Congress Considers Pro-Plaintiff Amendments to False Claims Act

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Developments in Congress: House Judiciary Subcommittees Hold Joint Hearing on False Claims Act Correction Act

- On Thursday, June 19, the Subcommittee on Courts, the Internet and Intellectual Property and the Subcommittee on Commercial and Administrative Law held a joint hearing on the False Claims Act Correction Act of 2007 (H.R. 4854), introduced by Rep. Howard Berman (D-CA) on December 19, 2007, and co-sponsored by Rep. James Sensenbrenner (R-WI). Similar to its companion Senate bill, S. 2041, the central provisions of H.R. 4854 would:
- Repeal the requirement of presentment of a false or fraudulent claim to a government employee, redefining the offense as presentment of a false or fraudulent claim for *Government money or property* irrespective of who receives the claim;
- Narrow the extent to which prior disclosure of the facts underlying the claim may reduce an award to the relator and authorize motions to dismiss an action based on public disclosures only if brought by the Attorney General, not by defendants;
- Expand the cause of action (a) for retaliatory behavior; and (b) to cover funds not owned by the Government, but simply held in trust for other private parties;
- Permit *qui tam* actions brought by current and former Government employees;
- Authorize the Government to share information learned during the course of a civil investigative proceeding with a relator;
- Expand the statute of limitations from 6 to 10 years, and make it possible for the government to file claims outside the statute of limitations by piggy-backing off the relator's filing date; and
- Reduce pleading requirements for relators, excusing the need to identify specific claims that result from alleged misconduct. (This proposed amendment is not included in the Senate version of the bill.)

Four witnesses testified at the June 19, 2008, hearing--three in support of the bill and one in opposition. Representing the US Chamber of Commerce, Peter B. Hutt II posited that the proposed amendments would not assist the fight against fraud on the Government, but would create incentives for relators to bring stale and unfounded claims where the Government was not harmed

and disable non-profits, small businesses, and public entities from defending costly, but meritless, suits. He argued that amendment of the presentment language is both unnecessary in light of *Allison Engine Co. Inc. v. United States ex rel. Sanders*, 2008 WL 2329722 (June 9, 2008), and unwise because it would expand the FCA to cover fraud affecting purely private entities with no nexus to a claim payable by the Government. He noted that the expansion of FCA treble damages and relator bounties for funds held in trust gives the Government and relators windfall recoveries at the expense of trust beneficiaries. The curtailment and weakening of the public disclosure bar will guarantee an increase in parasitic suits brought by relators whose claims merely echo public information, because the Government lacks the resources and incentive to file motions to dismiss in cases in which it declines to intervene, particularly given H.R 4854's much higher standard to prove the jurisdictional bar.

The extension of *qui tam* rights to Government employees creates perverse incentives for employees to conceal suspected fraud and race the Government to the courthouse to earn a relator's recovery, as well as jeopardizes voluntary disclosure programs. The reduced pleading requirement for relators and new ability to obtain information mined by the government converts the relator from someone who propels a fraud case to one who feeds off the government's efforts. During the hearing, ranking member Lamar Smith echoed the view that the FCA amendments were unnecessary and would create a "lottery for plaintiffs' attorneys."

Witnesses testifying in favor of the bill emphasized the need for these changes due to their perception that narrow interpretations of the FCA by the courts have created loopholes that Congress had not intended in its last major overhaul of the statute in 1986. They argued that the recent *Allison Engine* decision does not broadly protect against all claims made to private entities that have received government money to advance a government program. They believe that certain fraud by subcontractors will be left unredressed by the FCA given *Allison Engine's* emphasis that the claimant must intend to defraud the Government by making a false statement material to the Government's decision to pay. Likewise, they argued that the public disclosure bar is currently misused by defendants by securing dismissal of lawsuits where the relator was never aware of dispersed pieces of public information or pieced together information using the Freedom of Information Act. Finally, they argued that extension of the FCA to trusts administered by the United States serves the general policy goals that animated the Government's decision to assume responsibility for the trust.

Developments in the Courts: Use of the Second Circuit's Recent *Baylor* Decision as a Means to Gain Early Dismissal on Statute of Limitations Grounds

An FCA case must be brought no more than 6 years after the date of violation or 3 years after the responsible US official knew or should have known of the facts underlying the violation. 31 U.S.C. § 3731(b). As a matter of practice, after a *qui tam* complaint is filed under seal, the Government will often seek extensions of the 60-day investigative period, and it is sometimes several years before the Government files a complaint-in-intervention. In *United States v. Baylor University Medical Center*, 469 F.3d 263 (2nd Cir. 2006), the Second Circuit held that the Government's complaint-in-

intervention does not relate back to the original FCA complaint under Federal Rule of Civil Procedure 15(c)(2) and must therefore be dismissed as untimely if it is not brought within the pertinent statute of limitations measured from the date of the complaint-in-intervention. The Second Circuit reasoned that notice is a prerequisite of relation back under Rule 15(c) and that because *qui tam* complaints are filed under seal the required notice to defendants is missing. FCA defendants have relied on *Baylor University Medical Center* in a number of other circuits, but so far with little success:

- *United States of America ex rel. Ven-A-Care of the Fla. Keys, Inc. v. Dey*, Inc., 498 F. Supp.2d 389 (D. Mass. 2007): distinguishes *Baylor* by finding relation back under Rule 15(c)(1), but observing in dicta that "egregious delay" on the government's part may trigger due process concerns "in some circumstances."
- *United States of America ex rel. Miller v. Bill Harbert Int'l. Constr. Inc.,* No. 95-1231-RCL, 2007 WL 851855 (D.D.C. Mar. 14, 2007): declines to follow Baylor to dismiss a government complaint-in-intervention as untimely.
- *United States of America ex rel. Repko v. Guthrie Clinic*, No. 4:04-1556-JFM, 2008 WL 697161 (M.D. Pa. Mar. 12, 2008)): distinguishes *Baylor* by noting that it did not address relation back with respect to an amendment to the relator's complaint.
- *United States of America ex rel. Ven-A-Care of the Fla. Keys, Inc. v. Boehringer Ingelheim Corp.,* No. 01-12257-PBS, 2007 WL 4287572 (D. Mass. Dec. 6, 2007): distinguishes *Baylor* by noting that it did not address relation back with respect to an amendment to the relator's complaint, but dismisses new claims in third amended relator complaint that were unrelated to allegations in original complaint on statute of limitation grounds.
- *United States of America ex rel. Cericola v. Federal Nat. Mort. Ass'n.,* 529 F. Supp.2d 1139 (C.D. Cal. 2007): characterizes Baylor as an "outlier" and distinguishes it by noting that it did not address relation back with respect to an amendment to the relator's complaint.

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