

# GRASSLEY LEADS BIPARTISAN GROUP IN EFFORT TO BOLSTER FALSE CLAIMS ACT

The pandemic hit, mayhem and lockdowns ensued, and trillions of dollars were appropriated for COVID relief by Congress. It's a lot, and as response and recovery continues to unfold, fraudsters saw an opportunity and are taking it. In response, Senator Chuck Grassley (R-IA) – historically a champion of the False Claims Act (“FCA”) – is leading a bipartisan group of senators who have proposed legislation, the False Claims Act Amendments Act of 2021 (“FCA Amendments Act of 2021”), that, if passed, will implement important amendments to the FCA. The legislation’s objective is to help level the playing field by deflating the government’s *lack of materiality* charge and by bolstering [relators’](#) objections to the Department of Justice’s (“DOJ”) seemingly random dismissals of qui tam cases.

## THE ESCOBAR DECISION: KICKING OFF CONFUSION

According to a [press release](#) from Grassley’s office, the new legislation was spawned by SCOTUS’ *Escobar* decision, which makes it that much more challenging for whistleblowers and relators to prevail in lawsuits against the U.S. government. To recap, in *Escobar*, the Court tightened the FCA’s scope by transforming it from a statute that policed contractual workaday disputes to a statute that only applies when a statement that is known to be false has an actual – rather than theoretical – impact on the government’s overall decision to pay a claim.

## WHAT'S IN THE FCA AMENDMENTS ACT OF 2021

The [FCA Amendments Act of 2021](#) features several note-worthy tweaks, including:

- Raising the bar for burden of proof as it applies to defendants who rebut the issue of materiality
- Requiring the government to provide reasons for moving to dismiss claims – while providing relators with a statutory standard for challenging said dismissals
- Providing former employees with explicit protections from retaliation
- Allowing the government to recover on those costs generated by the request for discovery in cases that are ultimately declined

# MATERIALITY

Proponents of the FCA Amendments Act of 2021 find that *Escobar* diluted the FCA, thus allowing *fraudsters to argue that their obvious fraud was not material simply because the government continued payment* – in the words of Senator Patrick Leahy (D-Vermont). In its effort to strike back, the FCA Amendments Act of 2021 imposes a higher burden of proof on defendants who rebut allegations of materiality – in contrast to the burden borne by the government and relators in establishing materiality. In its current iteration, the FCA requires the government and relators to back their allegations with a *preponderance of the evidence* while the FCA Amendments Act of 2021 would boost this standard (for defendants) to *clear and convincing evidence* (a step closer to the highest standard, which is *beyond a reasonable doubt*) that the alleged fraud in question was not material in nature.

# DEMONSTRATED REASONS FOR DISMISSAL

The FCA Amendments Act of 2021 would also open opportunities for *qui tam* relators to dispute dismissals by requiring the government to share its reasons for said dismissals and to allow relators a chance to rebut governmental rationales for dismissal by demonstrating that they are *fraudulent, arbitrary, and capricious, or contrary to law*. The addition of *contrary to law* opens up a broader avenue of opposition to government dismissals.

Notably, this amendment – by putting more careful parameters on the government’s Executive Branch authority – would likely impede the government’s ability to enforce the FCA. This may represent the weakest link in the legislation, which is intended to bolster the *FCA’s standing* as the *best tool to fight fraud against the government and recover lost taxpayer dollars*. There is a potential disconnect between the proposed inroad to litigation that the government has already declined and its efforts to preserve federal resources (while bypassing precedent-setting case law) that could ultimately weaken the FCA.

# PROTECTIONS AGAINST RETALIATION

The FCA Amendments Act of 2021 directly addresses the issue of retaliation against whistleblowers by former employers. In fact, it entitles victims of retaliation (for their whistleblowing efforts) to legal relief – in a strike against post-employment retaliation.

# THE GOVERNMENT’S FINANCIAL RECOVERY

Finally, the FCA Amendments Act of 2021 would allow the government to recover on discovery-based expenses – including all attorney fees – in declined cases. This is, however, unless the party who requested the discovery can show that the information it sought checks several boxes:

- The discovery was relevant to the case
- The discovery was proportionate to the needs of the specific case
- The discovery was not unduly burdensome to the government

## THE GOAL

The goal of Grassley's bill, which was introduced on July 22, 2021, is to give whistleblowers' FCA cases a fighting chance against federal prosecutors' protestations that they are wasteful, meritless, or in opposition to standing federal policy. Currently, the FCA allows the DOJ, at any juncture in the proceedings, to end whistleblower actions by simply providing the whistleblower in question with a motion of notice to dismiss (and an opportunity to pursue a hearing on the motion). The FCA Amendments Act of 2021 does increase the burden on the DOJ by requiring it to provide a rationale for dismissal and, in turn, by requiring it to allow the qui tam plaintiff an opportunity to demonstrate the government's faulty reasoning. It is generally accepted, however, that this burden remains in the modest range. In fact, many proponents are of the opinion that, while the FCA Amendments Act of 2021 implements a low bar, it is a bar nonetheless, and most agree that something is better than nothing.

## THE GRANSTON MEMORANDUM

When the [Granston Memorandum](#) greenlighted prosecutors to stop so-called meritless cases that were poised to drain government resources and/or to generate unfavorable precedent in 2018, it significantly increased the number of DOJ-backed dismissals. In [response](#), Grassley asserts that requiring the DOJ to explain itself will improve transparency while reassuring *whistleblowers across the country that the government is not arbitrarily dismissing their claims*.

## PUTTING THINGS IN PERSPECTIVE

The pandemic has hit us all where it hurts, and fraud is but one unfortunate byproduct. In response, a bipartisan group of senators led by Chuck Grassley of Iowa has proposed legislation that is poised to help the FCA more nimbly address the issue of fraud, while protecting the rights of relators in qui tam cases.



### MATTHEW ZANDI

Senior Managing Director

Matthew Zandi has extensive experience in both the public and private sectors with over 40 trials in state, federal, and international courts. He is nationally recognized as one of the leading experts in Qui Tam, fraud, and various state and federal whistleblower statutes, compliance, investigations, litigation, and policy. During his tenure as an Assistant U.S. Attorney, Mr. Zandi oversaw the Affirmative Civil Enforcement Task Force (ACE) where he led investigations and litigations of whistleblower claims and Qui Tam litigations nationwide.