The False Claims Act Correction Act of 2007: Will It Bring a Third Era of False Claims Cases?

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Senator Chuck Grassley (R-IA) and Sen. Dick Durbin (D-IL) filed Senate Bill 2041, the False Claims Act Correction Act of 2007 (hereinafter “FCA Correction Act”), on September 12, 2007 in response to their concerns about recent court decisions interpreting the False Claims Act (hereinafter “FCA”).¹ Co-sponsors of the FCA Correction Act include Sens. Leahy (D-VT), Specter (R-PA), Lott (R-MS), and Whitehouse (D-RI).² Rep. Howard Berman (D-CA) will be filing the House version of the bill.³

The goal of the legislation is to override several recent cases interpreting the 1986 amendments to the FCA.⁴ The first, U.S. ex rel. Totten v. Bombardier Corp., involves a qui tam action brought by a former Amtrak employee against two Amtrak contractors who allegedly supplied non-compliant goods.⁵ At issue in the case was whether a claim submitted to Amtrak was effectively a claim presented to the Government given that Amtrak is a federal grantee.⁶ The Court stated that liability attaches in cases involving grantees if the Government provides the funds upon presentment of the claim to the Government, the Government provides funds directly to the grantee after the grantee presents the claim, or if the Government reimburses the grantee for disbursement of the claim upon presentment of the claim.⁷ The Court concluded that, regardless of whether the holding that the claim being presented to and paid by a federal grantee does not meet the FCA requirements conflicted with the legislative history of the 1986 amendments to the FCA, the holding was still correct as the Court must rely on the plain language of the FCA.⁸

The Totten Court stated that if Congress meant to delete the requirement that the claim be presented to the Government, it could have been done so through a statutory change. However, the Court found three potential problems with such a change if it were to be made: the potential for quadruple liability with a suit being brought by a grantee for damages for itself plus treble damages for the Government to share with the relator; the potential erasure of the knowledge requirement if a suit can be brought on behalf of an entity (the Government) to which the claim was not presented; and the breadth of the

² THOMAS, supra note 1.
⁴ Id.
⁶ Id. at 492.
⁷ Id. at 493.
⁸ Id. at 493-496.
potential new FCA by allowing any federal grantee to rely upon the FCA for any claims presented to the grantee.\(^9\)

The FCA Correction Act responds to the *Totten* case by removing the requirement that claims be presented to an officer or employee of the Government or a member of the Armed Forces. The proposed language relies instead on the requirement that the claim be for Government money or property.\(^10\) It appears that Sen. Grassley and his co-sponsors do not share the concerns of the *Totten* Court about the almost endless breadth this change could give the FCA.

The second case at issue, *Rockwell Int’l Corp. et al. v. United States*, involves questions about when someone is the original source of publicly disclosed information.\(^11\) James Stone, a former employee of Rockwell International, brought a qui tam action against his former employer for allegedly presenting claims to the Department of Energy based on fraudulent safety data.\(^12\) Information about environmental issues created by Rockwell were reported by the media prior to Stone’s filing of the case.\(^13\) The issue then became whether the case would be dismissed for lack of subject matter jurisdiction based on the FCA language on publicly disclosed information or whether Stone was the original source of the information.\(^14\) The Court held that to be the original source of the information for FCA purposes, the person must be the original source for all allegations in the complaint, the amended complaint if one was filed, or the final pretrial order’s statement of claims.\(^15\) Since Stone was not the original source of all the claims in the pretrial order, he was not an original source under the FCA.\(^16\)

In response to *Rockwell*, the FCA Correction Act would add language to clarify that the Government has 60 days from the date of service to move to dismiss a case in which the relator is a federal employee and all information was from an open and active fraud investigation or the person learned the information through his employment and did not wait at least 12 months after notifying his employing agency’s inspector general and/or his supervisor and the Attorney General of the information, during which time the Attorney General did not file an action; the Attorney General may request an additional 12 month waiting period from the court.\(^17\) Additionally, under the FCA Correction Act, the court would dismiss an action because the information has been publicly disclosed only upon a timely motion from the Attorney General’s Office. The FCA Correction Act contains no other methods of dismissing cases based on the information having been publicly disclosed, although a court would be allowed to consider public disclosure in determining the relator’s share of any penalties or damages collected.\(^18\) This opens a

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\(^9\) *Id.* at 496
\(^10\) Senate Bill 2041, 110th Cong. § 2 (2007).
\(^12\) *Id.* at 1401-1402.
\(^13\) *Id.* at 1402-1403.
\(^14\) *Id.* at 1403-1404.
\(^15\) *Id.* at 1407-1409.
\(^16\) *Id.* at 1410.
\(^17\) S. 2041, *supra* note 10, § 3.
\(^18\) *Id.* at § 4.
wide door for potential relators to sue based on information reported in newspapers and journals and removes a potential defense from alleged violators of the FCA as the defense can not be made to the court, but only made through a motion filed by the Government.

The third case addressed by the FCA Correction Act is United States ex rel. DRC, Inc. v. Custer Battles, LLC. The case involved a qui tam suit by a former subcontractor against a contractor for allegedly filing fraudulent claims with the Coalition Provisional Authority (CPA) for work done in Iraq. The relator was unable to prove that the claims were presented for payment with Government money, since the CPA paid the contractor with a $3 million advance from funds seized by the Coalition forces in Iraq, while the individual claims were paid using funds from the Development Fund for Iraq. The Development Fund money came from the CPA and the United Nations and therefore did not constitute U.S. funds.

In response, the FCA Correction Act would add definitions for “Government money or property” and “administrative beneficiary,” clarifying that Government money or property includes money or property of an administrative beneficiary on whose behalf the Government “collects, possesses, transmits, administers, manages or acts as custodian of money or property.” This appears to be a positive change, as it is difficult from a policy standpoint to see why an FCA action could not be based on claims presented to the Government for money or property in the Government’s hands for which it has a level of fiduciary responsibility.

The FCA Correction Act also contains some proposed changes unrelated to the above-mentioned cases. There are some technical language changes included in the bill, as well as new language regarding costs. Under the FCA Correction Act, any party found liable for violating the FCA would be liable for the United States’ costs for any civil actions brought to collect any penalties or damages. Additionally, the FCA Correction Act would prohibit the waiver or release from an FCA claim unless such a waiver or release was part of a court-approved settlement on an FCA issue. Relief from retaliatory actions would be extended to Government contractors and agents as well as employees.

The FCA statute of limitations would be extended to at least 10 years in all cases, potentially expanding problems of stale evidence and witnesses. Under current law, the statute of limitations is 6 years or within 3 years of when the relevant Government official knew or should have known the material facts, with a 10 year maximum. The FCA Correction Act would also allow the Government to relate back to the filing date of the relator for statute of limitations purposes when filing its own complaint, even if the Government’s complaint alleges additional facts or claims, so long as they arise out of

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20 Id.
21 S. 2041, supra note 10, § 4.
22 Id. at § 2.
23 Id. at § 4.
24 Id. at § 5.
25 Id. at § 6.
the same conduct, transactions, or occurrences relied upon in the relator’s original complaint.\textsuperscript{27}

The FCA Correction Act would also allow the Attorney General to delegate the authority to issue civil investigative demands seeking information the Attorney General or his designee believe a person to possess; this delegation is prohibited under current law. The Attorney General or designee would also be authorized to share any gained information with the relator if needed as part of the investigation.\textsuperscript{28}

As is clear from the above-review, if the FCA Correction Act is passed as filed, the FCA will have a breadth previously unforeseen by potential relators or defendants. Whether an accompanying spike in FCA litigation and awards would occur is unclear, but the possibility is certainly there.

\textsuperscript{27} S. 2041, supra note 10, § 6.
\textsuperscript{28} Id. at § 7.