

Senator Grassley and Senior DOJ Official Discuss Potential False Claims Act Changes and Enforcement Priorities

By Matthew Dunn, Michael Wagner and Terra White Fulham on February 23, 2021

False Claims Act

On February 17, 2021, Senator Chuck Grassley (R-IA) and Brian Boynton, Acting Attorney General for the Department of Justice's Civil Division, provided opening remarks at the Federal Bar Association's annual Qui Tam Conference. Both emphasized the key role of the FCA in combating fraud against the Government, and noted an anticipated increase in FCA enforcement actions in the coming years, particularly related to the Government's pandemic response. In addition, Senator Grassley offered a preview of potential legislative changes to the False Claims Act, and Boynton outlined DOJ's enforcement priorities for the coming year.

Senator Grassley Signals Potential Legislative Changes to the FCA

In his prepared [remarks](#), Senator Grassley, an architect of the 1986 and 2009 amendments to the False Claims Act, signaled that changes to the False Claims Act may be on the horizon. He confirmed that he is drafting legislation to overturn what he described as attempts by the courts and the DOJ to "undermine the law as written." Senator Grassley highlighted two areas of focus for potential legislative action, both of which would benefit *qui tam* relators.

First, Senator Grassley indicated a potential change to the materiality standard under the FCA. During a Q&A session, he acknowledged that materiality is "very, very important" and necessary to "prevent parasitic lawsuits." Yet, while not referencing the case directly, Senator Grassley took aim at the Supreme Court's 2016 decision in *Escobar* and its progeny, stating that courts have "read into the law a more stringent materiality standard than was originally intended" over the past several years. In particular, Senator Grassley stated that he wants to ensure that courts cannot dismiss cases on materiality grounds "just because somebody working in the government is aware of [the non-compliance or falsity of the claim] and continues to pay." Although he did not provide any detail on proposed amendments to the materiality standard, Senator Grassley's view appears directed at the Supreme Court's opinion in *Escobar*, which explained that the Government's "pay[ment] of a particular claim in full despite its actual knowledge that certain requirements were violated" is "very strong evidence that those requirements are not material." Since *Escobar*, [courts in a variety of circuits](#) have dismissed

FCA claims based, in part, on the Government's continued payment after notification that certain requirements were violated.

Second, Senator Grassley criticized DOJ's interpretation of its authority to dismiss *qui tam* suits. Following the issuance of the 2018 Granston Memo, the number of non-intervened *qui tam* cases that DOJ has sought to dismiss has increased from prior years (though the number of such dismissals relative to *qui tam* suits filed remains very low). Senator Grassley suggested that DOJ has dismissed cases under an "incorrect interpretation" of the FCA that it has "unfettered" discretion to dismiss *qui tam* cases. While acknowledging that the DOJ is within its rights to seek dismissal if a case "lacks merit," Senator Grassley suggested that potential new legislation would impose a higher standard on DOJ when seeking dismissals of *qui tam* lawsuits. Without providing specifics, Senator Grassley asserted the Attorney General should have to "provide evidence in a court of law" and "state legitimate reasons for deciding not to pursue" *qui tam* claims.

Senator Grassley noted that he intended to include language making any legislative changes to the FCA retroactive so as to ensure coverage of pending cases and cases on appeal, consistent with the approach used in the 2009 amendments to the Act.

There is, however, one aspect of the FCA that Senator Grassley made clear he does not intend to change. During a [Q&A session](#) following his opening remarks, Senator Grassley was asked for his opinion on the addition of language to limit FCA penalties to ensure they are not disproportionate or excessive. He rejected this notion, stating he does not want to "change those [penalties] at all," and remarking that the Government must "come down with a sledgehammer, not a toothpick" in response to fraud.

Boynton Highlights DOJ's FCA Enforcement Priorities

In his prepared remarks, Boynton outlined six priority areas for the Civil Division's FCA enforcement in the coming year. First, unsurprisingly, fraud relating to the government's pandemic response is expected to be a key priority in the coming year. Boynton noted that DOJ recently obtained its [first FCA settlement](#) for fraud on the CARES Act Paycheck Protection Program, and that more will undoubtedly follow. Boynton expects that the government's significant pandemic spending will translate to significant cases and recoveries in the coming years.

In addition to fraud related to the COVID-19 pandemic, Boynton highlighted the following enforcement priorities: fraud related to the opioid crisis; fraud directed toward senior citizens, particularly schemes to provide poor or unnecessary health care to seniors; fraud relating to electronic health records; fraud relating to telehealth schemes; and cybersecurity-related fraud.

Boynton's comments on the latter category are consistent with [December 2020 remarks](#) from Deputy Assistant Attorney General Michael Granston, in which he specifically identified "cybersecurity related fraud" as an "area where we could see enhanced False Claims Act activity." We [recently analyzed](#) the efforts of the Government and *qui tam* relators to use the FCA to enforce alleged cybersecurity noncompliance.

Boynton also discussed the Civil Division's increased use of sophisticated data analytics to identify fraudulent schemes and analyze *qui tam* claims. These techniques have largely been used in the health care context to date (e.g., through analysis of Medicare data). But Boynton

expects the Civil Division's use of data analytics to expand to combat other types of fraud, including misconduct related to the pandemic response.

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