the Due Process Clause requires that retroactive application of a statute must be "supported by a legitimate legislative purpose furthered by rational means."[8] Retroactive application of these one-sided and unsupportable proposed changes to the FCA would violate both constitutional standards.

Notes

[1] *See Universal Health Services v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016).

[2] S. Rep. No. 99-345, at 30-31.

[3] *See Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 784 (2000).

[4] Fed. R. Civ. P. 45(d)(1).

[5] *Hughes Aircraft Co. v. United States ex. rel. Schumer*, 520 U.S. 939, 947 (1997).

[6] *Landgraf v. USI Film Prod.*, 511 U.S. 244, 265 (1994).

[7] *Weaver v. Graham*, 450 US 24, 28 (1981).

[8] *United States v. Carlton*, 512 US 26, 30-31 (1994).

About the authors

Peter B. Hutt II (L), a partner at **Covington & Burling LLP**, represents government contractors, litigates qui tam matters brought under the False Claims Act and has testified before Congress concerning proposed amendments to the FCA. He can be reached at phuttjr@cov.com. **Matthew F. Dunn** (R), also a partner at the firm, represents health care companies during U.S. Department of Justice investigations and advises clients in cases involving FCA claims and state consumer fraud laws. He can be reached at mdunn@cov.com. Both authors are based in Washington, D.C.

This article was first published on Westlaw Today on October 11, 2021.