

False Claims Act Spotlight (2 of 3): Recent Proposed Amendments to the FCA Fall Short of Cohesive and Substantive Change

Health Care Law Brief Blog on September 13, 2021

This is the second installment in our series of posts covering recent developments in False Claims Act (“FCA”) doctrine and practice, with the [first post](#) discussing the rescission of the “Brand Memo” and restoring the role of sub-regulatory guidance in FCA enforcement actions. A third post, to come later this week, will address recent federal court cases construing the FCA.

In July 2021, Senator Chuck Grassley led a bipartisan group of senators in [introducing](#) S.B. 2428, the “[False Claims Amendments Act of 2021](#),” which aims to address legal developments in FCA doctrine that, according to the bill’s sponsors, made it “more difficult for plaintiffs and whistleblowers to succeed in lawsuits against government contractors engaged in fraud.” S.B. 2428 proposes amendments to the FCA in four key areas more fully described below:

- to shift the burden to defendants to disprove plaintiffs’ showing of materiality of alleged FCA misconduct;
- to provide a means by which the government can seek reimbursement for costs incurred for responding to burdensome discovery requests;
- to resolve a Circuit Court split regarding the appropriate standard of review for evaluating government’s (c)(2)(A) motions to dismiss *qui tam* complaints; and
- to extend the FCA’s anti-retaliation whistleblower protections.

[In Response to Escobar: An Incomplete Framework for Materiality Burden-Shifting](#)

S.B. 2428 is, at least in part, a direct response to the Supreme Court's decision in *United Health Services v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016). To make out a claim under the FCA, the statute requires that the alleged misconduct be "material" to the government's decision to pay claims. 31 U.S.C. § 3729 (a)(1)(B). Plaintiffs must prove materiality of the conduct by a preponderance of the evidence. 31 U.S.C. § 3731(d). In holding that the "implied false certification theory" – the failure to disclose violations of material statutory, regulatory, or contractual requirements in submitting a claim – can provide a basis for FCA liability, the Court in *Escobar* endeavored to clarify how the materiality requirement of the FCA should be enforced.

The *Escobar* Court explained that "very strong evidence that [] requirements are not material" includes but is not limited to the government's payment of either (1) a particular claim in full, despite actual knowledge that requirements were violated, or (2) a particular type of claim in full, on a regular basis, despite actual knowledge that requirements were violated, and the government has not signaled a change in position. *Escobar*, at 2003-04. Conversely, "proof of materiality can include, but is not necessarily limited to, evidence that the defendant knows that the Government consistently refuses to pay claims in the mine run of cases based on noncompliance with the particular statutory, regulatory, or contractual requirement." *Id.*

This "rigorous" and "demanding" standard of materiality under *Escobar* has supposedly made it easier for alleged fraudsters to prevail at either the motion to dismiss or summary judgment stages. As [described](#) by Senator Grassley, alleged fraudsters need only show that otherwise "obvious fraud was not material simply because the government continued payment." The practical effect of *Escobar* has been a marked [decrease in FCA recoveries](#), with 2020 recoveries totaling \$2.2 billion as compared to almost \$5 billion in 2016.

To correct for this perceived problematic development in FCA doctrine, S.B. 2428 would institute a burden-shifting framework that would purportedly make materiality-based dismissals harder for FCA defendants to obtain. Under the proposed amendment, “the Government or relator may establish materiality by a preponderance of the evidence,” but “[a] defendant may rebut an argument of materiality...by clear and convincing evidence.” However, the proposed amendment does not make clear how this would actually result in a shifting of burdens of proof. S.B. 2428 does not define materiality, alter the *Escobar* framework for proving materiality, or create a presumption based on a prima facie showing of materiality pursuant to which the burden of proof would shift to the defendant to disprove materiality, as would be the case in typical burden shifting frameworks.

As currently drafted, S.B. 2428 would still impose on a plaintiff the burden of proving materiality in the first instance, and would continue to allow a defendant to demonstrate that the plaintiff had not met its initial burden by using evidence of the government’s payment of claims despite knowledge of the defendant’s violations of FCA requirements. In such cases, the defendant would never need to meet its higher “clear and convincing” burden on rebuttal. Thus, if enacted in its current form, S.B. 2428 may further confuse those involved in bringing, defending, and deciding the outcome of FCA litigation without substantively altering FCA materiality doctrine.

Fishing for Materiality: Defendants’ Discovery Lines Not Cast on the Government Dime

S.B. 2428 also attempts to discourage defendants from engaging in discovery “fishing expeditions” to obtain evidence from the government that can be used to rebut an argument of materiality. But similar to the would-be burden shifting framework described above, the amendments again appear to fall short. They do not alter the scope of discovery available to FCA defendants or establish protections for the government to combat unnecessary or burdensome discovery requests, blunting the amendments’ practical effects in deterring unnecessary discovery. S.B. 2428 merely enables the government to recover attorneys’ fees and costs in non-intervened *qui tam* litigation “for responding to discovery requests, unless the party can demonstrate that the information sought is relevant, proportionate to the needs of the case, and not unduly burdensome on the Government.” Thus, the deterrent to “fishing expeditions” is only at play when the government responds to discovery requests in *qui tam* cases in which it has not intervened, and such discovery requests are outside the bounds set by Rule 26 of the Federal Rules of Civil procedure.

Again, these proposed changes to the FCA appear to raise more questions than they answer. For example, is the government’s objection to discovery a threshold for seeking reimbursement, or does failure to object constitute an implicit waiver of potential reimbursement by the government? Does a court’s order compelling discovery over the government’s objection definitively establish the appropriateness of discovery rendering the government ineligible for reimbursement? Furthermore, it is unclear how the fee-shifting procedure of S.B. 2428 acts independently of other protections against financial burdens of discovery imposed on the government.

Solving the Circuit Split on (c)(2)(A) Dismissals

The third section of S.B.2428 aims to address the current split among Circuit Courts regarding whether and when a court should grant the government’s motion to dismiss a *qui tam* complaint under 31 U.S.C. § 3730(c)(2)(A). This statutory provision allows the government to voluntarily dismiss a *qui tam* complaint over the objections of a relator, but does not state what standard of review courts should use in determining whether to grant dismissal. For example, the D.C. Circuit defers to the government’s “unfettered right” to use its dismissal authority (*Swift v. United States*, 318 F.3d 250, 252 (D.C. Cir. 2003)), while the Ninth Circuit requires there to be a “rational relation” between dismissal and a valid government purpose (*Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139 (9th Cir. 1998)).

S.B. 2428 would resolve this Circuit split by codifying a framework similar to the “rational relation” standard pursuant to which the government must demonstrate the reasons for the dismissal in an evidentiary hearing in which the relator has an “opportunity to show that the reasons are fraudulent, arbitrary, and capricious, or contrary to law.” While this would resolve the Circuit split and impose a minimal factual burden on the government, the practical effect on the number of dismissals under 31 U.S.C. § 3730(c)(2)(A) would likely be negligible, as the government presumably avoids dismissals for arbitrary and capricious reasons.

Expanding Whistleblower Protections to Post-Employment

Finally, in what would be the least controversial amendment to the FCA, S.B. 2428 would explicitly apply the FCA’s anti-retaliation provisions in 31 U.S.C. 3730(h) to both current and former employees. This extension heads off another Circuit split in how anti-retaliation provisions are applied to whistleblowers following the termination of their employment.

What is Next?

Notably, S.B. 2428’s amendments would apply to both new and pending FCA actions in an attempt to address frauds perpetrated in relation to COVID relief spending. Senator Grassley and S.B. 2428’s co-sponsors, Sens. Patrick Leahy, John Kennedy, Dick Durbin, and Roger Wicker, attempted to include a version of the bill as [Amendment 2435](#) to the Senate’s current infrastructure legislation. However, Amendment 2435 was stripped from the larger legislation almost as soon as it was added. Nevertheless, we can expect S.B. 2428 to continue popping up in some form as the Senate takes up larger pieces of legislation over the course of the current legislative session and as COVID-related fraud enforcement picks up. Otherwise, the bill may be tweaked and tinkered with in the Senate Judiciary Committee, which process will hopefully address the noted concerns with its current language.

Stay tuned for an additional post in the coming week covering recent court decisions addressing the FCA.

[View Original](#)

[Related Professionals](#)

- **Edward S. Kornreich**