

Senator Grassley Introduces S. 458, the "False Claims Act Clarification Act of 2009"

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March 13, 2009

On February 24, 2009, Senator Charles Grassley (R-IA) introduced S. 458, the "False Claims Act Clarification Act of 2009." Among other things, the bill, which is essentially identical to one which Senator Grassley introduced in the prior Congressional term, seeks to reverse judicial rulings regarding the proof required to sustain a finding of liability under the FCA (most notably the *Allison Engine* case); redefine the FCA's "public disclosure bar"; and more clearly define the *qui tam* relator status of Government employees. This client advisory will discuss these provisions and the likelihood of passage by the 111th Congress.

Presentment of Claims to the Government/Allison Engine

In *Allison Engine Co. v. United States, ex rel. Sanders, et al.*, 128 S.Ct. 2123 (2008), the Supreme Court interpreted the FCA's imposition of liability upon a person who knowingly uses a "false record or statement to get a false or fraudulent claim paid or approved by the Government," (31 U.S.C. § 3729(a)(2)) or "conspires to defraud the Government by getting a false or fraudulent claim allowed or paid," (31 U.S.C. § 3729(a)(3)) as requiring proof "that the defendant intended that the false record or statement be material to the Government's decision to pay or approve the false claim." Stated another way, it is not sufficient to simply show that the funds used to pay the false claim ultimately came from the Government.

Lower courts have interpreted the FCA in a similar fashion, albeit in slightly different contexts from *Allison Engine*. See, e.g., *United States ex rel. Totten v. Bombardier Corporation*, 380 F.3d 488 (D.C. Cir., 2004); *United States ex rel. DRC, Inc., v. Custer Battles, LLC*, 444 F. Supp. 2d 678 (E.D. Va. 2006). In *Totten*, the District of Columbia Circuit interpreted § 3729(a)(1), which imposes liability on anyone who "knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval" as not encompassing a fraudulent claim made to Amtrak, notwithstanding that Amtrak paid the claims with funds which included federal grant money. In *Custer Battles*, the District Court reversed a jury verdict in favor of relators and held that presentment of a claim to the Coalition Provisional Authority in Iraq did not constitute presentment to the United States Government.

Senator Grassley's bill attempts to avoid the holdings of *Allison Engine*, *Totten* and *Custer Battles* by removing the language "to an officer or employee of the United States Government or member of the Armed Forces of the United States" from § 3729(a)(1); and removing "by the Government" from § 3729(a)(2). The proposed bill then defines "claim" as including "any request or demand . . . for money or property . . . that . . . is made to a contractor, grantee, or other recipient if the United

States Government . . . provides or has provided any portion of the money or property requested or demanded" The aim of this language, according to the Senate Report that accompanied a previous version of the bill introduced by Senator Grassley in the 110th Congress, is to ensure "that liability under [Section] 3729(a) attaches whenever a person knowingly makes a false claim to obtain money or property, any part of which is provided by the Government without regard to whether the wrongdoer deals directly with the Government."

The implications of Senator Grassley's proposal are potentially far-reaching. Theoretically, for example, a second-tier subcontractor which itself has no dealings whatsoever with the Government, but which is providing services or materials on a project which is partially funded by a federal agency, could be subject to treble damages under the FCA because of the actions of one of its employees.

Public Disclosure Bar

Currently, 31 U.S.C. § 3730(e)(4)(A) provides a jurisdictional bar to civil *qui tam* actions "based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is the original source of the information." Subsection (4)(B) of § 3730(e) defines "original source" as "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action" The "public disclosure" bar has been successfully invoked by defendants in *qui tam* actions, resulting in dismissal of those actions. Perhaps most notably, in *Rockwell International Corp. v. United States*, 127 S.Ct. 1397 (2007), the Supreme Court confirmed that the "public disclosure" bar is jurisdictional in nature and upheld the dismissal of a *qui tam* action, after a verdict in favor of the relator, notwithstanding that the Government had intervened in the action.

Senator Grassley's bill proposes to take the defense of the "public disclosure" bar out of a *qui tam* defendant's hands and make dismissal contingent on "a motion by the Government filed on or before the service of a complaint on the defendant . . . or thereafter for good cause shown." If S. 458 is passed in its present form, the Government will have "sole authority to move to dismiss parasitic *qui tam* cases" (S. Rep. 110-507 to S. 2041, the 2008 version of Senator Grassley's bill). Stated another way, this portion of S.458 is highly significant in that it attempts to provide the Government with the exclusive ability to bring a motion to dismiss based on a lack of subject jurisdiction.

Qui Tam Actions Brought by Government Employees

As it is currently written, the FCA does not definitively state whether Government employees may serve as *qui tam* relators, and courts have come down on both sides of the issue. For example, in the Tenth and Eleventh Circuits, Government employees are not automatically barred from being *qui tam* relators, even if their job responsibilities included reporting fraud. See, e.g., *United States ex rel. Holmes v. Consumer Ins. Group*, 318 F.3d 1199 (10th Cir. 2007); *United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493 (11th Cir. 1991). By contrast, in the First and Ninth Circuits, Government employees have encountered difficulty in bringing *qui tam* actions. See, e.g., *United States ex rel. Fine v. Chevron, U.S.A., Inc.*, 72 F.3d 740 (9th Cir. 1995); *LeBlanc v. Raytheon Co., Inc.*, 913 F.2d 17 (1st Cir. 1990) *r'hrq denied, cert. denied*, 499 U.S. 921 (1991).

Senator Grassley's bill attempts to resolve the issue by adding subsection (6)(A) to 31 U.S.C. §

3730(b). In general terms, subsection (6)(A) permits the Government, within 120 days after the filing of an action, to move a relator who is a Government employee, or an immediate family member of a Government employee, if the allegations in the action were "derived from a filed criminal indictment or information or an open and active criminal, civil, or administrative investigation or audit by the Government"; (ii) if the employee's duties include "uncovering and reporting the particular type of fraud that is alleged" and the employee is "participating in or has knowledge of an open and active . . . investigation or audit"; or (iii) depending on the circumstances, employee learns of the information underlying the allegations in the course of his employment. A Government motion to dismiss under subsection (6)(A) may not be made public without the prior written consent of the relator and is not subject to discovery by the defendant. Further, the proposed subsection requires the Department of Justice to file annual reports regarding the cases in which it has sought dismissal.

This portion of S. 458, while seeking to clarify a somewhat unsettled area of the FCA, might actually create unsettled areas if enacted. For instance, subsection (6)(A) does not explicitly state that a sealed motion by the Government within 120 days of filing is the only means by which a *qui tam* action may be dismissed by virtue of the relator's status as a Government employee. However, we could expect that argument to be raised in the event a private defendant moved to dismiss a complaint on the ground that the relator is a Government employee.

Outlook

Senator Grassley's legislation has been referred to the Senate Judiciary Committee, where it appears to have broad bipartisan support. The bill is cosponsored by the Chairman of that Committee, Senator Patrick Leahy (D-VT), as well as Senators Durbin (D-IL), Whitehouse (D-RI), and Ranking Member Specter (R-PA). That bipartisan backing, combined with substantial progress made on similar legislation during the 110th Congress, indicates that this legislation will be able to get out of Committee and likely out of the Senate. Questions arise, however, as to how quickly that will happen. The Senate Judiciary Committee is also attempting to take on major patent reform legislation and may be asked to consider immigration reform.

House Judiciary Committee Members Howard Berman (D-CA) and James Sensenbrenner (R-WI) cosponsored companion legislation in the House of Representatives during the 110th Congress, but have yet to introduce a bill this Congress. Like its Senate companion, the House bill would likely have strong bipartisan backing, but again would be competing for attention on an aggressive legislative roster. Both chambers are facing a broad and ambitious agenda ranging from health care to climate change.

Finally, Senator Grassley's bill is only one of several efforts to reform government contracting. Recent regulatory rules and increased enforcement activities are also altering the procurement playing field. Given those changes and the potential implications discussed above, Government contractors should get involved early to impact the legislation or rulemakings, and to efficiently and effectively prepare for compliance with all final rules and laws.