

Significant Changes to Federal False Claims Act Introduced by Senator Grassley

On September 12, Senator Charles Grassley (R-Iowa), ranking member of the Senate Finance Committee, proposed Senate Bill 2041 to amend the federal False Claims Act (“FCA”) in ways which would directly impact qui tam suits initiated against health care providers.

In his statement on the Senate floor, Senator Grassley stated that the proposed “False Claims Act Correction Act of 2007” (“S. 2041” or “the bill”) is partly a response to recent federal court decisions that have weakened the congressional intent of the 1986 FCA amendments. The 1986 amendments were designed to increase the incentives for whistleblowers who file false claims complaints.

For example, S. 2041 seeks to eliminate the requirement that a false claim be presented directly to a government employee for payment before liability attaches. In 2004, the D.C. Circuit Court of Appeals ruled that the federal government could not recover certain money because the defendant submitted the purported false claim to employees of Amtrak, a government grantee, rather than to a direct employee of the government.¹ In a press release, Senator Grassley indicated that S. 2041 would permit the government to recover funds improperly paid consequent to fraud, waste, or abuse independent of whether a defendant submitted the false claim directly to a government employee.

In addition, S. 2041 would impede dismissal of qui tam cases based on arguments that such cases are founded on publicly available information. Currently, a whistleblower cannot base a qui tam claim on information that is publicly available. The bill proposes to narrow the FCA’s definition of “publicly disclosed” information, specifically excluding information obtained through Freedom of Information Act requests or from exchanges of information with government employees unless the information was somehow disclosed publicly in another manner. Thus, under the False Claims Act Correction Act of 2007, information obtained pursuant to the Freedom of Information Act could form the basis of an FCA claim. Moreover, the bill would define “based on” such that an FCA claim could only be dismissed because it is based on publicly available information if the relator obtained knowledge of every necessary element of the FCA violation from that public information.

Further, the bill would require that the United States Department of Justice (“DOJ”) quickly file a motion to dismiss a whistleblower claim that is improperly based on publicly available information. This proposed amendment to the FCA is meant to counter a 2007 Supreme Court decision which prohibited whistleblowers from receiving the statutory share of any recovered funds unless they were the original source of all of the



¹ United States ex rel. Totten v. Bombardier Corp., 380 F.3d 488 (D.C. Cir. 2004).

resolved claims.² Senator Grassley has explained that there are scenarios in which the DOJ may elect to settle an FCA case on grounds different from the ones the whistleblower originally asserted. Senator Grassley has further stated his concern that there is no incentive for whistleblowers to come forward with information about potential fraud if they are not permitted to share in the eventual recovery if the case ultimately settles on other grounds.

S. 2041 would amend the FCA in other ways of particular concern to the health care industry. In most cases, the statute of limitations for FCA liability is six years. However, the bill would expand the maximum statute of limitations to ten years. Likewise, the legislation seeks to further expand the statute of limitations by permitting DOJ claims to relate back to the date when the whistleblower originally filed a qui tam case under seal. Because these cases can exist under seal for a number of years, this change would render the statute of limitations analysis less predictable.

Moreover, the bill seeks to expand the range of people the FCA's whistleblower retaliation provision protects. Currently, the FCA protects employees whose employers punish them for lawfully pursuing a qui tam action. S. 2041 would also protect government contractors or agents who suffer any discrimination or adverse treatment because of lawful actions they or "associated others" take to stop an FCA violation.

If passed, S. 2041 would have a significant impact on FCA enforcement actions and would greatly expand the universe of potential false claims liability for health care providers. We will continue to monitor this legislation and provide updates as they become available.

A copy of the text of the False Claims Act Correction Act of 2007 is available by clicking [here](#).

² Rockwell Int'l Corp. et al v. United States, 127 S.Ct. 1397 (2007).

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